TRANSFORMING THE BUSINESS CORPORATION INTO A RELIGIOUS ASSOCIATION: HOW *BURWELL V. HOBBY LOBBY STORES, INC.* MADE THE RELIGIOUS VALUES OF FICTIONAL PERSONS MEAN MORE THAN THE REPRODUCTIVE RIGHTS OF WOMEN

RONI ADIL ELIAS[∞]

I.
INTRODUCTION

In *Burwell v. Hobby Lobby Stores, Inc.*,[1] the Supreme Court held that the enforcement of a regulation[2] under the Patient Protection and Affordable Care

∞ I would like to express my sincere appreciation for the entire Florida A&M University College of Law faculty and staff. To Dean Darryll K. Jones, Professor Patricia Broussard, Professor Omar Saleem, Professor Alexis Leventhal, Professor Robert Minarcin, Professor Norman Hull, Professor Carlos Woody, Professor Ka'Juel Washington, Professor Nicola Boothe-Perry, and Professor Joseph Richard Hurt, a special thanks for their guidance, time, and teachings

Act of 2010 ("ACA")[3] violated religious liberties protected by the Religious Freedom Restoration Act ("RFRA")[4] by compelling a closely held, for-profit corporation to pay health insurance premiums for contraceptives when the shareholders of the corporation opposed the use of those contraceptives on religious grounds. Because it touched on so many legal issues, the majority opinion, written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, raises many questions about diverse foundational constitutional principles. But the core questions—raised by the majority opinion and Justice Ginsburg's vigorous dissent—concern how to balance the religious liberties of corporate entities guaranteed by the Constitution and RFRA with women's[5] constitutionally protected reproductive freedoms and the social policies behind the ACA.

This article examines the reasoning behind the majority's approach to assessing that balance and concludes that the majority opinion reflects a historically persistent tendency to discount the value of women's reproductive liberties, a discount unwarranted by the meaning of the statutes at issue or by the constitutional principles implicated by those statutes. The majority accomplishes this result by two principal miscalculations: (1) overestimating the extent to which a for-profit business corporation can be involved in exercising religious freedom, regardless of who its owners or managers are or what their religious beliefs might be; and (2) underestimating the burden its holding places on women's reproductive liberties and on the health care policy objectives of the ACA. Because of these miscalculations, the majority opinion reaches a

and for being remarkable people. I am so blessed and greatly appreciate the love of my life, M.G.S, for her love and for making me smile every minute of every day. I also would like to thank and appreciate Dr. Elmira Mangum, Distinguished Educator of the Year, President, Florida A&M University, for her continuous support of the College of Law and its students. Provost and Vice-President for Academic Affairs and Professor of Law, Marcella David, I thank as her passion drives all around her to perform at a higher level and to make a difference. To Doctors Aida and Adil Elias, my first great teachers in life, I thank you and appreciate more than words can ever say. I am truly grateful to the best brother anyone could be blessed to have, my brother, Pierre A. Elias. To the *N.Y.U. Review of Law and Social Change*, for their non-stop attention to detail, I appreciate and thank them. I thank Professor LeRoy Pernell for his countless efforts and all he has done while Dean for the Florida A&M University College of Law and its students.

1. 134 S. Ct. 2751 (2014).

2. *See* 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

3. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the Internal Revenue Code and 42 U.S.C. (2012)).

4. 42 U.S.C. § 2000bb-1(a)–(b) (2012).

5. People other than women can become pregnant, including transgender men and some nonbinary individuals. *See generally* Alexis D. Light, Juno Obedin-Maliver, Jae M. Sevelius & Jennifer L. Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 OBSTETRICS & GYNECOLOGY 1120 (2014). This article follows the practice of the regulations and guidelines at issue in referring to "women's" health services, *see, e.g.*, HEALTH RES. & SERVS. ADMIN., WOMEN'S PREVENTATIVE SERVICES GUIDELINES, http://hrsa.gov /womensguidelines (last visited Jan. 30, 2016), but acknowledges that the availability of contraception and reproductive care is a matter of concern for all persons who can become pregnant.

conclusion that effectively privileges a highly attenuated religious interest over the interest of women in maintaining their reproductive freedom and over the government's constitutional interest in providing equal protection of that freedom. The analysis that the majority opinion employs, and the result it reaches, make the right to oppose women's reproductive freedom on religious grounds more important than women's right to such freedom.

This article focuses its analysis on the portions of the majority opinion that involve each of the two miscalculations identified. This focus distinguishes this article from other recent scholarship regarding *Hobby Lobby* that has emphasized the policy consequences of the decision[6] or broadly-framed constitutional and statutory considerations.[7]

Part I of the article provides a summary of the background to the issues presented in *Hobby Lobby*. Part II challenges the majority's conclusion that a for-profit business corporation can exercise religious freedom when its owners have strongly-held personal religious beliefs. This article argues that the structure of any for-profit business entity prevents such an entity from being a religious actor in any legally meaningful sense. In Part III, this article challenges the majority's conclusion that the government can promote universal health insurance coverage for contraception for women through alternatives to the ACA's requirement that employers pay for such coverage when they provide health insurance plans to their employees. This article contends that this conclusion about alternative means to accomplish the contraceptive requirement is possible only because the majority fundamentally misunderstands the nature of the health insurance system created by the ACA and how that system is

6. *See, e.g.*, I. Glenn Cohen, Holly Fernandez Lynch & Gregory D. Curfman, *When Religious Freedom Clashes with Access to Care*, 371 NEW ENG. J. MED. 596 (2014) (predicting that *Hobby Lobby* might deter policy compromise in the future because of how the administration's compromise with religious non-profits was used to demonstrate that it had not selected the least restrictive means in dealing with for-profit corporations); Alex J. Luchenister, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63 (2015) (suggesting legislative revisions to RFRA to avoid possible adverse consequences on employment anti-discrimination laws).

7. *See, e.g.*, Richard A. Epstein, *The Defeat of the Contraceptive Mandate in* Hobby Lobby*: Right Results, Wrong Reasons*, 2013–2014 CATO SUP. CT. REV. 35 (2014) (arguing that the government has no compelling interest in providing reproductive healthcare); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014) (arguing that the *Hobby Lobby* accommodation violates the Establishment Clause by shifting costs to third parties who do not share the accommodated religious belief); Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 HARV. WOMEN'S L.J. 35 (2015) (arguing that the broad, vague religious exemption standard utilized in *Hobby Lobby* will not survive application to future cases); Neil Siegel & Reva Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025 (2015) (arguing that the government's compelling interest in guaranteeing reproductive healthcare should be viewed as benefitting both individuals and communities); Nomi Maya Stolzenberg, *It's About Money: The Fundamental Contradiction of* Hobby Lobby, 88 S. CAL. L. REV. 727 (2015) (arguing that Hobby Lobby's claim that the ACA forced it to facilitate sinful activity applies with equal force to any alternatives and that therefore there is no less restrictive means for the government to satisfy its compelling interest).

structured to protect the preventative health care needs of women. When viewed together, the majority's two miscalculations reflect a common intellectual theme: an impulse to oversimplify complex social and economic relationships and the legal structures that make those relationships possible. This impulse leads the majority to perceive a conflict between the rights of individuals where no such conflict exists and to resolve that imagined conflict by privileging a religious opposition to reproductive freedom over the interests of women in pursuing gender equality.

II.
THE BACKGROUND TO THE *HOBBY LOBBY* DECISION

The questions raised in *Hobby Lobby* involve the intersection of two statutory schemes with the individual circumstances of the two corporate plaintiffs. Understanding precisely how those questions were presented requires an understanding of the relevant portions of the two statutes and of the factual circumstances of the two corporations. Without such an understanding, it is too easy to turn the concrete questions in the case into an exercise in political philosophy or abstract theorizing. This Part provides the necessary background.

A. The ACA and the Contraceptive Requirement

The challenge in *Hobby Lobby* arose from a mandate for health insurance coverage under the ACA, which required employers with over fifty employees to provide group health plans with minimum essential coverage.[8] Employers who do not meet this requirement face substantial fines.[9]

The minimum essential coverage required by the ACA includes preventative services that must be provided with no cost sharing by the insured person.[10] The ACA does not specify which preventative services are essential; Congress delegated that determination to the Health Resources and Services Administration ("HRSA"), a division of the Department of Health and Human Services ("HHS").[11] HRSA adopted recommendations about the required preventative services from the Institute of Medicine, a non-profit group of volunteer advisers.[12] Regarding contraceptives for women, HRSA provided that all FDA-approved contraceptives were included in the required preventative services for women.[13]

---

8. 26 U.S.C. §§ 5000A(f)(2), 4980H(a), (c)(2) (2012).

9. 26 U.S.C. § 4980D(a)–(b) (2012).

10. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014) (citing 42 U.S.C. § 300gg-13(a)(4) (2012)).

11. *Id.*

12. *See* 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012).

13. *Id.* at 8725; *see also* HEALTH RES. & SERVS. ADMIN., WOMEN'S PREVENTATIVE SERVICES GUIDELINES, http://hrsa.gov/womensguidelines (last visited Jan. 30, 2016).

HHS authorized the HRSA to provide exemptions from the contraceptive mandate for "religious employers."[14] Such employers are defined by reference to the Internal Revenue Code[15] and include "churches, their integrated auxiliaries, and conventions or associations of churches," and "the exclusively religious activities of any religious order."[16] Certain religious organizations are also entitled to exemption.[17] When an employer invokes this exemption, the issuer of its health insurance plan "must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries."[18]

B. RFRA: The Statutory Foundation for the Challenge to the Contraceptive Mandate

Congress enacted RFRA to provide statutory authority for a conception of constitutional religious liberty that had been rejected by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*.[19] Before *Smith*, when determining whether a challenged government action violated the Free Exercise Clause of the First Amendment, federal courts employed a balancing test under which they determined whether the challenged action imposed a substantial burden on free exercise and, if it did, whether the that action was necessary to serve a compelling government interest.[20] In *Smith*, the Court abandoned this approach, holding that a person's free exercise rights are not compromised by a rule of general application that is neutral with respect to religion.[21]

Responding to *Smith*, RFRA provides 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 "demonstrates that application of the burden to the person" is "in furtherance of a compelling

14. 45 C.F.R. § 147.131(a) (2014).

15. *Id.* (defining "religious employer" as a non-profit entity that "is referred to" in 26 U.S.C. § 6033(a)(3)(A)(i), (iii)).

16. 26 U.S.C. § 6033(a)(3)(A)(i), (iii) (2012).

17. *See* 45 C.F.R. § 147.131(b) (2014); 78 Fed. Reg. 39,870, 39,874 (July 2, 2013).

18. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763 (2014) (citing 45 C.F.R. § 147.131(c) (2014)). Since *Hobby Lobby*, the regulations governing the mandate have changed. This article discusses the regulatory regime as it existed at the time of the decision.

19. 494 U.S. 872 (1990).

20. *Hobby Lobby*, 134 S. Ct. at 2760.

21. *See Smith*, 494 U.S. at 878–79 (stating that "more than a century of our free exercise jurisprudence contradicts" the argument that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"); *see also* City of Boerne v. Flores, 521 U.S. 507, 514 (1997) (citing to *Smith* for the proposition that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest").

governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."[22]

C. The Corporations and Their Challenges

The Court's decision in *Hobby Lobby* involved two consolidated cases, one from the Third Circuit and one from the Tenth Circuit: *Conestoga Wood Specialties Corporation v. Secretary of the U.S. Department of Health & Human Services*[23] and *Hobby Lobby Stores, Inc. v. Sebelius*.[24] In each, the plaintiffs were closely held, for-profit corporations whose owners professed a religious objection to the contraceptive mandate and asserted their rights under RFRA to claim an exemption from that mandate.[25] The Court's decision importantly involved particular facts about the owners of the plaintiff corporations, their religious beliefs, and how they have integrated those beliefs into the operations of their business corporations.

Conestoga Wood Specialties is a Pennsylvania for-profit corporation with 950 employees owned by the Hahn family, who control all voting shares and the board of directors.[26] The Hahns are Mennonites.[27] As the Hahns understand it, their faith requires them to operate Conestoga under Christian moral principles and to earn a reasonable profit in a manner that reflects their personal Christian heritage.[28] Along these lines, Conestoga has issued a "Visions and Values Statement," which provides that Conestoga operates under the Hahns' Christian faith.[29]

The Hahns' religious tenets include definitive opinions about the morality of contraception. As Mennonites, the Hahns believe that "life begins at conception"[30] and that the fetus "in its earliest stages" shares humanity with its parents.[31] This belief extends to Conestoga, whose board of directors adopted a "Statement on the Sanctity of Human Life."[32] According to that statement, being involved with contraception that terminates life after conception is a "sin against God to which they are held accountable."[33] Thus, the Hahns contend that it would contravene their religious beliefs for them "to intentionally participate in,

22. 42 U.S.C. § 2000bb-1(a), (b) (2012).
23. 724 F.3d 377 (3d Cir. 2013).
24. 723 F.3d 1114 (10th Cir. 2013) (en banc).
25. *Conestoga Wood*, 724 F.3d at 381–82; *Hobby Lobby*, 723 F.3d at 1120.
26. *Hobby Lobby*, 134 S. Ct. at 2764.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 2765 (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 & n.5 (3d Cir. 2013)).

pay for, facilitate, or otherwise support" drugs that prevent a fertilized egg from developing.[34]

Before the ACA, Conestoga's health insurance plan did not offer coverage for contraceptives that the Hahns believed to be abortifacients.[35] After the enactment of the ACA, the Hahns sued HHS, seeking an injunction preventing the enforcement of the mandate against Conestoga.[36] The district court denied a preliminary injunction, and the Third Circuit affirmed, principally on the ground that a for-profit corporation cannot engage in religious exercise within the meaning of RFRA or the First Amendment.[37]

Likewise, David and Barbara Green and their three children own Hobby Lobby, an arts-and-crafts retail chain with five hundred stores and 13,000 employees.[38] One of their children owns a company, Mardel, which operates a chain of Christian bookstores, with thirty-five locations and over four hundred employees.[39] Both Hobby Lobby and Mardel are organized as for-profit corporations under Oklahoma law.[40] Hobby Lobby is owned and controlled by the members of the Green family, who also fill principal positions in executive management.[41]

Hobby Lobby has adopted a "statement of purpose" which "commits the Greens to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.'"[42] According to Hobby Lobby, this commitment leads the Greens to lose revenue: They close their stores on Sundays and refuse to engage in "profitable transactions" that might facilitate or promote alcohol use.[43] Like the Hahns, the Greens' Christian principles include the belief that life begins at conception and that any contraceptive method that works after the moment of conception is immoral.[44]

When the ACA was enacted, Hobby Lobby and Mardel had health insurance plans that excluded coverage for contraceptives that prevent implantation of a fertilized egg.[45] Although Hobby Lobby and Mardel could have retained "grandfather" status for the plans, they elected not to do so before the contraception mandate was in place.[46] When that mandate was established, the

---

34. *Id.* (quoting *Conestoga Wood*, 724 F.3d at 382).
35. *Id.*
36. *Id.*
37. *See Conestoga Wood*, 724 F.3d at 381.
38. *Hobby Lobby*, 134 S. Ct. at 2765.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 2766 (alteration in original) (quoting Verified Complaint at 10, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE)).
43. *Id.*
44. *Id.*
45. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125 (10th Cir. 2013) (en banc).
46. *Id.* at 1124.

two companies challenged the mandate as violative of their rights under RFRA and the Free Exercise Clause.[47]

The district court denied the request for a preliminary injunction.[48] The companies petitioned for immediate *en banc* appellate review by the entire Tenth Circuit, which agreed to hear the case and reversed the district court.[49] Unlike the Third Circuit, the Tenth Circuit held that the companies were "persons" within the meaning of RFRA and therefore could exercise religious beliefs.[50] The Tenth Circuit also concluded that the contraceptive mandate imposed a "substantial burden" on Hobby Lobby's and Mardel's free exercise rights,[51] and that HHS had not demonstrated a compelling governmental interest in the mandate or that the mandate was the least restrictive means to achieve that interest.[52]

After they were consolidated in the Supreme Court, the two cases presented a complex question. First, the Court had to decide whether for-profit corporations were "persons" within the meaning of RFRA. Second, the Court had to determine whether a for-profit corporation such as Hobby Lobby or Conestoga could engage in the exercise of religion for the purposes of RFRA. If the answers to the first two questions were affirmative, the Court then had to determine whether the contraceptive mandate imposed a substantial burden on the companies' free exercise rights. If there was a substantial burden, the Court had to determine whether it was imposed in furtherance of a compelling government interest and if imposing that burden was the least restrictive means for the government to achieve its interest. As a practical matter, this complicated, multi-step analysis boiled down to assessing the nature and relative strength of the religious liberty interests of business corporations against the government's interest in protecting women's reproductive liberty by maintaining the contraceptive mandate as part of a comprehensive system of employer-paid health insurance.

III.
BUSINESS CORPORATIONS CANNOT EXERCISE RELIGIOUS LIBERTIES

The majority's analysis of the companies' claim begins with its consideration of whether for-profit corporations can have religious liberties, either under RFRA or the First Amendment. Responding to one of HHS's primary arguments, the majority framed the issue this way: "[a]ccording to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal

47. *Hobby Lobby*, 134 S. Ct. at 2766.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

matter, apply only to the companies and not to the owners as individuals."[53] Through this characterization of the issue, the majority shifted the focus of the initial inquiry. Instead of asking whether for-profit corporations are the kinds of persons who can exercise the religious liberties protected by RFRA and the First Amendment, the majority asked whether the religious liberties of the human beings standing behind the corporate form can be affected by the contraceptive mandate. To borrow a phrase from this part of the majority opinion, this formulation of the question had "dramatic consequences."[54]

The most notable—and problematic—of these consequences is the disregard of the corporate entity. When the owners of a business enterprise choose the corporate form, they receive substantial protections; in particular, the protection provided by the corporate veil shields them from individual liability for the corporation's obligations.[55] In return for this benefit, of course, there are consequences, including a distinction between the owners' personal identities and that of the corporation itself. But the majority's formulation of the relationship between the corporation and its owners allows the owners of closely held business corporations to receive all of the benefits of the corporate veil without the costs. As the majority would have it, the owners of such a corporation can imbue the entity with their personal religious values without any reciprocal consequences for their personal liability.

A. The Nature of Corporate Personhood

By framing the question this way, the majority positioned itself to make its first significant rhetorical move of the opinion: treating the closely held business corporation as an association of individuals and therefore as an instrument that those individuals use to exercise their constitutionally and statutorily protected religious liberties. The majority made this move clear when it explained the nature of the "legal fiction" involved in the concept of corporate personhood:

> But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or

53. *Id.* at 2767.

54. *Id.*

55. *Id.* at 2797 (Ginsburg, J., dissenting) ("By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations."); Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 6, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 and 13-356), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cclp.authcheckdam.pdf ("Because the corporation is a separate entity, its shareholders are not responsible for its debts.").

> statutory, are extended to corporations, the purpose is to protect the rights of these people. . . . [P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.[56]

In this passage, the majority advanced a theory of the corporation as an association of its human constituents, an entity that reflects the ideas, beliefs, and legal rights of the individuals standing behind it. This approach marks a departure from well-established understandings of the nature of corporate personhood. Since the Supreme Court's decision in *Santa Clara County v. Southern Pacific Railroad Co.*,[57] the law has recognized that corporations can be "persons" in many significant respects.[58] This recognition has long been understood to represent a legal fiction.[59] Consequently, the suggestion that a corporation is entitled to all of the same rights as human beings has never been fully accepted by the Supreme Court, and there has been a persistent question about which constitutional rights belong to corporations.[60] Recent case law has held that corporations have rights of free expression under the First Amendment.[61] The majority's rhetorical maneuver in *Hobby Lobby* was unique because it essentially disregarded the conception of the corporation as an entity legally separate from its owners and treated the corporation as simply the embodiment of the collective personal identities of its owners.

This treatment is, at the very least, controversial in terms of contemporary corporate theory. Among corporate law scholars, there are three leading

---

56. *Hobby Lobby*, 134 S. Ct. at 2768.

57. 118 U.S. 394 (1886).

58. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 74–105 (1992) (discussing the developing conception of corporate personhood in the nineteenth century). *But cf. id.* at 66–70, 105–07 (arguing that *Santa Clara* did not articulate a theory of corporate personhood and that it was only later that the law fully embraced the notion); *id.* at 90–93 (describing efforts to replace the entity conception of corporations with an associational conception).

59. *See id.* at 76 (describing Chief Justice Taney's understanding of the corporation as a "fictional entity"). The fictional nature of legal personhood has also, at times, been used as justification for a more associational theory of corporate existence. *See id.* (describing a decision by the Ohio Supreme Court to pierce the corporate veil and treat "the idea that a corporation is a legal entity apart from the natural persons who compose it as 'a mere fiction'").

60. *Id.* at 73 (describing the "reluctance" of the Supreme Court "to entirely personify the corporation" even following widespread acceptance of the entity theory); *see also Santa Clara*, 118 U.S. at 396 (reporting that the Supreme Court declined to hear argument on the question of whether the Equal Protection Clause applied to corporate persons because "[they were] all of opinion that it does"); Hale v. Henkel, 201 U.S. 43, 74–76 (1906) (holding that corporations are protected by the search and seizure provisions of the Fourth Amendment but not by the Self-Incrimination Clause of the Fifth Amendment); Citizens United v. FEC, 558 U.S. 310, 353–56 (2010) (holding that corporations have rights of free expression).

61. *See Citizens United*, 558 U.S. at 353–56.

conceptions of the corporation: as a fictional person,[62] as an entity or piece of property owned by its shareholders,[63] or as a nexus of contracts.[64] The concept of the corporation as a "person" is a legal fiction designed to convey that the corporation has the authority to do things that persons do, such as make contracts and own property.[65] The power to own property is especially useful because it permits corporations to partition their own assets from the assets of their owners, insulating the owners from any liability for the corporation's debts.[66] The conception of corporations as legal entities is another way of explaining the reality of corporate existence. Under this conception, corporations are independent entities that have an identity and existence that is entirely distinct from that of their owners.[67] The "nexus of contracts" concept is useful because it explains how the corporation acts through the individuals of which it is comprised, such as its directors, managers, and employees.[68] In this sense, the corporation is purely abstract, a conceptual locus for a variety of contractual relationships—contracts between the shareholders and the corporation, the employees and the corporation, the corporation and its creditors, the corporation and its customers and suppliers, and so on.[69]

Under each of these conceptions, the corporation is constituted by a set of legal rules.[70] This set of rules has three principal elements: (1) the state statutory law that defines the framework in which it can operate; (2) its charter, bylaws, and other constitutive documents that determine how it will operate within that framework; and (3) any contractual agreements among its owners that determine their rights and duties to each other regarding the framing of the corporate constitutive documents.[71] These rules prescribe the set of values and objectives by which the corporation's directors, managers, employees, and other agents are bound when they act for the corporation. By controlling the actions of the human beings who act on the corporation's behalf, these legal rules define the corporation. The rules determine what actions the corporation may take, for what purposes those actions may be taken, and what values must be prioritized in deciding which actions to take. In a real sense, this set of rules constitutes the

62. *See* STEVEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 25–26 (2008).

63. *See id.* at 26–28.

64. *See id.* at 28–29.

65. *Id.* at 25.

66. *Id.* at 25–26.

67. *Id.* at 26–27.

68. *Id.* at 28.

69. *Id.* at 28–29; *cf.* William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521, 1521 (1982) (describing firms as "a series of bargains").

70. *See* BAINBRIDGE, *supra* note 62, at 28.

71. *See* John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 19–25 (2d ed. 2009) (describing the relationship between the corporate charter, shareholders' agreements, and corporate law).

corporation's identity and whatever "personhood" the corporation may be said to possess.

The majority's associational conception of the corporation eviscerates the idea that the corporation is an entity separate and apart from its owners, constituted by a set of legal rules established by statutes and by private agreements. This disregard of the corporation's distinct identity is contrary to some of the Court's own decisions.[72] Even more significantly, the majority's associational concept disregards the importance of the legal rules that constitute the corporation. The majority conceives of the corporation as an entirely passive instrument that its shareholders can use to exercise any of their personal desires. This conception gives new meaning to the phrase "pass-through corporation."

The "associational" conception of the corporation has been advocated by some scholars who have argued that for-profit corporations should have free exercise rights,[73] just as they have rights of free expression.[74] When viewed as an association of its human constituents, the corporation loses its separate identity and becomes the alter ego of its constituents—principally, its owners. As the majority emphasized, "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[75] This "associational" concept of corporate personhood is a decisive maneuver for the majority because it permits the elision of questions about whether the corporation can have a religious purpose distinct from its owners or managers.

Although it is important to the majority's analysis, this conception of the corporation is problematic. By conceiving of the corporation as an association of individuals, not as a distinct legal entity, the majority diverges from well-established theories of corporate personhood. This conception of the corporation overlooks many of the legally significant characteristics that distinguish the corporation from other ways in which people work together to accomplish a common goal and from other ways of organizing business enterprises. As a matter of corporate law theory, this conception is unwarranted, whether it relates

---

72. *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) (stating that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs").

73. *See* Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 53 (2013) (proposing that a for-profit corporation be understood as "a genuine community of individuals—investors, owners, officers, employees, and customers—coming together around a common vision or shared set of goals, values, or beliefs"); Robert K. Vischer, *Do For-Profit Businesses Have Free Exercise Rights?*, 21 J. CONTEMP. LEGAL ISSUES 369, 382 (2013) (arguing that for-profit entities should have some free exercise rights because they are predominantly recognized as "real entities" distinct from their constituent members).

74. *See Citizens United*, 558 U.S. at 353–56; *cf.* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (stating that "[t]he First Amendment . . . protects commercial speech" in a case involving regulation of corporate advertising).

75. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 385 (3d Cir. 2013)).

to a publicly traded corporation or, as here, to a closely held one. At the most fundamental level, there is a necessary wall of separation between the owners of a corporation and the corporation itself. As Justice Ginsburg recognized in her dissent:

> In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation.[76]

Because the owners of a corporation have a set of rights that is entirely distinct from the rights of the corporation itself,[77] it follows that the owners do not have their own personal right to corporate property and therefore may not take corporate property and convert it for their personal use. A corporation's owners can only use its property and direct its actions through the mechanisms specified in the legal structure that defines the corporation's identity. Once one recognizes the fundamental problems with the majority's conception of the corporation, one must ask: why would the majority distort the legal reality of corporate personhood? The answer seems to be that choosing the associational conception of the corporation is a necessary premise for the next crucial—and questionable—element in the majority's analysis. If the corporation is merely an association of individuals with no legally meaningful identity of its own, it is much easier to claim that the business corporation is an instrument by which human beings exercise their protected religious liberties.

B. The Nature of Free Exercise Rights for the Business Corporation

Having effaced any significant distinction between the corporation and its owners, the majority then sought to explain why an entity organized for profit-making purposes could have a legally significant religious purpose, in the same manner as churches and non-profit corporations. To make this point, the majority first explained how the operation of a for-profit business could be, or at least implicate, an expression of religious faith. The majority stated that "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons,'"[78] and concluded that "[b]usiness practices that are compelled or limited by the tenets of

---

76. *Id.* at 2797 (Ginsburg, J., dissenting).

77. *See Cedric Kushner Promotions*, 533 U.S. at 163 ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.").

78. *Hobby Lobby*, 134 S. Ct. at 2770 (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990)). See Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407, 427 (2011), for an academic explanation of this position that the purported distinction between religious worship and religious conduct is illusory.

a religious doctrine fall comfortably within that definition."[79] The majority noted that there was no dispute that church organizations and other kinds of non-profit entities engaged in exercising religion,[80] and that a for-profit sole proprietorship operated by religious persons had in a previous case been held to be capable of exercising protected religious activity.[81] The majority explained:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.[82]

Noting that RFRA only protected persons with "sincere" religious beliefs, the majority put aside any question of whether the beliefs held by Hobby Lobby and Conestoga were sincere because no one disputed that sincerity in this case.[83] The majority acknowledged that assessing the sincerity of an asserted religious belief could be an issue in other cases involving for-profit corporations.[84] And it conceded that, if a for-profit corporation professed to adopt a religious belief for financial purposes, such adoption would not qualify as "sincere."[85]

The majority's conclusion that a business corporation can have a set of sincere religious beliefs protected by RFRA and the First Amendment conclusion is a novelty in federal law.[86] In *Conestoga*, the Third Circuit pointed out that the question whether corporations have free exercise rights was one of

---

79. *Hobby Lobby*, 134 S. Ct. at 2770.

80. *Id.* at 2769–70.

81. *Id.* at 2770 (citing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

82. *Id.* at 2771. The majority noted that many states have recognized the "benefit corporation," a dual-purpose entity that pursues both profit and the accomplishment of a social good. *Id.* The majority also construed Pennsylvania and Oklahoma law, which both permit business corporations to be formed for "any lawful purpose," to include "the pursuit of profit in conformity with the owners' religious principles." *Id.* at 2771–72.

83. *Id.* at 2774.

84. *Id.*

85. *Id.* at 2774 n.28.

86. *See* Scott W. Gaylord, *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589, 593 (2014).

first impression.[87] Other federal courts also recognized that this question had not arisen before and had yet to be resolved.[88]

From the majority's perspective, when a corporation is closely held and the people who own it have sincere personal religious beliefs relating to the corporation's activities, the corporation must share those beliefs. Protecting the corporation's religious liberties would therefore be a necessary incident of protecting the owners' personal religious liberties. But is it really so easy to impute the sincere religious beliefs of human beings to the business corporation they own? On one level, the answer is yes. A corporation can adopt a "statement of purpose" or a "statement of principle" reflecting religious ideas, as did Conestoga[89] and Hobby Lobby.[90] Such statements undoubtedly reflect the beliefs of the people who make them. But do such statements bind the corporation and constitute the corporation's distinct identity? This question is harder to answer, and the majority failed to address it. Perhaps this was because the majority thought that, in light of its associational conception of the corporation, questions about the corporation's distinct identity were beside the point. Notwithstanding the majority's casual disregard, the attribution of religious beliefs to a for-profit corporation is difficult because of the problem of distinguishing between beliefs held by agents of the corporation and those held by the corporation itself. It is axiomatic that an agent of a corporation does not have exactly the same identity as her principal. In fact, such perfect identity between an agent and principal would be logically impossible, even for a closely-held corporation.[91] It is impossible to simply equate an agent and her principal; therefore, it is impossible to assume that an agent's every utterance can be attributed to the corporation. If, as a matter of law, a corporation has an identity that is separate from its owners and agents, then the statements of its owners and agents can only be attributed to the corporation if the corporation itself has definitively adopted them. The majority's analysis and assumptions do not come to grips with this idea.

---

87. *See* Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d Cir. 2013) (noting that whether *Citizens United* extends to the Free Exercise Clause is a question of first impression).

88. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 406 (E.D. Pa. 2013) (noting that neither the Supreme Court nor the Third Circuit had decided whether for-profit corporations possess religious rights); Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (stating that the arguments regarding the free exercise rights of for-profit corporations "pose difficult questions of first impression"); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 114 (D.D.C. 2012) (declaring that "whether for-profit corporations can exercise religion within the meaning of the RFRA and the Free Exercise Clause" is an "unresolved question").

89. *Hobby Lobby*, 134 S. Ct. at 2763.

90. *Id.* at 2766.

91. *See* Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners at 3, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 and 13-356), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cclp.authcheckdam.pdf (noting that a for-profit corporation has an identity separate from its owners even when the corporation is entirely owned by a single shareholder).

When a corporation is understood as an entity distinct from its owners, employees, and the other agents associated with it, it becomes clear that its unique, individual identity is determined entirely by its constitutive documents. These documents distinguish the corporation from those who own it and work for it, and they set the boundary lines that define where the corporation begins and ends. A shareholder, a corporate director, an executive officer, or an employee certainly has her own ideas and beliefs, including religious ones. But when any of those individual human beings act in the corporation's name, they have a duty to act for the principles and interests that are set forth in the corporation's constitutive documents. By the same token, any of those individual human beings only act for the corporation when they act in the service of the principles and interests set forth in the corporation's constitutive documents.

For this reason, the overwhelming majority of for-profit corporations will not possess any meaningful religious principles because their constitutive documents will not contain such principles. The majority tiptoes around this problem by noting that non-profit corporations have been recognized as having rights of free expression, and it reasons that, by extension, there is nothing preventing for-profit corporations from having the same rights.[92] But this equation between non-profit and for-profit corporations ignores an important difference between them. By definition, a non-profit corporation must identify its purpose in its constitutive documents; by contrast, it is presumed, by default, that an ordinary business corporation is organized for profit-making purposes. Consequently, it cannot be presumed that a for-profit corporation is animated by anything other than the profit motive, unless its constitutive documents say so. Significantly, it appears that Hobby Lobby and Conestoga did not have such statements in their constitutive documents; when the majority discusses their profession of religious principle, it points to policy statements or "statements of purpose,"[93] not the corporations' charters or bylaws. Such statements made by the corporation's agents are not necessarily binding on the corporation itself unless they are integrated into the documents that define what the corporation is.[94]

With respect to for-profit corporations, it can be difficult or even impossible to make a profession of religious faith a part of the corporation's constitutive documents, even if its founders wanted to do so. The only interest or principle that is necessarily "baked into the cake" of the corporate structure is profit-making. Courts and commentators have long recognized that the default principle of corporate governance is to maximize the shareholders' wealth. As the Michigan Supreme Court explained, "[a] business corporation is organized

92. *Hobby Lobby*, 134 S. Ct. at 2771.

93. *Id.* at 2763, 2766.

94. This follows from the principles governing the relationship between principals and agents. A statement by an agent cannot define the purposes or objectives of the principal; only the principal itself can determine what its foundational purposes and objectives are.

and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[95] The majority was correct in noting that state corporate law permits business corporations to be organized for purposes other than, or besides, profit-making, but they must take specific, legally meaningful steps to do so.[96] Such purposes only have a binding effect on the corporation when they are formally embodied in legally binding rules, such as the corporation's bylaws or in agreements among the shareholders. The Model Business Corporation Act authorizes shareholders to make agreements governing how the corporation shall operate and how its purposes shall be defined.[97] For closely held corporations, such agreements permit the formal adoption of precisely the non-economic corporate purposes that the majority contemplated.[98]

Adopting a religious corporate purpose is one thing; enforcing it is another. The majority blithely expressed confidence that enforcement would not be a problem because state corporate law would readily resolve disputes among owners, directors, and executives about how the corporation would fulfill its religious objectives. According to the majority:

> State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes.[99]

The majority's summary of state law adequately addresses enforcement when the dispute among corporate constituents is about who has the power to decide. But enforcement of corporate religious purposes is impossible when the dispute turns on interpretation of the religious idea to which the corporation has committed itself. If the owners of a religiously oriented business corporation disagree about whether the managers are following their duty to operate the business under the owners' Christian faith, or if the owners disagree about what business policies are best designed to fulfill the obligations of their faith, courts have no authority to resolve the dispute. In numerous cases, the Supreme Court has definitively

---

95. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

96. *See* PRINCIPLES OF CORP. GOVERNANCE § 2.01(b)(3) (AM. LAW INST. 1994) (stating that a corporation may "devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes"); *see also* MODEL BUS. CORP. ACT § 2.06(b) (AM. BAR ASS'N 2011) (providing that "[t]he bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation").

97. MODEL BUS. CORP. ACT § 7.32(a)(8) (AM. BAR ASS'N 2011) (providing that the shareholders can make an agreement that "governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them").

98. *Hobby Lobby*, 134 S. Ct. at 2771; *see also* MODEL BUS. CORP. ACT § 7.32 cmt. (AM. BAR ASS'N 2011) (noting that "section 7.32 validates for nonpublic corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Act").

99. *Hobby Lobby*, 134 S. Ct. at 2775 (citations omitted).

held that the Constitution forbids any courts from resolving any legal dispute that turns on a religious question.[100] As one commentator has explained:

> The reason for this prohibition is not the inability of a court to answer such a question, but the fear that if it does give an answer, no matter how careful it may be in assessing all the evidence, its answer is likely to be influenced or thought to be influenced by its own views about a particular religion or religion in general, or by secular considerations. One can appreciate that if a court interprets a very general provision, such as "they shall enjoy the property so long as they are faithful to the teachings of Vatican II," these fears would not be groundless.[101]

An Illinois case, *St. Mark Coptic Orthodox Church v. Tanios*,[102] confirms this observation and demonstrates that the majority severely underestimated the problems that follow the recognition of corporate religious purposes. In *St. Mark*, two factions of a church disputed which one had the right to control the non-profit corporation that governed church business.[103] The court noted the constitutional restriction that prohibited courts from deciding matters of religious doctrine and searched for a set of neutral, non-religious principles that could decide who controlled the entity.[104] But it could not find any.[105] The only way to resolve the dispute was to inquire into matters of church doctrine, but such an inquiry was strictly prohibited.[106] Although *St. Mark* involved a non-profit corporation, it presents exactly the same problem that would arise if the owners of Hobby Lobby or Conestoga disagreed with each other about what would be required to operate their business in accordance with their Christian principles.

Ironically, the majority recognized that the judiciary is prohibited from resolving questions that turn on interpreting religious matters when it discussed the burden on the companies' religious liberty imposed by the contraceptive mandate. When HHS argued that the burden on the companies' religious freedom was not sufficiently substantial because there was a highly attenuated connection between paying a health insurance premium and using

---

100. *See, e.g.*, Jones v. Wolf, 443 U.S. 595, 602 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440, 449 (1969) (holding that civil courts may use "neutral principles of law" to resolve church property disputes, but may not do so by resolving "controversies over religious doctrine and practice"); Watson v. Jones, 80 U.S. 679, 729 (1871) (holding that the decisions of ecclesiastical tribunals on religious matters are not reviewable by civil courts).

101. John H. Mansfield, *Constitutional Limits on the Liability of Churches for Negligent Supervision and Breach of Fiduciary Duty*, 44 B.C. L. REV. 1167, 1169 (2003) (footnote omitted).

102. 572 N.E.2d 283 (Ill. App. Ct. 1991).

103. *Id.* at 284.

104. *Id.* at 293.

105. *Id.* at 292–93.

106. *Id.* at 293.

contraceptives, the majority insisted this argument was out of bounds because it involved making a moral philosophical judgment entirely within the province of religion.[107] It is difficult to understand how the majority could recognize that courts may not resolve religious questions while also asserting there would be no problem from recognizing religious purposes for commercial enterprises. A lot of money and power is at stake in business corporations, and their constituents often litigate their disagreements about how to run the business. If the law acknowledges that business corporations can have religious objectives, there will be litigation about whether those objectives are being met. But even the majority acknowledges that the courts cannot constitutionally resolve this dispute, which ultimately means that the religious purposes of business corporations are unenforceable.

The fact that a business corporation cannot make a legally enforceable commitment to follow a religious principle casts serious doubt on the majority's conclusion that a for-profit corporation can exercise religious liberties just like any human being can. This fact raises doubts about how it could ever be possible to determine when a corporation's professed commitment to a matter of religious faith is sincere or mere lip service, designed to improve marketing efforts or to avoid compliance with government regulations too expensive or burdensome from the corporate perspective. Despite the majority's assertion to the contrary, it is not always obvious when a business corporation is sincerely exercising religious liberties. When the majority concludes that for-profit corporations can have religious liberties that are protected by RFRA and the First Amendment, it seems more like a wish about what the majority would like the law to be than an accurate summary of what the law actually is.

It might be argued that the sincerity of corporate religious belief is no different than the sincerity of an individual's religious belief. If a human being can make a profession of faith, so can a corporation; and beyond a certain point, it is not the business of courts to inquire into just how sincere a profession of faith may be. But when it comes to corporations, the problem of identifying sincerity is a problem of determining who has the authority to speak for the corporation and about what. A corporation's agent can make any number of statements about religion or religious belief. If corporations can have free exercise rights, the ultimate question is whether those statements can be properly attributed to the corporation itself or whether they are the personal opinion of the agent, made in her own name and not in the name of the corporation. The only way to be sure that a profession of faith belongs to the corporation is if the corporation has made that profession in its constitutive documents and if that profession has the power to legally bind its agents and employees.

---

107. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2777–78 (2014) (citing, among other things, Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church, 393 U.S. 440, 450 (1969)); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) (declining to challenge a party's contention that payment of certain taxes would be contrary to his faith).

IV.
THE CONTRACEPTIVE MANDATE IS THE LEAST RESTRICTIVE MEANS TO ACHIEVE THE GOVERNMENT'S INTEREST IN PROVIDING COMPREHENSIVE PREVENTATIVE HEALTH CARE TO WOMEN

The other half of the balancing test undertaken by the Court involved assessing whether the government could achieve the objectives behind the contraceptive mandate through a means that would not burden the companies' religious liberties. Just as the majority overestimated the extent to which business corporations had legally significant religious interests, it underestimated the significance of the contraceptive mandate, both in terms of how it contributed to the overall objectives of the ACA and in terms of how it affected women's reproductive rights. The majority failed to grasp that the contraceptive mandate was an integral part of an effort to redress historical inequities for women in the health care system.

The majority concludes that mandating contraceptive coverage by for-profit companies is not the least restrictive means for two reasons: (1) the government could pay for contraception that religiously oriented business corporations do not wish to pay for;[108] and (2) the ACA and its attendant regulations already have demonstrated that a less restrictive means exists—the exemption provided to non-profit entities who self-certify as having a religious objection to paying for contraceptives.[109]

A. The Majority's Mischaracterization of the Government's Interest in the Contraceptive Mandate

The majority accepted that the contraception mandate serves at least three interests: (1) promoting public health; (2) promoting gender equality; and (3) making contraceptives affordable and available.[110] The majority rejected the first two interests as too generalized to be compelling and stated that the RFRA inquiry must focus on whether the asserted interests would be undermined by granting a specific exemption to the claimants at hand.[111] It then assumed without deciding that the government's interest in guaranteeing affordable contraception was compelling.[112] This is a rather superficial assessment of the interests behind the ACA, and it makes the mistake of treating those interests as a collection of only marginally related elements. But it is possible—even necessary—to see the ACA as something much more.

Many scholars have recognized that the pre-ACA system of providing health care, in which insurance providers often did not provide coverage for

108. *Hobby Lobby*, 134 S. Ct. at 2780–81.
109. *Id.* at 2782–83.
110. *Id.* at 2779–80.
111. *Id.* at 2779.
112. *Id.* at 2780.

contraception or prenatal care, embodied long-established biases about the social and sexual role of women.[113]

> Today, most who espouse the sex equality approach to reproductive rights oppose legal restrictions on abortion because (1) whatever the asserted fetal-protective rationale, in actual practice legal restrictions on abortion have reflected and entrenched customary, gender-differentiated norms concerning sexual expression and parenting; (2) they have conscripted the lives of poor and vulnerable women without similarly constraining the privileged; (3) they have punished women for sexual activity without holding men commensurately responsible; and (4) they have used law to coerce, but not to support, women in childbearing.[114]

As one commentator put it, "equal protection should not stop at rooting out discriminatory treatment of similarly situated women and men, but should also assure that implicitly male norms of the reproductive role are not unreflectively accepted as the measure of equality, thereby disadvantaging most women."[115]

Eliminating the gender bias built into the health care system requires changing the health care system and changing how women can access services that give them control over reproduction, including contraceptives.

> Control over whether and when to give birth is practically important to women for reasons inflected with gender-justice concern: It crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that

---

113. *See*, *e.g.*, Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 340–42 (arguing that state policies preventing teenagers from accessing contraceptive and reproductive health care were based on a desire to discourage teen sexual activity); Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 374–76 (1998) (arguing that the failure of standard health insurance policies to cover contraceptives for women is an example of gender discrimination); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 821 (2007) (noting that restrictions on abortion and contraception are often "asserted only against women who resist customary sexual and parenting roles"). *See generally* Megan Veith, *The Continuing Gender Health Divide: A Discussion of Free Choice, Gender Discrimination and Gender Theory as Applied to the Affordable Care Act*, 21 GEO. J. ON POVERTY L. & POL'Y 341 (2014) (discussing the ways in which the ACA promotes advances in gender equality and ways in which it perpetuates stereotypes that have long contributed to gender inequality).

114. Siegel, *supra* note 113, at 821–22.

115. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 977 (2007).

> this society no longer believes fair to enforce, yet is unwilling institutionally to redress.[116]

The Supreme Court itself has noted that reproductive freedom is a central aspect of equal protection for women and that governments are not free to impose upon women their own preferred conceptions of gender roles.[117]

Given all of this, the majority's terse reference to "gender equality"[118] hardly captures the complete nature of the government interest in the comprehensive mandate. The mandate is a centrally important feature of an attempt to refashion the way women's health needs are understood and treated, and that attempt is itself a crucial element in the effort to redress a long history of gender discrimination. In this respect, the government's interest is not only in achieving abstract social policy objectives, such as public health; it is also in protecting the constitutional rights of women. As Justice Ginsburg pointed out in her dissent, the balancing test mandated by RFRA requires an accounting of the government's interest in protecting the rights of third parties.[119] For the contraception mandate, women as third parties have more than a garden-variety economic interest; they have an interest of the highest legal order, one that receives constitutional protection.

B. The Majority's Misunderstanding of the Means Available for Achieving That Interest

After misunderstanding and undervaluing the government interest behind the contraceptive mandate, the majority compounded its error by misunderstanding the mechanism created by the ACA to protect that interest. The majority conducted a deeply flawed analysis of whether the government had any means of serving its interests that would not burden the companies' religious liberties. Crucially, the majority misunderstood how and why the ACA relied on an employer-funded health insurance system to assure that the mandate would be adequately financed.

In the majority's view, the source of the funding for the contraceptive mandate was relatively unimportant. Considering the statutory scheme of the ACA, the majority concluded that if business corporations with a religious objection opted out of paying for the contraceptive mandate, their contributions to the insurance system's funding could be replaced by direct payments by the

---

116. Siegel, *supra* note 113, at 819.

117. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (noting that decisions related to pregnancy are "too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture").

118. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014).

119. *Id.* at 2801 (Ginsburg, J., dissenting) (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

government or by payments made by the insurance groups themselves.[120] In reaching this conclusion, the majority failed to recognize that the ACA reflected a deliberate decision by Congress to expand the availability of insurance through the already-existing employment-based system.[121] Requiring the government to create a new, independently-funded health care system for contraception would frustrate this objective.[122] There is also no limiting principle to the majority's proposed government-funded system; if every closely held business corporation could opt out of health care requirements imposed by the ACA by posting a religious "values statement" on its website or by citing the personal beliefs of its key constituents, Congress's desire to have the system financed primarily by for-profit employers would be largely undermined.[123]

It was this misunderstanding of the operation of the system that led the majority to misapprehend the application of *United States v. Lee*,[124] which the dissent considered dispositive.[125] In *Lee*, the plaintiff asserted a challenge under the Free Exercise Clause to the constitutionality of laws requiring the payment of social security taxes.[126] According to the plaintiff, his Amish religious faith required him to provide care to the elderly of his own accord.[127]

The *Lee* Court recognized that the challenge implicated the viability of the system as a whole. In framing the question about the governmental interest in the social security system, *Lee* noted that "[t]he Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions."[128] In this context, resolving the challenge was clear: "[b]ecause 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."[129]

The *Hobby Lobby* majority disregarded *Lee*, describing it as a case that "turned primarily on the special problems associated with a national system of taxation."[130] The majority accepted that "there simply is no less restrictive alternative to the categorical requirement to pay taxes," but distinguished the

120. *Id.* at 2780–83 (majority opinion).

121. *Id.* at 2802 (Ginsburg, J., dissenting) (highlighting that the ACA sought to create a comprehensive system of health insurance that provided full coverage for preventative care and was primarily employer funded).

122. *Id.*; *see also* M. Gregg Bloche, *The Emergent Logic of Health Law*, 82 S. CAL. L. REV. 389, 441–43 (2009) (discussing the differences between employment-based and single-payer health insurance systems proposed in the years leading up to the passage of the ACA).

123. *Hobby Lobby*, 134 S. Ct. at 2802–03 (Ginsburg, J., dissenting).

124. 455 U.S. 252 (1982).

125. *Hobby Lobby*, 134 S. Ct. at 2803–04 (Ginsburg, J., dissenting).

126. *Lee*, 455 U.S. at 254–55.

127. *Id.* at 255.

128. *Id.* at 259.

129. *Id.* at 260.

130. *Hobby Lobby*, 134 S. Ct. at 2784.

ACA because that law "does not create a large national pool of tax revenue for use in purchasing healthcare coverage."[131] But the Court in *Lee* accepted that social security taxes might be distinguished from general taxation because "the social security tax revenues are segregated for use only in furtherance of the statutory program."[132] It nevertheless rejected the idea that individuals could receive religious exemptions from paying social security taxes.[133]

The majority sought to cabin *Lee* to the subject of religious challenges to the statutory duty to pay income taxes.[134] But *Lee* stands for more than that; it stands for the proposition that, when the government establishes a comprehensive insurance system for the benefit of employees, such as social security, and it funds that system by requiring payments from commercial actors, those payers cannot shift the costs to their employees by asserting a personal religious objection.[135] The majority misapplies *Lee* because it does not appear to understand that the governmental interest at stake is the preservation of a comprehensive, centrally regulated health insurance system for the benefit of third parties whose rights should not be subordinated to the employer's religious beliefs. It is only this misunderstanding of ACA and the contraceptive mandate that permit the majority to conclude there is a less restrictive means available to fund the mandate.

V.
CONCLUSION

What remains is to ask why the majority calculated the balance between the companies' interests and the government's interests in the contraceptive mandate as it did. Why did the majority exaggerate the nature and importance of the religious exercise of a business corporation? Why did it diminish the manner in which the contraceptive mandate served the interests of the government and individual women in a comprehensive health care system? It is possible that there is no single explanation for why the majority framed the issues in this way. But there is a common theme in the majority's reasoning about the two key components of its decision: an intellectual reluctance to acknowledge that social and economic life involves complex structures in which individuals can collaborate and coexist despite having divergent moral values. The majority's analysis reflects a view that the ultimate question presented by the case was whether business owners should be free from any compulsion to facilitate women's choice to use contraceptives that the owners found objectionable on

131. *Id.*

132. *Lee*, 455 U.S. at 260.

133. *Id.* ("There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act.").

134. *See Hobby Lobby*, 134 S. Ct. at 2784.

135. *See Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.").

religious grounds. The majority could see the question this way because, on both sides of the question, it oversimplified the reality of the social phenomena it examined.

Regarding the business corporation, the majority disregarded the complex and often delicate legal structure that defines the relationship between a corporation and its owners. They preferred to see the corporation as the mere alter ego of its owners, at least where those owners are few in number and share certain moral and spiritual ideas.[136] It is not feasible to view the business corporation in such simple terms. Corporate law reflects a bargain made with the owners of business enterprises. The legal structure of the corporation makes it easier for entrepreneurs to aggregate capital from multiple sources, and it protects those entrepreneurs from the most severe personal financial risks of operating a business.[137] In return for these benefits, the corporation demands a legally significant separation of the owner, as an individual, from the entity that operates the enterprise.[138]

This separation prevents the owner from imbuing the corporation with all of her personal values and ideas. In a real sense, this is one of the costs of doing business in the corporate form. When they form a corporation, the owners must leave some of their personal values behind. The majority suggests that the free exercise rights of religious individuals will be diminished if they cannot express their own personal beliefs through the corporation's business activities.[139] But there is nothing preventing religious individuals from forming proprietorships or partnerships without limited liability if they want to have a business enterprise that is a perfect reflection of their beliefs.[140] If, on the other hand, they prefer to use the corporate form to insulate them from personal liability for the liabilities of their enterprise, then there is a price to be paid: a separation between owner and entity.[141] When the majority asserts that a corporation is nothing more than an aggregation of the individuals who own and work for it, it disregards this principle that has been at the center of corporate law for over a century.

---

136. *See Hobby Lobby*, 134 S. Ct. at 2768.

137. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 130–31 (3d ed. 2005) (describing the rise of the business corporation over commercial partnerships because the former offered efficiency and limited liability); *id.* at 391–93 (describing the roles of private investment and stockholder protections in the development of corporate law).

138. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001) ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.").

139. *See Hobby Lobby*, 134 S. Ct. at 2768.

140. *See id.* at 2770 (noting that a free exercise claim by a sole proprietorship had previously been entertained); *id.* at 2797 (Ginsburg, J., dissenting) (distinguishing sole proprietorships from corporations for purposes of free exercise).

141. *Id.* at 2797 (Ginsburg, J., dissenting) (noting that "[b]y incorporating a business an individual separates herself from the entity").

Regarding the ACA and its objectives, the majority disregarded the value of having a comprehensive, employer-funded health care system that sought to fix long-standing inequities in how women could access preventative health care. The healthcare system created by the ACA is not a simple instrument that employers use to purchase services for their employees. It is a system that seeks to reduce the costs of health care overall and expand access to health care for all in the United States. The relationship between employer and employee is mediated by that system, and it cannot work if employers can just choose the elements of the system they like and will fund. As with large-scale government programs such as social security, the system can only provide benefits to everyone if it includes everyone.[142]

The complex legal structures that the majority disregarded are vital instruments for solving social problems. The legal structure of the business corporation was developed to balance the need to promote risky but potentially valuable business enterprises with the need to make economic actors legally responsible for their conduct.[143] The legal structure of the ACA's comprehensive health insurance system was developed to provide health care more efficiently and effectively, and this was especially important for certain groups, including women, who had been historically and unfairly restricted in their access to health care.[144] The complexity of each structure is necessitated by the difficulty of the task each undertook. By disregarding the complexity and importance of the ACA's legal structure, the majority disregarded the complexity and importance of the system's underlying task.

Ultimately, the *Hobby Lobby* majority ignored the importance of providing preventative health care to and guaranteeing reproductive liberty for women. In this respect, the *Hobby Lobby* majority grounds its analysis in an intellectually dishonest position. It professes to base its ruling about the contraceptive mandate on established principles of corporate law, but in reality it creates new corporate law principles out of whole cloth. The result of the decision is to privilege the voices of religious objectors to contraceptives over the claims of women for better health care and equal treatment under law.

The best result going forward would be the reversal of *Hobby Lobby* because it is wrongly decided. In the absence of such a conclusive result, perhaps the best one can hope for is that *Hobby Lobby* will be sharply limited to its facts. Courts might conclude that only closely held corporations with long records of religious advocacy can be said to have something like free exercise rights. Additionally, courts could enforce the requirement that the putative religious

142. THE AFFORDABLE CARE ACT AND TRENDS IN HEALTHCARE SPENDING 11–13, https://www.whitehouse.gov/sites/default/files/docs/fact_sheet_implementing_the_affordable_care_act_from_the_erp_2013_final1.pdf (last visited Jan. 13, 2016) (discussing the systemic efficiencies gained from providing universal coverage).

143. *See* FRIEDMAN, *supra* note 137, at 391–93 (describing the development of shareholder protections to guard against explosive speculation in investment).

144. *See* Siegel & Siegel, *supra* note 7, at 1037–39.

beliefs of corporations be truly "sincere." This would mean ensuring that such beliefs are enshrined in the corporation's constitutive documents or, at the very least, in expressions of corporate policy and purpose that reflect substantial commitments, rather than mere marketing or public relations objectives. The worst result would be an acceptance of *Hobby Lobby*'s conclusions about corporate free exercise and an attendant body of case law in which the constitutional rights of real human beings are balanced against the hypothetical religious freedoms of business corporations. Human beings should not have to stake their finite lives against the ever malleable, shape-shifting, ephemeral beliefs of a disembodied and potentially immortal profit-making enterprise.