



2017

## Situating the Corporation within the Vulnerability Paradigm: What Impact Does Corporate Personhood Have on Vulnerability, Dependency, and Resilience

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### Recommended Citation

Situating the Corporation within the Vulnerability Paradigm: What Impact Does Corporate Personhood Have on Vulnerability, Dependency, and Resilience, 25 *Am. U. J. Gender Soc. Pol'y & L.* 51 (2017).

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# SITUATING THE CORPORATION WITHIN THE VULNERABILITY PARADIGM: WHAT IMPACT DOES CORPORATE PERSONHOOD HAVE ON VULNERABILITY, DEPENDENCY, AND RESILIENCE

HEATHER M. KOLINSKY\*

I. Introduction .....	52
II. Vulnerability, Dependency and Resilience .....	55
III. Corporation as Legal Subject.....	60
A. Corporate Entities and Their Related Rights .....	60
B. Duties and Protections for Corporate Actors in the Corporation.....	66
IV. Corporate Personhood and Religion: The Impact of <i>Hobby Lobby</i> .....	66
A. Religious Liberties and the Constitution .....	67
B. RFRA.....	69
C. <i>Hobby Lobby</i> .....	71
D. The Impact of a New Judicial View of Corporate Personhood .....	78
1. Critiques of <i>Hobby Lobby</i> .....	78
2. Limits of Hobby Lobby (or Lack Thereof).....	80
V. The Role of the Responsive State in Mediating Corporate Personhood .....	82
VI. Conclusion.....	85

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Corporations are social organizations “midway between the state and the individual, owing their existence to the latter’s need of organization and the former’s inability to supply it.” —John P. Davis (1905)<sup>1</sup>

“As the saying goes, a corporation will never truly be a citizen until you can execute one in Texas.”<sup>2</sup>

## I. INTRODUCTION

Corporations have been a part of civilized society for several hundred years, even though their structure and purpose have changed significantly during that time.<sup>3</sup> In the United States, the nexus for the shift from fewer corporations to a broader and transformative corporate existence was the advent of the industrial revolution.<sup>4</sup> This shift gathered more power, and this growth occurred, in an environment where “the ability to create by charter an abstract, indestructible, immortal and to some degree irresponsible entity that could gather the savings of a community or a nation and pour them into immense works . . . alter[ed] the character of the business system more than any other change of this period.”<sup>5</sup> Thus, corporations have evolved to become complex organisms imbued with personhood, institutional structure, and state-like qualities that have an encompassing impact on our society. In situating the corporation within its multitude of identities, employing theory that transcends any single component of social ordering in favor of a macro view that still incorporates micro level assessments can provide clarity. Vulnerability theory can provide such clarity by situating the corporation within the vulnerability framework with respect to corporation as “subject,” corporation as “institution,” and corporation as “state,” and illuminating fault lines and conflicts in and among those dependencies, resilience, and the responsive state.

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1. CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY, at 2-3 (Warren J. Samuels and Arthur S. Miller eds. 1987) (quoting John P. Davis, CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE (Abram Chayes, ed., 1961)).

2. Timothy Egan, *The Conscious of a Corporation*, N.Y. TIMES, (Apr. 3, 2015) <http://www.nytimes.com/2015/04/03/opinion/timothy-egan-the-conscience-of-a-corporation.html?&moduleDetail=section-news-4&action=click&contentCollection=Opinion&region=Footer&module=MoreInSection&pgtype=article>.

3. CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY, *supra* note 1, at 2.

4. *Id.*

5. *Id.* (quoting Thomas C. Cochran, BUSINESS IN AMERICAN LIFE: A HISTORY, 76 (1972)).

In considering corporate vulnerability fault lines are bound to appear because vulnerability, while universal, is not similarly experienced. Thus, considering how to react to conflicting vulnerabilities becomes just as important as identifying them in the first instance. Consider the corporation; it is a legal fiction. It is simultaneously a subject in that it has been identified as a person for legal purposes and an institution as it is both an entity through which resilience is built for certain constituencies and an entity through which the state has chosen to provide resilience to vulnerable subjects. As both legal subject and institution, a corporation would seem to have conflicting loyalties and responsibilities. Add to this the fact that the corporation itself is managed and driven by individuals who are vulnerable and positioned differently within the corporate structure in terms of resilience. The corporation, as an artificial construct, represents protection and resilience for a wholly different group of vulnerable subjects whose vulnerability may be at odds with those whom the state seeks to protect through the corporate form. When differing, perhaps even competing, constituencies seek to both provide and retain certain assets or privileges, for example access to health care versus religious freedom, a hierarchical ordering occurs which can both diminish the effectiveness of a responsive state and have lasting impacts on how we navigate our private and public spheres.

In 2010, Congress passed the Patient Protection and Affordable Care Act<sup>6</sup> (“Affordable Care Act”).<sup>7</sup> The main purpose of the Affordable Care Act was to provide better access to healthcare for unprotected and underserved populations.<sup>8</sup> The Affordable Care Act was also intended to provide for more comprehensive federal regulation of health insurance, including the prohibition of lifetime and annual limits and other coverage protections.<sup>9</sup> The Affordable Care Act expanded the type of health care that was available to women, including broader access to contraception and preventive care.<sup>10</sup> The main vehicle for providing more access to

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6. The Patient Protection and Affordable Care Act, 42 U.S.C. §§ 18001-18121 (2012) [hereinafter “Affordable Care Act”].

7. The Affordable Care Act was signed into law by President Barack Obama on March 23, 2010. *Key Features of the Affordable Care Act*, HHS.GOV, <http://www.hhs.gov/healthcare/facts/timeline/> (last visited Nov. 5, 2016).

8. Seema Mohapatra, *Time to Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 140 (2015).

9. Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER SOC. POL’Y & L. 303, 306 (2014).

10. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014); see Sepper, *supra* note 9, at 306-07.

healthcare was through insurance offered by employers, as many people already obtain health insurance through the workplace.<sup>11</sup>

In the Supreme Court's 2014 case *Burwell v. Hobby Lobby*, the religious beliefs of the persons who owned Hobby Lobby, which is a for-profit, closely held corporation, were privileged and protected by the Supreme Court over an identified need to deliver contraceptive health services to female employees of that corporation.<sup>12</sup> The finding that the corporation as a "person" had the right to assert religious beliefs that reflected those of the owners of the corporation impacted the efficacy of the corporation as an institution through which the state had chosen to deliver health care services to society at large, exposing the vulnerability, not only of those employees, but of the corporation, and the state.

As a result of *Hobby Lobby*, and the seemingly expanding notion of the corporation as a person within the traditional autonomous rights paradigm, a tension has developed between corporation as subject and corporation as institution. This evolution of corporation as person also highlights the problem of providing resilience to vulnerable subjects whose competing vulnerabilities are situated in the same corporate environment. Addressing this issue is of critical importance where employment has become the conduit for the responsive state to provide resilience to so many subjects, as well as the site of social institution building because the nature of our workplace has changed so dramatically.<sup>13</sup> What level of personification of the corporate form is necessary for it to function properly and provide optimal resilience and where does that personification cross the line into an area that leaves employees, the corporation, and the state too vulnerable?

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11. *Hobby Lobby*, 134 S. Ct. at 2762; see also W. David Koeninger, *Removing Access to Health Care from Employer and State Control: The ACA as Anti-Subordination Legislation*, 44 U. BALT. L. REV. 201, 211 (2015):

The ACA proposed to do several things that would challenge the path dependence of our health care system: expanding Medicaid and changing its eligibility methodology to a purely financial one; requiring large employers to provide health insurance to their employees or face a fine; and creating subsidized health care exchanges that would enable individuals to purchase affordable health insurance independently of the terms and conditions of their employment. It also proposed to invade the employer's prerogative to determine which benefits it would provide to its employees by mandating that large employers include specific items of preventive care in their benefits packages.

12. *Hobby Lobby*, 134 S. Ct. at 2785.

13. See generally CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY *supra* note 1 at 115; Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 295 (2013) [hereinafter Fineman, *The Vulnerable Subject at Work*].

Is there a way to resolve these conflicts or to negotiate these fault lines in and among competing vulnerabilities in a way that makes sense?

This article will seek to take a first step into the midst of these intersecting fault lines, identifying their cause and considering solutions. To do so, the corporation as person will be viewed through a vulnerability lens in the context of the United States Supreme Court's recent decision in *Hobby Lobby*. Part II of this Article will provide the vulnerability theory framework relevant to this discussion and Part III will explore different theories of the corporation as legal subject and address the concept of legal personhood. Having provided both the framework for context, and the competing theories of corporation as legal subject, Part IV will review and consider the *Hobby Lobby* decision as well as the religious freedom jurisprudence underpinning that decision. Part V will then consider what the role of a responsive state should or could be in light of the current state of corporate personhood post-*Hobby Lobby*.

## II. VULNERABILITY, DEPENDENCY AND RESILIENCE

The predominant modern legal framework used to explain the intersection between subject, institution, and state has been the autonomous legal liberal subject, individual rights, equal protection, and the sameness-of-treatment paradigm.<sup>14</sup> Vulnerability theory seeks to replace the autonomous legal liberal subject and that rights-based framework with a universally vulnerable and dependent subject who requires a responsive state to build resilience.<sup>15</sup> Dependency is envisioned as a fluid concept, rolling in peaks and troughs over the lifetime of a subject, touching each and every individual at different points in our lives.<sup>16</sup> It is both universal and particular.<sup>17</sup> In applying this framework, vulnerability conceptualizes the state and institutions, both public and private, as providing the requisite resilience for a vulnerable subject to successfully navigate her life course.<sup>18</sup> Just as individuals are vulnerable, so too are the state and institutions, requiring support to provide resilience to vulnerable subjects and to protect their own vulnerabilities as well.<sup>19</sup>

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14. See Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEM. 1, 2-5 (2008) [hereinafter Fineman, *Anchoring Equality*].

15. See Martha Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 263-66 (2011) [hereinafter Fineman, *Responsive State*].

16. See Fineman, *Anchoring Equality*, *supra* note 14, at 9-10.

17. See *id.* at 10.

18. See Fineman, *Responsive State*, *supra* note 15, at 255-57.

19. See *id.* at 256.

Vulnerability theory suggests that the problem in the way in which the state and society have historically conceived of equality is that the narrow confines of sameness of treatment do not sufficiently fill the gaps created by “growing inequality in wealth, position and power that we have experienced in the United States over the past few decades.”<sup>20</sup> Vulnerability theorists do not suggest that autonomy need be abandoned with the development of a more responsive state; rather, they suggest that we recognize autonomy cannot be “attained without the underlying provision of substantial assistance, subsidy, and support” from that responsive state and its institutions.<sup>21</sup> Thus, in order to be truly autonomous, every individual requires a responsive state and institution. The reality is simply that this responsive, supportive state is often rendered invisible by structural privilege and the common presumption that some autonomous subjects simply fare better than others because of their individual achievements.<sup>22</sup> Thus, in Professor Fineman’s view, the current state of the law envisions a subject whose vulnerability is both contingent and unrealized.<sup>23</sup>

Vulnerability is the embodiment of a lived experience that is both universally and particularly dependent as embedded in its environment and the context in which it is situated.<sup>24</sup> It is also a constant throughout a person’s life but may manifest itself differently.<sup>25</sup> “The most recognized differences are found in our embodiment. Human differences are manifested across differences in age, gender, race, and we also have

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20. *Id.* at 251. Fineman observes that rather than having any obligation to address these inequities, the state here is restrained from interference in “the name of individual liberty, autonomy, and paramount principles such as freedom of contract.”; *Id.* at 251-52; see also Martha Fineman, *Equality, Still Elusive After All These Years*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 256 (Joanna Grossman & Linda McClain eds., 2009).

21. Fineman, *Responsive State*, *supra* note 15, at 260.

22. Suzanne Mettler refers to this phenomenon as the “submerged state.” See generally SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011). Mettler explains that the invisibility of certain government subsidies, such as the home mortgage interest deduction, contrasted with the highly visible nature of certain programs, such as food stamps, enables the perception that the non-poor do not depend on the government in the same way that welfare recipients do creating a state that is largely invisible and shrouded by class privilege and race. *Id.*; see also Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 374 (2014).

23. Ani B. Satz, *Animals As Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65, 79 (2009).

24. See Fineman, *Anchoring Equality*, *supra* note 14, at 9-10.

25. See *id.* at 9-11.

different abilities or capabilities.”<sup>26</sup> But our embedded differences matter too, from access to education and health care to food security and safety.

Dependency itself can be inevitable or derivative.<sup>27</sup> Inevitable dependency is something we all experience at points in our lives; when we are infants, when we are ill, as we age, or if we experience disability. This type of dependency is both unavoidable and universal.<sup>28</sup> However, as conceived, derivative dependency is neither inevitable nor universal, but it is socially imposed through the institutional structure of family, and the social construct of gender.<sup>29</sup> Derivative dependency is most often encountered when women are required to care for children or the elderly.<sup>30</sup> When a woman is required to become a caregiver, she in turn becomes vulnerable and dependent on resources to help manage her vulnerability while she cares for another.<sup>31</sup> Dependency, whether inevitable or derivative, creates vulnerability, which must be mitigated by resources provided by other individuals, social institutions, or the state.<sup>32</sup>

And, because both vulnerability and dependency are inevitable, universal, and constant, resilience must be obtained from social institutions and the state, and as such, a responsive state must seek to find ways to build resilience so that dependency can be managed fairly by all individuals. In acknowledging that human vulnerability is relational both between and among individuals, a responsive state should strive to bridge the gap between formal and substantive notions of equality.<sup>33</sup> The relationship between the state and the individual requires that the state build resilience among vulnerable and dependent individuals based on their vulnerabilities, not simply based on a liberal legal subject that is neither embodied nor contextualized.

While vulnerability theory recognizes the need to create resilience for the universal vulnerable subject through state institutions, in order to work, it requires that those subjects and natural individuals who make up those institutions, who are also vulnerable subjects, both recognize others’ vulnerability and seek to build resilience for them.<sup>34</sup> Carter Dillard argues

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26. Fineman, *The Vulnerable Subject at Work*, *supra* note 13, at 301.

27. *See* Fineman, *Responsive State*, *supra* note 15, at 264.

28. *See id.*

29. *See id.*

30. *See id.* at 264-65.

31. *See id.* at 264-65.

32. *See id.* at 265.

33. CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY, *supra* note 1, at 255-256.

34. Carter Dillard, *Empathy with Animals: A Litmus Test for Human Legal Personhood?*, *An Uncomfortable Conversation: Human Use of Animals: A*



that one test for the efficacy of such a society, and the ability to apply vulnerability theory effectively, may be the level of empathy expressed for others within that society.<sup>35</sup> In examining our relationship with animals, Dillard observes that perhaps our society can only go so far in effectuating vulnerability within institutions because of a tension between self-interest and empathy.<sup>36</sup> This becomes a point of reflection when contemplating corporations because, as a non-sentient being, asking a corporation to exercise empathy seems like an empty gesture. Rather, corporate actors must exercise empathy, but exercising empathy may be difficult given the nature of a corporation generally and the duality inherent in a system of individuals that is also a collective.

This institutional assemblage of vulnerable subjects, the collectivist nature of such an institution, is one reason why institutions themselves are vulnerable.<sup>37</sup> These institutions are not vulnerable in the same sense as the vulnerable subject in that an institution does not live an embodied existence, but to the extent such institutions are embedded within society, they are vulnerable in ways that are also universal and particular.<sup>38</sup> For example, institutions are vulnerable to privilege in that those individuals who direct and manage an institution, whether as part of the state, or in a state-like capacity, may receive and retain privilege in a way that causes others subject to and dependent upon those institutions to be more vulnerable.<sup>39</sup>

The counterbalance to vulnerability and dependency is resilience. Resilience is not something a person is born with, rather it is developed over a lifetime. “Resilience is perceived as necessary to both confront life’s challenges and to allow individuals to manage risk and to take advantage of life’s opportunities and enjoyments.”<sup>40</sup> There are five

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Vulnerability and the Human Condition Initiative and Feminist and Legal Theory Project Workshop 2012, at 5, <http://www.heinonline.org.proxy.library.emory.edu/HOL/Page?handle=hein.peggy/unverinf001&id=63&collection=peggy&index=fltpconfwork> (available through HeinOnline).

35. *See id.* at 2-5. Dillard explores this idea through a thick conception of legal personhood that contemplates an ideal legal subject that is both human and humane, and complies with the law based on an other-regarding perspective as contrasted with the traditional legal subject that is seen as “self-regarding,” existing outside the contemplated synergy of the ideal legal subject and the law.

36. *See id.* at 1-6.

37. *See Fineman, Anchoring Equality, supra* note 14, at 12-13.

38. *See id.* at 19.

39. *See id.* at 15-17.

40. Fineman, *The Vulnerable Subject at Work, supra* note 13, at 301.

primary asset or resource conferring systems that allow an individual to build resilience: physical or material; human; relational; environmental; and existential.<sup>41</sup> Physical assets are those such as housing, food, healthcare, and other resources that support our physical well-being in society.<sup>42</sup> Human assets include training, education, and other supports.<sup>43</sup> Relational assets include family, friends, and other social networks in our lives throughout our life course.<sup>44</sup> Environmental assets include our natural environment clean air, safe drinking water, plants, trees, animals, and our built environment.<sup>45</sup> Finally, existential assets include religion, philosophy, art and culture, those things that provide us emotional support and can transcend the tangible.<sup>46</sup> Each of these assets assist in building resilience to vulnerabilities we face over a lifetime that are both embodied and embedded.

A responsive state looks for ways to help build resilience and provide substantive equality to all of its members. Only the state can act for the collective benefit of society because it is the only entity to which we all belong.<sup>47</sup> Membership within the state is mandatory and universal for all those who exist within it.<sup>48</sup> Our shared vulnerability and our shared membership within the state necessitate an independent state that actively regulates and participates in the collective good. However, in the United States, the state is viewed with much more suspicion. Given our emphasis on the market, autonomy, and formal equality, the state is often relegated to the role of facilitator rather than regulator.<sup>49</sup> A responsive state would provide basic social goods such as housing, healthcare, and a living wage, and create a system whereby individuals could achieve substantive equality.<sup>50</sup> A more passive state would permit the private sphere and the market to resolve inequities with little involvement beyond formal equality and sameness-of-treatment.

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41. See PEADAR KIRBY, *VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALIZATION* 55-72 (2006); Fineman, *The Vulnerable Subject at Work*, *supra* note 13, at 302.

42. See Fineman, *The Vulnerable Subject at Work*, *supra* note 13, at 301.

43. See *id.*

44. See *id.*

45. See *id.*

46. See *id.*

47. See MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 263 (2004).

48. See *id.*

49. See *id.* at 269-70.

50. See *id.* at 285.

### III. CORPORATION AS LEGAL SUBJECT

A corporation

is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the creature of the law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.<sup>51</sup>

#### A. Corporate Entities and Their Related Rights

As initially conceived, corporations were meant to support the economy and to protect individuals in their business endeavors, creating more security in business. To that end, corporations could sue and be sued, enter into contracts, own and possess property, assert a subset of constitutional rights, and manage their day-to-day affairs, “but they have never been accorded all the rights that individuals possess.”<sup>52</sup> However, as the corporate form has evolved, it has become more than an artificial entity, in fact Warren Samuels and Arthur Miller suggest that the modern corporation should be viewed “as an economic enterprise, a political organization, a sociological community, and a legal entity” that is recognizably a “constitutional phenomenon.”<sup>53</sup>

Scholars have proposed different theories to explain corporate existence. The first, the fictional entity theory, contemplates a corporation that is merely a creation of the state, prescribed by statute and subject to state control.<sup>54</sup> As a concession of the state, it would be a place where the vulnerable subject could build resilience. As conceived then, a corporation could have an affirmative duty to comply with the mandate issued by the state as a creature of state law. In essence, it would be understood that the corporation, when given a choice, should mirror the will of the state, and not the will of the individuals within the corporation.<sup>55</sup>

The second theory, the nexus of contract theory, posits that the corporation is merely a central hub for a multitude of contractual relationships by and between corporate actors and stakeholders, employers,

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

52. *Id.* at 636, 667-68.

53. CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY, *supra* note 1 at 2.

54. Mohapatra, *supra* note 8, at 157; *see also* Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 891-92 (2012).

55. It is somewhat akin to the public school system when considered in this way. And, in the context of public education, students and parents’ religious rights have been much more strictly limited than in the corporate sphere.

employees, shareholders, and the like.<sup>56</sup> This theory would be more in keeping with a trees versus forest approach, acknowledging the primacy of individual relationships over a separate corporate entity. However, as Professor Mohapatra explains, the theory is criticized because defining the boundaries of the corporation becomes particularly difficult and could cause problems in defining rights and responsibilities.<sup>57</sup> However, from a vulnerability perspective it would remove one layer of fault lines from the web of competing vulnerabilities. Mohapatra observes that “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>58</sup> Thus, corporate reliance on existential assets may be less compelling than under other theories.

The third theory, perhaps the more familiar, is the real entity theory. The real entity theory views the corporation as a separate, distinct entity—the park in which the trees are situated, with its own specifically delineated boundaries, rather than the trees themselves. A corporation is wholly separate and apart from those who are connected to and within it.<sup>59</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. 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>60</sup> From a vulnerability perspective, the impact of the real entity theory will depend a great deal on the type of recognition given to the corporate person and to the state’s need to deliver assets through the corporate form as an institution. Heavy reliance on this theory would make resilience-building much more difficult. However, it does have the benefit of giving the clearest view of the boundaries of the corporation and the impact of its governance, at least in theory.<sup>61</sup>

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56. Mohapatra, *supra* note 8, at 159.

57. *Id.* at 160.

58. *Id.* at 162.

59. *Id.*

60. *Id.*

61. In considering all of these theories of corporate existence, the striking feature is that a corporation is really an amalgam of all three theoretical constructs – part protective creature of law, part collective, part autonomous being. Perhaps that is why it is difficult to capture its essence and ascribe legal duties and rights in only one way. But, the collective consciousness ascribed under real entity theory fails to account for the lack of empathy a corporation can show while those vulnerable subjects within the

Samuels and Miller point to a singular event as the moment at which the corporation morphed from an artificial legal entity into a constitutional being—the United States Supreme Court’s decision in *County of Santa Clara v. Southern Pacific Railroad Company*<sup>62</sup> wherein the Justices somewhat blithely announced that a corporation was a person.<sup>63</sup> Then-Chief Justice Waite, prior to hearing oral argument in this tax assessment case, announced:

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 within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.<sup>64</sup>

Thus, corporate personhood was born of pure intuited assumption on behalf of the Justices, rather than a reasoned juridical explanation of the shift from state institution to constitutional subject.<sup>65</sup>

In interpreting this assumed personhood, the Supreme Court has had the occasion to delineate between property interests and liberty interests of

corporation can individually retain their own empathy. Reflecting back on Dillard’s point about the nature of the state and the individuals within it, perhaps corporate personhood suffers some of the same problems with collective empathy in the semi-public sphere where corporations are necessarily situated. *See generally* Dillard, *supra* note 34.

62. *See* 118 U.S. 394, 394-95 (1886).

63. *See id.*

64. *See id.* at 396.

65. Some scholars have taken the position that this announcement was never intended to equate a corporate person with a natural person. In their Amici Brief to the Supreme Court in *Hobby Lobby*, legal historians and scholars noted:

*Santa Clara* was never understood as barring even-handed regulation of corporations by the government. Indeed, Justice Field himself never viewed corporations in the same light as natural persons. To the contrary, he explained in his circuit court decision in *Santa Clara* that ‘corporations are creatures of the state’ and ‘could not exist independently of the law.’ Precisely because they were its creatures, the state might prescribe the conditions ‘upon which they may be formed and continued.’ That is, the state might regulate the activities of these “artificial” persons in the interests of the “natural” persons who were its real constituents.

Brief for Historians and Legal Scholars as Amici Curiae Supporting Neither Party, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 411289 at 13-14. Justice Alito seemingly took the same tack as Justice Field when authoring the decision in *Hobby Lobby*, ignoring the issue of whether a person in RFRA could include a corporation for the purpose of protecting religious liberties and simply treating that personhood as a given for the purposes of standing under RFRA and ignoring the dichotomy between artificial and natural persons. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

corporations and to more readily define corporate property interests under the Fourteenth Amendment.<sup>66</sup> What this has meant is that corporations enjoy extensive property rights via the Fourteenth Amendment and that Free Speech rights have been extended to corporations in the form of commercial speech protection in the marketplace of ideas, but the Supreme Court has specifically noted that liberty interests under the Fourteenth Amendment inure to natural, not artificial persons.<sup>67</sup> But, with respect to free speech, the Supreme Court has emphasized that the right to free press and free speech are of such importance that the speaker itself is irrelevant in terms of public speech and the expression of ideas, and this liberty interest, unlike others, has been more readily bestowed upon corporations, although not without some limitations.<sup>68</sup> Thus, while this right has been extended to corporations, it has been done so in a way that suggests the importance of information rather than the rights of the person or entity delivering that information.

In its majority opinion in *Bellotti* the Supreme Court explained that while “[t]he press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate, . . . the press does not have a monopoly on either the First Amendment or the ability to enlighten.”<sup>69</sup> The Court went on to explain that, in a similar manner, its “decisions involving corporations in the business of communication or

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66. See Brief for Historians and Legal Scholars as Amici Curiae Supporting Neither Party, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 411289 at 4-5:

In *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), then-Justice Rehnquist, writing in dissent, noted that [the Supreme] Court historically drew a distinction, for Fourteenth Amendment purposes, between the *property* and *liberty* interests of business corporations. In the decades following the adoption of the Fourteenth Amendment, the corporate “rights” recognized by this Court were largely limited to property and contract entitlements, in circumstances where the interests of the underlying shareholders or owners so required.

67. See *W. Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907) (liberty interests extend only to natural persons); *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (liberty interest of Fourteenth Amendment applies to natural persons); *Covington & Lexington Tpk. R.R. Co. v. Sandford*, 164 U.S. 578 (1896); *Smyth v. Ames*, 169 U.S. 466 (1898).

68. See *Bellotti*, 435 U.S. 765; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (Constitution accords a lesser protection to commercial speech than to other forms of expression). Thus, the Court has made a distinction between the speech and the speaker when considering pure speech versus commercial speech.

69. *Bellotti*, 435 U.S. at 781-82.

entertainment are based not only on the role of the First Amendment in fostering individual self-expression, but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.<sup>70</sup> Perhaps this liberty interest can still be distinguished between corporations and individuals by considering the audience for the speech, and the value this nation places on the freedom of the press and speech itself.<sup>71</sup>

Conversely, rights seen to be endemic to natural individuals have been withheld from corporations, and corporations as entities do not enjoy Fourth and Fifth Amendment rights in the same way that natural individuals do. Corporations are subject to additional governmental regulation that might otherwise invade an individual person's right to privacy. While corporations may assert Fourth Amendment claims to be free from unreasonable searches and seizures, courts have recognized that their rights do not extend as far as those of a natural individual.<sup>72</sup> Corporations, by their very nature, do not have a concomitant right to privacy enjoyed by natural individuals.

“[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They

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70. *Id.* at 783.

71. Interestingly, some states have sought to pass legislation stripping constitutional personhood from corporations, clarifying that it is available only to natural persons. As Matambanadzo states:

Various political interest groups have taken on the cause of repealing constitutional corporate personhood, and state and local governments have enacted legislation to address the problems raised thereby. Legislation designed to dismantle corporate personhood has been introduced in Montana, Vermont and Washington. On March 8, 2011 in Minnesota, a state constitutional amendment for the 2012 general election was introduced that would limit the definition of person to natural persons, excluding corporations from constitutional personhood. Similar amendments and initiatives have been adopted by other local governments, and proposed by political parties and public interests groups. These proposals either limit free speech rights for corporations or actively deny corporations personhood. At the federal level, Congressman Ted Deutch of Florida and Senator Bernie Sanders of Vermont introduced a constitutional amendment limiting constitutional rights to “natural persons” and eliminating constitutional rights for “for-profit corporations, limited liability companies, or other private entities established for business purposes.”

Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 DUKE J. GENDER L. & POL'Y 45, 55-56 (2012).

72. See *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (acknowledging that corporations have Fourth Amendment rights but also recognizing that “a business, by its special nature and voluntary existence may open itself to intrusions that would not be permissible in a purely private context.”).



have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.”<sup>73</sup>

Thus, when considering the reach of the Fifth Amendment right against self-incrimination, the Court determined that it is reserved to “natural individuals” and does not extend to any sort of corporate, collective, or representative organization to which that individual might belong.<sup>74</sup>

[I]ndividuals, when acting as representatives of a collective group . . . assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.<sup>75</sup>

Thus, in drawing a line for corporate personhood, the Supreme Court has recognized that some rights belong solely to natural individuals and those individual’s rights cannot be appropriated or asserted by the corporation as such.<sup>76</sup> Indeed, corporations have also been denied more discrete personal rights, for example, corporations cannot practice medicine because the nature of such an exercise is so inherently individual and personal, nor can they represent themselves in legal actions.<sup>77</sup>

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

74. *See United States v. White*, 322 U.S. 694, 699 (1944); *Hale v. Henkel*, 201 U.S. 43 (1906).

75. *White*, 322 U.S. at 699.

76. *See id.* The reason for this, according to the Supreme Court, is simple:

The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. *Id.* at 700.

77. *See, e.g., Berlin v. Sarah Bush Lincoln Health Ctr.*, 688 N.E.2d 106, 107 (Ill. 1997); *Eagle Assoc. v. Bank of Montreal*, 926 F.2d 1305, 1308-09 (2d Cir. 1991) (courts have long required corporations to appear through a licensed attorney, not a lay person who could otherwise represent themselves).



### *B. Duties and Protections for Corporate Actors in the Corporation*

The corporate construct also imposes accountability, to some degree, upon those who conduct business on behalf of the corporation. Generally, boards of directors manage corporate affairs and they are deemed to have a responsibility to shareholders that is expressed legally as a duty of loyalty and a duty of care.<sup>78</sup> This concept of “shareholder primacy” holds individuals who conduct business accountable to those on whose behalf the business is being conducted.<sup>79</sup> These obligations to others within the corporate structure are balanced against the business judgment rule, which protects corporate actors from liability to those shareholders and other stakeholders under certain conditions.<sup>80</sup>

When applying the business judgment rule, courts prefer to defer to corporate decision makers because it encourages informed risk-taking, which in turn encourages innovation and growth.<sup>81</sup> The relationship between corporate owners and other stakeholders is not regulated in a similar fashion, although in some respects obligations to other stakeholders, including employees and the public at large, have entered the corporate lexicon more in recent years, particularly in the form of constituency statutes.<sup>82</sup> The shift to recognizing other constituencies in corporate governance is important to a vulnerability analysis and may help reframe obligations by and between privileged and non-privileged subjects within the corporation.

## IV. CORPORATE PERSONHOOD AND RELIGION: THE IMPACT OF *HOBBY LOBBY*

The Free Exercise Clause of the First Amendment provides that

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78. See, e.g., DEL. CODE ANN., tit. 8, § 141 (2012).

79. See Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land*, 42 LOY. L.A. L. REV. 765, 770 (2009).

80. See Douglas M. Branson, *The Indiana Supreme Court Lecture: The Rule That Isn't A Rule – The Business Judgment Rule*, 26 VAL. U. L. REV. 631, 632 (2002).

81. Bisconti, *supra* note 79 at 775-76.

82. See Tamara C. Belinfanti, *Social Good Is Not Inconsistent with Profit*, N.Y. TIMES, Apr. 16, 2015, <http://www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/social-good-is-not-inconsistent-with-profit>.; see Bisconti, *supra* note 79, at 781-82 (discussing the rise and potential benefit of constituency statutes). Constituency statutes generally permit corporate boards to consider interests beyond those of their shareholders, considering a more holistic view of what is best for the company, in contemplation of more than just the bottom line. See generally Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579-80 (1992).

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>83</sup> Although it is only sixteen words and two simple clauses, the Free Exercise Clause has been a point of significant interpretive contention for over 200 years.<sup>84</sup> As Michael McConnell explains it, one view is that the clause “protects a specified *freedom*: presumptively, all people may worship God in accordance with the dictates of their own conscience, subject only to governmental interference necessary to protect the public good.”<sup>85</sup> But, under a second view, “the Free Exercise Clause, like the Equal Protection Clause, protects against a particular kind of governmental *classification* or *discrimination*: the government may not “single out” religion (or any particular religion) for unfavorable treatment.”<sup>86</sup> The distinction is important because, as McConnell notes, “the Free Exercise Clause would be of little practical importance to the hundreds of sects and millions of religious citizens who inhabit this pluralistic and religious nation” if it only protected against deliberate discrimination, but a “freedom-protective” version of the clause would enable these same groups to effectively protect their religious rights from governmental interference.<sup>87</sup> This push and pull between one view and the other can be illustrated by reviewing the Supreme Court decisions and Congressional enactments that led to the decision in *Hobby Lobby*.

#### A. Religious Liberties and the Constitution

For approximately twenty-five years, the test set forth in *Sherbert v.*

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83. U.S. CONST. amend. I.

84. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 157 (1997) [hereinafter McConnell, *Institutions and Interpretation*]; see also Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) [hereinafter McConnell, *Free Exercise of Religion*]. “The term ‘free exercise’ first appeared in an American legal document in 1648, when Lord Baltimore required his new Protestant governor and councilors in Maryland to promise not to disturb Christians (“and in particular no Roman Catholic”) in the “free exercise” of their religion.” McConnell, *Free Exercise of Religion*, *supra* note 84, at 1425.

85. McConnell, *Institutions and Interpretation*, *supra* note 84, at 157 (emphasis in original).

86. *Id.* (emphasis in original).

87. *Id.* This more expansive view is necessitated in part by the regulatory nature of government. As McConnell observes, “[t]he natural tendency of regulatory regimes is to make no exceptions for private concerns and to overinflate the importance of their own objectives—even when those private concerns are rooted in constitutional rights and accommodation could be made at reasonably low cost to public purposes.” *Id.*

*Vermer*<sup>88</sup> was applied to questions of whether a government regulation improperly infringed on an individual's religious beliefs.<sup>89</sup> In *Sherbert*, the United States Supreme Court struck down a state statute that disqualified a claimant from receiving unemployment benefits because she refused to work on her Sabbath.<sup>90</sup> In drawing on its prior decisions, the Supreme Court explained the balance that needed to be struck between free exercise of religion and government regulation holding that:

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.<sup>91</sup>

Under *Sherbert* a governmental action that substantially burdens a religious practice must be justified by a compelling governmental interest.<sup>92</sup> "The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'"<sup>93</sup> That compelling interest can only be met when it is "an especially important governmental interest pursued by narrowly tailored means. . . exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."<sup>94</sup>

The compelling interest test announced in *Sherbert* was applied to a variety of free exercise claims<sup>95</sup> until the Supreme Court's decision in

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88. 374 U.S. 398 (1963).

89. *Id.* at 402-04.

90. *Id.* at 409-10. The claimant was a Seventh Day Adventist and her Sabbath fell on Saturdays.

91. *Id.* at 402-03 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961)) (citations omitted).

92. *Id.* at 403.

93. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 895 (1990) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

94. *Bowen v. Roy*, 476 U.S. 693, 728 (1986).

95. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982); *Yoder*, 406 U.S. at 205-

*Employment Division v. Smith*, wherein Justice Scalia held that the compelling interest test did not reach laws of general applicability and neutrality such as Oregon's indirect criminalization of the religious use of peyote as part of a general prohibition against the use of peyote as a Schedule I controlled substance.<sup>96</sup> Thus, after *Smith*, the compelling interest test of *Sherbert* became the second step of a broader examination of the law in question. Instead of requiring that the government demonstrate a compelling interest in all cases, the Court held that where a law was "neutral and of general applicability [it] need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."<sup>97</sup> If, however, the law lacked neutrality or was not a law of general applicability, then the government had to satisfy the compelling interest and narrow tailoring requirements announced in *Sherbert* in order to survive a First Amendment free exercise challenge.<sup>98</sup> This interpretation was not without dissenters, in particular Justice Souter, who laid out a deeper analysis of the concepts of formal and substantive neutrality as part of a larger discussion of the interpretation of Free Exercise Clause post-*Smith* in his concurrence in *Church of Lukumi Babalu*.<sup>99</sup>

### B. RFRA

The Religious Freedom Restoration Act was passed in 1993 in direct response to the Supreme Court's decision in *Smith*.<sup>100</sup> Congress sought to

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96. See *Smith*, 494 U.S. at 884-85.

97. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872).

98. The Court stated that:

Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

See *id.* at 530-33.

99. Justice Souter took time to parse the Court's opinions in multiple free exercise cases and made the argument that *Smith* oversimplified the then existing Free Exercise jurisprudence. His position was that the Free Exercise Clause did not simply require facial neutrality but rather substantive neutrality such that the impact of a government regulation was subject to the more stringent test of *Sherbert* rather than the formal neutrality test set forth in *Smith*. *Id.* at 559-77 (Souter, J., concurring).

100. See Religious Freedom Restoration Act 42 U.S.C. § 2000bb(b)(1) (1994).

Both Houses of Congress held hearings at which witnesses testified about the practical implications of the *Smith* decision and criticized its historical and

reinstate the *Sherbert* test and require that the government continue to demonstrate both a compelling interest and the use of least restrictive means when a government law or regulation had an impact on religion.<sup>101</sup> RFRA was a Congressional affirmation of the freedom-protective interpretation of the Free Exercise Clause, and a disavowal of the discrimination view of the Free Exercise Clause offered in *Smith*.<sup>102</sup>

In 1997, the question of whether RFRA was constitutional as applied to the states came before the Supreme Court.<sup>103</sup> The case, *City of Boerne v. Flores*, involved the denial of a Catholic church's building permit application because the church was located in a historic district.<sup>104</sup> The church challenged the permit denial under RFRA.<sup>105</sup> The Supreme Court found that RFRA was unconstitutional as applied to the states because it exceeded the scope of Congress's power under Section Five of the Fourteenth Amendment to prevent or remediate state discrimination.<sup>106</sup> In considering the impact and breadth of RFRA, Justice Kennedy observed that:

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion . . . RFRA's substantial-burden test . . . is not even a discriminatory effects or disparate-impact test. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify—which also

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jurisprudential underpinnings. As the Supreme Court later noted, members of Congress debated the 'points of constitutional interpretation' raised by the *Smith* decision, and many 'criticized the Court's reasoning.' After due consideration, the House of Representatives passed RFRA unanimously and the Senate did so by a vote of 97-3. See McConnell, *Institutions and Interpretation*, *supra* note 84, at 160.

101. 42 U.S.C. § 2000bb(b)(1).

102. See McConnell, *Institutions and Interpretation*, *supra* note 84, at 157, 160.

103. See *City of Boerne v. Flores*, 521 U.S. 507, 507-508 (1997).

104. *Id.* at 507.

105. *Id.*

106. *Id.* at 507-08.

indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.<sup>107</sup>

In his concurrence, Justice Stevens observed that RFRA operated as a preference for religion rather than a protection of religious freedom in the face of otherwise neutral legislation.<sup>108</sup>

RFRA remains viable with respect to actions taken by the federal government, and the Supreme Court has confirmed the more exacting nature of the test under RFRA, as laid out in *Sherbert*, is still the prevailing test.<sup>109</sup> It is a test that is wholly centered on the impact a law that is otherwise neutral and of general applicability has on the person impacted in the context of the alleged burden.<sup>110</sup> The Supreme Court's current view also reflects the position that uniformity alone, as a governmental interest, cannot be compelling in and of itself despite pre-*Smith* cases that appear to suggest the contrary.<sup>111</sup> However, Chief Justice Roberts acknowledged that when a religious exemption would seriously compromise a program's administration the government may be able to demonstrate a compelling interest.<sup>112</sup>

### C. *Hobby Lobby*

The issue in *Hobby Lobby* was the application of a certain provision of the Affordable Care Act that required insurance plans and insurers to provide preventive care to women without cost sharing requirements.<sup>113</sup>

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107. *Id.* at 534-35.

108. *Id.* at 536-37 (Stevens, J., concurring).

109. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

110. *See id.* at 430-31 (“RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law “to the person”—the particular claimant whose sincere exercise of religion is being substantially burdened.”).

111. *Id.* at 435. The Supreme Court noted that cases like *United States v. Lee*, 455 U.S. 252, 252 (1982), which denied a request for a religious exemption to pay Social Security taxes, and *Braunfeld v. Brown*, 366 U.S. 599, 599 (1961), which denied a request for a religious exemption from a day of rest for workers, did not stand for the proposition that a general interest in uniformity justified a substantial burden on religion. Instead, Justice Roberts observed that “[t]hese cases show that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.” *Id.*

112. *Id.* at 435.

113. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1283 (W.D. Okla. 2012) *rev'd and remanded* 723 F.3d 1114 (10th Cir. 2013) *aff'd sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

Specifically, the Affordable Care Act provided that:

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.<sup>114</sup>

The comprehensive guidelines, in turn, incorporated the following provisions for contraceptive care for women that must be provided without cost sharing: “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”<sup>115</sup> These contraceptive methods included “diaphragms, oral contraceptive pills, emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively, and intrauterine devices.”<sup>116</sup>

Hobby Lobby, a private, closely held corporation<sup>117</sup> and its individual owners sued the federal government in federal district court in Oklahoma seeking declaratory and injunctive relief under the Free Exercise Clause and RFRA claiming that the contraceptive mandate violated both the corporation’s and the individuals’ religious beliefs.<sup>118</sup> While Hobby Lobby is a secular corporation, its owners have chosen to conduct their business in accordance with their Christian faith, which does not permit them to support the provision of “abortion-inducing” medications or devices such as the morning after pill, the week-after pill, or intrauterine devices.<sup>119</sup>

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114. *Id.* at 1283 (quoting the Affordable Care Act, 42 U.S.C. § 300gg-13(a)).

115. *Id.* at 1283-84 (citing 76 Fed. Reg. 466231; 45 C.F.R. § 147.130 (2012)).

116. *Id.* at 1284.

117. *See id.* at 1278. Hobby Lobby and another corporation, Mardel, are both wholly owned by the Green family. While both corporations were part of the suit, the case will be discussed largely with reference to Hobby Lobby for the sake of clarity.

118. *See id.*

119. *Id.* at 1285.

The Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles. The trust exists “to honor God with all that has been entrusted” to the Greens and to ‘use the Green family assets to create, support, and leverage the efforts of Christian ministries.’ The trustees must sign ‘a Trust Commitment,’ which among other things requires them to affirm the Green family statement of faith and to ‘regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer.’

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013) and *aff’d sub nom.* Burwell v. Hobby Lobby Stores,



While the Affordable Care Act grandfathered in certain health plans and provided a safe harbor for religious employers, Hobby Lobby did not qualify under either protection and was subject to the full force of non-compliance with the Affordable Care Act, which equated to fines of approximately 1.3 million dollars per day.<sup>120</sup>

The District Court first found that the corporation did not have a constitutional right to free exercise of religion because the Constitution reserves that right to individuals.<sup>121</sup> The court noted that the one exception to this had been the extension of free exercise rights to churches, religious organizations, and religious corporations “because believers ‘exercise their religion through religious organizations.’”<sup>122</sup> Ultimately, the court found that the plaintiffs failed to demonstrate a likelihood of success on the merits with respect to their constitutional free exercise claim.<sup>123</sup>

With respect to the RFRA claim, the court first needed to determine whether a corporation was a person for the purposes of RFRA.<sup>124</sup> The statute itself contains no definition, so the plaintiffs argued the dictionary act definition of person, which included corporations, should apply.<sup>125</sup> However the application of this definition was supposed to be taken in context, and the District Court found that, in this instance, the context was not appropriate for the application of the dictionary definition found in 1 U.S.C. § 1.<sup>126</sup> The District Court held that: “[t]he same reasons behind the court’s conclusion that secular, for-profit corporations do not have First Amendment rights under the Free Exercise Clause support a determination that they are not ‘persons’ for purposes of the RFRA.”<sup>127</sup> The court went on to find that neither the corporations nor the individual owners could demonstrate a likelihood of success on the merits and the motion for preliminary injunction was denied.<sup>128</sup>

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Inc., 134 S. Ct. 2751 (2014).

120. *Hobby Lobby*, 870 F. Supp. 2d at 1285.

121. *Id.* at 1288.

122. *Id.* (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J. concurring)).

123. *Id.* at 1290.

124. *Id.* at 1291.

125. *Id.* (quoting 1 U.S.C. § 101, which states, “In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ includes corporations. . . as well as individuals.”)).

126. *Id.* (citing *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 199 (1993)).

127. *Id.* at 1291-92.

128. *Id.* at 1291, 1294, 1296. With respect to the individual owners, the court found that they could not demonstrate a substantial burden on their religious beliefs. *Id.* at 1296.



The Tenth Circuit reversed the District Court's decision, finding that corporations were entitled to maintain free exercise claims and are persons under RFRA.<sup>129</sup> With respect to RFRA, the Tenth Circuit simply applied the Dictionary Act.<sup>130</sup> And, with respect to the Free Exercise Clause, the court found that historically the First Amendment had been applied to corporations, and that the Free Exercise Clause itself had been applied to corporations of a non-profit nature, as well as individuals who maintained for-profit businesses.<sup>131</sup> Thus, as the Tenth Circuit viewed the problem, the government's position that corporations could not maintain an action under RFRA or seek protection under the Free Exercise clause was untenable.<sup>132</sup> The court observed:

In short, individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights. With these propositions, the government does not seem to disagree. The problem for the government, it appears, is when individuals incorporate *and* fail to satisfy Internal Revenue Code § 501(c)(3). At that point, Free Exercise rights somehow disappear.<sup>133</sup>

The Supreme Court granted certiorari and arguments were heard on March 25, 2014, in *Burwell v. Hobby Lobby Stores*.<sup>134</sup> Justice Alito first addressed the nature of a corporation, clarifying that a corporation is nothing more than a collection of the persons who own it and, as such, is nothing more than, in essence, an artificial alter ego of those persons:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations

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129. *Hobby Lobby Stores v. Sebelius*, 723 F.3d 1114, 1116 (10th Cir. 2013).

We hold that Hobby Lobby and Mardel are entitled to bring claims under RFRA, have established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm. But we remand the case to the district court for further proceedings on two of the remaining factors governing the grant or denial of a preliminary injunction.

*Id.* at 1121.

130. *Id.* at 1116.

131. *Id.* at 1133-34.

132. *Id.* at 1136-37.

133. *Id.* at 1134.

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

protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.<sup>135</sup>

The majority found that corporations exercise the same religious beliefs as their owners, at least in the context of a closely-held corporation.<sup>136</sup> Interestingly, to some extent the Court recognized that corporations, as legal entities, have religious beliefs by finding that corporations are simply an expression of their owners' religious beliefs. But then the Court found that corporations were persons for the purposes of RFRA.<sup>137</sup> And, of course, the majority included other stakeholders in its definition but then disregarded lack of uniformity to the extent it did not converge with that definition.

The distinction at the heart of *Hobby Lobby*, however, was not whether a corporation is a person, but whether a corporation can "exercise" religious beliefs in the same way a person can.<sup>138</sup> Clearly, the owners of Hobby Lobby, Mardel Books, and Conestoga Woods can have religious beliefs and exercise them. Similarly, the employees of these companies can have religious beliefs and exercise them. The question is whether these corporations, made up of more than one individual, can hold and exercise religious beliefs in the same manner. The majority relied on decisions wherein non-profit corporations have been given religious rights, as have individuals conducting for-profit businesses to find that the for-profit corporate form was entitled to similar protection.<sup>139</sup>

While the majority recognized that for-profit corporations could have religious beliefs, it stopped short of extending recognition of such beliefs to public corporations, or corporations that were not closely-held, because those corporations would arguably lack a certain unity of religious belief.<sup>140</sup> The dissent took issue with this and the potential problems that were evident. Where will the line be drawn between closely held and public? Will a majority of shareholders or an active board of directors be enough to provide the appropriate religious imprimatur on the corporation in question?

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135. *Id.* at 2768.

136. *See id.* at 2755.

137. *See id.* at 2768-69.

138. *See id.* at 2769.

139. *See id.* at 2768-70.

140. *See id.* at 2769, 2771, 2774.

Ultimately, the Court found that providing mandatory health insurance coverage that included abortifacient contraception substantially burdened the objectors' religious beliefs and that by having multiple exceptions and accommodations the government had demonstrated less restrictive means for providing coverage to female employees.<sup>141</sup> The Court also noted that, from the female employees' perspective, the net result was the same.<sup>142</sup> The women would have access to the subject contraceptive coverage through other means. From a vulnerability perspective then, it could be said that extending religious beliefs to the corporations involved did not prevent other vulnerable subjects within the corporation from obtaining a desirable physical asset because it was still available. The state could provide resilience through alternate means to the same population without damaging the existential asset of the corporate owners while still utilizing the corporate form as the framework for services. The Court itself noted the narrow scope of its ruling in this regard, stating "our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs."<sup>143</sup> However, as the dissent demonstrated, and more recent cases have borne out, the notion of resorting to alternate channels to provide services outside the corporate structure for those within still creates significant real world problems.

The dissent in *Hobby Lobby* raised the specter of the policy problems, both real and potential, that would arise from the majority's decision.<sup>144</sup> The dissent highlighted the slippery slope that had just been crafted from a broad interpretation of the reach of RFRA and the recognition of corporate personhood.<sup>145</sup> Justice Ginsburg framed the problem as one where the government will now always be compelled to apply the less restrictive alternative regardless of the compelling government interests or the disparate impact on those who lose a privilege based solely on another's sincerely held religious beliefs.<sup>146</sup> And now those religious beliefs include the beliefs of a corporation as an autonomous entity, based upon the corporation's ownership structure. In real terms, Justice Ginsburg explained, the majority's decision meant that "[t]he exemption sought by Hobby Lobby and Conestoga would override significant interests of the

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141. *See id.* at 2779-80.

142. *See id.* at 2782.

143. *See id.* at 2783.

144. *See id.* at 2790-92 (Ginsburg, J., dissenting).

145. *See id.* at 2787.

146. *See id.*

corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."<sup>147</sup>

Justice Ginsburg also expressed concern over the majority's decision that RFRA, as amended by RLUIPA, charted a new legal course away from First Amendment jurisprudence to give even more religious freedoms than were constitutionally provided.<sup>148</sup> The majority read RFRA's new definition as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" to be a complete divestiture from First Amendment case law.<sup>149</sup> In Justice Ginsburg's opinion, this language was designed to clarify that the courts should not question the asserted religious belief, not that the courts should wholly abandon the *Sherbert* line of cases in favor of a more expansive view of religious liberties.<sup>150</sup>

Beyond the expanded reading of RFRA, Justice Ginsburg expressed serious concerns about extending religious rights to corporations and the precedent that was being set.<sup>151</sup> She observed that:

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities.<sup>152</sup>

Ginsburg predicted that RFRA claims would proliferate because "the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."<sup>153</sup>

The only good thing about the majority's choice to rely so heavily on RFRA is that it is completely within the power of Congress to roll back the broadest definitions of RFRA, or remove it altogether, as the Supreme Court has functionally decoupled it from First Amendment jurisprudence.

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147. *Id.* at 2790.

148. *See id.* at 2792.

149. *Id.* at 2792 (quoting 42 U.S.C. § 2000cc-5(7)(A) (2012)). RFRA's definition was amended when RLUIPA was passed and the noted language was added. *Id.*

150. *See id.*

151. *See id.* at 2797.

152. *Id.* at 2794.

153. *Id.* at 2797.

### D. *The Impact of a New Judicial View of Corporate Personhood*

#### 1. *Critiques of Hobby Lobby*

The majority in *Hobby Lobby* came to the conclusion that a corporation was nothing more than a “simple” form of organization to achieve the desired ends of the *people* who are associated with that corporation. In that context, extending constitutional rights to a corporation is simply recognition of the constitutional rights of the people within that corporation. Scholars continue to debate how this issue should be resolved and whether this simple statement is a correct expression of the law or policy.<sup>154</sup> And, at least one author has suggested we are asking the wrong question.<sup>155</sup>

First, regardless of how “corporation” was defined by the Court, the only religious rights that were recognized in *Hobby Lobby* were those of the owners of the corporation. Second, corporations have been specifically designed to be separate legal entities for a reason. Corporations may be driven by a stated purpose or mission; but, corporations are supposed to exist in a legal construct apart from their owners and employees, regardless of whether they are contemplated as fictional entities or as real entities. If

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154. Thad Eagles, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims*, 90 N.Y.U. L. REV. 589, 625 (2015); see also Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 64-69 (2013) (conflating the corporation and its owners, as if corporations themselves could believe anything); Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589, 620-30 (2014) (arguing that the right of religious exercise extends to corporations themselves and not just individuals); Elissa Graves, *The Corporate Right to Free Exercise of Religion: The Affordable Care Act and the Contraceptive Coverage Mandate*, 18 TEX. REV. L. & POL. 199, 211-16 (2014) (arguing that corporations exercise the religious beliefs of their owners); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 63-64 (2013) (arguing that for-profit corporations can exercise religion). *But see* Gregory P. Magarian, *Hobby Lobby in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. EN BANC 67, 72 (2014) (arguing that corporations cannot “manifest conscience”); 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, 1 (2014) (“[A] business organization does not have religious beliefs.”).

155. Eagles suggests that the appropriate question, the one that should have been more clearly addressed by the Court in *Hobby Lobby*, was about whether “regulatory burdens on corporations *can* substantially burden the free exercise of individuals’ religions, and that courts should not ignore that potential burden simply because the directly regulated party is a corporation.” In other words, Eagles advocates disposing with the corporate form in answering the broader question of whether a business regulation substantially burdens an individual’s exercise of religion. Eagles, *supra* note 154, at 593.

it were otherwise, then corporations would enjoy all of the same constitutional protections as their owners, as contemplated by the nexus of contracts theory. If this were the case, there would be no need to ever pierce the corporate veil, because such a thing would simply not exist, and thus there would be no need to reverse-pierce the corporate veil to allow certain classes of corporate owners to exercise their religious rights.<sup>156</sup>

The other problem with the logic of *Hobby Lobby* is that it ignores the very real world problem of conflicting beliefs held by owners, shareholders, and employees. In some respects, the case was an easy one because there was a unity of religious belief at the ownership level in a closely held corporation, but what if there isn't the same unity of belief in the next case? What if the corporation itself acknowledges a religious belief that does not reflect that of the owners, but has an end that supports the underlying goal of the corporation to be profitable? And even if the opposing view is taken, that corporate form should be irrelevant in deciding whether a business regulation impermissibly impacts an individuals' religion, how should the state balance competing vulnerabilities where the state regulation serves a compelling interest?

One troubling aspect, from a vulnerability perspective, is the assignment of an embodied trait to a legally created person. Embodiment and embeddedness are distinct, and the scholars that argue that blurring that line is problematic have a point.<sup>157</sup> There is a genuine concern that the door that has swung open to address discrimination by individual corporate actors will now swing the other way in the name of religious freedom.<sup>158</sup> While most of the talk in this capacity has been with respect to LGBTQ rights and state-enacted RFRA's, more subtle religious challenges such as providing for healthcare for a pregnancy conceived out of wedlock are not beyond cavil. While pregnancy discrimination is prohibited, such discrimination has not been challenged on religious grounds. Kent Greenfield comes from a different perspective, however, in that he believes the Supreme Court's recent decisions call for "[m]ore corporate personhood, not less."<sup>159</sup> His concern with the debate over corporate

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156. See Mohapatra, *supra* note 8, at 170-74.

157. See generally Matambanadzo, *supra* note 71 (applying vulnerability analysis and the concept of embodiment to the legal definition of person).

158. Stephanie Wang, *What the Religious Freedom Really Means for Indiana*, INDY STAR, Apr. 3, 2015, <http://www.indystar.com/story/news/politics/2015/03/29/religious-freedom-law-really-means-indiana/70601584/>.

159. Kent Greenfield, *Let Us Praise Corporate Persons*, WASHINGTON MONTHLY, Jan/Feb. 2015, [http://www.washingtonmonthly.com/magazine/januaryfebruary\\_2015/features/let\\_us\\_now\\_praise\\_corporate\\_pe053466.php?page=all](http://www.washingtonmonthly.com/magazine/januaryfebruary_2015/features/let_us_now_praise_corporate_pe053466.php?page=all). Greenfield argues, in part, that "[t]he

personhood and the extreme notion of a “corporation is not a person” is that it plays into the hands of managers and employers to the detriment of other stakeholders.<sup>160</sup>

## 2. *Limits of Hobby Lobby (or Lack Thereof)*

Two post-*Hobby Lobby* cases further illustrate the fault lines that develop in balancing vulnerabilities of different constituencies. In both cases, the complaining parties argued that requiring them to be attached to the mandate in any way, in these specific cases by requiring them to affirmatively “opt out” of the mandate, created a substantial burden on their religious beliefs.

In *Priests For Life v. United States Department of Health & Human Services*<sup>161</sup> the D.C. Circuit observed that the case was

paradoxical and virtually unprecedented . . . [and] analogous to a religious conscientious objector to a military draft claiming that the act of identifying himself as such on his Selective Service card constitutes a substantial burden because that identification would then ‘trigger’ the draft of a fellow selective service registrant in his place and thereby implicate the objector in facilitating war.<sup>162</sup>

The D.C. Circuit Court found that “Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out.”<sup>163</sup> The Court also stated that “They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors.”<sup>164</sup> The court, citing the Supreme Court, recited a simple yet powerful premise, “Government simply could not operate if it were required to satisfy every citizen’s

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best way to constrain corporations is to require them to sign on to a more robust social contract and to govern themselves more pluralistically—mechanisms designed to mimic the traits of human personhood within the corporate form.” Greenfield sees great value in the “real entity” theory and argues for more democratic governance within corporations themselves, debunking the notion of shareholder primacy in favor of a more human and humane version of corporate governance.

160. *See id.*

161. 772 F.3d 229, 229 (D.C. Cir. 2014), *vacated and remanded by* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

162. *Id.* at 246 (citing *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 556 (7th Cir. 2014) *cert granted, judgment vacated by* *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015) (Supreme Court vacated for further consideration based on its decision in *Hobby Lobby*).

163. *Id.*

164. *Id.*



religious needs and desires.”<sup>165</sup> The truth is the collective good must trump individual need at some point if society is to survive.<sup>166</sup>

However, in *Catholic Benefits Association LCA v. Burwell*,<sup>167</sup> the Western District of Oklahoma agreed with the Eleventh Circuit which had previously found that even if the opt-out form alone didn’t trigger RFRA coverage, the government had required the objector to “participate” in the mandate scheme by requiring it to deliver a notice to its third party administrator or insurer which was a sufficient burden on the objector’s religious beliefs.<sup>168</sup> The court found that the mere fact that the plaintiffs had to affirmatively notify the government by filling out a form caused a substantial burden on their religious beliefs that was not the least restrictive means of doing so. However, the court also side-stepped one big issue because it found that a majority of the Supreme Court in *Hobby Lobby* had not decided that the government had a compelling interest in issuing the mandate in the first place.<sup>169</sup>

These cases highlight a slightly different issue than that presented in *Hobby Lobby* in that they do not involve the corporate form and corporate personhood. Nonetheless they are contextually relevant in considering the very real problems confronted by the state in building resilience through corporations, often in the employment context. The degree to which the state chooses to protect individual exercise of religion creates a very real

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165. *Id.* (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988)). In *Lyng*, certain Native Americans argued that timber harvesting on land which they used for religious purposes violated their free exercise rights, and the court made a distinction between government regulation that caused an individual to behave in a way that violated their religious beliefs versus government conduct that simply made exercising those beliefs more difficult. *See Lyng v. NW Indian Cemetery Protective Ass’n*, 485 U.S. 439, 442 (1988).

166. Interestingly the Supreme Court found a way to accommodate both sides’ concerns in this case through a compromise of sorts, based on the changed positions of the parties after oral arguments before the Court. *Zubik*, 136 S. Ct. at 1560. In *Zubik*, the matter was remanded for the parties to fashion a remedy whereby the petitioners no longer had to affirmatively opt out of contraceptive care, “while at the same time ensuring that women covered by petitioners’ health plans ‘receive full and equal health coverage, including contraceptive coverage.’” In reaching this compromise, the Court did not decide “whether petitioners’ religious exercise has been substantially burdened, whether the Government has a compelling interest, or whether the current regulations are the least restrictive means of serving that interest.” *Id.*

167. 81 F. Supp. 3d 1269 (W.D. Okla. 2014).

168. *Id.* (citing *Eternal Word Television Network, Inc. v. Sec’y of the United States Dep’t of Health & Human Servs.*, 756 F.3d 1339, 1347 (11th Cir. 2014)).

169. *Id.* at 1272-4.; *see also Dordt Coll. v. Burwell*, No. 14-2726, 2015 WL 5449504 (8th Cir. Sept. 17, 2015); *Sharpe Holdings, Inc. v. DHS*, No. 14-1507, 2015 WL 5449491 (8th Cir. Sept. 17, 2015).



tension between the common good and individual rights. The government itself has created this tension, passing RFRA when the Supreme Court effectively situated Free Exercise in a space that would have better balanced the common good with individual existential needs. Now that RFRA is law, and has been interpreted in the broadest manner, any government action that in any way impacts religious belief may be subject to challenge and impeded in its implementation. The Supreme Court's decision to extend RFRA beyond natural persons to for-profit corporations and to extend the concept of corporate personhood is likely to further exacerbate this problem.

#### V. THE ROLE OF THE RESPONSIVE STATE IN MEDIATING CORPORATE PERSONHOOD

Much of the resilience of corporations is built upon the oft-ignored contribution of those who labor on their behalf as well as the privileges afforded to corporations under the current legal system based on a lax regulatory scheme.<sup>170</sup> Thus, corporations are comprised of those whose vulnerabilities are not similarly situated. The responsive state needs to address these disparities in vulnerability, because these disparities are exacerbated by the inequities in power that exist in the corporate structure. The state can mediate such disparities in many ways, but one question is how to address competition for acquisition of assets that are required for resilience.

In *Hobby Lobby*, the owners of the company were trying to protect an existential asset. There was and is a valid religious reason for their decision to decline to offer certain types of contraceptives to their female employees. The owners were not preventing their employees from using such contraception, they were not removing preventive care from these employees, nor were they denying access to all contraception, instead they deliberately drew a line between what they felt was appropriate and what

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170. Fineman observes that "in the market context, we need to be reminded that corporations and those who run, direct, and profit from them cannot function without the labor of others." FINEMAN, *supra* note 47 at 289. A perfect example of this invisible resilience is the labor of undocumented workers whose efforts help drive our economy, but whose presence is met with disdain from those who benefit from their labor. Kasperkovic cites to studies that indicate deporting all undocumented workers and closing our borders "would 'reduce the [United States gross domestic product] by 1.46% annually[,] or \$2.6 trillion . . . over ten years.'" Jana Kasperkovic, *These States Will Lose Billions If Their Illegal Immigrants Are Deported*, BUS. INSIDER, (Jan. 23, 2012, 3:54 PM), <http://www.businessinsider.com/illegal-immigrants-deported-2012-1>; see also *Giving the Facts a Fighting Chance: Addressing Common Questions on Immigration*, AM. IMMIGRATION COUNCIL (Dec. 14, 2015), <http://www.immigrationpolicy.org/high-school/top-10-myths-about-immigration>.

was not. However, their decisions, both before and after the Affordable Care Act mandate, impacted their female employees' resilience, through their access to physical assets, in a tangible way.

By the same token, the Greens' employees were trying to build resilience through acquisition of a physical asset. This type of healthcare has a direct impact on the woman who chooses to use it, but it has a much broader impact on society as a whole because it is intimately related to family planning, child care, housing, and every other metric of support required to raise children. However, but for the government's mandate, these employees might not have been able to obtain the resilience provided by the mandate. "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."<sup>171</sup>

Prior to the mandate, the state had not interceded in this juxtaposition of privilege and interests; after the mandate, the state chose to bolster the resilience and privilege of existential assets over the need for more immediate physical assets when it recognized the Greens' tenuous religious liberty interests. The government, in a responsive posture, was seeking to provide a physical asset to many Americans, expanding healthcare and access to healthcare. In attempting to accomplish this goal, the state sought to use the corporation as an institution as an efficient means of delivering this asset to the population. Because the government has permitted both corporations and the healthcare system to develop in certain ways, it has now created a circumstance whereby a means to deliver resilience to its constituency may be largely foreclosed. The problem is, given the current political climate, it may not be realistic to deliver such an asset any other way.<sup>172</sup>

Here, the privileged employer seeks to protect the outer boundary of an existential asset. And a less privileged employee, who is vulnerable within the corporate structure, seeks to capture a physical asset that has a significant impact and benefit far beyond her own health and well-being. The state, in an attempt to mediate between the established asset and the newly captured asset, fails in protecting the more vulnerable of the two. Is this part of the process? Is this just how it goes sometimes? Should we have a hierarchical assumption of how assets should be distributed? Is the

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171. Mohapatra, *supra* note 8, at 161.

172. *See id.* at 155. There has been at least some Congressional attempt to reinstate the mandate after the Supreme Court's decision in *Hobby Lobby*. *See id.* (citing Protect Women's Health from Corporate Interference Act of 2014, S. 2578, 113th Cong. § 2 (2014)).

answer simply to federalize healthcare and spread the cost of healthcare among all of us and remove healthcare from the private/public equation? Maybe.

When assessing these issues, it is worth considering how healthcare became embedded in the employment environment in the first place. W. David Koeninger has recently reviewed the historical evolution of state, corporation, employment and healthcare in discussing the Affordable Care Act.<sup>173</sup> The common story about healthcare in the United States is that post-World War II labor unions and large corporations agreed, based upon their mutual interests, to institute employer health care plans.<sup>174</sup> Koeninger explains that it did not start out that way, both companies and labor unions had their own medical services, but after the Supreme Court's decision in *Inland Steel*, health benefits became a part of collective bargaining and labor unions abandoned the idea of government-sponsored health insurance.<sup>175</sup> Because employers controlled access to health care for many workers, these plans were a means of control over workers, and a means of gender discrimination.<sup>176</sup>

The development of health care in this manner led to a system of "path dependence" wherein an individual's choices were absent from the process; if you were able-bodied you obtained health insurance through work, if you were otherwise frail, you obtained health insurance through the federal system.<sup>177</sup> In fact, the historical underpinnings of the healthcare system prior to the Affordable Care Act had distinct racial undertones and a clear distinction between the deserving and undeserving poor.<sup>178</sup> The "notion that an employer or governmental authority could define health for the purpose of taking advantage of an individual's labor power has been woven into our health care system for 150 years."<sup>179</sup> The Affordable Care Act challenged this system of path-dependence, and has even been identified as this era's civil rights legislation.<sup>180</sup> Koeninger has suggested defending the Affordable Care Act as anti-subordination legislation based on the racially

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173. Koeninger, *supra* note 11, at 203-4

174. *Id.* at 201.

175. *Id.* at 206-07.

176. *See id.* at 207.

177. *Id.* at 201-02 (citing Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 439 n.31 (2011)).

178. *Id.* at 205-6 (citing JIM DOWNS, *SICK FROM FREEDOM: AFRICAN AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION* 42-52 (2012)).

179. *Id.* at 204.

180. *Id.* at 202 (citing JOHN E. McDONOUGH, *INSIDE NATIONAL HEALTH REFORM* 305 (2011)).

skewed history of healthcare in this country.<sup>181</sup>

Regardless of how it is viewed, the Affordable Care Act took a privilege held by employers and created a system whereby employees could obtain health insurance outside the employment context as well as receiving mandatory benefits within it. Even if it was limited in some respects, it was the action of a responsive state. However, the state response unearthed a new set of vulnerabilities that had otherwise lay dormant due to the privilege employers enjoyed with respect to healthcare. Since the Affordable Care Act's enactment, employers have been faced with a new reality—their privilege has been diminished and some balance has been restored to the inequities in the system. Thinking through those vulnerabilities and their practical impact highlights the choices that need to be made between competing assets and resources.

*Hobby Lobby* was wrongly decided on a corporate personhood basis, not because corporate personhood is bad, but because it blurred the line between corporate personhood and individuals in a way that was both expansive and limiting. This level of individuation of corporations further exacerbates a systemic imbalance that will make the delivery of any assets and resources by a responsive state more complicated. The state cannot have it both ways. In enacting RFRA, the state sought to provide even more protection for religious liberties but, in doing so, it exposed both itself and other institutions that normally would provide resilience to a harmful limiting principle. By further restricting its responsiveness when it conflicts with an existential asset, the state has created a model that may never be able to efficiently provide the appropriate measure of resilience.

In terms of balancing vulnerabilities and resilience there is also another limiting principle that should be addressed, the delivery of existential assets via state response must cede to the need for physical assets. This is not to suggest there should be a strict hierarchy among vulnerabilities, they are all interdependent, but balance must be achieved in a manner that makes sense – one that addresses our embodied nature first, before addressing our embedded one. In this instance it may mean many potential solutions for the problems that have arisen with the provision of health care and the protection of religious liberties but the obvious one is for universal health care, or at least a reworking of RFRA and a return to the *Smith* jurisprudence.

## VI. CONCLUSION

Greenfield was right when he observed that corporate personhood has great value, but that value does not supplant the need to regulate. As

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181. *Id.* at 203.

government moves to regulate, and to address some of the inequities within society, it will have to mediate between competing vulnerabilities in a meaningful way. Government needs to fill the vacuum left by collective workers' movements led by labor unions and seek to meet corporations where their interests diverge from that of the vulnerable subjects in their midst. The political will to do so will be the sticking point. Clearly, as legally created entities, corporations are still subject to government regulation and, as Greenfield is quick to point out, perhaps leaving religious liberties where they are — where corporation meets society — is better and we should focus on the other part of the equation, the construction and governance of corporations from within.<sup>182</sup>

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182. See generally Greenfield, *supra* note 159.