Washington and Lee Law Review

Volume 74 | Issue 2 Article 22

4-1-2017

Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility

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I. Introduction

> [T]he *Hobby Lobby* decision will reverberate across corporate America. It will reshape fundamentally how business people, lawyers, legal and business scholars (particularly, corporate law professors), as well as ordinary citizens, think about the permitted objectives of business corporations in a free society, objectives that extend far beyond those that are religiously

> motivated and into the larger realm of corporate social responsibility of all kinds.[1]
>
> Law . . . mandates—with the state's full sanctioning power behind it—compliance with specified standards of behavior. Apart from a decision to comply or disobey, there is no real exercise of discretion in choosing to abide by the law. "Responsible" conduct, on the other hand, presupposes the freedom to engage in or refrain from certain conduct. Viewed this way, corporate responsibility concerns can be seen as picking up precisely where legal strictures leave off.[2]

With deep appreciation and admiration for the work of Lyman Johnson and David Millon, I offer this contribution to the Symposium that honors them and their scholarship. The language quoted above provides the foundation for this Essay. The first quotation describes the potentially significant implications of the now three-year-old Supreme Court case, *Burwell v. Hobby Lobby Stores, Inc.*,[3] for understanding corporate purpose and corporate social responsibility. The second quotation from Johnson's work distinguishes between what companies are required to do (they must comply with applicable law) and what companies choose to do for the betterment of society's individuals and institutions (corporate social responsibility).

I mentioned in my presentation at the Symposium that I have a narrow but significant quibble with Johnson's assertion in the second quotation that, when it comes to compliance, "there is no real exercise of discretion in choosing to abide by the law."[4] I think that there is a great amount of discretion to be exercised by corporate officers when it comes to compliance. It is discretion relating to how the corporation will "abide by the law."[5] In other

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1. Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 2–3 (2015) [hereinafter Johnson & Millon, *After* Hobby Lobby].

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

3. 134 S. Ct. 2751 (2014), *aff'g* 723 F.3d 1114 (10th Cir. 2013); Conestoga Wood Specialties Corp. v. Burwell, 134 S. Ct. 2751 (2014), *rev'g* 724 F.3d 377 (3d Cir. 2013). After granting certiorari, both cases were consolidated. Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013).

4. Johnson, *Corporate Personhood*, *supra* note 2, at 1135.

5. *Id.*

words, the discretion is not limited to the choice of whether to follow the law, but is found in the choices corporate officers make, sometimes implicitly, about whether to follow the spirit of the law or merely the letter of the law. The discretion is exercised when making decisions about how compliance programs are created and implemented, and how their effectiveness is assessed.

I quibble also with Johnson's observation that "corporate responsibility concerns can be seen as picking up precisely where legal strictures leave off."[6] Compliance with the legal strictures Johnson speaks of is an important part of corporate governance.[7] It seems to me, however, that the line between corporate governance and corporate social responsibility is blurred. While law compliance is mandated, the quality of that compliance is within corporate officers' discretion.[8] Officers may decide to do the bare minimum when it comes to compliance.[9] Compliance programs are sometimes mere window dressing or cosmetic in nature.[10] The decision to create robust compliance programs that take seriously the substance of legal strictures is not only good corporate governance; it is socially responsible.[11] I believe there is

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6. *Id.*

7. *See* H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post* Caremark *Era*, 26 DEL. J. CORP. L. 1, 6 (2001) ("For corporations operating in regulated industries, compliance with the applicable laws is essential . . . . Thus, the avoidance of a regulatory crisis may be as significant to the corporation's long-term well-being as is strategic planning and product innovation.").

8. *See* Maurice E. Stucke, *In Search of Effective Ethics and Compliance Programs*, 39 J. CORP. L. 769, 800–01 (2014) ("Particularly in times of shrinking budgets and restricted resources it would be very helpful to have some evidence to demonstrate why a solid compliance program is needed—and why a better program is worth the effort versus a bare bones minimum." (citing ETHICS RES. CTR., THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS: A CALL TO ACTION FOR MORE EFFECTIVE PROMOTION AND RECOGNITION OF EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS 44 (2012))).

9. *See id.* at 800–01, 821 (discussing the possibility of minimum investment in compliance as a means of corporate policy or management).

10. *See* HEALTH CARE COMPLIANCE ASS'N, IS YOUR COMPLIANCE PROGRAM EFFECTIVE OR MERELY WINDOW DRESSING? (Mar. 9, 2015), http://www.hcca-info.org/Portals/0/PDFs/Resources/Conference_Handouts/Compliance_Institute/2014/mon/211print2.pdf (highlighting "Hallmarks of [Compliance] Window Dressing" in the healthcare industry).

11. *See* Sarah A. Altschuller, *Corporate Social Responsibility and Compliance: A Functional Convergence*, FOLEY HOAG (Aug. 11, 2016), http://www.csrandthelaw.com/2016/08/11/corporate-social-responsibility-and-

a great deal of overlap between corporate governance and corporate social responsibility and very little precision in understanding where corporate governance ends and corporate social responsibility begins.

At the Symposium, Johnson offered an observation about my presentation during the question and answer period. "Compliance is substance, the duty of care is process," he said.[12] Johnson's insight helps to frame and clarify my thesis in this Essay. The substance about which Johnson speaks is found in the legal mandates—i.e., the law to which corporations must comply.[13] The process to which he refers is the stuff of corporate governance.[14] The process includes a board's decision to establish a compliance program.[15] The process also relates to the measures undertaken by corporate officers who are responsible for the implementation and management of compliance programs.[16] These processes are undertaken by corporate officers in order to fulfill the fiduciary duties they owe their shareholders and the corporation for whom they serve.[17] A commitment to taking compliance obligations seriously must become part of the fabric of corporate culture.[18]

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compliance-a-functional-convergence/ (last visited Apr. 6, 2017) ("There are strong business reasons, therefore, to leverage and integrate CSR commitments and compliance processes.") (on file with the Washington and Lee Law Review).

12. Symposium, *Corporate Law, Governance, and Purpose: A Tribute to the Scholarship of Lyman Johnson and David Millon*, 74 WASH. & LEE L. REV. 677 (2017).

13. *See* Baccei v. United States, 632 F.3d 1140, 1145 (9th Cir. 2011) ("Full compliance is necessary when the requirement relates to the substance of the statute or where the essential purposes have not been fulfilled." (citing Shotgun Delivery, Inc. v. United States, 269 F.3d 969, 973 (9th Cir. 2001))).

14. *See In re* NVIDIA Corp. Derivative Litig., No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008) ("As corporate debacles such as Enron, Tyco and WorldCom demonstrate, strong corporate governance is fundamental to the economic well-being and success of a corporation.").

15. *See* Brown, *supra* note 7, at 6 (discussing the role of the board and compliance personnel to take measures ensuring that the laws are dutifully observed).

16. *See id.* at 108 ("Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.").

17. *See generally id. But see* Mercer Bullard, Caremark*'s Irrelevance*, 10 BERKELEY BUS. L.J. 15, 16–17 (2013) (arguing that compliance standards impose higher expected costs on corporations than the standard under *Caremark*).

18. *See* Brown, *supra* note 7, at 6 ("For corporations operating in regulated

Boards must demand that adequate compliance programs are installed and diligently implemented.[19] Once installed, corporate officers do the work of implementing compliance programs.[20] Johnson's work is illuminating on the link between effective compliance and the advice that officers get from in-house counsel concerning their fiduciary duties.[21] Johnson and Millon's work regarding corporate personhood and purpose is also relevant to my thesis in this Essay about the overlap, interplay, and interaction between corporate governance and corporate social responsibility.[22]

I begin the Essay with an examination of the overlap between corporate governance and corporate social responsibility.[23] After doing so, I explore the notions of corporate personhood and purpose in order to suggest ways to make compliance programs less cosmetic and defensive and more meaningful and effective.[24] I conclude that the decision-making inherent in corporate governance is an important factor in the corporate social responsibility equation.[25] There is a gap that separates the fulfillment of fiduciary duties (including the installation and upkeep of a compliance program) and best practices.[26] Companies and their managers can win litigation, or

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industries, compliance with the applicable laws is essential.").

19. *See id.* (discussing the various guidelines in place to ensure that corporations implement satisfactory compliance programs).

20. *See id.* at 119–127 (generally describing the function and procedure that should be followed by compliance officials in implementing effective compliance programs).

21. *See generally* Johnson & Millon, *After* Hobby Lobby, *supra* note 1; Johnson, *Corporate Personhood*, *supra* note 2; Johnson, *Corporate Governance*, *infra* note 70; Johnson & Millon, *Recalling Why Corporate Officers are Fiduciaries*, *infra* note 105; Johnson, *Business Judgment*, *infra* note 111; Johnson & Garvis, *infra* note 113.

22. *See generally* Johnson & Millon, *After* Hobby Lobby, *supra* note 1; Johnson & Millon, *infra* note 105.

23. *See infra* notes 28–81 and accompanying text (discussing the overlap between corporate governance and corporate social responsibility).

24. *See infra* notes 120–152 and accompanying text (exploring issues of corporate personhood and purpose); *infra* notes 235–281 (discussing the effect of corporate personhood corporate purpose).

25. *See infra* notes 320–334 and accompanying text (concluding that the decision-making portion of corporate governance is an integral part of corporate social responsibility).

26. *See* Lightfoot v. District of Columbia, 339 F. Supp. 2d. 78, 82 n.1 (D.C.

perhaps even avoid litigation, that alleges fiduciary duty breach by doing the bare minimum.[27] But, what can inspire them to adhere to best practices, particularly when it comes to installing and maintaining an effective compliance program? My answer to this question in this Essay requires an exploration of how corporate governance and corporate social responsibility are not clearly separate, and an examination of corporate personhood and purpose that may inspire businesses to adhere to best practices.

II. Good Corporate Governance as Corporate Social Responsibility

I begin my discussion about how to make corporate compliance programs meaningful and effective by looking at definitions of compliance, corporate governance, and corporate social responsibility (CSR).

According to the Financial Times, "CSR is a concept with many definitions and practices."[28] CSR can be defined in a way that focuses on the impact of corporate activity on the constituencies that are affected by the decisions that corporate agents and actors make.[29] These constituencies include corporate stakeholders—employees, creditors, consumers, suppliers, and the communities in which a company conducts business.[30] Some definitions of CSR look beyond stakeholders to the effects of a company's activities on general social wellbeing.[31] Like Johnson,

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Cir. 2006) ("[T]he term 'best practices' often tends to be murky and ambiguous.").

27. *See* Stucke, *supra* note 8, at 800–01, 821 (discussing the possibility of minimum investment in compliance as a means of corporate policy or management).

28. *Definition of Corporate Social Responsibility (CSR)*, FIN. TIMES, http://lexicon.ft.com/Term?term=corporate-social-responsibility--(CSR) (last visited Apr. 6, 2017) (on file with the Washington and Lee Law Review).

29. *See id.* ("Corporate social responsibility (CSR) is a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders.").

30. *See Definition of Stakeholders*, FIN. TIMES, http://lexicon.ft.com/Term?term=stakeholders (last visited Apr. 6, 2017) ("Typical stakeholders that define most businesses are customers, employees, suppliers, communities, and shareholders or other financiers.") (on file with the Washington and Lee Law Review).

31. *See Corporate Social Responsibility*, INVESTOPEDIA, http://www.investopedia.com/terms/c/corp-social-responsibility.asp (last visited Apr. 6, 2017)

those who subscribe to this way of defining CSR look beyond what is required by law to protect stakeholders, looking instead to the discretion that corporate managers and officers may exercise in choosing to benefit society by doing something extra for the people (whether stakeholders or not) touched by corporate activity.[32]

Sometimes CSR definitions make no reference to stakeholders or the company's impact on the public's wellbeing.[33] These definitions focus on society and general social welfare, not how companies impact stakeholders or other members of society with whom the company comes in contact.[34] For example, one commentator described CSR as the "business practices involving initiatives that benefit society."[35]

Definitions of Corporate Governance are also conceptually varied.[36] Investopedia defines corporate governance as "the system of rules, practices and processes by which a company is directed and controlled . . . . [E]ssentially [it] involves balancing the interests of a company's many stakeholders, such as shareholders, management, customers, suppliers, financiers, government and the community."[37] Robert Monks and Nell Minow define corporate governance as "the relationship among

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("[CSR] is a corporation's initiatives to assess and take responsibility for the company's effects on environmental and social wellbeing. The term generally applies to efforts that go beyond what may be required by regulation or environmental protection groups.") (on file with the Washington and Lee Law Review).

32. *See* Johnson, *Corporate Personhood*, *supra* note 2, at 1135 (distinguishing between CSR and the governance procedures implemented in accordance with "legal strictures").

33. *See* Sammi Caramela, *What is Corporate Social Responsibility*, BUS. NEWS DAILY (June 27, 2016, 12:12 PM), www.businessnewsdaily.com/4679-corporate-social-responsibility.html (last visited Apr. 6, 2017) (referencing CSR as a business' relationship to society generally, while making no mention of stakeholders) (on file with the Washington and Lee Law Review).

34. *See id.* ("Corporate social responsibility (CSR) refers to business practices involving initiatives that benefit society.").

35. *Id.*

36. *See infra* notes 37–47 and accompanying text (providing definitions of "corporate governance" that vary depending on the focus given responsibilities to shareholders over other parties).

37. *Corporate Governance*, INVESTOPEDIA, www.investopedia.com/terms/c/corporategovernance.asp (last visited Apr. 6, 2017) (on file with the Washington and Lee Law Review).

various participants in determining the direction and performance of corporations. The primary participants are (1) the shareholders, (2) the management (led by the chief executive officer), and (3) the board of directors . . . . Other participants include the employees, customers, suppliers, creditors, and the community."[38] These definitions of corporate governance look beyond shareholders and managers and include stakeholders.[39] In these definitions, there is an obvious overlap between corporate governance and corporate social responsibility in the inclusion of stakeholders, including the community, when defining both concepts.[40]

Monks and Minow, however, see shareholders, management, and boards as the primary participants in corporate governance.[41] Under their definition, the primary focus in corporate governance is on processes, practices, policies, and norms that are internal to the corporation.[42] In contrast to this, when considering CSR, the primary focus looks beyond internal constituents, the stakeholders, or, under many definitions, beyond stakeholders to general social welfare and wellbeing.[43] Internal matters and decision-making are the focal point of corporate governance.[44] External matters are at the center of CSR considerations.[45] This boundary that separates the external from the internal when distinguishing corporate governance from CSR, however, is far

38. ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 75 (2d ed. 2001).

39. *See supra* note 30 ("Typical stakeholders that define most businesses are customers, employees, suppliers, communities, and shareholders or other financiers.").

40. *Compare supra* notes 28–31 and accompanying text (highlighting the relationship between CSR and stakeholders), *with supra* notes 33–39 and accompanying text (highlighting the relationship between corporate governance and stakeholders).

41. *See generally* MONKS & MINOW, *supra* note 38 and accompanying text (stating that the primary participants in corporate governance are shareholders, management, and boards of directors).

42. *Id.*

43. *See* Caramela, *supra* note 33 (defining CSR).

44. *See* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 6 (3d ed. 2004) (focusing on "the three most significant players in the corporate process: shareholders, managers, and directors").

45. *See* Caramela, *supra* note 33 ("Corporate social responsibility (CSR) refers to business practices involving initiatives that benefit society.").

from clear.[46] Both concepts are defined by referring to both internal constituencies (shareholders, officers, and directors) and external groups (stakeholders and communities).[47]

The line of demarcation that separates corporate governance from CSR is further blurred by the fact that an important aspect of corporate governance includes compliance work.[48] Corporate compliance, like CSR and corporate governance, involves policies and practices that are both internal and external to the corporation.[49] Compliance involves "the processes by which an organization seeks to ensure that employees and other constituents conform to applicable norms—which can include either the requirements of laws or regulations or the internal rules of the organization."[50] Additionally, "[t]he contemporary compliance function serves a core governance function. . . . But, unlike other governance structures, its origins are exogenous to the firm."[51]

Compliance involves internal governance processes to comply with law, regulations, and norms created by sources that are external to the firm.[52] It is clear that, as Johnson wrote, "there is

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46. *See* MONKS & MINOW, *supra* note 38 and accompanying text (discussing corporate governance as dealing with both internal players—shareholders, managers, and directors—and external considerations—employees, the community, etc.).

47. *Compare supra* notes 28–31 and accompanying text (defining CSR with reference to both internal and external constituencies), *with supra* notes 33–39 and accompanying text (defining corporate governance with reference to both internal and external constituencies).

48. *See* Nadelle Grossman, *Director Compliance with Elusive Fiduciary Duties in a Climate of Corporate Governance Reform*, 12 FORDHAM J. CORP. & FIN. L. 393, 425–26 (2007) ("Internal control systems pervade every corporate enterprise, and include systems designed to provide assurances as to the effectiveness and efficiency of operations, reliability of financial reporting and compliance with law.").

49. *See id.* at 395–97, 425–426 (discussing the public impact of poor corporate governance and the need to balance interests of the corporation and its stockholders).

50. GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT AND COMPLIANCE 3 (2014).

51. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2078 (2016).

52. *See id.* at 2079 ("[T]he imposition of intrafirm governance from extrafirm sources introduces a host of outside interests and incentives into firm decision making.").

no real exercise of discretion in choosing to abide by the law."[53] The type of internal processes that encourage compliance, however, and the extent to which a company takes them seriously, is voluntary and discretionary.[54] Even the decision about whether to adopt a compliance program involves a certain amount of discretion.[55]

CSR, on the other hand, is almost entirely discretionary and includes things like charitable donations.[56] This is the something extra that companies do to be good citizens—to be responsible.[57] But CSR can also be intertwined with internal processes that involve compliance.[58] Companies can, and too often do, install programs that monitor compliance with the letter of the law rather than the spirit of the law.[59] These companies behave in a way that is socially irresponsible when they spend large sums of

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53. Johnson, *Corporate Personhood*, *supra* note 2, at 1135. Even the strictest adherents to shareholder primacy and wealth maximization acknowledge that all firms must comply with applicable law even in their quest to maximize profits. *See* ERIC W. ORTS, BUSINESS PERSONS xvii (2013)

> [T]he economist Milton Friedman argues that business executives should act in accordance with the desires of the company's owners, "which generally will be to make as much money as possible." Friedman also agrees, however, that the executive must also do so "while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.

Id.

54. *See* Stucke, *supra* note 8 and accompanying text (discussing the degree of discretion afforded officers in compliance).

55. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(c)(1) (2016) (stating that "the board of directors *may*" create a given committee for whatever specified purpose the board may define (emphasis added)).

56. *See* Caramela, *supra* note 33 (including philanthropy, volunteering, and environmental preservation efforts as categories of CSR).

57. *See id.* ("Corporate social responsibility (CSR) refers to business practices involving initiatives that benefit society. A business's CSR can encompass a wide variety of tactics, from giving away a portion of a company's proceeds to charity, to implementing 'greener' business operations.").

58. *See* Ronen Shamir, *Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility*, 6 ANN. REV. L. & SOC. SCI. 531, 534–35 (2010) (highlighting studies involving various types of compliance and their relationship to the self-regulation that is integral to CSR compliance).

59. *See* Stucke, *supra* note 8 and accompanying text (discussing the potential to do "bare bones minimum" in terms of compliance).

money on compliance programs that are not effective and meaningful.[60]

A company that behaves in a socially responsible way will take compliance seriously.[61] One way to do this is to avoid the check-the-box approach to creating and implementing compliance programs.[62] Installation of a program is only the first step. A socially responsible company will make sure that problems are addressed when compliance measures uncover them.[63] Responsible companies will work hard to prevent recurring wrongdoing.[64] Socially responsible companies will protect whistleblowers (not just say they do) so that there are no repercussions for employees who report wrongdoing.[65]

Effective compliance programs require information flow from employees who are deep "in the interior of the organization" to senior managers and executives who are charged with monitoring law compliance.[66] And, senior managers must adequately

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60. *See* Aaron Chatterji & Siona Listokin, *Corporate Social Responsibility*, DEMOCRACY: J. IDEAS (Winter 2007), http://democracyjournal.org/magazine/3/corporate-social-irresponsibility/ (last visited Apr. 6, 2017) (evaluating the actual success of CSR campaigns on effecting corporate behavior because large companies are simply better able to spend large amounts of money on CSR and compliance) (on file with Washington and Lee Law Review).

61. *See* Shamir, *supra* note 58, at 539 (describing CSR as "a set of practices that lie beyond compliance," with legal mechanism compliance as a baseline).

62. *See generally* Cindy Yanasak & Eileen Xenarios, *Culture-Shift: Moving from a Check-the-Box Mentality to One of Ethical Performance*, COMPLIANCE & ETHICS INST.—SOC'Y CORP. COMPLIANCE & ETHICS (Sept. 2014), http://www.slideshare.net/theSCCE/culture-shift-moving-from-a-checkthebox-mentality-to-one-of-ethical-performance (last visited Apr. 6, 2017) (on file with the Washington and Lee Law Review).

63. *See* Brown, *supra* note 7, at 131 ("[T]he company must be vigilant in preventing possible violations and in responding to violations that occur by taking appropriate remedial measures and disciplinary action.").

64. *See id.* at 131 ("A compliance program should be grounded on legal and regulatory requirements that are applicable and specifically, the requirements that govern the particular business activities of the corporation.").

65. *See* Tim Barnett, *Why Your Company Should Have a Whistleblowing Policy*, SAM ADVANCED MGMT. J., Autumn 1992, at 37–42 (encouraging the adoption of policies that protect and encourage the reporting of concerns and whistleblowing).

66. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–70 (Del. Ch. 1996) ("As the facts of this case graphically demonstrate, ordinary business decisions that are made by officers and employees deeper in the interior of the organization can, however, vitally affect the welfare of the

communicate with mid-level managers and low-level employees about the firm's compliance goals and requirements.[67] This information is conveyed in employee training programs.[68]

The impact a company has on communities, on labor, on consumers, as both Johnson and Millon have noted in their work, is regulated by environmental, labor and consumer laws that have nothing to do with corporate governance.[69] The laws that protect stakeholders are external to the corporation.[70] But the nature and adequacy of a company's compliance with law is an internal corporate governance matter.[71] Has the company installed a compliance program just to be able to defend itself against litigation or prosecution? Is the compliance program merely cosmetic window dressing? Affirmative answers to these questions mean that the company's behavior is not socially responsible.

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corporation and its ability to achieve its various strategic and financial goals."). *But see* Bullard, *supra* note 17, at 16–17 (concluding that *Caremark* is an inadequate source for encouraging legal compliance and arguing that the agencies that are charged with enforcing laws are the most able to encourage corporations to comply with applicable law).

67. *See* Corder v. United States, 107 F.3d 595, 598 (8th Cir. 1997) (granting an alternative monetary sanction instead of disqualification sanction to a store owner by virtue of the store owner's comprehensive compliance policy and effective employee training program).

68. *See id.* at 597 (finding that employer had engaged in comprehensive employee training programs).

69. *See, e.g.*, David Millon, *Corporate Social Responsibility and Environmental Sustainability*, *in* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 35 (Beate Sjåfjell & Benjamin J. Richardson eds., 2015) (highlighting the relationship of compliance to environmental law and corporate social responsibility).

70. *See* Lyman Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 981–82 (2013) [hereinafter Johnson, *Corporate Governance*] (detailing the distinction between external "positive law" and internal "soft law," laws such as Sarbanes–Oxley and Dodd–Frank that focus on shareholder interest from outside the internal mechanism of the corporate governance).

71. *See id.* at 981

> [Sarbanes-Oxley] corresponded with growth in the promulgation of "soft law" associated with corporate activity. Corporations increasingly adopted internal codes of conduct and committee charters . . . . These various nonbinding initiatives did not have the legal "bite" of positive law, but they served to alter internally the evolving normative expectations as to what responsible corporate conduct should look like.

A socially responsible company takes compliance with law seriously.[72] It measures the effectiveness of its compliance programs on a regular basis.[73] If there are shortcomings in the program, or if problems are discovered, a socially responsible company quickly and effectively deals with them.[74] Adequate compliance programs protect stakeholders' interests.[75] They may also impact social welfare in general.[76] This is the definition of CSR.[77] In other words, effective compliance is good corporate governance and these internal processes have benefits that reverberate beyond the corporation's shareholders and managers to reach its stakeholders and the general public.[78] This is the crux of my disagreement with Johnson when he wrote that "corporate responsibility concerns can be seen as picking up precisely where

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72. *See* Shamir, *supra* note 58, at 539 (describing CSR as "a set of practices that lie beyond compliance," with legal mechanism compliance as a baseline).

73. *See* Sarah A. Altschuller, *Corporate Social Responsibility and Compliance: Commitment at the Top*, FOLEY HOAG (Sept. 21, 2016), http://www.csrandthelaw.com/2016/09/21/corporate-social-responsibility-and-compliance-commitment-at-the-top/ (last visited Apr. 6, 2017) ("Moments of crisis are not the time for corporate leaders to realize that a company's commitments, often prominently displayed on websites and in glossy reports, have not been effectively implemented. On an ongoing basis, top-level management and the board are in a position to raise questions regarding the processes . . . .") (on file with the Washington and Lee Law Review).

74. *Id.*

75. *See* Sarah A. Altschuller, *Corporate Social Responsibility and Compliance: Building Capacity to Respond to Stakeholder Demands*, FOLEY HOAG (Aug. 18, 2016), http://www.csrandthelaw.com/2016/08/18/corporate-social-responsibility-and-compliance-building-capacity-to-respond-to-stakeholder-demands/ (last visited Apr. 6, 2017) ("In light of evolving stakeholder expectations, integrating CSR commitments into a company's compliance programs presents opportunities for both enhanced performance and operational efficiencies.") (on file with Washington and Lee Law Review); *see also* Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses,* 54 N.Y.L. SCH. L. REV. 743, 745 (2009/2010) ("A 'socially responsible corporation' may take into consideration the interests of other stakeholders in the enterprise, including but not limited to employees, customers, and suppliers.").

76. *See* Taylor, *supra* note 75, at 746 (stating that "the active advancement of social welfare is, at times, an appropriate and laudable corporate activity").

77. *See supra* notes 28–35 and accompanying text (defining CSR).

78. *See, e.g.*, Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1464–68 (2002) (discussing how proper levels of empathetic corporate governance can "positively [effect] racial discourse").

legal strictures leave off."[79] Compliance with legal strictures and corporate social responsibility are intertwined in a way that it is impossible to see where one ends and the other begins.[80] Understanding this helps to unravel why many companies install compliance programs that encourage adherence to the letter of the law rather than the spirit of the law.

III. Contextualizing: Diversity Discussions vs. Monitoring Compliance with Antidiscrimination Law

Understanding that there is no clear line of demarcation between corporate compliance with law and CSR is important in many business contexts. I will, however, examine only one context that illustrates how corporate governance decisions are intertwined with CSR and good citizenship—racial diversity and antidiscrimination efforts in the business setting. In this context, several problems manifest. First, there is the seemingly intractable problem of racially homogenous corporate boards, workplaces, and executive ranks.[81] And, there are other problems that infect relationships between firms and stakeholders of color: unfair disparities in pay and promotion rates for employees of color when compared to white employees;[82] profiling consumers of color when they shop; generally inferior service some consumers

79. Johnson, *Corporate Personhood*, *supra* note 2, at 1135.

80. *See supra* notes 43–44 and accompanying text (arguing that the distinction between CSR and corporate governance is blurred).

81. *See generally*, Cheryl L. Wade, *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, 26 PACE INT'L L. REV. 23 (2014); Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2010); AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015).

82. *See e.g.,* Cheryl L. Wade, *Organizational Responsibility for Workplace Racial and Sexual Harassment: The Stories of One Company's Workers*, 43 HOFSTRA L. REV. 229, 236 (2014) (recounting specific cases against a company that had engaged in "workplace racial harassment, retaliatory firings, and pay and promotion discrimination").

of color experience;[83] and, predatory lending that targets consumers of color.[84]

Two problems occur when discussing stakeholders of color in the business setting. First, emphasis is placed on the race of the African American and Latino stakeholders who are negatively impacted by business actors while failing to articulate that the overwhelming majority of corporate decision-makers are white.[85] This way of discussing relationships among white Americans and Americans of color is prevalent.[86] It ignores the fact that whiteness is a race. I will come back to this later in this Essay when I discuss corporate personhood.[87]

Second, most discourse about relationships among Americans of different races, especially in the business setting, is framed as a discussion about diversity.[88] Diversity sounds like a CSR issue.[89] But a lack of diversity in the business setting is simply a manifestation of the real problem—implicit, and sometimes even explicit, bias and discrimination.[90] Once the potential for implicit

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83. *See generally* George E. Schrer, Saundra Smith & Kristen Thomas, *"Shopping While Black": Examining Racial Discrimination in a Retail Setting*, 39 J. APPLIED SOC. PSYCHOL. 1432 (2009) (providing empirical evidence of inferior service for African American shoppers).

84. *See generally* Cheryl L. Wade, *How Predatory Mortgage Lending Changed African American Communities and Families*, 35 HAMLINE L. REV. 437 (2012) (looking at the effect of predatory lending on African American communities).

85. *See* Jillian Berman, *Soon, Not Even 1 Percent of Fortune 500 Companies Will Have Black CEOs*, HUFFINGTON POST (Jan. 29, 2015 3:41 PM) http://www.huffingtonpost.com/2015/01/29/black-ceos-fortune-500_n_6572074.html (last visited Apr. 6, 2017) ("When McDonald's CEO Don Thompson officially steps down in March, there will be just four black CEOs in the Fortune 500.") (on file with the Washington and Lee Law Review).

86. *See* Amy H. Kastely, *Out of the Whiteness: On Race Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 280 (1994) (discussing topics of white race consciousness and the "white norm" and their effect on applications of the law).

87. *See infra* notes 190–220 and accompanying text (discussing the racial identities of corporations, in particular the existence of "white businesses").

88. *See, e.g.*, Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005) (framing discussion in terms of facilitating diversity).

89. *See supra* notes 28–31 and accompanying text (defining CSR, including social issues).

90. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin Levinson & Robert J. Smith eds., 2012) (describing implicit stereotyping and bias against

bias and even explicit discrimination is acknowledged, what is typically discussed as a CSR issue—a diversity issue—becomes a corporate governance or compliance issue.[91] The question becomes whether there are effective processes and systems in place that measure compliance with antidiscrimination law.[92] This corporate governance question, unlike a CSR/diversity question, must be examined because compliance is mandated.[93] The voluntary and discretionary nature of CSR drops out of the picture.[94]

Here is the problem. Corporate compliance departments draft and issue policies about harassment and discrimination.[95] But, too often, the policy is drafted and put on a shelf.[96] This is inadequate compliance that is also socially irresponsible. Moreover, "[m]any compliance metrics track *activity* rather than *impact*, thereby demonstrating that compliance may be busy but not necessarily effective."[97] Though companies might spend millions on compliance, busy but ineffective programs are a type of check-the-box corporate governance that is not socially

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people of color).

91. *See generally* Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation, and Universal Mandates: Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111 (2003) (examining the correlation between disparate compliance costs and governmental anti-discrimination mandates).

92. *See* LOUIS M. BROWN, ANNE O. KANDEL & RICHARD S. GRUNER, LEGAL AUDIT § 8:87 (1990) (evaluating good faith efforts at preventing employment discrimination).

93. *See* Sarbanes–Oxley Act, 15 U.S.C. § 7202(b) (2012) (making any violation of the Act enforceable against the violator).

94. *See* Johnson, *Corporate Personhood*, *supra* note 2, at 1135 ("[C]orporate responsibility concerns can be seen as picking up precisely where legal strictures leave off.").

95. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2093 (2016) ("First, authorities uniformly emphasize the development of policies and procedures for compliance, tailored to the firm.").

96. *See* Lorene D. Park, *The Road to Liability is Paved with Inconsistent Enforcement of Grooming, Tipping, and Other Employment Policies*, WOLTERS KLUWER (Dec. 28, 2013), http://www.employmentlawdaily.com/index.php/2013/12/28/the-road-to-liability-is-paved-with-inconsistent-enforcement-of-grooming-tipping-and-many-other-employment-policies/ (last visited Apr. 6, 2017) (demonstrating the frequency of non-enforcement of company policy in multiple arenas nationwide) (on file with the Washington and Lee Law Review).

97. Griffith, *supra* note 95, at 2105–06.

responsible.[98] Compliance programs that transform mere activity into impact are socially responsible.

IV. Compliance and Fiduciary Duty

It is clear that corporate governance failures can have significant implications beyond the corporation, its shareholders, managers and stakeholders.[99] Corporate governance failures can have national and even global impact.[100] More specifically, fiduciary duty breaches and inadequate monitoring of financial firms' compliance with law significantly contributed to the 2008 financial crisis.[101] Corporate actors must take their obligation to monitor compliance with law more seriously.[102] Boards must demand installation and implementation of compliance programs but corporate officers perform the day-to-day work of monitoring compliance.[103]

Chief Compliance Officers and the executives, managers, and employees who work for them are on the front line when it comes

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98. *See* Yanasak & Xenarios, *supra* note 62 and accompanying text (evaluating socially irresponsible "check-the-box" compliance approaches and advocating for improvement); Chatterji & Listokin, *supra* note 60 and accompanying text (showing that sometimes even expensive compliance programs may not be socially responsible).

99. *See, e.g.*, Grossman, *supra* note 48, at 395 (using Enron, WorldCom, Adelphia, Qwest, Global Crossing and Tyco as preeminent examples of the reaching effects of failure to comply with corporate and other legal requirements).

100. *See id.* (citing examples of significant external effects due to corporate governance failures).

101. *See* Cheryl L. Wade, *Fiduciary Duty and the Public Interest*, 91 B.U. L. REV. 1191, 1197 (2011) (detailing and examining breaches in fiduciary duty involved in the 2008 financial crisis).

102. *See* Claire A. Hill & Brett McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013 U. ILL. L. REV. 859, 862–63 (2013) (asserting that boards must monitor compliance with more fervor in light of the 2008 financial crisis).

103. *See generally* Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271 (2014) (describing the importance of executives and officers in preventing crises by effectively monitoring). *See also* Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 203–06 (2016) (describing differing positions on whether corporate counsel, rather than corporate executives, should be responsible for monitoring and compliance).

to compliance.[104] Johnson and Millon's work about the ambiguity of the fiduciary duties that officers owe illuminates potential hazards for them.

> For all the renewed federal attention to regulating—and differentiating—corporate officer and director functions . . . a curious fact remains: state fiduciary duty law makes no distinction between the fiduciary duties of these two groups. Instead, courts and commentators routinely describe the duties of directors and officers together, and in identical terms. To lump officers and directors together as generic "fiduciaries", with no distinction being made between them suggests—as patently is not the case—that their institutional function and legal roles within the corporation are the same.[105]

In order to satisfy their fiduciary duties, corporate officers are responsible for the details of their firms' compliance programs.[106] A great deal is at stake for the executives and officers in this regard.[107] For example, "officers rightly face a greater risk of personal liability for misconduct. Heightened review of officer performance is especially fitting given that many of the recent corporate scandals involved wrongdoing at the officer level."[108] In the compliance context, the officers' misconduct would be one of two things. A grossly negligent failure to install an adequate compliance program would breach the duty of care that an officer owes.[109] A conscious disregard of an officer's obligation to install a compliance program may be

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104. *See* John B. McNeese IV, *The Ethical Conflicts of the Hybrid General Counsel and the Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677, 683 (2012) ("Staying in compliance requires an active role on the part of the corporation and by extension, the Chief Compliance Officer.").

105. Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005) [hereinafter Johnson & Millon, *Recalling Why Corporate Officers are Fiduciaries*]

106. *See id.* (stating that officers "daily manage corporate operations" while directors "remotely monitor corporate affairs").

107. *See id.* at 1602 ("[D]irectors *must* preserve for themselves a critical governance responsibility on behalf of the corporate principal and its stockholders . . . ." (emphasis added)).

108. *Id.* at 1603.

109. The duty of care is breached whenever the decision-making process is grossly negligent. *See generally* Kamin v. Am. Express Co., 387 N.Y.S.2d 993 (1st Dept. 1976); Smith v. Van Gorkom, 488 A.2d 858 (Del. Sup. Ct. 1985).

construed as a duty of loyalty breach.[110] And, some courts reserve business judgment rule protection for directors only.[111] In these jurisdictions, corporate officers are far more likely to be found to have breached fiduciary duties.[112]

Moreover, many corporate managers may not get the advice they need from in-house corporate counsel concerning the fiduciary duties they owe—advice that would help them to establish effective compliance programs.[113] Johnson and Garvis found that more corporate counsel advise executives about their fiduciary duties when advising them about compliance and risk management issues than in other contexts such as transactional work, employee relations, and executive compensation.[114] But not enough corporate counsel provide advice about fiduciary duty to officers and managers who are closer to the middle of corporate hierarchies.[115]

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110. A bad faith failure to monitor compliance with law is established when fiduciaries consciously disregard their duties or engage in intentional derelictions of their obligations, thereby violating the duty of loyalty. *See generally* Stone v. Ritter, 911 A.2d 362 (Del. 2006).

111. *See* Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 455–65 (2005) [hereinafter Johnson, *Business Judgment*] (examining business judgment rule protection as used for directors, officers generally, or both).

112. *See id.* (examining effects on officer liability depending on a given jurisdiction's treatment of the business judgment rule).

113. *See* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1113 (2009) (showing how counsel generally advises executives, with less advisory emphasis on mid-level managers).

114. *See id.* (finding that advice regarding fiduciary duties is more frequent when given to executives about compliance and risk management).

115. *See id.* at 1117 ("[F]ewer than half of all respondents provide fiduciary duty advice to managers or officers 'deeper' in the organization, such as division managers or officers of subsidiaries."); *id.* at 1120 ("[C]orporate counsel do not appear to do a particularly good job of advising non-senior officers. . . . This is an area where advice-giving practices should be improved. It hardly needs arguing that executive vice presidents, and the whole gamut of more junior-ranking officers beneath them, have enormous influence over corporate affairs."). For a general discussion of fiduciary duties and corporate purpose, see Martin Gelter & Genevieve Helleringer, *Lift Not the Painted Veil! To Whom Are Directors' Duties Really Owed?*, 2015 U. ILL. L. REV. 1069 (2015).

V. Corporate Personhood and Purpose

In the preceding sections of this Essay, I explore the possibility of making compliance programs more effective by challenging companies that claim to be socially responsible while failing to maintain compliance programs that are effectively managed and maintained.[116] Later in the Essay, I provide context for the challenge by looking at how certain companies impact stakeholders of color.[117] In this section and the sections that follow, I examine notions of corporate personhood and purpose, some of which are offered by Johnson and Millon, in order to present additional inspiration for corporate managers to take their compliance obligations more seriously.[118]

Relatively uncontroversial is the legal fiction that corporations are entities that are separate from the individuals who own and manage them.[119] There has been some disagreement, however, about how to describe and define corporate entities in the context of their separateness.[120] The Supreme Court has refined the notion of corporations as entities separate from their shareholders, officers, and directors, making it clear that corporations are persons (at least under the Religious Freedom Restoration Act (RFRA)[121] and other federal law) who

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116. *See supra* notes 43–51, 81–98, 101–115 and accompanying text (discussing the overlapping principles guiding CSR and corporate governance, viewing this overlap in the context of anti-discrimination and harassment compliance regimes, and incorporating this understanding with the doctrine of fiduciary duty).

117. *See infra* notes 190–234 and accompanying text (looking at the effect companies can have on stakeholders of color by considering the racial characteristics of these companies).

118. *See infra* notes 152–200 and accompanying text (examining notions of corporate personhood and purpose, including such characteristics as a company's race and religion).

119. *See* Gottlieb v. Kest, 141 Cal. App. 4th 110, 150 (Cal. Ct. App. 2006) ("Generally, a corporation is a distinct legal entity, separate from its shareholders and officers.").

120. *See generally* Johnson & Millon, *After* Hobby Lobby, *supra* note 1 (highlighting throughout the article points of contention that still exist after the *Hobby Lobby* decision).

121. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb–2000bb-4 (2012).

are separate from the flesh and blood people who invest in them and act on their behalf.[122]

In their Article, *Corporate Law After Hobby Lobby*,[123] Johnson and Millon sort through some of the most frequently debated issues relating to corporate law and corporate governance in the aftermath of the controversial 2014 Supreme Court case *Burwell v. Hobby Lobby Stores, Inc.*[124] The Supreme Court held that for-profit corporations, because they are "persons" under RFRA, have a federally protected right to exercise religion.[125] Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp., the closely held for-profit companies at issue in the consolidated cases, argued that the contraceptive mandate under the Patient Protection and Affordable Care Act ("ACA")[126] was a substantial burden on the religious freedom of the corporations.[127]

The Court held that the companies, Hobby Lobby and Conestoga, did not have to comply with the ACA's contraceptive mandate because compliance would hamper the companies' free exercise of religion.[128] Arguably, the Court protected the free-exercise rights of closely held corporations by attributing to the corporations the religious beliefs of their Christian shareholders.[129] The Court acknowledged that its protection of a

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122. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) ("[T]he wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." (citing 1 U.S.C. § 1 (2012)).

123. *See* Johnson & Millon, *After* Hobby Lobby, *supra* note 1, at 2–3 (discussing the most debated issues arising from the *Hobby Lobby* decision).

124. 134 S. Ct. 2751 (2014).

125. *See id.* at 2771 (affirming the right of for-profit corporations to pursue any lawful act or purpose, "including the pursuit of profit in conformity with the owners' religious principles.").

126. Affordable Care Act, Pub. L. No. 114-148, 124 Stat. 119 (2010).

127. *See Hobby Lobby*, 134 S. Ct. at 2779 (" . . . [T]he mandate clearly imposes a substantial burden on those beliefs.").

128. *See id.* at 2771 (explaining that for-profit organizations may not be presumed to be solely concerned with the pursuit of money).

129. *See id.* at 2768 ("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.").

closely held for-profit corporation's free-exercise rights was imperative in order to protect the religious freedom of the flesh and blood individuals who control and own the corporations.[130]

By answering the question of whether a for-profit corporation is a person under RFRA in the affirmative, the Court confirmed the idea of corporate personhood when it decided the *Hobby Lobby* case.[131] Businesspeople, corporate lawyers and scholars, along with judges who decide business law cases, long ago embraced the notion that corporations are entities separate from the humans who own and control them.[132] But, knowing that corporations are separate from officers, shareholders and directors does little to clarify the kinds of entities corporations are.[133]

Professor Kent Greenfield noted "the increased political focus on corporate personhood" after the Supreme Court's decision in *Citizens United v. Federal Election Commission*,[134] in which the Court protected the First Amendment rights of corporations to make political expenditures aimed at influencing election outcomes.[135] When Mitt Romney campaigned in 2012, he proclaimed that "corporations are people."[136] But, Greenfield noted that some notable lawyers, who are politicians also, rejected the legal fiction of corporate personhood.[137] President

130. *See id.* at 2786 ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.").

131. *See id.* at 2768 (Interpreting the RFRA's use of the term "person" by looking to the Dictionary Act, affirming that a corporation is "person" under the RFRA (citing Dictionary Act, 1 U.S.C. § 1 (2012)).

132. *See* Gottlieb v. Kest, 141 Cal. App. 4th 110, 150 (Cal. Ct. App. 2006) ("Generally, a corporation is a distinct legal entity, separate from its shareholders and officers.").

133. *See infra* notes 152–200 and accompanying text (examining various kinds of corporate identities).

134. *See* 558 U.S. 310 (2010) (affirming and protecting the right of a nonprofit corporation to political speech).

135. Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 310 (2015).

136. *Id.*

137. *See id.* (quoting President Barack Obama and Senator Elizabeth Warren, whose stances reject the legal fiction of corporate personhood).

Obama declared that "people are people."[138] Senator Elizabeth Warren made several speeches in which she summarily rejected the idea that corporations are persons.[139] Greenfield described other individuals and organizations that formed what he calls the "anti-personhood movement."[140] According to Greenfield, however, corporate personhood is an analytically important foundational principle that should require "courts to separate the claims of shareholders from those of the corporation itself, leading to a dismissal of corporate religious claims asserted on behalf of shareholders."[141]

Several corporate and criminal law professors, including Professor Greenfield, filed an amicus brief exploring the impact on corporate law of Hobby Lobby's and Conestoga's arguments that the religious beliefs of the companies' shareholders should be attributed to the corporations.[142] Their argument did not revolve around corporate personhood but pertained to the related notion of the corporation's separateness.[143] They asserted that attributing the religious beliefs of shareholders to the corporation in which they invested (whether the investment is direct or indirect) ignored the legal fiction of the separateness of the corporation from its owners.[144] The legal fiction that corporations are entities separate from those who own and manage them justifies the most salient characteristic of all corporations—

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138. *Id.*

139. *See id.* ("According to the *Washington Post*, her most dependable applause line in her stump speech was "Corporations are not people!").

140. *See id.* at 310–11 (referencing groups such as Common Cause, Public Citizen, and Free Speech for the People as members of the "anti-personhood movement").

141. *Id.* at 312.

142. I signed onto an amicus brief drafted by Jayne Barnard, Barbara Black, James Cox, Kent Greenfield, Ellen Podgor, and Faith Stevelman that makes this point. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), (Nos. 13-354, 13-356), 2014 WL 333889 (U.S. Jan. 28, 2014) [hereinafter *Amicus Brief*].

143. *See generally id.*

144. *See id.* at 2 ("The essence of a corporation is its 'separateness' from its shareholders. It is a distinct legal entity, with its own rights and obligations, different from the rights and obligations of its shareholders. This Court has repeatedly recognized this separateness.").

limited liability.[145] But for this separateness, according to the amicus signatories, individual shareholders would be personally responsible for the corporation's tort or contract debts.[146]

As we all now know, the Court disagreed with the arguments made in the amicus brief, and the Christian faith practiced by the shareholders of Hobby Lobby and Conestoga was the religion that the companies had a right to freely exercise.[147] The Court protected the religious freedom of the corporations by referring to the religious beliefs of their owners.[148] Johnson and Millon, in their article *Corporate Law After* Hobby Lobby, explain away the concerns of the corporate and criminal law professors who filed the amicus brief.[149] They point out that the separateness of Hobby Lobby and Conestoga from their shareholders was preserved because the religious beliefs and practices of the individual shareholders are relevant only in their roles as corporate actors.[150] The article notes, "[a]nalytically, in order to preserve the separateness of the corporation as a legal person distinct in a meaningful way from the humans associated with it,

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145. When shareholders fail to respect the separation between themselves and the corporations in which they invest, courts may pierce the corporate veil that protects shareholders with limited liability and the shareholders may be held personally liable to tort and contract creditors. *See* Walkovszky v. Carlton, 244 N.E.2d 55, 55 (N.Y. 1968) (affirming a denial to dismiss case against shareholder defendant because complaint alleged sufficient facts to pierce the corporate veil); Sea-Land Serv., Inc. v. Pepper Source, 941 F.2d 519, 524–25 (7th Cir. 1991) (determining that the two-pronged state law test for piercing the corporate veil was not satisfied).

146. *See Amicus Brief*, *supra* note 142, at 2 ("Shareholders rely on the corporation's separate existence to shield them from personal liability. When they voluntarily choose to incorporate a business, shareholders cannot then decide to ignore, either directly or indirectly, the distinct legal existence of the corporation when it serves their personal interests.").

147. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014) (affirming the lower court judgment that the contraceptive mandate violated RFRA).

148. *See id.* at 2768 ("Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all.").

149. *See generally* Johnson & Millon, *After* Hobby Lobby, *supra* note 1, at 16 (elaborating on the Court's equating of individual rights with the rights of a corporation run by those individuals).

150. *Id.* at 16 ("Roles, organizational structure, and the decisionmaking process are all quite different for humans interacting in the corporate setting than outside it. But the human desire to express religious convictions in the corporate milieu may be no less fervent . . . .").

while still acknowledging their desires for religious expression, the Court emphasized . . . the *corporate* capacity and *corporate* positions and roles played by these humans."[151]

VI. If Corporations Are Persons, What Kinds of Persons Are They?

Corporations are persons that are separate from the humans who own and control them.[152] But what kinds of persons are they? In the aftermath of the Court's embrace of and elaboration on some aspects of corporate personhood in *Hobby Lobby*[153] and *Citizens United*,[154] it is important to dig deep and think about other aspects of a corporation's identity. That is what I do in this Part of my Essay, but I do not do so to bestow on corporations even more rights. I examine other aspects of a corporation's identity and personhood, specifically a corporation's race, because doing so reveals nontrivial implications for corporate governance and social responsibility.[155]

Besides the right to freely exercise religion, and their right to free speech in the form of political contributions, what else, or who else, are corporations? Once we accept the idea that corporations are persons who are separate from the flesh and blood individuals who own and manage them, it is imperative to examine the kinds of persons corporations are.[156] Already crystal clear are the characteristics of a corporation as an artificial entity—limited liability, free transferability of shares, centralized

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151. *Id.*

152. *See* Gottlieb v. Kest, 141 Cal. App. 4th 110, 150 (Cal. Ct. App. 2006) ("Generally, a corporation is a distinct legal entity, separate from its shareholders and officers.").

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

154. Citizens United v. F.E.C., 558 U.S. 310 (2010).

155. *See infra* notes 157–203, 221–234 and accompanying text (examining aspects of corporate identity and personhood for their impact on corporate governance and social responsibility).

156. For one example exploring this question, see Teemu Ruskola, *What is a Corporation? Liberal, Confucian, and Socialist Theories of Enterprise Organization and State, Family, and Personhood*, 37 SEATTLE U.L. REV. 639, 640 (2014) ("An easy, but not very informative, answer is that [a corporation] is . . . a legal person . . . . More substantive answers suggest that it is a moral person, a person/thing, a production team, a nexus of private agreements, a city, a semi-sovereign, a (secular) God, or a penguin (kind of).").

management, and continuity of life.[157] But we need to know more about the identity and characteristics of the corporate person. This knowledge has important implications that relate to corporate governance and corporate social responsibility.[158] One way to begin this inquiry is to think about how we describe and think about flesh and blood people in the United States (U.S.).

Descriptions of individuals in the U.S. frequently rely on one or more of several components of identity: religion; race; gender; age; national origin; ethnicity; sexual orientation; class; physical ability or disability; and political affiliation, among other things.[159] Since corporations are persons, it makes sense to ask in what ways the factors that make up an individual's identity apply to define and describe the identity of a corporation.

First, consider two of the factors from the list in the preceding paragraph. Flesh and blood people frequently have a religious and a political affiliation accompanied by First Amendment rights related to these affiliations.[160] In some sense, so do corporate persons.[161] In *Hobby Lobby*, the U.S. Supreme Court protected the free exercise of religion rights of two closely held corporations.[162] In *Citizens United,* the Court protected a

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157. *See* Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 89 (1991) ("The so-called 'Kintner regulations,' which govern on this issue, identify four characteristics that distinguish corporations and partnerships: continuity of life, centralized management, free transferability of interest, and limited liability.").

158. *See infra* notes 163–178, 212–234 and accompanying text (dealing with the elements of corporate personhood—including religion and race—and their effect on corporate governance and CSR).

159. *See, e.g.*, U.N.C.—GILLINGS SCH. GLOBAL PUB. HEALTH, HOW WOULD YOU DEFINE DIVERSITY? 1 (2010), https://sph.unc.edu/files/2013/07/define_diversity.pdf ("Differences among groups of people and individuals based on ethnicity, race, socioeconomic status, gender, exceptionalities, language, religion, sexual orientation, and geographical area.").

160. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

161. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (affirming the right of religious expression for the corporations); Citizens United v. F.E.C., 558 U.S. 310 (2010) (affirming the right to make political contributions for the corporation).

162. *See Hobby Lobby*, 134 S. Ct. at 2751 (allowing closely-held for-profit corporations the right to religious expression).

corporation's right to make political expenditures aimed at assisting political campaigns.[163] So we can say, in some rough sense, that corporations (at least those that are closely held) may be identified as having religious rights that they can freely exercise according to the Court's reasoning in *Hobby Lobby*, and they also have political affiliations in line with the court's analysis in *Citizens United*.[164]

Two other factors used when describing individuals—age and national origin—are far less controversial when used to describe corporate persons.[165] Some corporations are young, recently incorporated startups, others are venerable firms that have been incorporated for decades.[166] The corporation's national origin is easily defined by looking to the country in which it incorporated.[167] The analogue to the physical ability of natural persons in the corporate context is to ask whether the company is performing well.[168] Or, is it "disabled" by debt, approaching

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163. *See* Citizens United v. Federal Election Commission, 558 U.S. 310, 313 (allowing nonprofit corporation the right to make political contributions by affirming its right to political speech).

164. *See id.* (identifying a corporation as having political affiliations); *Hobby Lobby*, 134 S. Ct. at 2751 (discussing corporations and their ability to have religious affiliations).

165. *See How Would You Define Diversity?*, *supra* note 159 (including age and national origin in definitions of diversity).

166. *Compare* Biz Carson, *Top 17 Startups to Launch So Far in 2016*, BUS. INSIDER (June 28, 2016, 8:00 AM), http://www.businessinsider.com/top-17-startups-launched-in-2016-2016-6 (last visited Apr. 19, 2017) (providing examples of "young" companies) (on file with the Washington and Lee Law Review), *with Founded When? America's Oldest Companies*, BUS. NEWS DAILY (July 29, 2016, 10:01 AM), http://www.businessnewsdaily.com/8122-oldest-companies-in-america.html (last visited Apr. 19, 2017) (providing examples of "old" companies) (on file with the Washington and Lee Law Review).

167. *See* Richard R. W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2082 (2006) ("When corporations were largely held by local interests, all possessing the same state or national citizenship, the matter of transferring shareholder citizenship to the corporation was somewhat straightforward."). For a list of examples of foreign corporations and the countries in which they are incorporated, see *Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission December 31, 2000*, SEC. & EXCHANGE COMMISSION (Dec. 31, 2000), https://www.sec.gov/divisions/corpfin/internatl/alpha2000.htm (last updated June 25, 2002) (last visited Apr. 19, 2017) (on file with the Washington and Lee Law Review).

168. *See* Margaret Rouse, *Corporate Performance*, WHATIS.COM, http://whatis.techtarget.com/definition/corporate-performance (last updated Oct. 2015) (last visited Apr. 19, 2017) ("Corporate performance analysis is a subset of

insolvency or even bankruptcy? The class question is slightly more challenging conceptually. For natural persons, class is determined by an individual's wealth, education, social status and income.[169] Similarly, "class" differences among corporations can be examined by looking at a company's wealth—its assets, for example, and its income—more typically referred to as earnings.[170]

Determining a corporation's gender, ethnicity, or sexual orientation is more problematic analytically but not impossible. A closely held company whose shareholders, officers, and directors are women or heterosexual may be a female corporation or a heterosexual corporation as determined by the identities of its shareholders.[171] The ethnicity of a closely held corporation may be determined by its shareholders when all or most of them are, for example, Italian-American.[172] The Supreme Court's approach in *Hobby Lobby* was similar.[173] The religious rights of the corporation derived from the religious affiliations of Hobby Lobby's owners.[174] Arguably, it is possible to label Hobby Lobby as a Christian company because its shareholders are Christian.[175]

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business analytics/business intelligence . . . that is concerned with the 'health' of the organization, which has traditionally been measured in terms of financial performance.") (on file with the Washington and Lee Law Review).

169. *See* Milton M. Gordon, *Social Class in American Sociology*, 55 AM. J. SOCIOLOGY 262, 262 (1949) ("The term 'social class' . . . is used by sociologists to refer to the horizontal stratification of a population.").

170. *See Wealth*, INVESTOPEDIA, http://www.investopedia.com/terms/w/wealth.asp (last visited Apr. 19, 2017) ("Wealth measures the value of all the assets of worth owned by a . . . company . . . . Wealth is determined by taking the total value of all physical and intangible assets owned, then subtracting all debts. Essentially, wealth is the accumulation of resources.") (on file with the Washington and Lee Law Review).

171. *See* Brooks, *supra* note 167, at 2082 (mentioning gender as an element of corporate identity based on the shareholders).

172. *See id.* at 2072 (discussing the ethnicity of corporations based on the general ethnic identity of the shareholders, though ethnicity of corporations has also been found by looking to the conduct of third party consumers).

173. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (equating the religious beliefs of the shareholders with the religious affiliation of the corporation).

174. *See id.* at 2768 ("Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all.").

175. *See id.* (making consistent reference to the religion of the Hobby Lobby shareholders in order to determine that Hobby Lobby had a protected right to

The same reasoning works in determining the race of a corporation. The idea that a corporation has a race, however, is not new or peculiar.[176] While we rarely think of corporate entities as female, heterosexual, ethnic, Christian, or Republican, corporations have been racialized.[177] For example, "courts have declared that corporations can and do possess racial identities 'as a matter of law.'"[178]

Also, consider that from June 1 through 7, 2016, the first "Virtual Black Business Week," took place.[179] There is also a "Black Business Directory,"[180] a "Black Business Association,[181] a "National Black Business Month,"[182] and even a Black Business School.[183] Note that these events and organizations do not refer to a business week, directory, association or school for "black owned" businesses, or for black entrepreneurs.[184] They refer to "black

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religious expression).

176. *See* Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1059 (9th Cir. 2004) (stating that, in the present case, "a corporation has acquired an imputed racial identity").

177. *See* Bains, LLC v. Arco Prod. Co., 405 F.3d 764, 770 (9th Cir. 2005) (imputing racial identity to the corporation).

178. Brooks, *supra* note 167, at 2025 ("[C]ourts have declared that corporations can and do possess racial identities 'as a matter of law.'" (citing *Thinket*, 368 F.3d at 1059)). Brooks also cited to *Pourier v. S.D. Dep't of Revenue*. 658 N.W.2d 395, 404 (finding that corporation had enrolled as a member of an Indigenous American ethnic group).

179. *See* NEW YORK BLACK ENTREPRENEURS NETWORK, http://www.meetup.com/NewYorkBlackEntrepreneursNetwork/events/220668892/ (last visited Apr. 19, 2017) (providing information on upcoming events and for those interested in the network) (on file with the Washington and Lee Law Review).

180. *See* BLACKBUSINESSLIST.COM, http://www.blackbusinesslist.com/ (last visited Apr. 19, 2017) (providing links to support, advertise, or search for black businesses) (on file with Washington and Lee Law Review).

181. *See* BLACK BUSINESS ASSOCIATION, http://www.bbala.org/ (last visited Apr. 19, 2017) (providing links to bids, jobs, events, news, and other member information) (on file with Washington and Lee Law Review).

182. *See* BLACKBUSINESSMONTH.COM, http://blackbusinessmonth.com/ (last visited Apr. 19, 2017) (providing links in a timeline highlighting notable news in the black business community) (on file with Washington and Lee Law Review).

183. *See* THE BLACK BUSINESS SCHOOL, http://theblackbusinessschool.com/ (last visited Apr. 19, 2017) (providing information for enrolling in the school and the featured programs in the curriculum) (on file with Washington and Lee Law Review).

184. *See supra* notes 179–183 (choosing to explicitly describe and attribute race to the organizations' identity).

business."[185] There are also Hispanic Business Associations[186] and a National Hispanic Business Group.[187] And, there is an Asian American Business Association[188] and an Asian American Business Roundtable.[189]

The fact that there are categories labeled "black business,"[190] "Hispanic business,"[191] and Asian American business[192] not only illustrates the racialization of business and firms, but also begs the question of whether there is such a thing as "white business."[193] There do not seem to be any white business schools, national white business months, white business associations or directories.[194] But the fact that there are no explicitly labeled

185. *See supra* notes 179–183 (referring to the businesses as "black" rather than describing the business in reference to its black members).

186. *See, e.g.*, ROCHESTER HISPANIC BUSINESS ASSOCIATION, http://rochesterhba.org/ (last visited Apr. 19, 2017) (providing links to bids, jobs, events, news, and other member information) (on file with Washington and Lee Law Review); *see also* HISPANIC BUSINESS ASSOCIATION, COLUMBIA UNIVERSITY BUSINESS SCHOOL, http://www.cbshba.com/ (last visited Apr. 19, 2017) (providing links and general information for members, recruiters, prospective students) (on file with Washington and Lee Law Review).

187. *See* NATIONAL HISPANIC BUSINESS GROUP, http://www.nhbg.org/ (last visited Apr. 19, 2017) (providing links to events, funding, and other member information) (on file with Washington and Lee Law Review).

188. *See* ASIAN AMERICAN BUSINESS EXPO, http://asianamerican businessexpo.com/ (last visited Apr. 19, 2017) (providing links for the event program, registration, membership, and sponsorship opportunities) (on file with Washington and Lee Law Review).

189. *See* ASIAN AMERICAN BUSINESS ROUNDTABLE, http://aabusinessroundtable.org/ (last visited Apr. 19, 2017) (providing information on the forum, the AABR generally, upcoming summits, speaker information, and registration) (on file with Washington and Lee Law Review).

190. *See supra* notes 179–183 (illustrating groups organizing around the concept of "black business").

191. *See supra* notes 186–187 (noting groups organizing around the concept of "Hispanic business").

192. *See supra* notes 188–189 (identifying groups organizing themselves around the concept of Asia American business).

193. *See* Alicia M. Robb & Robert W. Fairlie, *Access to Financial Capital Among U.S. Businesses: The Case of African American Firms*, 613 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 48–49 (2007) (discussing the negative impact of limited access to financial capital on African American businesses).

194. *See generally* ALICIA M. ROBB & ROBERT W. FAIRLIE, RACE AND ENTREPRENEURIAL SUCCESS: BLACK-, ASIAN-, AND WHITE-OWNED BUSINESSES IN THE UNITED STATES (2008) (referring to "white-owned" businesses rather than describing business identities as "white").

white business schools, directories, organizations, or events, does not mean that they do not exist.[195] We just do not speak of them in that way. To do so would be deemed by some as racist.[196]

If there are in fact black, Asian American, and Latino businesses, it would seem that the rest of U.S. businesses are white.[197] The fact that they are not labeled white is irrelevant.[198] They exist. They are companies where the overwhelming majority, if not all, board members, executives, or senior managers are white.[199] Corporate persons belong to socially constructed racial groups in ways that are similar to the assignation of race to flesh and blood persons.[200] Acknowledging and understanding this will help corporate officers and managers navigate their relationships with stakeholders of color.[201]

In examining the utility of racializing the corporate person,[202] it is important to understand what race is.[203] Critical legal

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195. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (directly identifying the existence of "white businesses").

196. *See The Racial Equity Resource Guide*, W.K. KELLOGG FOUNDATION, http://www.racialequityresourceguide.org/ (last visited Apr. 19, 2017) (identifying certain networks and programs aimed at building anti-racist coalitions against "white" organizations) (on file with Washington and Lee Law Review).

197. *See supra* notes 179–189 (providing examples of black, Hispanic, and Asian American "business" groups).

198. *See supra* note 194 (labeling businesses as white-owned rather than truly being white businesses).

199. White-owned businesses that are run exclusively by white management embody a "white business" identity even if they are not described, by themselves and others, as such. *See supra* note 194, at 1 (discussing the disparities between businesses owned by individuals of different races).

200. *See* Bernie D. Jones, *Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South*, 52 AM. J. LEGAL HIST. 395, 395 (2010) (noting that "[c]ategorical assignations of race and status fail to encompass a lateral diversity to include free, wealthy, and propertied blacks").

201. *See* Sloan T. Letman & Katherine Leslie, *Disproportionate Minority Confinement*, 2004 J. INST. JUST. INT'L STUD. 57, 70 (utilizing advisory groups including "stakeholders of color" to effectively respond to community problems, which is a tactic for corporate relations with stakeholders of color as well).

202. *See* John A. Powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity under the Fourteenth Amendment*, 32 CARDOZO L. REV. 885, 899 (2010) (discussing the racialization of the corporate person) (citing Steve Martinot, *The Cultural Roots of Interventionism in the United States*, 30 SOC. JUST. 1, 126 (2003)).

203. *See* Al-Khazraji v. Saint Francis Coll., 784 F.2d 505, 517 (3d Cir. 1986)

scholars explain that race is a social construct.[204] Ian F. Haney Lopez explained that, "human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization."[205] He also noted that, "races are construed relationally, against one another, rather than in isolation."[206]

Another commenter observed that "[p]ersons of different races have distinguishing physical characteristics. These physical characteristics, such as phenotype, are, however, not biologically determinative of personality, traits, intelligence, or other important personal characteristics.[207] In fact, the biological difference is unimportant, but society has constructed important differences."[208] Race is a social construction, but it is "materially relevant."[209]

Psychologists observe that the assignation of race to individuals in the U.S. is inevitable.[210] Phenotype and other

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(noting the difficulty some courts have faced in defining what race is).

204. *See supra* notes 205–219 (describing various interpretations of race as a social construct and its effects on the corporate person).

205. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (arguing for viewing race as a social construction).

206. *See id.* at 28 (discussing the "four important facets of the social construction of race").

207. *See* Ann C. McGinley, *Policing and the Clash of Masculinities*, 59 HOW. L.J. 221, 241 (2015) (discussing critical race theory and race as a social construction); *see also* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609 (1987) (finding that only in the twentieth century did dictionaries refer to "race as involving divisions of mankind based upon different physical characteristics").

208. *See id.* at 241 (noting that "history and its social effects" created race).

209. *See id.* (arguing that it is "materially relevant" because "blackness" and its association with stereotypes and prejudices affect society, institutions, and the individuals within them).

210.

> Race essentializes and stereotypes people, their social statuses, their social behaviors and their social ranking. In the Unites States and South Africa, one cannot escape the process of racialization; it is a basic element of the social system and customs of the United States and is deeply embedded in the consciousness of its people. Physical traits have been transformed into markers or signifiers of social racial identity. But the flexibility of racial ideology is such that distinctive physical traits need no longer be present for humans to racialize others.

Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a*

physical attributes are less relevant than the cultural meanings that attach to an individual's race.[211] The notion of corporate personhood invites the same type of racialization of firms that occurs with individuals, but this racialization does not depend on physical characteristics.[212] I posit that it does not even depend on a physical body, thereby making a corporation's racialization less implausible. In other words, the corporation has no physical body but it can still have a race.[213]

I acknowledge, however, that racializing corporations may unfairly advantage or disadvantage corporations depending on the race attributed to them.[214] The race of flesh and blood persons "continues to play an important role in determining how individuals are treated . . . their employment opportunities . . . and whether individuals can fully participate in the social, political, and economic mainstream of American life."[215] The same thing can happen when considering the race of a corporation.[216]

Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race, 60 AM. PSYCHOLOGIST 16, 22 (2005).

211.

> Skin color, hair texture, nose width, and lip thickness have remained major markers of racial identity in the United States. . . . However, physical features and differences connoted by them are not the effective or direct causes of racism and discrimination. It is the culturally invented ideas and beliefs about these differences that constitute the meaning of race.

Id. at 20.

212. *See* Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 170 (2013) (referencing the idea that "[b]y making race—taking an active part in the process if racialization—individuals stake out new racial meanings"); *see also* STEVE MARTINOT, THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE 75 (2003) (noting that physical characteristics serve as signifiers and play a role in racialization).

213. *See* Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1288 n.165 (1991) (describing how the Supreme Court implicitly "recognized that corporations can have a race").

214. *See supra* note 211, at 16, 23 (finding that public policy cannot ignore race).

215. *Id.* at 23. *See also* Paul Gowder, *Symposium: Critical Race Theory and Empirical Methods Conference: Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155, 3157 (2015) ("When we . . . observe the race of others, that observation is not a neutral act.").

216. *See supra* note 207 (describing how one's race affects their social and economic status as individuals, but without precluding that description for the

Attributing race to a place or thing other than an individual is not new.[217] Scholars have written about racialized spaces—white neighborhoods, schools, workplaces, and restaurants, for example.[218] These "white spaces" contrast with what many Americans stereotypically construe as "black spaces." The ghetto as a black space is one example.[219] This phenomena, "[t]he 'racialization of space,' . . . is the process by which residential location and community are carried and placed on racial identity."[220]

John Calmore noted that "legal persons adopt and are ascribed identities for the same reasons as natural persons: Identities signify commitments of persons to other persons, communities, beliefs, and conventions."[221] When a company acknowledges its racial identity, it has the capacity to understand more clearly certain governance issues.[222] To which stakeholders is the corporation committed? What is the company's relationship with stakeholders of color? If this relationship is not optimal, acknowledging a company's racial identity may reveal implicit biases and perhaps even previously ignored intentional discrimination.[223] A focus on a corporation's race can inform a company's compliance with anti-discrimination law—an important corporate governance matter.[224] And, when business

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race of corporations as well).

217. *See supra* notes 205–212 (noting examples of attributing race to something other than an individual).

218. *See* Elijah Anderson, *The White Space*, *in* SOCIOLOGY OF RACE AND ETHNICITY 10, 10 (2015) (noting the clear differences between "white" and "black" spaces).

219. *Id.*

220. *See* John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Home From a Mountain of Despair"*, 143 U. PA. L. REV. 1233, 1235 (1995) (defining the "racialization of space" concept).

221. *Id.* at 2026.

222. *See* Powell & Watt, *supra* note 202, at 897 (recognizing that the "deliberate creation of a space for both a new kind of racial identity and a new kind of citizen that would implicate the role and identity with the elite and corporate America").

223. *See* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 926 (2016) (noting the use of "implicit bias to broaden the concept of intentional discrimination" when challenging "subtle discrimination").

224. See Cheryl L. Wade, *Racial Discrimination and the Relationship*

leaders no longer ignore their firm's racial identity, their firms' relationships with stakeholders of color may improve.[225] When corporate leaders understand racial differences between their firms and the firms' stakeholders, implicit biases that disadvantage certain stakeholders may become more discoverable.[226] The impact of better relationships with stakeholders of color can have at least modestly transformative consequences for American society in general.[227] The ubiquity and influence of corporations in U.S. culture may mean that more equitable corporate cultures will positively influence racial reality in the U.S.[228]

Understanding a firm's racial identity has potentially positive implications that may make the company more socially responsible.[229] Take for example the corporation that has hired

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Between the Directorial Duty of Care and Corporate Disclosure, 63 U. PITT. L. REV. 389, 389–90 (2002) (stating that breaches of antidiscrimination monitoring compliance can seriously harm the economic interests of shareholders in the short term and may also affect the long term profitability of the corporation and shareholders).

225. *See id.* at 440 (suggesting "ways to help corporate managers serve shareholders" and other stakeholders "while adhering to . . . the laws prohibiting racial discrimination").

226. *See* Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Isms in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75, 76 (2015) (finding that "although overt expressions of bias have significantly decreased in recent years, expressions of implicit bias, the primary cause of workplace discrimination, persist").

227. *See* Jeff Nesbit, *America Has a Big Race Problem*, U.S. NEWS & WORLD REP. (March 28, 2016), http://www.usnews.com/news/articles/2016-03-28/america-has-a-big-race-problem (last visited Apr. 19, 2017) (finding that there is a need for younger generations misperceptions about a "post-racial society" in the corporate world to change) (on file with the Washington and Lee Law Review).

228. *See* LEADERSHIP LEARNING CMTY., LEADERSHIP & RACE 10 (2010), http://leadershiplearning.org/system/files/Leadership%20and%20Race%20FINAL_Electronic_072010.pdf (discussing whether current approaches contribute to "growing disparities" or supporting "a more equitable and just future for people of all races and ethnicities").

229. *See* RONDA L. WHITE, THE ASSOCIATION OF SOCIAL RESPONSIBILITY ENDORSEMENT WITH RACE-RELATED EXPERIENCES, RACIAL ATTITUDES, AND PSYCHOLOGICAL OUTCOMES AMONG BLACK COLLEGE STUDENTS ii, xiv (2008) (noting that these findings suggest that endorsement of social responsibility attitudes differs from actual engagement in the behaviors consistent with social responsibility) (on file with the DeepBlue Collection at the University of Michigan).

few people of color. If that firm's managers acknowledge the firm's race as white, they may become more cognizant of the impact of racial differences between the firm and its decision makers on the one hand, and the people of color interviewed on the other.[230] Or, if most of the interviewees are white, and if most are hired to the exclusion of candidates of color, the shared racial identity of the white firm and the white hires may inspire meaningful introspection about hiring practices.[231]

Attributing racial identity to a corporation may shed light on the pervasive, entrenched ways race and racism impact a company's relationship with stakeholders of color, its culture, and its social standing.[232] Lawyers, academics, judges, and businesspeople rarely talk about race in the context of corporate law and governance.[233] The fact that little to nothing is said about race in the corporate context, however, does not render race, racism, and racial difference unimportant or nonexistent. Scholars have noted that, "[r]ace suffuses all bodies of law . . . even 'the purest corporate law questions within the most unquestionably Anglo scholarly paradigm.'"[234]

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230. *See* Dr. Arin N. Reeves, *Colored by Race: Bias in the Evaluation of Candidates of Color by Law Firm Hiring Committees*, MINORITY CORP. COUNSEL ASS'N (2006), http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=576 (last visited Apr. 19, 2017) (discussing "strategies law firms should employ to address the challenges they face in creating and implementing an objective hiring process where differences are valued instead of tolerated and diversity is appreciated instead of exploited") (on file with the Washington and Lee Law Review).

231. *See id.* (outlining specific hiring processes that "acknowledge the realities of racial bias" which "cannot be removed unless" it is acknowledged).

232. *See* CHARLES T. BANNER-HALEY, THE FRUITS OF INTEGRATION: BLACK MIDDLE-CLASS IDEOLOGY AND CULTURE, 1960–1990, 161 (2010) (noting that African Americans continued "to face a corporate culture entrenched in racist notions" about African Americans).

233. *See* Cheryl L. Wade, *Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TULANE L. REV. 1461, 1461–62 (2002) (finding that books on corporate governance are silent on race issues and citing Jay W. Lorsch & Elizabeth MacIver, *Pawns or Potentates* (1989) and Robert A.G. Monks & Nell Minow, *Corporate Governance* (2d ed. 2001) as examples of this idea).

234. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 44 (1994) (discussing the idea that "no body of law exists untainted by the powerful astringent of race in our society") (citing Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 729 and Mario L. Baeza, *Telecommunications Reregulation and Deregulation:*

VII. Johnson and Millon on Hobby Lobby*: Shareholder Primacy, Stakeholders, and Corporate Social Responsibility*

The Court in *Hobby Lobby* makes clear that a corporation's role and purpose is not limited to shareholder wealth maximization.[235] Under state law, the Court explains, for-profit corporations may be formed to pursue any lawful purpose their organizers desire.[236] Corporations may pursue profit, for example, "in conformity with the owners' religious principles."[237] The Court acknowledges that the goal of for-profit corporations is to "pursue profit" but they do not have to do so "at the expense of everything else."[238] Offering two examples, the Court explains that many for-profit corporations behave charitably and altruistically.[239] Some firms protect the environment in ways that go beyond what is required by law.[240] Other companies may operate in ways that protect workers' interests beyond "the requirements of local law regarding working conditions and benefits."[241]

The Court's language, perhaps unwittingly, suggests important analytical distinctions among the notions of corporate compliance, stakeholder theory, and corporate social

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The Impact on Opportunities for Minorities, 2 HARV. BLACKLETTER J. 7 (1985) (discussing the pervasive impact of race on society)).

235. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (noting that modern corporate law may not require corporations to "pursue profit at the expense of everything else").

236. *Id.* at 2771.

237. *See id.* at 2770–71 (finding that state law, which governs the "objectives that may" be pursued by companies, permits religious principles to guide profit pursuits for the companies at issue in the case).

238. *See id.* at 2771 (permitting invocation of religious principles for company goals and objectives).

239. *See id.* (illustrating through examples of a "for-profit corporation [taking] costly pollution-control and energy-conservation measures that go beyond what the law requires" and "a for-profit corporation that operates facilities in other countries [that] may exceed the requirements of local law regarding working conditions and benefits").

240. *See id.* (using a hypothetical example to show that U.S. companies may unilaterally behave altruistically when they provide advantages and benefits beyond what is required overseas, and thus, not succumbing to the low-hanging profitable fruit of engaging in inhumane, but legal working conditions abroad).

241. *See id.* (describing how there is no reason religious objectives may not be pursued).

responsibility.[242] That corporate boards and officers should install monitoring systems that produce information about their firms' compliance with applicable law is a foundational corporate governance principle.[243] The Court introduces this idea by referring to what the law requires companies to do to protect the environment or workers.[244]

Then, the Court acknowledges that state corporate statutes permit for-profit companies to go beyond what the law requires in environmental regulation and labor law.[245] This going beyond what the law requires can be construed as the application of stakeholder theory.[246] This is the idea that, in their decision-making, boards may consider the interests of any constituency that has a stake in the company—employees, creditors, consumers, and the communities in which the company does business.[247] So, corporate boards can do more than what the law requires for the benefit of the company's stakeholders.[248] For example, as the Court states in *Hobby*

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242. *See id.* (leaving open the implications of corporations adopting charitable or altruistic objectives).

243. *See In re* Caremark Intern. Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) (describing failure to monitor as "director inattention or 'negligence'").

244. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (noting how both Pennsylvania and Oklahoma law permit pursuit of profits "in conformance with the owners' religious principles").

245. *See id.* (noting how both Pennsylvania and Oklahoma law permit pursuit of profits "in conformance with the owners' religious principles").

246. *See* Benedict Sheehy, *Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, 14 U. MIAMI BUS. L. REV. 193, 201 (2005) (describing stakeholder theory as embodying "the idea that the corporation is an entity that has profound effects on society. On that basis, those affected should have some influence or control over the corporation").

247. *See* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, And Implications*, 20 ACADEMY MGMT. REV. 65, 82 (1995), http://faculty.wwu.edu/dunnc3/rprnts.stakeholdertheoryofcorporation.pdf (noting that the "modern corporation by its nature creates interdependencies with a variety of groups with whom the corporation has a legitimate concern, such as employees, customers, suppliers and members of the communities in which the corporation operates").

248. *See* Noah Noked, *The Corporate Social Responsibility Report and Effective Stakeholder Engagement*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Dec. 28, 2013), https://corpgov.law.harvard.edu/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement/ (last visited Apr. 19, 2017) (concluding that "it would benefit companies to effectively

Lobby, boards can adopt "costly pollution-control . . . measures that go beyond what the law requires."[249] These pollution-control measures protect corporate stakeholders, namely, local communities.[250] The Court also acknowledges that state law allows many for-profit companies to operate "facilities in other countries [that] may exceed the requirements of local law regarding working conditions and benefits."[251] Once again, this is relevant to stakeholder theory.[252] Some companies protect stakeholders, i.e. workers, in other countries even when not required to do so under domestic and foreign law.[253]

But the Court seems to go beyond stakeholder theory when it mentions that there is nothing in state corporation statutes precluding charitable, humanitarian, and altruistic goals.[254] The Court points out that some corporations adopt "energy-conservation measures" that are not required by law.[255] Conserving energy is a practice that goes beyond the interests of a company's stakeholders.[256] It benefits national

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engage their shareholders, and other stakeholders as necessary . . . so that (1) related stakeholder concerns can be proactively discussed and addressed . . . [and] (3) relationships between companies and their stakeholders may be nurtured.") (on file with the Washington and Lee Law Review).

249. *See Hobby Lobby*, 134 S. Ct. at 2771 (comparing pursuit of religious objectives with pollution-control and energy-conservation measures).

250. *See id.* at 2771 (implying that these environmental concerns constitute "worthy objectives" precisely because they protect local communities as corporate stakeholders).

251. *See id.* (noting other objectives that are as worthy and permissible as pursuing religious objectives).

252. *See* Sheehy, *supra* note 246 (noting a corporation's fundamental tendency to affect society).

253. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (referencing the example of a company adhering to working conditions and benefits in excess of those required by the law to protect stakeholder-workers).

254. *See id.* (finding that Pennsylvania and Oklahoma laws permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious principles and that corporate discretion in this regard is broad).

255. *See supra* note 249 and accompanying text (using the example of corporations pursuing far-reaching environmental objectives to illustrate permissible, worthy objectives for corporations beyond sheer profit maximization).

256. *See supra* note 250 (recognizing energy and pollution-conservation measures as benefitting company stakeholders in the form of local

and global communities.[257] It is corporate social responsibility.[258]

This part of the Court's analysis in *Hobby Lobby* can assist corporate leaders in managing their firms' anti-discrimination efforts and articulated diversity goals.[259] When it comes to compliance with anti-discrimination law, business leaders must be clear about what the law requires, and they must be clear and honest about explicit and implicit biases at their firms.[260] In this regard, the assignation of race to a corporation, discussed earlier in this Essay, is helpful.[261] Many, if not most, white Americans enjoy the privilege of not having to think about race and racism as often as Americans of color do.[262] Understandably, white Americans may not notice implicit and even explicit acts or patterns of racial bias because it does not impact them.[263] The same is true for corporate managers.[264] As white Americans, they

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communities).

257. *See Corporate Environmental Responsibility*, FOOD & AGRIC. ORG. UNITED NATIONS, http://www.fao.org/corporate-environmental-responsibility/en/ (last visited Apr. 19, 2017) (identifying companies that adopt a "global citizen" mindset and adopt energy and pollution-conservation measures that in turn have led to "the implementation of top-down internal policies which put word to actions as well as encouraging internal grassroots movements.") (on file with the Washington and Lee Law Review).

258. *See* Danny Wilson, *Corporate Environmental Responsibility,* HARV. POL. REV. (Oct. 4, 2010), http://harvardpolitics.com/online/hprgument-blog/corporate-environmental-responsibility/ (last visited Apr. 19, 2017) (discussing the "recent expansion of corporate social responsibility to include environmental issues") (on file with the Washington and Lee Law Review).

259. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (opening up corporate potential to pursue worthy corporate goals related to race).

260. *See* Greenberg, *supra* note 226, at 76 (discussing the biases pervasive in corporations and corporate culture generally).

261. *See* Smedley & Smedley, *supra* note 210 (discussing the implications of the "assignation of race").

262. *See* Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 185 (2005) (identifying the reality of unconscious bias, but the different cognitions of race experienced by African Americans and whites).

263. *See id.* at 184 (describing the "modern racists" who may "genuinely" not believe themselves to be racist).

264. *See* Greenberg, *supra* note 226, at 76 (noting the role corporate leaders can and should take on in grappling with their own racial biases and those existing at their companies).

may not pick up on or understand systemic racism that taints hiring, promotion and pay practices, and relationships with consumers and communities of color.[265] The attribution of race, or more particularly whiteness, to the corporation may inspire deeper thought regarding race and racism within firms.[266] When white executives and managers understand that they are working for a white firm, the racial differences between the corporation on the one hand, and stakeholders of color on the other, may clarify the racial realities within corporate cultures for business leaders.[267] This will help them to more adequately monitor compliance with anti-discrimination law.[268]

But corporate leaders infrequently discuss or think about race discrimination.[269] Most corporate discourse, thought or disclosure about people of color focuses on diversity—racial diversity among employees,[270] or ways to convince consumers of color to do business with a firm.[271] This is stakeholder theory in action.[272] Unfortunately, however, considering the number of race discrimination claims brought by workers and evidence of

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265. *See* Reeves, *supra* note 230 (illustrating a corporate hiring process tainted by systemic racism).

266. *See* Page, *supra* note 262, at 185 (discussing the need to unravel or wind back biases through identifying as a white business and by doing so make corporate managers cognizant and more responsive to stakeholders of color).

267. *See* Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1582 (2004) (finding that management understanding racial realities through identifying themselves as a white corporation has been insufficient to resolve persistent discriminatory corporate culture).

268. *See* Wade, *supra* note 224, at 389 (discussing the implications of complying with antidiscrimination monitoring as an immense net gain for a corporation).

269. *See* Page, *supra* note 262, at 185 (recognizing an "unconsciousness" with respect to race).

270. *See* Wade, *supra* note 267, at 1582 (explaining that companies say that diversity is a priority even while failing to confront persisting discrimination).

271. *See* Roy S. Ginsburg, *Diversity Makes Cents: The Business Case for Diversity*, 2014 A.B.A SECTION ANNUAL CONFERENCE SECTION OF LITIG. (2014), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_sac/2014_sac/diversity_makes_cents.authcheckdam.pdf (introducing a focus on diversity as an avenue for business expansion and development).

272. *See* Sheehy, *supra* note 246, at 201 (describing a corporation's effects on society and the need for those affected in society, by a corporate diversity focus, to have an influence and voice in corporate action).

discrimination against consumers, companies do not seem to do as well as they claim when it comes to compliance with anti-discrimination law (a corporate governance issue).[273] The lack of racial diversity among employees, and the impact of discriminatory practices that negatively impact consumers, indicates a lack of corporate compliance with anti-discrimination law and a failure to consider stakeholder interests.[274]

After *Hobby Lobby*, it is clear that for-profit corporations may pursue socially responsible goals (however defined) while they pursue profits.[275] The resistance to corporate social responsibility has typically revolved around the idea that such efforts would run contrary to the goal of shareholder wealth maximization.[276] *Hobby Lobby*, however, makes clear the fact that profit maximization is not synonymous with corporate purpose.[277] For-profits may pursue any lawful purpose or business,[278] and may even pursue socially responsible goals that reduce shareholder wealth.[279] This makes obsolete the debate about whether a business case for diversity can be articulated. A

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273. *See Charge Statistics FY 1997 Through FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Apr. 19, 2017) (noting that 31,027 race discrimination employment claims were filed in fiscal year 2015) (on file with the Washington and Lee Law Review).

274. *See* Wade, *supra* note 267, at 1582 (identifying the failure to follow through on prioritizing diversity and rooting out racial discrimination is indicative of a failure to consider stakeholder, and by extension society's interests).

275. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (finding that pursuit of environmental and religious objectives is fully allowable under the law).

276. See *Dodge v. Ford,* for the leading decision which has been interpreted to support the long-standing notion that corporations should be run in a manner that maximizes shareholder wealth and profits. 170 N.W. 668, 682 (Mich. 1919).

277. *See Hobby Lobby*, 134 S. Ct. at 2771 (concluding that pursuit of religious objectives may take precedence should owners so desire).

278. *See id.* (referencing modern corporate law's tenet that "each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for any lawful purpose or business") (citing 1 J. COX & T. HAZEN, TREATISE OF THE LAW OF CORPORATIONS § 4:1, at 224 (3d ed. 2010)).

279. *See id.* (discussing the aforementioned environmental and working conditions objectives and their permissibility notwithstanding any adverse impact such objectives may have on shareholder wealth).

business case for diversity is no longer needed.[280] After *Hobby Lobby*, for-profits are freer to think more deeply about the seemingly intractable problems of racial inequities within their firms and problematic relationships between their firms and stakeholders of color.[281]

VIII. Context

In this Part, I provide context for the preceding discussion. I describe predatory lending by firms that victimized Americans of color.[282] Of course, the predatory lenders were subject to mandates to comply with anti-discrimination law.[283] It is hard to imagine why compliance programs did not reveal pervasive race discrimination at the firms involved.[284] My discussion in this Part supports the idea that a more frank discussion about racial difference and discrimination—both implicit and explicit—can lead to more effective compliance.[285] Acknowledging that the

280. *See* Dorie Clark, *Making the Business Case for Diversity*, FORBES (Aug. 21, 2014, 1:00 PM), http://www.forbes.com/sites/dorieclark/2014/08/21/making-the-business-case-for-diversity/#5a85b37919b3 (last visited Apr. 19, 2017) (adopting the idea that a business case for diversity is necessary before corporate management will prioritize it) (on file with the Washington and Lee Law Review).

281. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (noting that the pursuit of objectives other than profit maximization permits corporate decision-makers to set their corporate agenda for "worthy" objectives).

282. *See* Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 170 (2010) (describing targeted marketing of minorities by predatory lenders); *see also* WEI LI ET AL., CTR. FOR RESPONSIBLE LENDING, PREDATORY PROFILING: THE ROLE OF RACE AND ETHNICITY IN THE LOCATION OF PAYDAY LENDERS IN CALIFORNIA 2 (2009), http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf (noting in its report that African Americans and Latinos make up a disproportionate share of payday loan borrowers).

283. *See id.* at 199 (recognizing that liability may arise under antidiscrimination laws for practices that predatory lenders may otherwise claim as effective marketing strategies). This idea was noted by the court in *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 22 (D.D.C. 2000).

284. *See* Wade, *supra* note 224, at 390 (noting the economic consequences of non-compliance, but questioning why racial discrimination's extensiveness did not raise red flags).

285. *See id.* (supporting the need for a new approach to incentivize corporate compliance with antidiscrimination law).

overwhelming majority of the firms that engaged in predatory lending were "white" firms (i.e., explicitly racializing them), and acknowledging that the firms' victims were people of color are important steps toward accomplishing this.[286]

Banks and other financial institutions targeted people of color—African Americans in particular—for high-interest predatory mortgages.[287] Studies have found that "[m]ortgage originators relaxed their standards to offer subprime mortgages, and in some instances, engaged in fraud so that they could lend money at high rates of interest and therefore make more money."[288] Many consumers of color who qualified for prime or low-interest mortgages were offered only subprime, high-interest loans.[289] Some consumers of color who did not qualify for

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286. *See* Powell & Watt, *supra* note 202, at 899 (discussing the positive consequences that would flow from racializing corporations).

287. *See* Wade, *supra* note 84, at 447 (arguing that "[r]eforming the secondary mortgage market will be futile" unless the underlying unfair treatment of minorities before the 2008 crisis is tackled head on). For example, a former Wells Fargo credit officer revealed in a sworn statement that the bank targeted African American borrowers for high-interest loans they could not afford because of the pervasive perception at the bank that African American customers were not savvy enough to figure out that the loans offered them were predatory. *See id.* at 440 (finding a "prevailing attitude" among lenders that "African-American customers weren't savvy enough to know they were getting a bad loan" (citing testimony from Michael Powell, *Suit Accuses Wells Fargo of Steering Blacks to Subprime Mortgages in Baltimore*, N.Y. TIMES, June 7, 2009, at A1)). Another loan officer admitted that African Americans who qualified for prime loans were targeted for subprime loans because when loan officers referred borrowers who qualified for low-interest loans to the subprime division, they earned bonuses and higher fees. *See id.* (finding that loan officers could earn "bonuses when they referred borrowers who qualified for low-interest loans to the subprime division" (citing reports from Michael Powell, *Suit Accuses Wells Fargo of Steering Blacks to Subprime Mortgages in Baltimore*, N.Y. TIMES, June 7, 2009, at A1)). "Yet another Wells Fargo loan officer revealed that African Americans were called 'mud people' and the predatory loans offered them were labeled 'ghetto loans.'" *Id.* Loan officers targeted black churches also. *See id.* (noting reports that certain corporate divisions did so because Wells Fargo believed "church leaders had a lot of influence and could convince congregants to take out subprime loans" (citing reports from Michael Powell, *Suit Accuses Wells Fargo of Steering Blacks to Subprime Mortgages in Baltimore*, N.Y. TIMES, June 7, 2009, at A1))).

288. *See id.* at 437 (noting that this practice predictably resulted in borrowers' inability to repay their mortgages).

289. *See, e.g.*, MONIQUE W. MORRIS, NAACP A SUMMARY OF THE DISPARATE IMPACT OF SUBPRIME MORTGAGE LENDING ON AFRICAN AMERICANS 2–3 (2009), https://action.naacp.org/page/-/resources/Lending_Discrimination.pdf (finding

low-interest mortgages were offered subprime loans even though they had no or low incomes and no assets.[290] Lenders told their customers "that they would be able to pay off their mortgages as housing prices climbed".[291] But, it became clear that this was not true as "the housing bubble burst and housing prices plummeted."[292] Predictably, "many borrowers could not repay these predatory loans."[293] The mortgages, however, had been pooled together to create securities that were sold to investors.[294] Banks and lenders were able to transfer foreseeable risks that borrowers would default on the underlying mortgages to investors who purchased the securities.[295] These are risks that should have been anticipated by lenders and the experts who advised them, but were understandably unforeseen by borrowers with no economic expertise.[296]

Billions of dollars in wealth was drained from African American and Latino families when banks foreclosed on the homes of consumers who were victims of this predatory lending.[297] Communities were infested with unsightly, abandoned

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that African American borrowers were more likely to receive subprime loans than similarly-situated white borrowers); Debbie Gruenstein Bocian, Keith S. Ernst & Wei Li, *Unfair Lending: the Effect of Race and Ethnicity on the Price of Subprime Mortgages,* CTR. FOR RESPONSIBLE LENDING 3–4 (2006), http://www.responsiblelending.org/mortgage-lending/tools-resources/rr011-Unfair_Lending-0506.pdf (evaluating several studies and finding that higher-income African American and Latino borrowers were more likely to receive higher-rate loans than similarly-situated white borrowers).

290. *See* Wade, *supra* note 84, at 438 (noting that minorities were "targeted" specifically for subprime loans).

291. *See* Cheryl D. Wade, *Predatory Lending in the Context of Home Ownership Continues in 2016 Under Another Name*, CORP. JUST. BLOG (May 3, 2016), http://corporatejusticeblog.blogspot.com/2016/05/predatory-lending-in-context-of-home.html (last visited Apr. 19, 2017) (examining lending to unqualified buyers) (on file with the Washington and Lee Law Review).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *See* Cheryl L. Wade, *How Predatory Mortgage Lending Changed African American Communities and Families*, 35 HAMLINE L. REV. 437 (2012); Cheryl L. Wade, *Fiduciary Duty and the Public Interest*, 91 B.U. L. REV. 1191 (2011) (discussing to whom blame is owed for the financial crisis and its adverse effects on minority borrowers).

297. *See* Wade, *supra* note 84, at 438 (describing the expanding wealth gap that will result from African Americans losing billions due to subprime lending)

homes.[298] Investors who purchased mortgage-backed securities lost billions.[299] Predatory lending harmed local, national, and global economies and helped to precipitate the economic downturn of 2008.[300]

In the aftermath of the predatory mortgage lending that targeted African Americans and Latinos, and even after the passage of Dodd–Frank, enacted, in part, to address this misconduct, the predatory practices used in the mortgage context have been replicated in the auto industry.[301] Auto dealers often connect auto buyers to lenders.[302] The dealers are allowed to engage in discretionary pricing when setting interest rates and there is evidence that dealers charge consumers of color more for their auto loans than they charge similarly situated white consumers.[303]

(citing Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 680 (2009) (noting that the wealth gap has increased because foreclosures have disproportionately impacted African Americans)).

298. *See* Wade, *supra* note 84, at 440–41 (discussing the increased vulnerability that resulted from abandoned homes and the resulting burden on law enforcement and cities to deal with the problems).

299. *See id.* at 437–38 (noting the financial crisis' immense adverse impact on global economies).

300. *See id.* at 437 (describing the contributions to the economic downturn and underlying effects).

301. *See Putting an End to Abusive Car Loans*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/opinion/sunday/putting-an-end-to-abusive-car-loans.html?_r=0 (last visited Apr. 19, 2017) (beginning the article by declaring auto loans to be a "bastion of predatory lending and racial discrimination") (on file with Washington and Lee Law Review).

302. *See id.* (discussing how auto dealers and lenders profit by making "auto loans that contain hidden figure charges and other essentially useless add-ons like credit insurance").

303.

> Data from the late 1990s to early 2000s obtained in nationwide cases against the major auto lenders brought by the National Consumer Law Center…showed widespread racial disparities, unrelated to credit risk, in the markups added by auto dealers to auto loan rates. In practices similar to today, the auto dealers had discretion whether and how much to markup rates already priced for credit risk by the auto lenders.

NAT'L CONSUMER LAW CTR., RACIAL DISPARITIES IN AUTO LOAN MARKUPS, STATE-BY-STATE DATA (2005) https://www.nclc.org/images/pdf/car_sales/ib-auto-dealers-racial_disparites.pdf; *see also* Van Jones, *Congress Says 'OK' to racist auto lenders*, CNN, http://www.cnn.com/2015/12/16/opinions/jones-discrimination-

Even more disturbing is the fact that predatory conduct in the context of home ownership continues in 2016 under another name.[304] On April 18, 2016, the New York Times reported on a relatively new practice that targets low-income homebuyers who are now unable to get mortgages because they lost homes in the recent downturn, and because banks are now more likely to adhere to lending standards.[305] The deals allow home sellers to provide consumers with high-interest, long-term loans that are known as contracts for deed.[306] If the consumer can repay the loan in installments on time, he or she will own the home.[307] But two things impede borrowers' ability to pay on time. First, the interest rates are exorbitantly high.[308] Once again, we see the terribly familiar practice of imposing interest rates that make repayment difficult if not impossible.[309] Second, many of the homes are in a state of disrepair and consumers need to spend

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auto-lenders/ (last updated Dec. 16, 2015, 3:31 PM) (last visited Apr. 19, 2017) (describing the "solid evidence that black, Latino, and Asian-American car buyers are charged higher interest rates than white Americans with similar credit histories.") (on file with the Washington and Lee Law Review). Ally Bank, Honda Finance, and Fifth Third Bank settled with the Consumer Financial Protection Bureau and the Department of Justice in order to pay back victimized consumers. *Id.* Toyota has also agreed to pay millions in restitution to thousands of consumers of color after charging them interest rates that were higher than those charged to white borrowers with similar credit histories. *See* Lisa Lambert, *Toyota Motor Credit Settles with U.S. over Racial Bias in Auto Loans,* REUTERS (Feb. 2, 2016), http://www.reuters.com/article/us-consumers-autofinance-toyota-idUSKCN0VB2EO (last visited Apr. 19, 2017) (reporting Toyota's $21.9 million restitution settlement) (on file with the Washington and Lee Law Review).

304. *See* Alexandra Stevenson & Matthew Goldstein, *Wall St. Veterans Are Betting on Low-Income Homebuyers*, N.Y. TIMES, April 18, 2016, at B1 (introducing the "contracts for deed" concept).

305. *See id.* (finding that banks are now "unwilling to write mortgages to riskier clients after being fined billions of dollars for pushing borrowers into unaffordable subprime mortgages before the crisis").

306. *See id.* (describing contracts deeds as those deals where "a seller provides the buyer with a long-term, high-interest loan, with the promise of actually owning the home at the end of it").

307. *Id.*

308. *See id.* (referencing the case of a millennial who is required to pay ten percent interest under the terms of her contract deed for a house).

309. *See* Wade, *supra* note 291 (referencing the impossibility of repaying some of these predatory loans, but finding continued proliferation nonetheless).

money to make the home habitable.[310] When a prospective homebuyer defaults on the contract for deed, the lender may convert the contract to a month-to-month tenancy.[311] Even worse, the laws that protect homeowners who default on mortgages from eviction do not apply in this context.[312]

While this practice targets low-income homebuyers, there is no reliable information available regarding the race of the homebuyers. But, it is likely that a disproportionately large number of these homebuyers are consumers of color because, as a result of centuries of economic discrimination in the U.S., people of color are overrepresented among low-income consumers.[313]

The achievement of race, gender, and viewpoint diversity among corporate leaders is essential in addressing many of the economic disparities that big business has helped to create between white Americans and Americans of color.[314] Johnson and Millon's work demands this.[315] While their work does not focus on racial wealth and income gaps, it provides a theoretical foundation on which practical considerations and resolutions may be fashioned for many corporate governance issues including the ones I address in this Essay.[316]

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310. *See* Stevenson & Goldstein, *supra* note 304, at B1. (noting that the "homes are often sold "as is," in need of costly repairs and renovations, and many of the transactions end in eviction when buyers fall behind on payments").

311. *See id.* (discussing how the home sale documents often "did not provide buyers with a specified time period to remedy a default, give Harbour the right to immediately convert the agreement to a month-to-month tenancy upon a default, and include an arbitration clause for settling some disputes").

312. *See id.* (finding that contracts for deed benefit investment firms especially because "contracts, buyers can be evicted if they default on their loans. That is very different from traditional mortgages, under which the foreclosure process can be lengthy and costly").

313. *See Class Divides*, ECONOMIST (Nov. 21, 2015), http://www.economist.com/node/21678814 (last visited Apr. 19, 2017) (discussing the past oppression leading to current disadvantages for the black population and a resulting "achievement gap" between white Americans and Americans of color) (on file with the Washington and Lee Law Review).

314. *See supra* notes 202 and 222 and accompanying text (noting the need for diversity and race consciousness at the corporate management level).

315. *See supra* notes 1–2 and accompanying text (discussing the future implications of corporate social responsibility after *Hobby Lobby*).

316. *See* Johnson, *Corporate Personhood*, *supra* note 2 and accompanying text (noting how compliance with the law interacts with corporate social responsibility).

Focusing on the notion of corporate personhood adds a new layer of corporate accountability. Consideration of the details of the identity of corporate persons helps to hone and refine expectations for the corporate person's social responsibility.[317] Understanding how social constructions of personal identity, particularly the social construction of race, illuminates subtle, covert, or implicit bias that infects the economic relationships between corporations and constituents of color.[318] In other words, explicit identification of corporations as white, as determined culturally in the way natural persons are deemed white, may shed light on discriminatory dealings with employees, consumers, and communities of color.[319]

IX. Conclusion

In this Essay, I explore the possibility of creating corporate cultures that promote rather than suppress racial equity. In order for this to happen, business leaders must understand the impact that continuing societal discrimination has on corporate cultures. Large public companies employ hundreds, sometimes thousands of people who will interact with other employees, communities and consumers of color, and minority-owned businesses.[320] Even closely-held, family-owned companies like Hobby Lobby and Conestoga employ thousands.[321] Implicit or

317. *See supra* notes 202 and 233 (arguing for corporate personhood to come to grips with race as a component of corporate social responsibility).

318. *See supra* note 205 (arguing for viewing race as a social construction).

319. *See* Wade, *supra* note 267 (noting that this explicit identification is a crucial step in challenging the United States' persistently discriminatory corporate culture).

320. *See* Claire Zillman & Stacy Jones, *7 Fortune 500 Companies with the Most Employees*, FORTUNE (June 13, 2015), http://fortune.com/2015/06/13/fortune-500-most-employees/ (last updated Aug. 17, 2015 12:03 PM) (last visited Apr. 19, 2017) (discussing how, for example, retail giants, who have "mammoth rosters" of employees interacting with millions of consumers and clients, constitute four of the seven largest companies ranked by employment numbers) (on file with the Washington and Lee Law Review).

321. *See Our Story*, HOBBY LOBBY, http://www.hobbylobby.com/about-us/our-story (last visited Apr. 19, 2017) (noting that Hobby Lobby employs "approximately 32,000 people") (on file with Washington and Lee Law Review).

unconscious racism that affects the relationships between for-profit companies and their constituents of color is inevitable because the individuals who act on behalf of these companies live in a nation in which racism and discrimination endure.[322] The racism that continues to plague our national culture is in some instances unconscious, implicit, and subtle.[323] Sometimes it is blatant and overt. Whatever its manifestation, the racism that continues to be part of U.S. culture impacts corporate cultures and shapes the relationships between public companies and their constituents of color.[324]

For-profit companies, however, are a promising locus for cultural transformation as it relates to race and racism.[325] This is because norms are homogenous in the corporate context.[326] Individualism reigns in U.S. culture. But in corporate cultures, individuals have to conform to the norms and priorities established by the CEO and other senior executives.[327] This is why a focus on corporate governance is an important first step toward racial reconciliation.

The *Hobby Lobby* case changes the way we should think about corporate governance and corporate social responsibility.[328]

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322. *See* Bornstein, *supra* note 223 (discussing the far-reaching consequences to society and those living and doing business within it when implicit discrimination is so entrenched).

323. *See id.* (describing in greater detail the various manifestations of implicit or unconscious discrimination).

324. *See supra* notes 201 and 224–225 (discussing the disproportionate effects felt by stakeholders of color when corporate managers fail to address racism).

325. *See generally* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364 (1992) (discussing the view that racism is a permanent feature of the American landscape, that black-over-white ascendancy and the need for profits drive it, and that the status quo will persist without greater initiative from, among others, for-profit companies).

326. *See* Jens Dammann, *Homogeneity Effects in Corporate Law*, 46 ARIZ. ST. L.J. 1103, 1107 (2014) (finding corporate norms homogenous, and by extension compatible, because all corporations use the same corporate law regime that empowers executives).

327. *See id.* (arguing that corporate homogeneity is akin to economic utility analysis and that corporate law's general regime evidences the overall corporate utility inherent to homogeneity in this respect).

328. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (finding that pursuing objectives besides profit-maximization is permissible and even encouraged because those other objectives satisfy the "any lawful purpose"

The work of Lyman Johnson and David Millon helps us navigate the impact of the Court's *Hobby Lobby* decision and extrapolates what we need to know about how corporations may be governed.[329]

After *Hobby Lobby*, we know that there is no obligation under the law to maximize shareholder wealth.[330] In fact, corporations, even for-profits, may reduce wealth for the sake of stakeholders or the general welfare of the public under the Court's reasoning.[331] Johnson and Millon noted that this approach carries significant implications for companies concerned about their social goals and responsibilities.[332] Rejecting the idea that the solitary goal of a for-profit is to maximize profits has interesting implications for corporate social responsibility advocates.[333] *Hobby Lobby* removes a longstanding barrier to corporate social responsibility by

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standard).

329. *See supra* notes 1–2 (discussing openings for corporate social responsibility after *Hobby Lobby* allowed corporate goals without sole regard for profit maximization).

330. *See Hobby Lobby*, 134 S. Ct. at 2771 (finding that pursuit of religious objectives was a worthy goal that was not precluded under corporate law).

331. *See id.* (arguing that disregard for profit-maximization for religious objectives could be extended to other worthy objectives as well).

332. *See supra* notes 1–2 (discussing the new corporate landscape and openings created by *Hobby Lobby*).

333. The Court's approach in *Hobby Lobby* to ideas about shareholder primacy and stakeholder theory is also informative. *See Hobby Lobby*, 134 S. Ct. at 2771 (construing state statutes permitting incorporation for "any lawful purpose" broadly and unburdened by a restrictive, exclusive shareholder wealth maximization objective). The Court rejected shareholder primacy in its traditional sense by acknowledging that for-profit corporations do not have to defer to shareholder interests and may disregard non-shareholder interests. *See id.* (concluding that modern corporate law does not and cannot impose a requirement on corporations to "pursue profit at the expense of everything else"). But interestingly, the Court upheld the idea of shareholder primacy in a noneconomic sense. *See id.* (questioning why religious objectives should be treated differently than other accepted charitable or altruistic pursuits by corporations). The religious objectives of the shareholders of Hobby Lobby and Conestoga were paramount. *See id.* at 2774 (noting the closely held status of the companies and the undisputed "sincerity of their religious beliefs"). The interests of both companies' women employees in having access to certain contraceptives were not protected. *See id.* at 2775 (concluding that the HHS contraceptive mandate substantially burdened the exercise of religion"). The shareholders' religious objectives prevailed over the interests of stakeholders. *Id.* at 2775.

holding that for-profits may pursue other goals as they pursue profits.[334]

334. *See id.* at 2771 (finding that worthy objectives are permissible under the law and shattering the long-held notion that the sole objective of for-profit corporations was to maximize profits, and therefore, maximize shareholder wealth).