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"Not Like You and Me": *Hobby Lobby*, the Fourteenth Amendment, and What the Further Expansion of Corporate Personhood Means for Individual Rights

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"Not Like You and Me"

HOBBY LOBBY, THE FOURTEENTH AMENDMENT, AND WHAT THE FURTHER EXPANSION OF CORPORATE PERSONHOOD MEANS FOR INDIVIDUAL RIGHTS

INTRODUCTION

"Corporations, as F. Scott Fitzgerald might have put it, are not like you and me."[1] Yet, this summer, the Supreme Court held in *Burwell v. Hobby Lobby* that closely held, for-profit corporations are in fact "persons" with standing to sue under the Religious Freedom Restoration Act of 1993 (RFRA),[2] and that further, RFRA protects those corporations from having to follow a provision of the Affordable Care Act (ACA, also known as "Obamacare") that the corporations claim violates their religious beliefs.[3] The decision "has been both praised and condemned for expanding religious rights and . . . the right of corporations to be treated like people."[4] The problem with the ruling is not that it expanded the rights of corporations to be treated like people, but that it held the corporations' newfound religious rights more dearly than the rights of actual people, the employees of the corporations.[5] This tears at the fabric of our democracy, which was created to protect the rights of individuals. Courts should take that into account when balancing conflicting rights of corporations and individuals, and always err on the side of protecting natural, not corporate, people.

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[1] Binyamin Appelbaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES (July 22, 2014), http://www.nytimes.com/2014/07/27/magazine/what-the-hobby-lobby-ruling-means-for-america.html?_r=0.

[2] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C.A. § 2000bb).

[3] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, slip op. at 2 (U.S. June 30, 2014), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

[4] Appelbaum, *supra* note 1.

[5] *Hobby Lobby*, dissenting slip op. at 8 (Ginsburg, J., dissenting) ("The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents.").

"The notion that corporations are people is ridiculous on its face, but often true."[6] When then-presidential candidate Mitt Romney told a crowd at the 2011 Iowa State Fair that "[c]orporations are people, my friend,"[7] flesh-and-blood people across the country thought he was at best socially tone-deaf and at worst completely oblivious to the economic plight of the average American.[8] But legal scholars and business majors knew he was referring to the fact that corporations[9] are in fact seen as "persons" for the purposes of most statutory and regulatory law. It makes sense that when actual people are forming a business, their business can take on a separate corporate form that is seen as a separate legal entity: the corporation can hold property, pay taxes, and sue or be sued under its own name rather than that of its owners.[10] Perhaps more importantly, the corporate form also limits the personal liability of its owners, encouraging risk,[11] and survives beyond the life of its owners,[12] allowing business ventures to have a far greater impact on future customers, employees, and shareholders than a single individual could. The development of the corporate form has in many ways helped lead America from an agrarian society to a world power,[13] increasing wealth and opportunity in ways and amounts that would probably have been unthinkable to our founders.

The increasing dominance of and deference to for-profit corporations also has its downside. The wealth and opportunity corporations afford to society are not applied equally or equitably, and often come at the cost of other social, cultural, and environmental values.[14] For-profit corporations are allowed to amass seemingly unlimited profits, allowing the corporations

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[6] Appelbaum, *supra* note 1.

[7] Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry over His Tax Policy*, N.Y. TIMES, Aug. 11, 2011, at A16, *available at* http://www.nytimes.com/2011/08/12/us/politics/12romney.html?_r=0.

[8] *See* Ashley Parker, *Romney's 'Poor' Remark Resonates*, THE CAUCUS—THE POLITICS AND GOVERNMENT BLOG OF THE TIMES, N.Y. TIMES, (Feb. 1, 2012, 10:34 PM), http://thecaucus.blogs.nytimes.com/2012/02/01/romneys-poor-remark-resonates/; *see also id.* at Comments.

[9] The author uses "corporations" throughout this note to mean "secular, for-profit corporations" unless explicitly noting that nonprofit corporations are meant.

[10] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819); *see also id.* at 666-67 (Story, J. opinion).

[11] *See* ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 37 (4th ed. 2013).

[12] *See Dartmouth*, 17 U.S. at 636 (majority opinion); *id.* at 667 (Story, J. opinion).

[13] *See* PINTO & BRANSON, *supra* note 11, at 5.

[14] *See generally* THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 15-23 (2002).

ever more wealth and opportunity[15] while the individuals who make up the labor force and communities that support the corporations often find themselves fighting over the scraps. If corporations are people, then surely some people "are more equal than others."[16]

As corporate persons are granted protections "equal" to those of natural persons, the inequality between human people and corporate people becomes increasingly clear. Corporations in modern America enjoy almost all of the protections of the First Amendment: freedom of speech,[17] of the press,[18] of assembly,[19] and the right to petition the government.[20] The remaining First Amendment freedom, as yet uncaptured by for-profit corporations, had been freedom of religion—until the *Hobby Lobby* decision. Over 100 cases have been filed in the federal courts (at least 80 are still pending) in which both nonprofit and for-profit corporations are asserting a right to the free exercise of religion.[21] Circuit courts split on the issue of whether or not for-profit corporations actually have standing to assert a free exercise claim,[22] and the Supreme Court held in *Hobby Lobby* that for-profit corporations have such standing, at least under RFRA.[23] Charitable nonprofit corporations organized expressly for religious purposes, such as churches and religious schools, can plausibly be said to freely exercise religion.[24] But

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[15] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting).

[16] GEORGE ORWELL, ANIMAL FARM 134 (Signet Classics 1996) (1946) (emphasis omitted).

[17] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340-43 (2010).

[18] *See, e.g.*, N. Y. Times Co. v. Sullivan, 376 U.S. 254, 264 (1964).

[19] The corporate form itself is a form of free assembly and free association; further, corporations are free to band together in trade associations, chambers of commerce, and the like.

[20] Corporations petition the government through a multi-billion dollar lobbying industry. *See* Ctr. for Responsive Politics, *Lobbying Database*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/index.php (last visited Aug. 23, 2014).

[21] *See* NAT'L WOMEN'S LAW CTR., STATUS OF THE LAWSUITS CHALLENGING THE AFFORDABLE CARE ACT'S BIRTH CONTROL COVERAGE BENEFIT 1-3 (Aug. 18, 2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/rr_fs_contraceptive_coverage_litigation_status.pdf.

[22] *See* Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1243 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013), *vacated and remanded sub nom*. Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 384 (3d Cir. 2013), *rev'd and remanded sub nom*. Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014); Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014).

[23] *See Hobby Lobby*, slip op. at 2.

[24] *See, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 381-84 (1990) (affirming a California court decision to enforce the collection of generally

should secular, for-profit corporations be allowed to assert freedom of religion as a defense against a generally applicable federal law? And if so, how will "corporate religion" impact the rights of the corporation's employees?

Not all constitutional protections apply to corporations. In *First National Bank of Boston v. Bellotti*,[25] the Court distinguished "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination" and "equality with individuals in the enjoyment of a right to privacy" as "unavailable to corporations . . . because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[26] The Bill of Rights, including the First Amendment's Free Exercise Clause, was written expressly to protect ordinary citizens from governmental tyranny.[27] "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the *individual's* freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience."[28] The right to exercise one's religion is surely one of our most "purely personal" rights.[29]

The Court was wrong to extend the constitutional protection of freedom of religion to corporations because so doing will increase powers "inherent" in corporate personhood to the further detriment of the rights of natural persons.[30] The Fourteenth Amendment guarantees equal protection under the law, but natural persons cannot hope to be equal to corporations, which have "dramatically more power, property, and wealth."[31] To extrapolate from Thomas Jefferson's famous statement

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applicable state sales and use taxes on a religious nonprofit corporation; the Court did not question the nonprofit's standing to bring Free Exercise or Establishment Clause claims).

[25] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978).

[26] *Id.* at 779 n.14 (quoting United States v. White, 322 U.S. 694, 698-701 (1944), Cal. Bankers Ass'n. v. Shultz, 416 U.S. 21, 65-67 (1974), United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950)).

[27] *See* Charles C. Haynes, *Democracy Minus Freedom Equals Tyranny*, FIRST AMENDMENT CTR. (July 5, 2013), http://www.firstamendmentcenter.org/democracy-minus-freedom-equals-tyranny; *The Virginia Statute for Religious Freedom: The Road to the First Amendment*, CONSTITUTIONAL RIGHTS FOUND.: BILL OF RIGHTS IN ACTION (Fall 2010), http://www.crf-usa.org/bill-of-rights-in-action/bria-26-1-the-virginia-statute-for-religious-freedom.html.

[28] Wallace v. Jaffree, 472 U.S. 38, 49 (1985) (emphasis added).

[29] Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 384-85 (3d Cir. 2013), *rev'd and remanded sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014).

[30] Kathryn S. Benedict, Note, *When Might Does Not Create Religious Rights: For-Profit Corporations' Employees and the Contraceptive Coverage Mandate*, 26 COLUM. J. GENDER & L. 58, 109 (2013).

[31] HARTMANN, *supra* note 14, at 94.

regarding religious freedom, recognizing religious freedom for corporations could in fact pick our pockets and break our legs.[32] *Hobby Lobby* and the other ACA birth control mandate cases offer an interesting intersection of Fourteenth Amendment jurisprudence as applied to corporations as opposed to individuals. This note argues that for-profit corporations should have no standing under the First Amendment's Free Exercise Clause or RFRA, and that the constitutional and statutory freedoms of natural persons must always take precedence over the rights of corporate persons, as the Constitution was written to protect actual human individuals, not corporations.

Part I of this note examines the history of corporate personhood as compared to the treatment of the rights of natural persons under the Fourteenth Amendment. Part II describes the Supreme Court's latest expansion of corporate personhood into religion via recent federal litigation which successfully challenged the ACA "Birth Control Mandate" provision. Part III delves into the arguments against expansion of corporate personhood in the context of the birth control mandate litigation, reaffirms that the Constitution was designed to protect individuals, and presents ideas to better balance the beliefs of the corporations' owners with the constitutionally protected rights of their employees and compelling governmental interests.

I. HISTORY OF CORPORATE PERSONHOOD AND THE RIGHTS OF NATURAL PERSONS

For centuries, corporations only came into existence by way of royal charters, usually to take on a risk or provide a public benefit that the crown was unwilling to personally fund.[33] Thus, at the time the Constitution was written, the Framers

> took it as a given that corporations could be comprehensively regulated in the service of the public welfare . . . . [T]hey had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First

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[32] Harry R. Rubenstein & Barbara Clark Smith, *History of the Jefferson Bible*, *in* THE JEFFERSON BIBLE 11, 15-16 (Smithsonian ed. 2011) (quoting Jefferson's 1784 essay *Notes on the State of Virginia*).

[33] Robert Sprague & Mary Ellen Wells, *The Supreme Court As Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 509 (2012).

> Amendment, it was the free speech of individual Americans that they had in mind.[34]

After the American Revolution, state governments took on the business of granting corporate charters when needed, with the understanding that the proper purpose of a corporation was public welfare.[35] "The local public service function of early American corporations . . . led to their legislative encouragement,"[36] but, even so, state "legislatures retained a tight control over corporate purposes and activities."[37]

In 1819's *Trustees of Dartmouth College v. Woodward*, the Supreme Court officially recognized corporations as separate legal entities that can hold property, pay taxes, and sue or be sued, without further approval of the state.[38] Yet, this was not a grant of absolute power. Chief Justice Marshall famously summed up the still-wary public attitude toward corporations: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[39] In other words, we the people should only grant powers and privileges to the corporation that are necessary for the corporation to fulfill its purpose for the public good.

The expansion of corporate status as legal persons was logical at first; if corporations are allowed to hold property, then it logically follows they should not be deprived of that property without due process. In contrast, however, the Constitution then allowed some natural persons to be seen and treated as property. The 1790 Census counted nearly 700,000 slaves,[40] each of whom was counted as three-fifths of a person for the purposes of allocation of seats in the House of Representatives, per the Constitution.[41] The 1820 Census counted over 1.5 million slaves,[42] each a natural person, none of

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[34] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 428 (2010) (Stevens, J., dissenting).

[35] Sprague & Wells, *supra* note 33, at 523.

[36] JAMES J. FISHMAN & STEPHEN SCHWARTZ, TAXATION OF NONPROFIT ORGANIZATIONS 23 (3d ed. 2010).

[37] *Id.*

[38] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

[39] *Id.* at 636.

[40] *Historical Census Browser*, UNIVERSITY OF VIRGINIA GEOSPATIAL AND STATISTICAL DATA CTR. (2004) http://mapserver.lib.virginia.edu/index.html (retrieved Aug. 24, 2014).

[41] U.S. CONST. art. I § 2, cl. 3.

[42] *Historical Census Browser*, *supra* note 40.

whom had any rights at all.[43] Throughout the mid-1800s, banks accepted slaves as payment and as collateral on loans,[44] and insurance companies sold policies "that reimbursed slave owners for financial losses when the enslaved Africans they owned died."[45] As early as 1841, railroad corporations owned their own labor forces in the form of slaves.[46] The idea that corporate persons could own natural persons as slaves is abhorrent to our modern mindset, but until the Thirteenth Amendment, it was common throughout the South.

With this knowledge, it will perhaps come as no surprise that corporations, led by the railroads, began to argue as soon as the Fourteenth Amendment was ratified that its Due Process and Equal Protection Clauses, written to protect the newly freed slaves, should apply to corporate persons as well as natural persons.[47] In *Santa Clara County v. Southern Pacific Railroad*,[48] multiple railroad corporations alleged that California's state and local governments violated the Fourteenth Amendment's Due Process and Equal Protection Clauses by taxing railroad property differently from that of individual citizens. But when the case reached the Supreme Court in 1886, proper taxation was the only issue reviewed. The Court made no note of the issue of corporate personhood within its opinion,[49] nor did it distinguish between due process and equal protection claims. The Court found for the defendant railroads based on the fact that the taxes in question were improperly levied under the California state constitution.[50] "As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings,"[51] Justice Harlan explained. There was no need to

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[43] *See* Dred Scott v. Sandford, 60 U.S. 393, 404 (1856) (denying a slave standing to bring suit in federal court because he was not nor could he ever be made a U.S. citizen).

[44] Katie Benner, *Wachovia Apologizes for Slavery Ties*, CNNMONEY.COM (June 2, 2005), http://money.cnn.com/2005/06/02/news/fortune500/wachovia_slavery/.

[45] *15 Major Corporations You Never Knew Profited from Slavery*, ATLANTA BLACK STAR.COM (Aug. 26, 2013), http://atlantablackstar.com/2013/08/26/17-major-companies-never-knew-benefited-slavery/; *see also* James Cox, *Corporations Challenged by Reparations Activists*, USATODAY.COM (Feb. 21, 2002), http://usatoday30.usatoday.com/money/general/2002/02/21/slave-reparations.htm.

[46] William G. Thomas III, *Did U.S. Railroads Own Slaves—How Many?*, WILLIAM G. THOMAS III ON HISTORY, DIGITAL HUMANITIES, AND HIGHER EDUCATION (July 2, 2008), http://railroads.unl.edu/blog/?p=32.

[47] *See* HARTMANN, *supra* note 14, at 91.

[48] *See* Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394, 409 (1886).

[49] *See* HARTMANN, *supra* note 14, at 98.

[50] *Santa Clara*, 118 U.S. at 416.

[51] *Id.*

reach the Fourteenth Amendment claims. Yet, the headnote to the case states:

> Before argument MR. CHIEF JUSTICE WAITE said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[52]

Again, there is nothing in the opinion itself to support the idea that the Fourteenth Amendment applies to corporations, or to explain how the Court reached this conclusion. The headnote was written by the Supreme Court reporter[53] and former railroad president[54] J.C. Bancroft Davis, who either mistakenly or deliberately misinterpreted the decision.[55] Some suggest that the misinterpretation might have occurred at the urging of Justice Field, who advocated for corporate personhood throughout his career as a railroad attorney, judge, and Justice.[56] Chief Justice Waite fell ill and died before the opinion was published, so never had a chance to correct the mistake;[57] however, "the history of the Waite Court suggests the unlikelihood of Waite's endorsing 'equal protection' for corporations."[58]

Santa Clara might have been forgotten to history—headnotes are non-precedential, as they are not written by the Justices—except that "*Pembina* lent *Santa Clara* the momentum of settled law."[59] In 1888, Justice Field wrote the opinion in *Pembina Consolidated Silver Mining & Milling Co. v. Commonwealth of Pennsylvania*, in which a Colorado mining company tried to avoid Pennsylvania's licensing and tax requirements on out-of-state corporations.[60] The case affirmed Pennsylvania's right to regulate out-of-state corporations, yet noted: "Under the [Fourteenth Amendment's] designation of person there is no doubt that a private corporation is included."[61] Justice Field does not elaborate, and in fact writes almost immediately afterward: "The equal protection of the

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[52] *Id.* at 396.

[53] HARTMANN, *supra* note 14, at 107.

[54] *Id.* at 119.

[55] *Id.* at 112-13.

[56] *Id.* at 113-16, 119.

[57] *Id.* at 115-16, 119; *see also* JACK BEATTY, AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900, at 171-76 (2007).

[58] BEATTY, *supra* note 57, at 174.

[59] *Id.* at 180.

[60] Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888).

[61] *Id.* at 189.

laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State."[62] Taken together, the opinion seems to say that the Fourteenth Amendment ensures equal protection within each type of persons. This actually mirrors the greater jurisprudence of the time, in which all white men might be equal among themselves, while black men were "separate but equal"[63] (or, still not equal, as history evinced) and women were not to trouble themselves about such matters. During this period, the Court determined that the Fourteenth Amendment[64] did *not* apply to: suffrage for women[65] or Native Americans,[66] protection of blacks attempting to exercise suffrage granted by the Fifteenth Amendment,[67] ability of women to qualify for professional licenses,[68] ability of blacks and whites to associate in the same rail car,[69] or to Asian immigrants[70] or Puerto Ricans[71] in any capacity. These natural persons were dismissed from Fourteenth Amendment constitutional protection as quickly and illogically as the *Santa Clara* corporate defendants were seemingly welcomed with open constitutional arms.

The judicial shift in attitude toward corporations in the latter half of the 19th Century accompanied a legislative shift among the states. The explosive growth of the Industrial Revolution went hand in hand with the relaxation of laws governing incorporation, culminating in Delaware's 1899

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[62] *Id.*

[63] Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

[64] Many of the early Fourteenth Amendment cases cited in notes 65-71 were argued under the Privileges or Immunities Clause, rather than the Equal Protection Clause. Given the state of the Court and the country at the time, the author thinks it highly unlikely that the outcomes would have been different if Minor et al. had instead argued for their rights under the Equal Protection Clause.

[65] *See* Minor v. Happersett, 88 U.S. 162 (1874); *see also* United States v. Reese, 92 U.S. 214, 217-18 (1875) (determining that Congressional power to prevent voter discrimination was limited strictly to discrimination based on "race, color, or previous condition of servitude"); United States v. Anthony, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459).

[66] *See* Elk v. Wilkins, 112 U.S. 94 (1884).

[67] *See* United States v. Cruikshank, 92 U.S. 542 (1876).

[68] *See* Bradwell v. Illinois, 83 U.S. 130 (1873).

[69] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[70] *See generally* United States v. Wong Kim Ark, 169 U.S. 649, 699, 704 (1898) (conceding that the children of Chinese immigrants born in the U.S. were U.S. citizens, despite a federal law barring Chinese immigration); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding a federal law barring Chinese immigration as constitutional without discussing the Fourteenth Amendment).

[71] *See generally* Downes v. Bidwell, 182 U.S. 244, 251, 279-80 (1901) (noting that until Congress decided to extend constitutional protections, the Fourteenth Amendment did not apply to citizens of the newly acquired territory because it was not a state).

statute "authoriz[ing] the formation of a corporation for the transaction of any lawful business."[72]

The 20th Century's expansive proliferation of the use of the corporate form[73] resulted in battles over the expansion and regulation of corporate rights.[74] Justice Hugo Black once noted that:

> [O]f the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent [sic] invoked it in protection of the negro race, and more than fifty per cent [sic] asked that its benefits be extended to corporations.[75]

The Court specifically expanded corporate First Amendment rights in lines of cases about freedom of speech;[76] unfortunately, the ghost of the mistaken *Santa Clara* headnote continued to cause problems, even when other courts tried to correct the course. In *First National Bank of Boston v. Bellotti*, a key case in the jurisprudence of corporate political speech, the Court declared, "We believe that the [Supreme Judicial C]ourt [of Massachusetts] posed the wrong question . . . . The proper question . . . is *not* whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons."[77] The *Bellotti* majority, voiding a state ban on corporate participation in referenda,[78] instead focused solely on the self-answering question of whether the First Amendment protects political speech,[79] holding that it should not matter to the government whether the speech comes from an individual or a corporation.[80] The majority held that the First Amendment freedoms are within the "liberty" (not "property") interests protected by the Fourteenth Amendment, "and [that] the Court has not identified a separate source for the right when it has been asserted by corporations."[81]

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[72] Sprague & Wells, *supra* note 33, at 530.

[73] *See id.* at 530-31.

[74] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 394, 433-34, 446 (2010) (Stevens, J., dissenting) (discussing the Tillman Act of 1907, which banned corporate contributions to political candidates, and the Taft-Hartley Act of 1947, which extended the corporate ban to independent political expenditures).

[75] Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

[76] *See, e.g.*, *Citizens United*, 558 U.S. at 318-19; McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978).

[77] *Bellotti*, 435 U.S. at 776 (emphasis added).

[78] *Id.* at 767-68.

[79] *Id.* at 776.

[80] *Id.* at 777.

[81] *Id.* at 780.

The *Bellotti* dissenters, however, declared that this should be

> merely the starting point of analysis, because an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not.[82]

Justice White stated that corporations, created for economic reasons and granted the ability to "control vast amounts of economic power,"[83] may be treated differently than natural persons in the interest of "protecting a system of freedom of expression"[84] across the entire population. Justice Rehnquist went further, saying that the Massachusetts law offered "at least as much protection as the Fourteenth Amendment requires,"[85] and any corporation "upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation."[86]

The "special privileges or immunities different from those of natural persons"[87] to which Justice Rehnquist referred are the fact that the corporate form affords its owners and shareholders limited liability for corporate actions, and further, can continue to exist and conduct corporate business long after its founding owners and shareholders are dead.[88] These "supernatural powers"[89] are a definite cause for concern in a democratic society, and have occasionally even been recognized as justifying a compelling government interest by a majority of Supreme Court Justices.[90]

Following *Bellotti* in the line of corporate speech cases were *Austin v. Michigan Chamber of Commerce* and *McConnell v. Federal Election Commission*. Both cases upheld campaign finance laws banning corporate independent expenditures because the concern that state-created corporations would dominate elections was ruled a compelling governmental interest. In both cases, the Court noted that it was acceptable to treat corporations differently than individuals when it came

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[82] *Id.* at 804 (White, J., dissenting).
[83] *Id.* at 809.
[84] *Id.* at 821.
[85] *Id.* at 828 (Rehnquist, J., dissenting).
[86] *Id.* at 826-27.
[87] *Id.* at 827.
[88] Sprague & Wells, *supra* note 33, at 513.
[89] *Id.* at 509.
[90] McConnell v. Fed. Election Comm'n, 540 U.S. 93, 115-22 (2003); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655-61 (1990).

to political speech in part because the accumulation of corporate wealth and power meant corporations could effect a higher level or volume of political speech than an individual could hope to achieve.[91]

Despite the existence of precedents like *Austin* and *McConnell* and the reasoned warnings of its dissent, the *Citizens United v. Federal Election Commission* majority controversially overruled *Austin* and *McConnell* and continued to expand the rights of corporations, holding that both for-profit corporations and unions have the right to unlimited independent political expenditures, which are protected political speech.[92] The majority looked upon individuals, the nonprofit plaintiff, for-profit corporations, and unions as equals, saying that:

> [T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice.[93]

The Court's reference to for-profit corporations as "disadvantaged persons" went further than it needed to. Citizens United was a nonprofit group formed to advocate a certain set of political beliefs;[94] the Court could have taken a narrower view, as it did in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*MCFL*).[95] In *MCFL*, the Court carved out an exception to the ban on corporate political speech for a nonprofit group, which did "not pose [a] danger of corruption [because it] was formed to disseminate political ideas, not to amass capital," and ergo was distinct from the for-profit corporations which had "been the focus of regulation of corporate political activity."[96] Indeed, the *Citizens United* dissent pointed out that the majority decision lacked justification to broaden the decision beyond the nonprofit plaintiff at issue:[97] "The conceit that corporations must be treated identically to natural persons . . . is not only inaccurate but also inadequate to justify the Court's disposition of this

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[91] *McConnell*, 540 U.S. at 115-22; *Austin*, 494 U.S. at 658-59.
[92] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
[93] *Id.* at 340-41.
[94] *Id.* at 319-20.
[95] *See* Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).
[96] *Id.* at 259.
[97] *See Citizens United*, 558 U.S. at 393-94, 404-05 (Stevens, J., dissenting).

case . . . . [T]he distinction between corporate and human speakers is significant."[98]

Unfortunately, in a post-*Citizens United* world, this distinction may eventually signify the complete subordination of the rights and freedoms of natural persons.[99] The consequences of the "perpetual life and limited liability"[100] and other "special privileges or immunities"[101] granted corporations mean that any right granted to a corporation becomes infinitely easier for that corporation to assert than for a natural person trying to assert the same right. For example, an individual may not have time or money to pursue her rights in court, but many corporations—especially those established to make a profit—have ample time and money to repeatedly bring suits until the courts rule in their favor.[102] This is true especially when the rights of natural persons are not always viewed by the courts as actual constitutional rights.

The rapid progression of a corporate right to political speech far outpaced the expansion of equal protection for different groups of individuals from the 1970s to the present, which mirrors early Fourteenth Amendment jurisprudence as discussed above. *Pembina* led to cases wherein the Fourteenth Amendment ensured at best equal protection within each type of persons, rather than across types; today, the Court still applies different levels of scrutiny depending on the type of plaintiff and claim. Plaintiffs bringing cases challenging laws which classify people by race are subject to strict scrutiny, meaning that in order to be upheld as constitutional, the legislation at issue must be necessary and narrowly tailored to meet a compelling government interest.[103] In contrast, cases challenging sex or gender classifications do not merit strict scrutiny; the Court at best holds those to intermediate scrutiny.[104] Cases challenging discrimination surrounding pregnancy and abortion polices, for example, are often subject

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[98] *Id.* at 394.

[99] Sprague & Wells, *supra* note 33, at 550-51.

[100] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 825 (1978) (Rehnquist, J., dissenting).

[101] *Id.* at 827.

[102] HARTMANN, *supra* note 14, at 94.

[103] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220 (1995).

[104] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 218 (1976). In *Frontiero v. Richardson*, the Court struck down a discriminatory law without deciding the proper level of scrutiny. The four-justice plurality held that sex-based classifications require strict scrutiny. 411 U.S. 677, 688 (1973). Another four justices thought it "unnecessary" to raise sex-based classifications to that level. *Id.* at 691-92 (Powell, J., concurring in judgment) (citing Reed v. Reed, 404 U.S. 71 (1971)).

merely to a rational basis test, because they are not seen as being based on a sex/gender classification,[105] despite the fact that, by definition, only women get pregnant or need abortions. This supposedly equal application of equal protection leads to inequitable results; by ignoring gender differences when evaluating gender discrimination, courts are contributing to the continued subordination of subordinate groups.[106] Gender differences are not germane as to whether women (or men) should be allowed to vote or enter a profession, but are quite relevant when talking about health care.[107] *Hobby Lobby* is merely the latest example of the Court's willingness both to expand corporate rights and to undervalue women's rights.

II. THE AFFORDABLE CARE ACT, BIRTH CONTROL MANDATE, AND SUBSEQUENT LITIGATION INCLUDING *HOBBY LOBBY*

While the free speech cases discussed above glimpse at the problems inherent in treating corporations and individuals as equals, these problems come into sharper focus when discussing the ACA and the Court's holding of for-profit corporations' right to freedom of religion in *Hobby Lobby*.[108] Gender discrimination and the rights of individuals, especially those of low-income individuals and individuals of color, continue to be at issue. Unfortunately, the rights of individuals continue to be devalued by the Court in comparison to corporate rights.[109]

A. Background on the ACA and its Birth Control Mandate

Upon taking office in 2009, President Obama and his Congressional allies led a charge to pass legislation addressing

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[105] *See* Maher v. Roe, 432 U.S. 464, 470-71 (1977); Geduldig v. Aiello, 417 U.S. 484, 493-97 (1974). *But cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874-78 (1992) (setting an "undue burden" standard by which courts evaluate challenges to regulations limiting access to abortions; such standard can arguably be considered intermediate scrutiny).

[106] Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 173-77 (1994) (discussing the theories of Catharine MacKinnon and Martha Minow).

[107] *See, e.g.*, Andrea Irwin, *Diagnosing Gender Disparities in Health Care*, NAT'L WOMEN'S HEALTH NETWORK (July-Aug. 2007), https://nwhn.org/diagnosing-gender-disparities-health-care; *see infra* Part II.A.

[108] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, slip op. at 2 (U.S. June 30, 2014), available at http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

[109] *Id.* dissenting slip op. at 8 (Ginsburg, J., dissenting).

America's health care crisis.[110] The United States spends roughly twice as much as other developed nations on health care, yet has worse health outcomes, including lower life expectancy, higher rates of obesity and related diseases, and lack of quality care for long-term conditions like asthma and chronic obstructive pulmonary disease.[111] The health care industry is one-sixth of our entire gross domestic product.[112] Medical expenses account for over 60% of personal bankruptcies.[113] Despite the fact that the goals of health care reform—increasing access to and quality of health care services; ending unfair, discriminatory practices by insurance companies; and affordability[114]—are popular with a majority of Americans,[115] it took over a year of debate to pass the ACA.[116]

Part of the debate addressed the disparities between women's and men's access to health care. As Senator Barbara Mikulski of Maryland said, "For far too long, many insurance companies have treated simply being a woman as a pre-existing condition."[117] Women of childbearing age pay roughly 68% more out of pocket for health care needs.[118] Millions of young women go uninsured during their prime reproductive years, despite the fact that the average woman spends about 30 years trying not to get pregnant and three years either trying

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[110] Will Dunham, *Timeline: Milestones in Obama's Quest for Healthcare Reform*, REUTERS.COM (Mar. 22, 2010 1:50 AM), http://www.reuters.com/article/2010/03/22/us-usa-healthcare-timeline-idUSTRE62L0JA20100322.

[111] Jason Kane, *Health Costs: How the U.S. Compares with Other Countries*, PBS.ORG (Oct. 22, 2012, 10:30 AM), http://www.pbs.org/newshour/rundown/2012/10/health-costs-how-the-us-compares-with-other-countries.html.

[112] The World Bank, *Health Expenditure, Total (% of GDP)*, WORLDBANK.ORG, http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS (last visited Aug. 23, 2014).

[113] Theresa Tamkins, *Medical Bills Prompt More than 60 Percent of U.S. Bankruptcies*, CNNHEALTH.COM (June 5, 2009, 9:33 AM), http://www.cnn.com/2009/HEALTH/06/05/bankruptcy.medical.bills/.

[114] Democratic Policy Committee, *Affordable Care Act Detailed Summary* (Sept. 17, 2010), http://www.dpc.senate.gov/healthreformbill/healthbill95.pdf; U.S. Dep't of Health & Human Servs., *Strategic Goal 1: Strengthen Health Care*, HHS.GOV, http://www.hhs.gov/strategic-plan/goal1.html (last visited Aug. 23, 2014).

[115] Nate Silver, *Health Care Polls: Opinion Gap or Information Gap?*, FIVETHIRTYEIGHT.COM (Jan. 23, 2010, 5:29 PM), http://www.fivethirtyeight.com/2010/01/health-care-polls-opinion-gap-or.html.

[116] Dunham, *supra* note 110.

[117] Office of Sen. Barbara A. Mikulski, U.S. Sen. for Maryland, *Mikulski Amendment Guarantees Women Access to Affordable Preventive Care*, E-NEWSLETTER (Dec. 2009), http://www.mikulski.senate.gov/media/enewsletter/December-2009-Womens-Health-Amendment.cfm (last visited Aug. 24, 2014).

[118] Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, THE GUTTMACHER REP. ON PUB. POL'Y, Aug. 1998, at 5, *available at* http://www.guttmacher.org/pubs/tgr/01/4/gr010405.html.

to get pregnant, being pregnant, or immediately post-partum.[119] "Ninety-eight percent of sexually experienced American women have used a [birth control] method at some point in their lives."[120] Many women take birth control for reasons other than basic contraception; birth control pills are also known to treat dysmenorrhea, endometriosis, fibroids, and other health conditions.[121] For these reasons, Senator Mikulski and 61 of her Senate colleagues passed the Mikulski Amendment to include full coverage for women's preventive health services as part of Obamacare.[122]

The amendment, however, did not explicitly state which services constituted "women's preventive health."[123] Instead, Congress granted authority to the Department of Health and Human Services and its subdivisions (HHS) to make recommendations on which services should be included at no co-pay to each insured woman.[124] In August 2011, after nearly 18 months of rule promulgation, HHS announced its list, which included annual well-woman exams, including mammograms if applicable; screenings for HPV, HIV, and other sexually transmitted infections, as well as for interpersonal/domestic violence and gestational diabetes; and contraceptive methods and counseling to prevent unintended pregnancies.[125] The amendment and its preventive services went into effect in August 2012.[126] In its first year, nearly 30 million women benefitted from the Mikulski Amendment's coverage of women's preventive health services, including access to birth control—even before the launch of the full ACA.[127]

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[119] THE GUTTMACHER INST., PUBLICLY FUNDED CONTRACEPTIVE SERVICES IN THE UNITED STATES (Aug. 2014), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.pdf.

[120] Adam Sonfield, *The Case for Insurance Coverage for Contraceptive Services and Supplies Without Cost Sharing*, 14 GUTTMACHER POL'Y REV. 1, 9 (Winter 2011), *available at* http://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html.

[121] *Id.*

[122] Press Release, Office of Sen. Barbara A. Mikulski, Senate Approves Mikulski Amendment Making Women's Preventive Care Affordable and Accessible (Dec. 3, 2009), *available at* http://www.mikulski.senate.gov/media/record.cfm?id=320404.

[123] *Id.*

[124] *Id.*

[125] Press Release, Office of Sen. Barbara A. Mikulski, Mikulski Applauds Adoption of IOM Guidelines for Women's Preventive Health (Aug. 1, 2011), *available at* http://www.mikulski.senate.gov/media/pressrelease/8-1-2011-1.cfm.

[126] Press Release, Office of Sen. Barbara A. Mikulski, Mikulski, Sebelius Announce New Preventive Health Coverage for Women (July 31, 2012), *available at* http://www.mikulski.senate.gov/media/pressrelease/7-31-2012.cfm.

[127] Phil Galewitz, *8 Ways Young Women Benefit From Obamacare*, KAISERHEALTHNEWS.ORG (Sept. 24, 2013), http://www.kaiserhealthnews.org/stories/2013/september/25/8-things-young-women-obamacare.aspx.

B. ACA Litigation and the Circuit Split

Unfortunately, neither the potential nor the actual beneficial impact of the law on the people it was designed to help has deterred its detractors.[128] Almost immediately after the ACA was passed in 2010,[129] various parties began filing lawsuits to enjoin the law in whole or in part. While in 2012, a splintered Supreme Court upheld one of the law's major principles,[130] a barrage of litigation specific to the Mikulski Amendment's so-called "birth control mandate" continues. In a series of suits that worked their way through the federal courts, a diverse group of plaintiffs who do not approve of birth control—nonprofit groups, including religiously affiliated organizations;[131] for-profit corporations; and their owners—asserted that the corporations can exercise freedom of religion either on their own or on behalf of their owners, and that the

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[128] Beyond the birth control mandate cases discussed in this note, another circuit split developed in 2014 over whether the approximately 4.7 million Americans enrolled in the federal health insurance exchange (as opposed to exchanges set up by the states) are eligible for ACA subsidies in the form of tax credits. The D.C. Circuit followed the strict letter of the law and disallowed the subsidies, while the Fourth Circuit followed the spirit of the law and allowed the subsidies which were meant to expand the number of people covered by comprehensive health insurance. Sandhya Somashekhar & Amy Goldstein, *Federal Appeals Courts Issue Contradictory Rulings on Health-Law Subsidies*, THE WASHINGTON POST.COM (July 22, 2014), http://www.washingtonpost.com/national/health-science/federal-appeals-court-panel-deals-major-blow-to-health-law/2014/07/22/c86dd2ce-06a5-11e4-bbf1-cc51275e7f8f_story.html. Plaintiffs in the cases include "employers residing in states that did not establish Exchanges," who, if their employees are eligible for subsidies because the plaintiff employers fail to provide health insurance under the ACA, are "subject to certain penalties under the ACA that they would rather not face." Halbig v. Burwell, No. 14-5018, 758 F.3d 390, 392, 400-02 (D.C. Cir. July 22, 2014), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/10125254d91f8bac85257d1d004e6176/$file/14-5018-1503850.pdf. The D.C. Circuit has since vacated its ruling and scheduled an en banc hearing for December 2014. Jonathan H. Adler, *D.C. Circuit Grants en banc Rehearing in* Halbig v. Burwell, THE WASHINGTON POST.COM (Sept. 4, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/04/d-c-circuit-grants-en-banc-rehearing-in-halbig-v-burwell/. In the meantime, the Supreme Court has granted certiorari to the Fourth Circuit's *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014), which will be heard in early 2015. Adam Liptak, *Justices to Hear New Challenge to Health Law*, N.Y. TIMES (Nov. 7, 2014), http://www.nytimes.com/2014/11/08/us/politics/supreme-court-to-hear-new-challenge-to-health-law.html?emc=edit_th_20141108&nl=todaysheadlines&nlid=66879945&_r=0.

[129] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified throughout titles 26, 29, and 42 U.S.C.).

[130] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593-600 (2012) (upholding the requirement that individuals purchase health insurance or face a tax as a constitutional exercise of Congressional power to levy taxes).

[131] *See, e.g.*, Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111 (D.D.C. 2012), *appeal dismissed*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013); Legatus v. Sebelius, 901 F. Supp. 2d 980, 986 (E.D. Mich. 2012). Largely, early suits brought by religious institutions were dismissed for lack of ripeness. *See* NAT'L WOMEN'S LAW CTR., *supra* note 21, at 2, 17-18.

mandate that employers must provide their employees with health insurance plans that cover access to a wide range of birth control options violates the corporations' freedom of religion.[132] While the for-profit corporations who made it to the Supreme Court objected specifically to provision of coverage for four methods of contraception considered abortifacients under the owners' religious beliefs,[133] the religious objections of other plaintiffs extended across the full range of contraceptive options covered by the birth control mandate.[134] The corporate plaintiffs take issue not just with the mandate itself, but with the $100 per-day, per-employee tax imposed by the law on those employers who refuse to offer health insurance with coverage of the women's preventive health services.[135]

A circuit split developed in the summer of 2013 when the Third Circuit held that a for-profit corporation, Conestoga Wood Specialties, had no standing under either the First Amendment or RFRA to assert a freedom of religion claim against the women's preventive health provisions in the ACA,[136] while in *Hobby Lobby v. Sebelius*, the Tenth Circuit held the opposite (hereinafter referred to as *HL-10th Cir.* where necessary to distinguish it from the ultimate Supreme Court decision).[137] Later, the Sixth Circuit agreed with the Third Circuit and held that the for-profit Autocam Corporation lacked standing.[138] The D.C. Circuit split the difference, finding that while the plaintiff, closely held corporation Freshway Foods, had no standing, its owners, the Gilardi family, could bring a suit asserting their own rights under the First Amendment and RFRA as "an exception to the shareholder-standing rule."[139]

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[132] *See, e.g.*, Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 384 (3d Cir. 2013), *rev'd and remanded sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014); Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013), *vacated and remanded sub nom.* Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); Hobby Lobby Stores, Inc. v. Sebelius (*HL-10th Cir.)*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014).

[133] *Hobby Lobby*, slip op. at 2.

[134] *See, e.g.*, *Autocam*, 730 F.3d at 621; *Gilardi*, 733 F.3d at 1210.

[135] *HL-10th Cir.*, 723 F.3d at 1125 (citing 26 U.S.C.A. § 4980D(b)(1) and pointing out that Hobby Lobby faces a lower penalty if it drops coverage altogether than if it offers coverage that does not comply with the birth control mandate). Whether the penalty scheme instituting a higher fine for partial coverage than for no coverage makes sense is a subject for the next student's note.

[136] *Conestoga*, 724 F.3d at 384.

[137] *HL-10th Cir.*, 723 F.3d at 1121.

[138] *Autocam*, 730 F.3d at 625.

[139] *Gilardi*, 733 F.3d at 1216.

The *Autocam*, *Conestoga*, *Gilardi* (Freshway Foods), and *Hobby Lobby* plaintiffs are all closely held corporations and their owners, claiming that their respective for-profit equipment manufacturing,[140] cabinet manufacturing,[141] produce distributorship,[142] and craft-supply retailing[143] businesses can either independently assert freedom of religion, or can do so on behalf of their owners. Is this enough? Can the corporations and their owners "have their corporate veil and pierce it too"?[144] According to Constitutional requirements, to have standing a plaintiff must demonstrate he or she suffered an actual, concrete "injury in fact" somehow caused by the defendant, which relief from the court would cure.[145]

Three of the four circuit panels held that when the plaintiff is not a he or she, but an "it"—a for-profit corporation—it cannot hold a faith or religious belief that can be injured. In *Conestoga*, the Third Circuit applied *Bellotti*'s "purely personal" test to determine whether a corporation could be said to have the ability to assert the free exercise of religion.[146] The court considered the "inherently 'human'" nature of religious belief[147] and the "total absence of caselaw"[148] in support of religious rights for for-profit corporations, and concluded that such rights do not exist. The Third Circuit then went further, also denying standing for the corporation to assert religious rights on behalf of its owner via a "pass[] through theory," because "it rests on erroneous assumptions regarding the very nature of the corporate form,"[149] and "fails to acknowledge that, by incorporating their business, the [owners] themselves created a distinct legal entity that has legally distinct rights and responsibilities" separate from those of its owners.[150] The Third Circuit also held that the owners of the corporation had no viable RFRA claims, because the birth control mandate does

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[140] *Autocam*, 730 F.3d at 620.

[141] *Conestoga*, 724 F.3d at 381.

[142] *Gilardi*, 733 F.3d at 1210; *About Us*, FRESHWAY FOODS, http://www.freshwayfoods.com/about/ (last visited Aug. 30, 2014).

[143] Hobby Lobby Stores, Inc. v. Sebelius (*HL-10th Cir.*), 723 F.3d 1114, 1121 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014).

[144] *Id.* at 1179 (Matheson, J., concurring in part and dissenting in part).

[145] *Gilardi*, 733 F.3d at 1228 (Edwards, J., concurring in part and dissenting in part).

[146] *Conestoga*, 724 F.3d at 384.

[147] *Id.* at 385 (agreeing with the District Court below).

[148] *Id.* at 384-85.

[149] *Id.* at 387.

[150] *Id.* at 387-88.

not require any action by the owners, just the corporations.[151] In other words, the plaintiffs' theories incorrectly assume that the corporation and its owners are inseparable. "The [owners of the closely held corporation] chose to incorporate and conduct business through [their corporation], thereby obtaining both the advantages and disadvantages of the corporate form. We simply cannot ignore the distinction between [the two]."[152] The D.C. Circuit in *Gilardi* and the unanimous Sixth Circuit *Autocam* panel agreed with the Third Circuit's reasoning and held that the for-profit corporate plaintiff at bar had no standing to bring a religious freedom claim on its own or on behalf of its owners.[153] The Sixth Circuit agreed with *Conestoga* that the corporate owners could not claim a RFRA injury under the mandate,[154] but the D.C. Circuit allowed the personal RFRA claims of the corporate owners to proceed.[155]

In *HL-10th Cir.*, however, the en banc Tenth Circuit disagreed entirely, holding that the right to exercise one's religion is not "purely personal,"[156] per the *Bellotti* test of whether or not a constitutional right applies to corporations, which "depends on the nature, history, and purpose of the particular constitutional provision."[157] The *HL-10th Cir.* majority concluded that since the Supreme Court has previously recognized religious rights for nonprofit corporations such as churches, then naturally they must also extend to for-profit corporations.[158]

> [I]ndividuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights. With these propositions, the government does not seem to disagree. The problem for the government, it appears, is when individuals incorporate [as

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[151] *Id.* at 388-89.

[152] *Id.* at 388.

[153] Autocam Corp. v. Sebelius, 730 F.3d 618, 623-24 (6th Cir. 2013), *vacated and remanded sub nom.* Autocam Corp. v. Burwell, 134 S. Ct. 2901 (2014); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1214-15 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014).

[154] *Autocam*, 730 F.3d at 624.

[155] *Gilardi*, 733 F.3d at 1216.

[156] Hobby Lobby Stores, Inc. v. Sebelius (*HL-10th Cir.*), 723 F.3d 1114, 1133 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014).

[157] First Nat. Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978) (citing United States v. White, 322 U.S. 694, 698-701 (1944); California Bankers Assn. v. Shultz, 416 U.S. 21, 65-67 (1974); United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950)).

[158] *HL-10th Cir.*, 723 F.3d at 1134.

> for-profit businesses rather than charitable organizations]. . . . At that point, Free Exercise rights somehow disappear.[159]

The court's reasoning, however, is disingenuous; free exercise rights do not disappear upon incorporation of a for-profit entity. They remain where they belong: with the individual corporate owners, as the D.C. Circuit found.[160] The *HL-10th Cir.* majority further concluded that the for-profit corporate plaintiffs were likely to win under RFRA because of the pending injury—a large tax penalty—which they would face if they followed their religion and refused to comply with the birth control mandate.[161]

The losing party in each appeal filed for certiorari with the Supreme Court. The Court chose to hear consolidated arguments in only two cases to resolve this split: the Third Circuit *Conestoga* case and the Tenth Circuit *Hobby Lobby* case.[162]

C. The Supreme Court Hobby Lobby *Decision*

In 2014, a majority of Supreme Court Justices ruled in favor of the closely held corporations and their owners, finding the birth control mandate "unlawful"[163] but not necessarily unconstitutional: "Our decision on [the] statutory [RFRA] question makes it unnecessary to reach the First Amendment claim raised by" the plaintiffs.[164] Ultimately, the *Hobby Lobby* majority paraphrased *Gilardi*'s guess as to what the Court would rule: "*Citizens United* plus [RFRA] equals a corporate free-exercise right."[165] The majority held that the Hobby Lobby and Conestoga corporations did have standing as persons under RFRA.[166] According to the majority, RFRA protections extend to corporations in order "to provide protection for human beings,"[167] namely, the corporations' owners. The Court further held that in imposing the mandate, the government had substantially burdened the corporations' exercise of their religious beliefs,[168] and that while the government's interest in providing access to

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159 *Id.*

160 *Gilardi*, 733 F.3d at 1216; *see also infra* Part III.

161 *HL-10th Cir.*, 723 F.3d at 1126.

162 Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

163 *Id.* at 2, 49.

164 *Id.* at 49.

165 *Gilardi*, 733 F.3d at 1214.

166 *Hobby Lobby*, slip op. at 2.

167 *Id.* at 18.

168 *Id.* at 31-38.

birth control was compelling under RFRA,[169] it had failed RFRA's "least restrictive means" test.[170] The majority held that it would be less restrictive on the corporations' religions for the government to provide birth control itself[171] or to accommodate the for-profit corporations in the same manner as it accommodates religious nonprofit employers.[172] The majority apparently believed that either of these options would result in absolutely no burden on the ability of the plaintiff corporations' employees to fulfill their birth control needs.[173]

The Court seemingly thinks that its ruling is sufficiently narrow to protect the religious beliefs of the corporate owners without impinging upon the rights of the corporations' employees.[174] Unfortunately, as Part III of this note argues, the majority's focus on the corporations and their owners is myopic. It does not give proper consideration to the interests of individual employees.

III. WHY THE COURT WAS WRONG: COURTS SHOULD VALUE THE RIGHTS AND FREEDOMS OF NATURAL PERSONS OVER THOSE OF CORPORATE PERSONS

The Supreme Court has historically been more likely to apply equal protection under the Fourteenth Amendment to corporate persons than to natural persons (women and other groups) not explicitly singled out for protection in the Constitution, as exemplified by the line of women's rights cases in which challenged discriminatory laws have not received strict scrutiny.[175] As Justice Ginsburg's *Hobby Lobby* dissent points out, the majority has once again upheld the rights of corporations to the detriment of the rights of natural persons,[176] potentially "deny[ing] legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."[177] As discussed in Part I, the Constitution was written by and for the benefit of natural, not corporate, persons. While neither the founders nor the Constitution are perfect, the Constitution is elastic enough to

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169 *Id.* at 40.
170 *Id.*
171 *Id.* at 41.
172 *Id.* at 43.
173 *Id.* at 44-45.
174 *Id.* at 45-49; *see also id.* concurring slip op. at 2-4 (Kennedy, J., concurring).
175 *See supra* Part I.
176 *Hobby Lobby*, dissenting slip op. at 2 (Ginsburg, J., dissenting).
177 *Id.* dissenting slip op. at 8.

guarantee balanced freedom, equality, and protection to each of us, when properly applied. For the reasons set forth below, the rights and freedoms of natural persons should always take precedence over those of corporate persons.

A. A Question of Standing: For-Profit Corporations Do Not Have Religion

Corporations are not people, not in the sense that the founders intended when writing the Constitution. A corporation "is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural persons composing it."[178] The various lower courts that considered litigation around the birth control mandate by no means came to a consensus on the first impression question as to whether the above statement means a for-profit corporation has standing to assert a right to freedom of religion.[179] The *Hobby Lobby* majority pointed to the Dictionary Act (which notes that, "unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations . . . as well as individuals,"[180] for purposes of federal law) in declaring that the for-profit corporations were persons under RFRA, just as nonprofit religious institutions are.[181]

Justice Ginsburg's dissenting interpretation that the present context clearly indicates otherwise[182] is, however, much more logical and consistent with Court precedents. "The Court's 'special solicitude to the rights of religious organizations' . . . is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in 'the commercial, profit-making world.'"[183] The *Hobby Lobby* majority scoffed at the government's desired distinction

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[178] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 667 (1819) (Story, J., concurring).

[179] Rochelle Swartz, Note, *Bearing the Burden of Contraception: Why For-Profit Businesses Must Comply with the "Contraceptive Mandate,"* 18 FORDHAM J. CORP. & FIN. L. 1049, 1063 (2013).

[180] 1 U.S.C. § 1 (2012).

[181] *Hobby Lobby*, slip op. at 19-20 (majority opinion).

[182] *Id.* dissenting slip op. at 13 (Ginsburg, J., dissenting).

[183] *Id.* dissenting slip op. at 15-16 (citations omitted) (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012), and Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 337 (1987)).

between secular for-profit corporations and nonprofits,[184] but it is a serious and substantial distinction when discussing the nature of the freedom of religion. For-profit corporations must do much more than merely make a religious claim in order to be treated the same as a church or other religious institution.[185] As Justice Stevens stated in his *Citizens United* dissent, the "denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality."[186]

While nonprofit corporations, namely religious institutions, have successfully asserted freedom of religion, nonprofits' arguments for freedom of religion are fundamentally different than those of secular, for-profit corporations. "The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same."[187] As Tenth Circuit Chief Judge Briscoe made clear in her separate opinion, Hobby Lobby's certificate of incorporation does not mention religion,[188] and despite the sincere beliefs of the owners, the majority's adoption of plaintiffs' "faith-based company" label is without precedent in either federal jurisprudence or in Oklahoma state law which governs the corporate plaintiffs.[189]

Supreme Court "jurisprudence reflects the foundational principle that religious bodies—representing a communion of faith and a community of believers—are entitled to the shield of the Free Exercise Clause."[190] This is due mainly to the nonprofits' associational standing; "[t]hey come into court as representatives of their members."[191] Religious nonprofit corporations have standing to bring freedom of religion claims precisely because they were formed to promote a faith tradition

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[184] *Hobby Lobby*, slip op. at 19-20 (majority opinion).

[185] John B. Stanton, Comment, *Keeping the Faith: How Courts Should Determine "Sincerely-Held Religious Belief" in Free Exercise of Religion Claims by for-Profit Companies*, 59 LOY. L. REV. 723, 765-73 (2013).

[186] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 420 (2010) (Stevens, J., dissenting).

[187] Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1, 35 (1986) (Rehnquist, J., dissenting).

[188] Hobby Lobby Stores, Inc. v. Sebelius (*HL-10th Cir.*), 723 F.3d 1114, 1165 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014) (Briscoe, C.J., concurring in part and dissenting in part).

[189] *Id.* at 1166.

[190] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1213 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014).

[191] Ron Fein, *Why Every Single Supreme Court Justice Got Hobby Lobby Wrong*, JURIST.ORG (Sept. 18, 2014, 12:00 PM), http://jurist.org/hotline/2014/09/ron-fein-hobby-lobby.php.

and to represent the cohesive religious beliefs of their congregants, who are all of the same faith.[192] But when a secular, for-profit corporation brings a religious claim, it represents at best the faith and belief of only the corporate owners, which may be mixed in somewhere, with the real purpose for corporate formation: to make a profit.[193] Indeed, the *Hobby Lobby* majority opinion does not mention the corporations' beliefs without attributing them to their actual source, the corporations' owners: "The *owners* of the businesses have religious objections to abortion, and according to *their* religious beliefs . . . .";[194] "[t]he *Hahns* believe that . . . .";[195] "Hobby Lobby's statement of purpose commits the *Greens* to '[h]onoring the Lord . . . .'";[196] "the *Greens* believe that . . . ."[197] and so on. Furthermore, the majority opinion does not take the various religious beliefs of the employees into account. "The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention."[198]

The religious beliefs at issue in these cases are properly ascribed to the corporate owners,[199] but freedom to exercise one's religion does not mean the freedom to force it upon others, even upon one's employees.[200] For-profit corporations employing individuals of various faiths or of no faith should not be given the same standing as religious nonprofit institutions under RFRA; context clearly indicates that they should be treated differently.[201]

B. A Question of Merit: First Amendment and RFRA Tests

The First Amendment and RFRA set out different standards for free exercise claims. Under the First Amendment standard established in *Employment Division, Department of Human Resources of Oregon v. Smith*,[202] individuals and corporations must follow the same neutral law of general applicability as all other corporate actors, regardless of the

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192 *See id.*; *Hobby Lobby*, dissenting slip op at 16 (Ginsburg, J., dissenting).
193 *Gilardi*, 733 F.3d at 1227 (Edwards, J., concurring in part and dissenting in part).
194 *Hobby Lobby*, slip op. at 2 (majority opinion) (emphasis added).
195 *Id.* at 12 (emphasis added).
196 *Id.* at 14 (emphasis added) (quoting Hobby Lobby's complaint).
197 *Id.* (emphasis added).
198 *Id.* dissenting slip op. at 17 (Ginsburg, J., dissenting).
199 *See supra* Part II.B.
200 United States v. Lee, 455 U.S. 252, 261 (1982).
201 *Hobby Lobby*, dissenting slip op. at 13-17.
202 *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877-78 (1990).

personal beliefs of the owners.[203] "Congress responded to *Smith* by enacting RFRA,"[204] which ensures a higher standard of review.[205] Yes, the religious beliefs of the corporation's owners are protected by the First Amendment, but since the ACA and the birth control mandate apply generally to all employers with complete neutrality to the employers' religions, there is no First Amendment violation.[206]

> Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest."[207]

The Court upheld the plaintiffs' RFRA claims; its RFRA analysis, however, is flawed.

1. Substantial Burden

Courts take claims of threats to religious freedom seriously; unlike claims about gender discrimination,[208] RFRA claims get strict scrutiny.[209] Yet, the religious claim itself is rarely scrutinized. "This case is not about the sincerity of the [plaintiffs'] religious beliefs, nor does it concern the theology behind [their religion's] precepts on contraception. The former is unchallenged, while the latter is unchallengeable."[210] Once the Tenth and D.C. Circuits decided that the *HL-10th Cir.* corporate plaintiffs and the *Gilardi* corporate-owner plaintiffs, respectively, had standing, the courts gave them wide leeway in making claims about what constitutes a substantial burden on their sincerely held beliefs.[211] The Supreme Court followed suit in *Hobby Lobby*, ruling that the government substantially

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[203] Grote v. Sebelius, 708 F.3d 850, 859-60 (7th Cir. 2013) (Rovner, J., dissenting) (discussing United States v. Lee, 455 U.S. 252 (1982) and Braunfeld v. Brown, 366 U.S. 599 (1961)).

[204] *Hobby Lobby*, slip op. at 5 (majority opinion).

[205] *Id.* at 4-7.

[206] *See Grote*, 708 F.3d at 865.

[207] *Hobby Lobby*, dissenting slip op. at 8 (Ginsburg, J., dissenting) (quoting RFRA).

[208] *See supra* Part I.

[209] Hobby Lobby Stores, Inc. v. Sebelius (*HL-10th Cir.*), 723 F.3d 1114, 1147 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. June 30, 2014).

[210] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1216 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014).

[211] *HL-10th Cir.*, 723 F.3d at 1140-43; *Gilardi*, 733 F.3d at 1216-17.

burdened the corporations not by forcing them to violate their religious beliefs and provide contraceptive coverage, but by charging too high a tax penalty to allow the corporations to follow their religious beliefs rather than the mandate.[212] Is the plaintiff's religion being burdened, or merely its pocketbook? Courts are supposed to apply legal reasoning to the governmental action in order to determine whether it is a substantial burden on religious practice.[213] The majority instead declares that if the monetary penalty "do[es] not amount to a substantial burden, it is hard to see what would."[214] The majority thus "elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger."[215] Even if we grant that the corporations themselves do have a religious objection to contraceptives, the ACA mandate "carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans."[216]

The D.C. Circuit covered both sides of this argument in the *Gilardi* case. The majority held that "[t]he burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan,"[217] and that since the "basket" would contain other women's preventive services, it is immaterial that birth control isn't included.[218] Judge Edwards, on the other hand, likened the provision of health care under the birth control mandate to "a gift certificate to a supermarket where the recipient may purchase whatever is available."[219] Further, Judge Edwards advanced the point that the nature of the birth control benefit to employees is exactly the same as paying wages to the employees.[220] Neither the corporations nor their owners could forbid an employee from spending her wages on birth control; it

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[212] *Hobby Lobby*, slip op. at 38 (majority opinion).

[213] *Id.* dissenting slip op. at 21-22 (Ginsburg, J., dissenting).

[214] *Id.* at 2 (majority opinion).

[215] *Id.* dissenting slip op. at 22 (Ginsburg, J., dissenting).

[216] *Id.* dissenting slip op. at 23.

[217] Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1217 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014).

[218] *Id.* at 1223-24.

[219] *Id.* at 1238 (Edwards, J., concurring in part and dissenting in part).

[220] *Id.* at 1237-38.

is nonsensical to think of the contribution of a portion of that employee's wages toward a health care plan which she may or may not then use to obtain birth control as a more burdensome weight on the plaintiffs' religion.[221] Justice Ginsburg's *Hobby Lobby* dissent echoes this idea: because "decisions whether to claim benefits under the plans are made not by [the corporations], but by the covered employees,"[222] the government's requirement does not substantially burden the free exercise of religion by the corporations or their owners.[223]

2. The Least Restrictive Means to a Compelling Governmental Interest

The *Hobby Lobby* majority assumed that guaranteed access to birth control was a compelling governmental interest, yet ruled that the government had not used the least restrictive means to achieve that interest.[224] Nonetheless, the fact that employers are required to provide insurance as a benefit to their employees should alter the calculus of the religious analysis. The nature of the insurance marketplace makes employers' payments to insurers similar to their tax payments to state and federal governments: all taxpayer funds get pooled and no one can say exactly which taxpayer's dollar pays for what. In *United States v. Lee*, the Supreme Court held that an Amish farmer employing other Amish as farmhands and carpenters was not exempt from paying social security tax, despite his religious objection to the social security system.[225] The governmental interest was too important: "Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[226] The *Hobby Lobby* majority rejected a *Lee* analysis, distinguishing it as a tax case[227] and saying that even under RFRA, Lee would have lost because "there simply is no less restrictive alternative to the categorical requirement to pay taxes."[228]

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[221] *Id.*

[222] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, dissenting slip op. at 23 (U.S. June 30, 2014) (Ginsburg, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

[223] *Id.* dissenting slip op. at 20-23.

[224] *Id.* slip op. at 40 (majority opinion).

[225] United States v. Lee, 455 U.S. 252, 254-55 (1982).

[226] *Id.* at 260.

[227] *Hobby Lobby*, slip op. at 46-47.

[228] *Id.* at 47.

Lee is, however, the most proper analogy. The *Lee* Court held that "a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high."[229] The exact same can be said about the functionality of a statewide or nationwide insurance marketplace; in fact, the Roberts Court had previously upheld the ACA's individual mandate (requiring individuals to purchase and maintain health insurance coverage) as a constitutionally appropriate tax.[230] The *Hobby Lobby* majority does not explain why it sees the individual mandate as a tax, but not the birth control mandate. Instead, the majority offers two options for less restrictive means to meet the compelling government interest: the government can pay for the coverage of birth control,[231] or it can extend exemptions created to accommodate religious nonprofits to for-profit corporations, by which employees are supposed to remain able to access coverage for birth control.[232]

Unfortunately, it is unlikely that either of the majority's suggestions would actually be effective solutions. Justice Ginsburg points out that the "let the government pay" option could create an administrative nightmare for both the government and for women,[233] and that extending the exemptions might not guarantee that women are covered.[234] Indeed, a few days after *Hobby Lobby* was decided, the Court granted an injunction in *Wheaton College v. Burwell* so that the religiously-affiliated institution plaintiff need not comply with the government's requirements of notice to Wheaton's third-party insurer in order to be exempted from the birth control mandate.[235] "After expressly relying on the availability of the religious-nonprofit accommodation to hold that the contraceptive coverage requirement violates RFRA as applied to closely held for-profit corporations, the Court now, as the dissent in *Hobby Lobby* feared it might, retreats from that position."[236] Wheaton College claimed that filling out one side of the government's two-page form "would

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229 *Lee*, 455 U.S. at 258-59.
230 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593-600 (2012).
231 *Hobby Lobby*, slip op. at 41.
232 *Id.* at 43.
233 *Id.* dissenting slip op. at 28-29 (Ginsburg, J., dissenting).
234 *Id.* dissenting slip op. at 29-31.
235 Wheaton Coll. v. Burwell, No. 13A1284, slip op. at 1 (U.S. July 3, 2014).
236 *Id.* at 3 (Sotomayor, J., dissenting) (internal citation omitted).

make it complicit in the provision of contraceptive coverage, in violation of its religious beliefs,"[237] but the dissent correctly noted that birth control coverage for Wheaton employees would, "in every meaningful sense . . . result from the relevant law and regulations," not the completion of the form.[238] In contrast, lack of a completed form is likely to result in Wheaton employees losing birth control coverage entirely.[239] By deciding that Wheaton could avail itself of the exemption by notifying HHS rather than its insurer, the Court rewrote the HHS regulations and potentially denied thousands if not millions of women the benefits of the birth control mandate.[240] "A 'least restrictive means' cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their . . . employers can adhere unreservedly to their religious tenets."[241]

C. A Question of Equal Protection: The Courts Must Properly Weigh the Rights of Employees of For-Profit Corporations

Regardless of the religious convictions of a corporation's owners, allowing that corporation to curtail its employees' access to health care means the employees will have been denied equal protection under the Fourteenth Amendment and the ACA.[242] The plaintiff corporations make First Amendment and RFRA claims based on the Free Exercise Clause.[243] The government defines its interests in general terms of public health and welfare, women's autonomy, and gender equality.[244] Neither specifically addresses the rights of the employees—the women and families who are undoubtedly persons with full constitutional protections and who are affected by the corporation's decision to reject the provision of mandated health care benefits. The plaintiff corporations and their owners clearly see themselves as the victims of a tyrannical government. But unless someone brings the disadvantaged employees—women and families—into the equation, justice

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[237] *Id.* slip op. at 6.

[238] *Id.* at 10.

[239] *Id.* at 13-16.

[240] *Id.*

[241] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, dissenting slip op. at 28 (U.S. June 30, 2014) (Ginsburg, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

[242] *See* Benedict, *supra* note 30, at 117-19.

[243] *Id.* at 79-84.

[244] *Id.* at 114-16.

will not be done. "Employee interest in maintaining coverage equivalent to that of her counterparts employed by non-religious corporations is a strong factor that adds weight to the government's compelling interest,"[245] because if an employee's access to the full range of preventive health services depends upon whether or not her corporate boss' religion tolerates birth control, then she is not being treated equally under the law.[246] "Working for Hobby Lobby or Conestoga . . . should not deprive employees of the preventive care available to workers at the shop next door."[247]

The Supreme Court has held that "women (and men) have a constitutional right to obtain contraceptives."[248] The birth control mandate, and the ACA as a whole, include health care benefits that are meant to be available to all Americans regardless of the religious beliefs of their employer,[249] and the *Hobby Lobby* Court agreed that access to birth control is a compelling state interest.[250] As Justice Kennedy wrote in his *Hobby Lobby* concurrence:

> Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.[251]

While the constitutional right to easily access birth control does not necessarily guarantee a constitutional right to subsidized birth control, the mandate does not require the plaintiffs to make direct payments for their employees' birth control, but merely to include coverage of birth control under the group health plan.[252] The majority is wrong to raise the corporations' newfound statutory rights above the constitutional rights of their employees, and the majority is naïve in thinking

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[245] *Id.* at 117.

[246] *Id.*

[247] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, dissenting slip op. at 32 (U.S. June 30, 2014) (Ginsburg, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

[248] *Id.* slip op. at 39 (majority opinion) (discussing *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965), which overturned a state law forbidding the use of contraceptives, in violation of the protections of the First, Fourth, Fifth, and Ninth Amendments); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972) (overturning a Massachusetts state law that violated the Fourteenth Amendment by allowing distribution of contraceptives to married but not unmarried persons).

[249] Benedict, *supra* note 30, at 117-18.

[250] *Hobby Lobby*, slip op. at 40.

[251] *Id.* concurring slip op. at 4 (Kennedy, J., concurring).

[252] *See supra* notes 219-21 and accompanying text.

they simply shifted the cost burden of birth control onto the government or insurers. The *Hobby Lobby* and *Wheaton* dissenters are most likely correct that employees' access to birth control will be truncated. Moreover, allowing so-called "faith based companies" to violate the birth control mandate defeats the statutory intention of the ACA and further harms women as a class. The "compelling interests protected by the mandate can only be served if women have easy access to contraceptives as a practical matter."[253]

Assuming that corporations have the same rights and protections as natural persons, their rights and protections must be balanced against the rights and protections of natural persons. Courts should adopt a new rule to properly balance the rights of humans against the rights of corporations. In situations like the birth control mandate cases, where the rights of a corporate person would be in direct conflict, yet of equal and balanced weight, with those of natural persons, such a tie should go to the natural persons, by virtue of the natural person's humanity. Because a corporation is incorporeal, damages and injuries done to it pale in comparison to the damages and injuries it can inflict upon natural persons.[254] A corporation can generally mitigate any harm done to it by changing business tactics, thanks to the "special privileges or immunities"[255] of the corporate form, whereas a natural person denied a remedy by the court—or unable to access the court through lack of money

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[253] Benedict, *supra* note 30, at 120.

[254] This is most obvious when it comes to environmental hazards caused by corporate negligence, such as homes, lives, and livelihoods destroyed by the 1972 Buffalo Creek flood or the 2014 Freedom Industries chemical spill. *See Buffalo Creek Disaster*, W. VA. DIV. OF CULTURE AND HISTORY (2014), http://www.wvculture.org/history/buffcreek/bctitle.html; *CSB Investigation Finds No Record of Inspections on Freedom Industries Chemical Storage Tanks*, U.S. CHEMICAL SAFETY BOARD (July 16, 2014), http://www.csb.gov/csb-investigation-finds-no-record-of-inspections-on-freedom-industries-chemical-storage-tanks-leak-in-bottom-of-tank-that-contaminated-charleston-wv-drinking-water-resulted-from-corrosion-caused-by-water-seeping-through-holes-in-tank-roof-/. Further, punishment for corporate crimes is almost non-existent, even when it results in deaths, or in billions of dollars in damage. HARTMANN, *supra* note 14, at 183-86. Even when punishments are meted out to corporations, they may be inconsistent. "U.S. Attorney General Eric Holder called the wide-ranging settlement [BP faced for the 2006 oil spill in the Gulf of Mexico] . . . . 'both the largest single criminal fine . . . and the largest total criminal resolution' in U.S. history," but BP will not necessarily "be debarred from contracting with the federal government." Ian Johnston & James Eng, *BP to Pay $4.5 Billion, Plead Guilty to Manslaughter in Gulf Of Mexico Oil Spill*, NBCNEWS.COM (Nov. 15, 2012, 1:13 AM), http://usnews.nbcnews.com/_news/2012/11/15/15181916-bp-to-pay-45-billion-plead-guilty-to-manslaughter-in-gulf-of-mexico-oil-spill?lite.

[255] First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 827 (1978) (Rehnquist, J., dissenting).

or power—remains injured.[256] "When one party [(a corporation)] has dramatically more power, property, and wealth than another [(a corporate employee)], it makes no sense to assert that both require equal protection."[257] Such a rule is necessary to ensure human persons can enjoy their constitutional rights. Justice demands that courts give the natural person the edge, because she has been historically disadvantaged in comparison to the corporate person. Advancing corporate rights to the detriment of women's rights is patently unfair, and will further disadvantage women as a class, particularly low income women and women of color who already face health disparities and lack of access to appropriate health care.[258]

Moreover, when facing corporate challenges to laws and regulations, the government should be allowed to present arguments not just on the compelling *government* interest, but on the compelling interests of the people who would be affected by corporate rejection of the law.[259] When considering questions of standing, the courts allow churches and other religious nonprofits to bring free exercise and establishment claims on behalf of their members, because the religious nonprofit exists for the religious needs of those members.[260] Similarly, a secular nonprofit can bring a claim related to its services on behalf of the people it serves,[261] and a state can bring a claim when "the health, comfort, and welfare of its citizens . . . are implicated."[262] In each of these instances, the members of the religious faith, the people served by the nonprofit, and the citizens of the state all have a voice in court only through their affiliation; if the suit is successful, the members, people, and citizens all benefit from the outcome.[263] Unfortunately, in the cases fighting the birth control mandate, the actual users of birth control have no voice.[264] The only organization that could immediately represent the corporate

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[256] HARTMANN, *supra* note 14, at 94.

[257] *Id.*

[258] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, dissenting slip op. at 23-24 (U.S. June 30, 2014) (Ginsburg, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf; Cynthia Greenlee, *Hobby Lobby Ruling Opens the Door to 'Method Discrimination' for Black Women*, THE ROOT.COM (July 3, 2014, 4:21 PM), http://www.theroot.com/articles/culture/2014/07/black_women_s_reproductive_health_could_now_be_at_greater_risk.html?wpisrc=newstories.

[259] Benedict, *supra* note 30, at 115-19.

[260] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925); *see also* Fein, *supra* note 191.

[261] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481 (1965); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 458-59 (1958); *see also* Fein, *supra* note 191.

[262] 42 A.L.R. FED. 23 § 2[a] (1979).

[263] *See* Fein, *supra* note 191.

[264] *See* Benedict, *supra* note 30, at 117.

employees in need of birth control is the government. The government should be allowed to stack on the scales next to its compelling interests of public health and welfare, women's autonomy, and gender equality, the more particularly compelling interests of the employees: equal protection interests, wage and compensation interests, and yes, diverse religious freedom interests.[265] Surely, that is compelling enough to outweigh the nuisance to the corporate owners' religious interests.

Allowing the government to represent not just its own interests, but the interests of the people its legislation and regulations are intended to help, essentially adding these groups as a class action plaintiff to the government interest already present in a given suit, would help ensure that the rights of natural persons are in fact protected. Such an allowance would also more closely align with the intent of the Fourteenth Amendment. It has been said that the flaw in the Supreme Court's interpretation of the Fourteenth Amendment is that it offers not "equal protection *of* law," as the amendment plainly states, but "equal protection *against* law."[266] *Hobby Lobby* would seem to fall into this category: the employees are denied the beneficial protection of the ACA, but the corporations at bar are granted protection against it. Imagine if instead, the government were allowed to fully enforce the protections *of* the laws. For example, the government could represent the actual people whose lives and homes would be affected by a corporation's toxic chemical spill when enforcing EPA regulations. Instead of discussing vague ideas of clean air or clean water, the court could also consider the actual people who rely on the clean air and water, and are guaranteed it by statute and regulation. The government and the people may not win in every case, but at least the courts would be forced to confront the implications of holding corporate rights over those of natural persons. Such a power should not, however, preclude or preempt the rights of the people to sue on their own behalf; if the government neglects to protect their interests in a suit, the people should not be left without remedy.

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[265] *Id.* at 115-19.

[266] Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79, 80-81 (Jack M. Balkin & Reva B. Siegel, eds., 2009).

D. A Question of Consequences: Now That Corporations Have Religion, What's Next?

Justice Ginsburg is right to warn that "[t]he Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects."[267] Holding corporate rights as equal to the rights of natural persons may mean that eventually only corporations are able to exercise or enjoy their rights.[268] If for-profit corporations are allowed to use RFRA as an unquestioned defense against the birth control mandate, the door is open for corporations to claim that other health services—or even health care itself—violate their religious beliefs, therefore they should not have to provide insurance coverage for employees.[269] Which services would be the next ones dropped from a devout corporation's health plan? Justice Ginsburg pointed out that some religions oppose blood transfusions, antidepressants, and vaccinations;[270] *Hobby Lobby* could also preclude insurance coverage for HIV treatment, mental health services, or addiction rehabilitation. What if the corporation's religion approves of health care, but not Title VII or Title IX? What if the corporation's religion causes it to violate federal drug laws—not because the corporation or its customers are personally using a sacred drug in religious ceremonies,[271] but because the corporation's religion dictates that it should be allowed to sell their "religious product" to the general public?

And, despite the majority's assurances that it is "unlikely" publicly traded corporations will ever avail themselves of RFRA protections, they did not limit the decision to closely held corporations like the plaintiffs at bar.[272] *Citizens United* did not make such a distinction about speech; there is no reason to think the majority will decide that such a

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[267] Burwell v. Hobby Lobby Stores, Inc., No. 13-354, dissenting slip op. at 19 (U.S. June 30, 2014) (Ginsburg, J., dissenting), *available at* http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf.

[268] Sprague & Wells, *supra* note 33, at 550-51.

[269] *Hobby Lobby*, dissenting slip op. at 19-20, 27-31.

[270] *Id.* dissenting slip op. at 33.

[271] *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (affirming that petitioner church correctly invoked RFRA to protect its use of hallucinogenic tea as communion against enforcement of federal Controlled Substances Act).

[272] *See Hobby Lobby*, slip op. at 20 (majority opinion) ("No known understanding of the term 'person' includes *some* but not all corporations."); *id.* at 29 ("[W]e have no occasion in these cases to consider RFRA's applicability to such [publicly traded] companies.").

distinction is desirable when it comes to religion. If Coca-Cola decides to bring back the original formula for their product, which included cocaine,[273] because their religion dictates that the original formula was more godly, would the courts question this belief? This may sound too far-fetched an example to give real consideration—at least, until you find out that Coca-Cola's founders "felt like early Christian martyrs in a way, fighting for a just cause."[274]

To avoid the slippery slope, we the (human) people may have to take matters back into our own hands. RFRA is, after all, an act of Congress; Congress could amend its scope to include only natural persons. Though that has not yet been proposed, Senator Patty Murray and forty-five co-sponsors introduced the Protect Women's Health from Corporate Interference Act[275] within days of the *Hobby Lobby* decision, as "[i]t is imperative that Congress act to reinstate contraception coverage and to protect employees . . . from other attempts to take away coverage for other health benefits to which such employees and dependents are entitled under Federal law."[276] Local ordinances have been passed to "reject[] the notion of corporate personhood,"[277] and there is a movement underway to amend state constitutions to do the same.[278] In 2013, joint resolutions were introduced in both the House and Senate "[p]roposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate corporations."[279] Another amendment proposal was introduced in the House to ensure "that the rights extended by the Constitution are the rights of natural persons only."[280]

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[273] Jill Richardson, *"Original Coca-Cola Had a Very Small Amount of Cocaine": An Expert Explains How the Company's Ruthless Business Tactics Helped Create The World's Most Recognizable Brand*, SALON.COM (May 22, 2013, 1:27 PM), http://www.salon.com/2013/05/22/original_coca_cola_had_a_very_small_amount_of_cocaine_partner/.

[274] *Id.*

[275] S. 2578, 113th Cong. (2014), *available at* https://beta.congress.gov/bill/113th-congress/senate-bill/2578/text.

[276] *Id.* at § 3(18).

[277] HARTMANN, *supra* note 14, at 277.

[278] *Id.* at 291-93, 315-16; *see also MTA Coalition*, MOVE TO AMEND, https://movetoamend.org/about-us (last visited Aug. 17, 2014) ("Formed in September 2009, Move to Amend is a coalition of hundreds of organizations and hundreds of thousands of individuals committed to . . . an amendment to the U.S. Constitution to unequivocally state that inalienable rights belong to human beings only.").

[279] S.J. Res. 18, 113th Cong. (2013), *available at* https://beta.congress.gov/bill/113th-congress/senate-joint-resolution/18/text; H.R.J. Res. 21, 113th Cong. (2013), *available at* https://beta.congress.gov/bill/113th-congress/house-joint-resolution/21/cosponsors.

[280] H.R.J. Res. 29, 113th Cong. (2013), *available at* https://beta.congress.gov/bill/113th-congress/house-joint-resolution/29.

Unfortunately, to date, neither the Protect Women's Health from Corporate Interference Act nor the proposed amendments have gathered much political momentum.

CONCLUSION

The 2014 *Hobby Lobby* decision stands as another link in a long line of cases in which the Court has treated the claims of individuals unfavorably in comparison with its treatment of corporations. The Constitution and the Fourteenth Amendment were designed to ensure the equality and freedom of human beings, not corporations,[281] and this protection should never be extended to corporations to the detriment of human beings. The intent of the ACA's birth control mandate was to ensure women equal access to preventive health care. Corporate employers should not be allowed to interfere with their employees' health care, regardless of religious belief. In *Hobby Lobby*, the Court missed the opportunity to reverse its practice of holding corporate rights more dearly than those of individuals; like its wrongheaded 19th Century decisions regarding the rights of women and others, it must be overturned. As Justice Ginsburg told a reporter in the wake of the decision: "I am ever hopeful that if the Court has a blind spot today, its eyes will be open tomorrow."[282]

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[281] Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85-86 (1938) (Black, J., dissenting).

[282] Laura Bassett, *Ruth Bader Ginsburg: 5 Male Justices Have A 'Blind Spot' On Women's Issues*, HUFFINGTONPOST.COM, http://www.huffingtonpost.com/2014/07/31/ginsburg-hobby-lobby_n_5636254.html (last updated July 31, 2014, 8:59 PM) (quoting from Katie Couric's interview with Justice Ginsburg).

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