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# Hobby Lobby, Carnell Construction, and the Theoretical Deficit of Second-Class Personhood: The Indecipherable Calculus of Corporate Rights

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***Hobby Lobby, Carnell Construction, and the Theoretical Deficit of Second-Class Personhood: The Indecipherable Calculus of Corporate Rights\****

*“If only there were some way to prove that corporations were not people.”*

—Jon Stewart<sup>1</sup>

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INTRODUCTION

In *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*,<sup>2</sup> the Fourth Circuit of Appeals took the plunge into the polluted waters of corporate personhood and racial identity.<sup>3</sup> In concluding that the Virginia-based Carnell Construction Corporation (“Carnell”) had standing to assert a federal race discrimination claim<sup>4</sup> against Danville Redevelopment and Housing

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1. *The Daily Show with Jon Stewart: Heavy Settle* (Comedy Central television broadcast Dec. 4, 2013), <http://thedailyshow.cc.com/videos/wc91m5/heavy-settle> [http://perma.cc/LGY4-TWVQ].

2. 745 F.3d 703 (4th Cir. 2014).

3. *Id.* at 709.

4. Carnell brought its racial discrimination claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C §§ 2000d to 2000d-7 (2012), which prohibits “discrimination under any program or activity receiving Federal financial assistance,” and 42 U.S.C. § 1981 (2012), which prohibits an employer from using a person’s race as the basis for refusing to enter, interfering with, or terminating an employment contract. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 175–76 (1976) (“There could hardly be a clearer indication of congressional agreement with the view that § 1981 *does* reach private acts of racial discrimination.” (emphasis added)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–42 n.78 (1968) (quoting *Hodges v. United States*, 203 U.S. 1, 17 (1906)) (“Section 1981 provides, in terms that closely parallel those of § 1982, . . . that all persons in the United

Authority (“Housing Authority”), the Fourth Circuit imputed the African-American racial identity of Carnell’s corporate owner to the corporate entity itself.<sup>5</sup> Though the issue was one of first impression in the Fourth Circuit, similar racial-identity challenges brought by corporate entities in several neighboring circuits provided the *Carnell Construction* court a deep pool of pertinent decisions to guide its analysis.<sup>6</sup> Persuaded in particular by the Ninth Circuit’s reasoning in a similar case from 2004,<sup>7</sup> the Fourth Circuit concluded “a corporation that is minority-owned and has been properly certified as such under applicable law can be the direct object of discriminatory action and establish standing to bring an action based on such discrimination.”<sup>8</sup>

This Comment argues that the Fourth Circuit’s decision in *Carnell Construction* and the convergence among the circuits on the question of “corporate race” represents a trend of enabling corporate entities to assume an increasing number of personal attributes and liberties. The discussion below explores this nationwide trend toward a broader construction of corporate personhood by dissecting the Fourth Circuit’s decision in *Carnell Construction* in light of the Supreme Court’s recent decision to extend religious rights to closely held corporations in *Burwell v. Hobby Lobby Stores, Inc.*<sup>9</sup> The push to provide corporate entities with greater protection and recognition independent from their owners is certain to give rise to a number of challenging legal questions. This Comment addresses the analytical

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States ‘shall have *the same right . . . to make and enforce contracts*, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.’ ”); *Hodges v. United States*, 203 U.S. 1, 17 (1906) (“[O]ne of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts . . .”), *overruled in part by Jones*, 392 U.S. 409.

5. *Carnell Constr. Corp.*, 745 F.3d at 715–16.

6. Seven circuit courts had previously granted corporations standing to assert federal claims of racial discrimination independent from their owners. *See, e.g.*, *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (§ 1981 claim); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 882 (8th Cir. 2003) (Fair Housing Act claims); *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1072 (10th Cir. 2002) (§§ 1981 and 1982 claims); *Gersman v. Grp. Health Ass’n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991) (§ 1981 claim), *vacated on other grounds*, 502 U.S. 1068 (1992); *Triad Assocs., Inc. v. Chi. Hous. Auth.*, 892 F.2d 583, 591 (7th Cir. 1989) (§ 1983 claim), *abrogated on other grounds*, *Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668 (1996); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (Title VI claim); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13–14 (1st Cir. 1979) (§ 1981 claim). *But see Pocono Mountain Charter Sch. v. Pocono Mountain Sch. Dist.*, 442 F. App’x 681, 688 (3d Cir. 2011) (dismissing Title VI claim brought by charter school).

7. *Thinket Ink Info. Res., Inc.*, 368 F.3d at 1058–59.

8. *Carnell Constr. Corp.*, 745 F.3d at 715.

9. 134 S. Ct. 2751 (2014).

tension fueling these questions—questions that increasingly threaten to undermine the law’s advancement of corporate rights. The doctrinal incompatibility exposed is puzzling: Courts consistently endorse poorly translatable, case-by-case personifications of corporate litigants—the approach taken by the *Carnell Construction* and *Hobby Lobby* courts—instead of adopting more theoretically cohesive alternatives, such as corporate personality theory, which both common sense and academic inquiry have shown to be the more logical approach.

Part I traces the historical evolution of “corporate personhood,” a concept heavily relied upon and ultimately expanded in both *Carnell Construction* and *Hobby Lobby*. Part II analyzes the two primary cases animating this commentary. Although the Supreme Court decided *Hobby Lobby* after the Fourth Circuit decided *Carnell Construction*, this Comment examines *Hobby Lobby* in an attempt to shed fresh light on the Fourth Circuit’s conclusions. Both analyses focus primarily on the courts’ discussions of corporate personhood. Part II concludes with an analytical bridge between the rules articulated in *Carnell Construction* and *Hobby Lobby* and those limited principles set out in Part I. Part III presents a critical discussion that both flows from and moves beyond Part I’s exploration of corporate personhood. By using the *Carnell Construction* and *Hobby Lobby* courts’ kindred findings that corporate owners can assign or “impute” their characteristics or identities to the corporate entities that they helm—size or motive (theoretically) notwithstanding—as a jumping-off point, Part III draws on compatible corporate law theories that help reorient the movement to corporatize traditionally personal rights. Part III uses these theories to advocate for an alternative to the Supreme Court’s laissez-faire approach to establishing corporate rights. To that end, Part III critiques the Supreme Court’s failure to advance a comprehensive corporate-rights framework, which this Comment argues is necessary to ensure doctrinal consistency.

#### I. THE HISTORICAL EVOLUTION OF CORPORATE PERSONHOOD

The debate over corporate personhood has raged in the academic literature for many decades.<sup>10</sup> That discussion has not only

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10. See, e.g., Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1404 (2006) (“For more than a century American courts have been receptive to the notion that corporate actors are persons or entities with rights of their own rather than merely creatures of the state or instruments of [natural persons].”). See generally Morton J. Horwitz, *Santa Clara Revisited: The Development of*

intensified<sup>11</sup> in the years since the Supreme Court's decision in *Citizens United v. FEC*,<sup>12</sup> it has gone mainstream.<sup>13</sup> The Court's recent

*Corporate Theory*, 88 W. VA. L. REV. 173 (1985) (examining the history of corporate theory that led the Court to adopt the view that a corporation is a person in *Santa Clara*); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (exploring the Court's history of conferring the Bill of Rights guarantees to corporations); Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987) (presenting different views, major controversies, and linguistic foundations of corporate personhood).

11. See generally Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221 (2011) (arguing the drafters and ratifiers of the Constitution intended a definition of the words "people," "person," and "citizen" that did not include corporations); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011) (examining the relationship between corporate personhood and the Second Amendment); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (presenting a social theory that adequately explains the arguments for the theory of corporate personhood).

12. 558 U.S. 310 (2010).

13. See, e.g., Nancy Benac, *Corporations Are People? It's a Real Legal Concept*, YAHOO! NEWS (July 3, 2014, 10:37 AM), <http://news.yahoo.com/corporations-people-real-legal-concept-070458465--finance.html> [<http://perma.cc/N73V-CRLC>] (discussing the "renewed debate over the idea of corporations as people," and tracing the concept to "legal cases stretching back to the 1880s"); Michael P. Falcone & Z. Byron Wolf, *Mitt Romney at Iowa State Fair: "Corporations Are People, My Friend"*, ABC NEWS (Aug. 11, 2011), <http://blogs.abcnews.com/thenote/2011/08/romney-shouted-down-at-fair-corporations-are-people-too-my-friends.html> [<http://perma.cc/LL3M-LLZ7> (dark archive)] (quoting then-presidential candidate Mitt Romney's now-infamous remark during the 2012 campaign: "Corporations are people, my friend, . . . Of course they are, . . . everything corporations earn ultimately goes to people. . . . Where do you think it goes? . . . Whose pockets? People's pockets, . . . [h]uman beings, my friend."); Kent Greenfield, *Let Us Now Praise Corporate Persons*, WASH. MONTHLY (Jan./Feb. 2015), [http://www.washingtonmonthly.com/magazine/januaryfebruary\\_2015/features/let\\_us\\_now\\_praise\\_corporate\\_pe053466.php#](http://www.washingtonmonthly.com/magazine/januaryfebruary_2015/features/let_us_now_praise_corporate_pe053466.php#) [<http://perma.cc/86F9-M7G9>] ("[T]he attack on corporate personhood is a mistake. And it may, ironically, be playing into the hands of the financial and managerial elite. What's the best way to control corporate power? More corporate personhood, not less."); Charles McGrath, *Colbert Pushes "Corporations Are People" Referendum*, N.Y. TIMES: THE CAUCUS (Dec. 6, 2011, 5:44 PM), [http://www.thecaucus.blogs.nytimes.com/2011/12/06/colberts-pushes-corporations-are-people-referendum/?\\_r=0](http://www.thecaucus.blogs.nytimes.com/2011/12/06/colberts-pushes-corporations-are-people-referendum/?_r=0) [<http://perma.cc/3D7L-GUCG>] (discussing the efforts of then-Comedy Central host Stephen Colbert to include a referendum question on corporate personhood during the 2012 South Carolina Republican primary); Eric Posner, *Stop Fussing over Personhood*, SLATE (Dec. 11, 2013, 10:09 AM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/12/personhood\\_for\\_corporations\\_and\\_chimpanzees\\_is\\_an\\_essential\\_legal\\_fiction.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html) [<http://perma.cc/A6C4-B94Z>] ("There has been much mockery of the idea that 'corporations are people, my friend,' as Mitt Romney put it. But if you think it matters whether the law calls a chimpanzee, corporation, or even human zygote a 'person,' you are making a fundamental error about how the law works."); Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NPR (July 28, 2014, 4:57 AM), <http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution> [<http://perma.cc/J6NG-ABX6> (dark archive)] (noting that "in the past four years, the high court has dramatically expanded corporate rights"); Jack & Suzy Welch, Opinion, *It's True: Corporations Are People*, WALL ST. J. (July 15, 2012, 6:37

ruling in *Hobby Lobby*<sup>14</sup> has only added fuel to the fire.<sup>15</sup> The continued currency of the corporate personhood debate, however, belies its ancient roots.<sup>16</sup> Indeed, as Justice Story noted in *Trustees of Dartmouth College v. Woodward*<sup>17</sup> nearly 200 years ago,

[a]n aggregate corporation at common law 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. . . . It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage.<sup>18</sup>

Justice Story's definition notwithstanding, Chief Justice John Marshall's majority opinion offered a different perspective: "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 . . . ."<sup>19</sup> Two decades after Chief Justice Marshall and Justice Story addressed the question of corporate personhood, Chief

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PM), <http://www.wsj.com/articles/SB10001424052702303740704577524823306803692> [<http://perma.cc/TGH7-H69B> (dark archive)] ("Of course corporations are people. What else would they be? Buildings don't hire people. Buildings don't design cars that run on electricity or discover DNA-based drug therapies that target cancer cells in ways our parents could never imagine.").

14. 134 S. Ct. at 2751.

15. See, e.g., Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 95 (2014) (arguing that the Court did not actually adopt the theory that corporations are "real entities" in *Hobby Lobby*); Malcom J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues To Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 201 (2014) (urging the Supreme Court of the United States to take a clear position on corporate personhood); Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 273 (2014) (arguing that religious for-profit organizations do not compromise the objectives of corporate law).

16. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."); *Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 482 (1823) ("[T]here is no difference between a corporation and a natural person, in respect to their capacity to hold real property, . . . the civil rights of both are the same.").

17. 17 U.S. (4 Wheat.) 518 (1819).

18. *Id.* at 667–68 (Story, J., concurring).

19. *Id.* at 636 (majority opinion).

Justice Roger B. Taney reopened the debate over corporate personhood by offering this definition:

[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law. . . . It is indeed a mere artificial being, invisible and intangible; *yet it is a person, for certain purposes* in contemplation of law, and has been recognized as such by the decisions of this Court.<sup>20</sup>

Chief Justice Taney's hedging effectively illustrates the Court's notorious reputation of sending mixed signals in the area of corporate law, especially where those questions touch or concern matters of constitutional law.<sup>21</sup>

Ample Supreme Court precedent supports the notion that corporations should, at least under certain circumstances, be understood as "persons" in the constitutional sense.<sup>22</sup> Further, where federal statutes are at play, Congress clarified the issue in its enactment of the Dictionary Act,<sup>23</sup> which provides that, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as

20. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 588 (1839) (emphasis added).

21. See, e.g., Jeffrey D. Clements, *Beyond Citizens United v. FEC: Re-Examining Corporate Rights*, AM. CONST. SOC'Y FOR L. & POL'Y, Nov. 2009 at 9 (noting that "the Court has hardly been consistent in its reaction to corporate demands upon the Court's extraordinary power to invalidate democratic enactments," and describing "the substantive due process era that followed the Court's declaration at the turn of the 20th century that corporations are 'persons' under the Fourteenth Amendment's protection of the life, liberty, and property of persons," as the one of the "most notorious examples of the Court's responsiveness").

22. Meese & Oman, *supra* note 15, at 275 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233–35 (1897); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 553 (1844)). Meese and Oman's illuminating defense of corporate rights argues that corporate personhood has been long entrenched in American constitutional law. *Id.* For a conflicting view of the historical development of corporate personhood, see Naomi Lamoreaux & William Novak, *Getting the History Right: Tracking the Real History of Corporate Rights in American Constitutional Thought*, SLATE (Mar. 24, 2014, 4:48 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/03/hobby\\_lobby\\_and\\_corporate\\_personhood\\_here\\_s\\_the\\_real\\_history\\_of\\_corporate.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/hobby_lobby_and_corporate_personhood_here_s_the_real_history_of_corporate.html) [<http://perma.cc/E9XE-TQAR>] ("Contrary to present efforts to depict corporations as simple and natural entities—like persons—entitled to constitutional rights, a different view prevailed for most of American history. Until the mid-20th century, the corporation was seen as a special and artificial creature of the government. It has *never* been seen as entitled to the same array of rights guaranteed to citizens.").

23. 1 U.S.C. §§ 1–8 (2012).

individuals . . . .”<sup>24</sup> As discussed below, the Supreme Court has at times relied on this statutory language, and the congressional acquiescence to corporate personhood that it implies, in deciding non-constitutional questions of corporate rights.<sup>25</sup> Similarly, the Fourth Circuit Court of Appeals cited the Dictionary Act’s inclusive definition of personhood with approbation in its discussion of corporate status and racial identity in *Carnell Construction*.<sup>26</sup>

Nevertheless, there is also substantial support, in both history<sup>27</sup> and precedent,<sup>28</sup> to buoy the reasoning behind those who oppose the expansion of corporate personhood.<sup>29</sup> Justice Brandeis’s lengthy dissent to the Court’s decision in *Louis K. Liggett Co. v. Lee*,<sup>30</sup> for

24. *Id.* § 1; see also Emily J. Barnet, *Hobby Lobby and the Dictionary Act*, 124 YALE L.J. F. 11, 12 (2014), <http://yalelawjournal.org/forum/hobby-lobby-and-the-dictionary-act> [<http://perma.cc/7EF8-G5D8>] (noting that “in line with general trends in statutory interpretation, courts have applied the Act inconsistently for the past century” (footnote omitted)); Meese & Oman, *supra* note 15, at 276 (pointing out that the Dictionary Act defines “‘persons’ without regard to whether such firms or individuals are engaged in profit-seeking activities”).

25. See *infra* Section II.A.

26. *Carnell Constr. Co. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703, 714 n.4 (4th Cir. 2014); see also *infra* Section II.B.

27. See, e.g., Lamoreaux & Novak, *supra* note 22 (“Most of America’s first corporations . . . were viewed as essentially public service corporations or public franchises. In addition to grants of property and public financing, the state usually accorded such entities special privileges like monopoly power, the power of eminent domain, or toll-taking authority. In return for those benefits, the government insisted on the special public obligations of corporations. Not only were corporations *not* exempted in any way from generally applicable regulatory laws, but they were routinely held to higher standards of public service, public accountability, social responsibility, and public trust. Even after the proliferation of general incorporation laws, and even after most state constitutions prohibited legislatures from granting privileges to particular corporations, states continued to treat corporations as artificial entities with special obligations to the states that created them.”).

28. See, e.g., *Flint v. Stone Tracy Co.*, 220 U.S. 107, 108–09 (1911) (upholding the corporate income tax on the grounds that it was properly an excise tax on the privilege of doing business as a corporation); *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (holding that the liberty of due process was crafted as “the liberty of natural, not artificial persons”); *Hale v. Henkel*, 201 U.S. 43, 43 (1906) (refusing to extend Fifth Amendment protections against self-incrimination to corporations by holding the government’s need to monitor the artificial entities it created to be superior).

29. See, e.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–49 (1933) (Brandeis, J., dissenting in part); see also *supra* note 15.

30. 288 U.S. 517 (1933). In *Louis K. Liggett Co.*, the Court was tasked with deciding the constitutionality of a Florida statute that discriminately targeted chain stores. *Id.* at 517. The Florida law required all businesses with stores located in multiple counties within the state to pay higher taxes than those imposed on single-locale businesses that were independently owned. *Id.* The Court held that the discriminatory tax increase was unreasonable and thus struck down the anti-chain store law as a violation of the Fourteenth Amendment. *Id.*



example, sheds a less sympathetic light on the evolution of the corporate entity that contrasts with its place in modern-day life:

The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life and, hence, to be borne with resignation. Throughout the greater part of our history a different view prevailed. . . . [Indeed,] incorporation for business was commonly denied long after it had been freely granted for religious, educational and charitable purposes.<sup>31</sup>

Justice Brandeis's nearly century-old opinion remains relevant today. Indeed, a pair of anti-corporate rights crusaders channeled Brandeis's historical perspective in the lead up to last summer's *Hobby Lobby* decision when they wrote, "[C]orporations are subject to more oversight than are individual citizens. . . . And for most of American history, nothing in a corporation's legal status was construed to protect it from generally operable police power statutes passed by the legislature in the interest of the public's health, safety, comfort, and welfare."<sup>32</sup> Yet, while such historical appeals may lend considerable force to those seeking to preclude corporations from attaining additional rights and liberties, they offer little explanation as to why present-day corporations should be bound by the same antiquated views that governed their corporate predecessors.<sup>33</sup>

As the wildly divergent characterizations above demonstrate, the difference in opinion over the role and rights of the corporate entity is nearly as old as the nation itself. Such polarization will not likely be resolved soon. If anything, the fervor surrounding the Court's decision in *Hobby Lobby* suggests that the debate is growing more

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31. *Id.* at 548–49.

32. Lamoreaux & Novak, *supra* note 22.

33. *Cf.* Brief Amicus Curiae of Pac. Legal Found. et al. at 5, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 281683 at \*5 (“Before the 1830s, profit-making corporate enterprises were often government-created franchises enjoying chartered privileges to exercise a sovereign prerogative (such as constructing roads or canals) or monopoly status. But beginning in the early nineteenth century, private companies began using the corporate form to conduct purely private business. . . . [C]orporations were no longer creatures of the state.” (internal citations omitted)); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 137 (3d ed. 2005) (explaining that “[o]ld decisions and doctrines, from the time when most corporations were academies, churches, charities, and cities” are largely inapposite to the modern-day “world of business corporations”).

robust.<sup>34</sup> With increasing uncertainty over corporate rights and personhood, the Supreme Court must offer lower courts a clearer and more comprehensive scheme of corporate personhood rights. Unfortunately, the Court's decision in *Hobby Lobby* to provide certain corporate entities with federally codified religious exercise rights offered no cohesive theory of corporate personhood. And, "although the Court is pragmatically averse to theories of corporate personhood, . . . [t]he Court's avoidance of corporate personality does not make the issue disappear; it simply becomes a judicial silence, pregnant with implication."<sup>35</sup> Indeed, the *Hobby Lobby* decision, coupled with subtler corporate personhood victories in the circuit courts,<sup>36</sup> including the Fourth Circuit's illustrative decision to allow corporations to assume an imputed racial identity, demonstrates that the courts have no problem expanding the corporate arsenal of rights despite their inability to articulate the scope or meaning of corporate personhood and the attendant consequences.<sup>37</sup>

## II. CONTEMPORARY CORPORATE PERSONHOOD CASE LAW

Although decided after *Carnell Construction*, this Comment surveys the Supreme Court's decision in *Hobby Lobby* first. Both the majority and minority opinions issued by the *Hobby Lobby* Court shed fresh light on the Fourth Circuit's conclusions and frame the ensuing discussion of corporate personhood.

34. See *supra* notes 10–15 and accompanying text.

35. Miller, *supra* note 11, at 915.

36. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 308 (4th Cir. 2008); cf. Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement To End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 221 n.42 ("[T]he Court's decision [in *Santa Clara v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886)] relied on the aggregate theory arguments . . . [advanced by] Justice Field in his circuit court opinion in the companion case, *San Mateo v. So. Pac. R.R. Co. (The Railroad Tax Cases)*, 13 F. 722 (C.C.D. Cal. 1882)."). *But see*, James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 467 (2015) (discussing the incoherency in federal case law concerning businesses' freedom-of-association rights under the First Amendment and arguing that "[a]lthough the Supreme Court has only obliquely addressed associational asymmetry, lower courts have consistently applied it as a matter of First Amendment doctrine").

37. See *infra* Part III.

## A. Hobby Lobby

The Supreme Court's 5–4 decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>38</sup> addressed a circuit split concerning the friction between the religious beliefs of closely held corporations and the Affordable Care Act's ("ACA")<sup>39</sup> so-called "contraceptive mandate" provision.<sup>40</sup> That provision requires certain employer-sponsored health plans to give women free "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," a regulatory arm of the Department of Health and Human Services ("HHS").<sup>41</sup>

In an effort to resolve the inconsistency among the circuit courts, the Supreme Court agreed to hear two cases—*Hobby Lobby Stores, Inc. v. Sebelius*,<sup>42</sup> a Tenth Circuit case decided in favor of Christian owners of two closely held businesses,<sup>43</sup> and *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*,<sup>44</sup> a Third Circuit case decided in favor of HHS.<sup>45</sup> In both cases, the owners of the closely held, for-profit corporations contended that compliance with the ACA's contraceptive mandate would require them to violate their "sincere religious belief that life begins at conception."<sup>46</sup> The corporate plaintiffs in each case sued federal officials and agencies under the Religious Freedom and Restoration Act ("RFRA")<sup>47</sup> and the Free Exercise Clause of the First Amendment,<sup>48</sup> in an attempt "to enjoin application of the ACA's contraceptive mandate."<sup>49</sup>

In *Conestoga Wood*, the Hahns, Mennonite owners of Conestoga Wood Specialties, appealed a district court decision denying their request for a preliminary injunction to the ACA's contraceptive mandate.<sup>50</sup> The Third Circuit found the mandate imposed no requirements on the Hahns personally and concluded that "for-profit, secular corporations cannot engage in religious exercise" under

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38. 134 S. Ct. 2751 (2014).

39. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

40. *Hobby Lobby*, 134 S. Ct. at 2759.

41. 42 U.S.C. § 300gg-13(a)(4) (2012).

42. 723 F.3d 1114 (10th Cir. 2013).

43. *Id.* at 1120–21.

44. 724 F.3d 377 (3d Cir. 2013).

45. *Id.* at 381.

46. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2751, 2775 (2014).

47. 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

48. U.S. CONST. amend. I.

49. *Hobby Lobby*, 134 S. Ct. at 2765.

50. *Conestoga Wood*, 724 F.3d at 381.

RFRA or the First Amendment, affirming the district court's decision.<sup>51</sup> The Hahns appealed the decision to the Supreme Court, which granted certiorari.<sup>52</sup>

In *Hobby Lobby*, the Greens, Christian owners of Hobby Lobby, a chain of arts and crafts stores, were also denied a preliminary injunction to the ACA's contraception provision.<sup>53</sup> Unlike the Third Circuit in *Conestoga Wood*, however, the Tenth Circuit found "no persuasive reason to think that Congress meant 'person' in RFRA to mean anything other than its default meaning in the Dictionary Act—which includes corporations regardless of their profit-making status."<sup>54</sup> Accordingly, the court of appeals reversed the district court's denial of the Greens' preliminary injunction motion,<sup>55</sup> and remanded the case with explicit instructions that the lower court address the remaining preliminary injunction factors.<sup>56</sup> HHS appealed the decision to the Supreme Court, which granted certiorari.<sup>57</sup>

In July 2013, several months before the Supreme Court granted certiorari in *Hobby Lobby* and *Conestoga Wood*, HHS issued regulations specifying the ACA requirements for women's "preventive health services," and adopted as binding the Health Resources and Services Administration's "preventive care . . . guidelines."<sup>58</sup> These comprehensive guidelines included a requirement compelling nonexempt employer-sponsored plans to provide female employees with coverage of "FDA-approved contraceptive methods, including Plan B, Ella, and IUDs."<sup>59</sup>

However, the HHS rules adopted in 2013 exempted "group health plan[s] established or maintained by a religious employer" from "any requirement to cover contraceptive services."<sup>60</sup> "Religious employer" was defined as "an organization that is organized and operates as a nonprofit entity and is referred to in section

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51. *Id.*

52. *Conestoga Wood Specialties Corp v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356).

53. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1284–85, 1296–97 (W.D. Okla. 2012).

54. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1132 (10th Cir. 2013).

55. *Id.* at 1147.

56. *Id.*

57. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354).

58. 45 C.F.R. § 147.130(a)(1)(iv) (2013).

59. *See Coverage of Certain Preventive Services Under the Affordable Care Act*, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013), commentary on 45 CFR § 147.130 (2012).

60. 45 C.F.R. § 147.131(a) (2013).

6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code.”<sup>61</sup> The relevant portions of the Internal Revenue Code mention only “churches, their integrated auxiliaries, and conventions or associations of churches,” and “the exclusively religious activities of any religious order.”<sup>62</sup> In short, only churches and other houses of worship were exempted from the ACA mandate to provide employees with cost-free contraceptive services. Thus, neither of the for-profit corporations involved in the consolidated *Hobby Lobby* decision qualified for the religious employer exemption to the contraceptive mandate.

Apart from religious employers’ wholesale exemption from the contraceptive mandate, the 2013 regulations also accommodated qualifying nonprofit institutions.<sup>63</sup> The accommodation enabled nonprofit religious organizations opposed to providing coverage for “some or all of [the ACA-mandated] contraceptive services” to assign the costs of those services to a third party, most likely an insurance carrier, following a “self-certification” procedure.<sup>64</sup>

In response to the Court’s decision in *Hobby Lobby*, HHS proposed revisions to its regulations detailing organizations that would be exempt from providing the contraceptive services mandated by the ACA.<sup>65</sup> In line with the Court’s holding, the proposed amendments extended the existing religious-based accommodation to include closely held for-profit businesses that object “to covering some or all of the contraceptive services on account of [their] owners’ sincerely held religious beliefs.”<sup>66</sup> The proposed rules suggest “two possible approaches to defining a qualifying closely held for-profit entity . . . [and] invite comments on other approaches as well.”<sup>67</sup> One approach would require qualifying businesses to be privately owned and would impose a cap on the number of shareholders or owners.<sup>68</sup> An alternative approach would necessitate, in addition to the private “ownership requirement, that a specified fraction of the ownership interest [be] concentrated in a limited and specified number of owners.”<sup>69</sup>

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61. *Id.*

62. I.R.C. § 6033(a)(3)(A)(i), (iii) (2012).

63. 45 C.F.R. § 147.131(b)–(c) (2013).

64. *Id.* § 147.131(b)–(c)(1).

65. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118, 51,126–27 (proposed Aug. 27, 2014) (to be codified at 45 C.F.R. pt. 147).

66. *Id.* at 51,126.

67. *Id.* at 51,124.

68. *See id.*

69. *See id.* at 51,121–22.

Lastly, in addition to proposing the new rules outlined above, HHS issued new regulations that set out an alternative certification procedure for qualifying organizations with religious objections to filing a self-certification form with their insurers.<sup>70</sup> The alternative process “provides that an eligible organization may notify HHS in writing of its religious objection to coverage of all or a subset of contraceptive services.”<sup>71</sup> From there, the government assumes responsibility for notifying the insurance carrier that it must arrange for contraceptive coverage in lieu of the religious organization.<sup>72</sup>

The Court held that both Hobby Lobby Stores and Conestoga Wood Specialties, as closely held businesses, were entitled to the religious protections guaranteed under RFRA, which “prohibits the ‘Government [from] substantially burden[ing] 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*’ ” advances a compelling government interest by the least restrictive means.<sup>73</sup> Although, as Justice Alito explained, “Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of ‘persons.’ ”<sup>74</sup> Moreover, the Court stressed the importance of keeping in mind Congress’s aim of protecting people’s religious rights:

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

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70. *Id.* at 51,101. The alternative process closely tracks an interim order issued by the Court staying an injunction in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014) (order granting injunction). The *Wheaton* order, joined by six of the nine Justices and issued in the week following the Court’s ruling in *Hobby Lobby*, reasoned that Wheaton College could opt out of the contraceptive services at odds with its sincere religious beliefs by simply informing the government. *Id.* at 2807. This alternative opt-out process relieved Wheaton College administrators from personally signing and sending the opt-out form to the insurer, a process the college argued made it complicit in offering the contraceptive coverage. *Id.* at 2807–08.

71. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. at 51,094.

72. *See id.* at 51,095.

73. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (emphasis added) (quoting 42 U.S.C. § 2000bb-1(a), (b)). With the enactment of the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc (2012)), RFRA’s reach was expanded to cover “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc-5(7)(A).

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

a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.<sup>75</sup>

Having determined that the closely held companies<sup>76</sup> were entitled to religious protection under RFRA,<sup>77</sup> the Court concluded that the HHS regulations at issue amounted to a substantial burden on the companies' exercise of religion because they required the provision of "health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."<sup>78</sup>

In writing his majority opinion, Justice Alito made a number of plainspoken attempts<sup>79</sup> to limit the *Hobby Lobby* decision to the facts

75. *Id.* In reaching the opposite conclusion the year before, the Third Circuit had reasoned that "[g]eneral business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." *Id.* (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), *rev'd*, 134 S. Ct. 2751 (2014)). The Court in *Hobby Lobby* dismissed the Third Circuit's logic as "true—but quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Id.*

76. As Justice Alito points out in the majority opinion, the Court had previously "entertained RFRA and free-exercise claims brought by nonprofit corporations." *Id.* at 2768–69 (citing *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (Free Exercise); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (RFRA); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (Free Exercise)).

77. *See id.* at 2785. The Court found it unnecessary to reach the companies' constitutional free exercise claims.

78. *Id.* at 2759.

79. For instance, Justice Alito responded to the government's argument that extending RFRA protection to large, publicly traded corporations would trigger destructive proxy battles over corporate religious identity by stating, "[W]e have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2774.

of the case, or at the least to the category of so-called “closely held” businesses.<sup>80</sup> The logic underpinning the Court’s decision, however, has largely frustrated this attempt at judicial restraint. The Court does not expressly limit its understanding of corporate eligibility for religious exemptions under RFRA to only those businesses controlled by a single family, nor does it offer any explicit advice on how to decide whether a certain business fits the “closely held” label. Although Justice Alito noted that “[t]hese cases . . . do not involve publicly traded corporations”<sup>81</sup> and argued that “it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims [because of] numerous practical restraints,”<sup>82</sup> the logic underlying the Court’s decision to extend RFRA protection to for-profit companies<sup>83</sup> suggests that any business entity of any size or form could invoke RFRA.<sup>84</sup> In spite of this ambiguity, the Court pointed out that publicly owned companies, with shareholders that

80. *Hobby Lobby*, 134 S. Ct. at 2774. Determining what is and what is not a “closely held” business is complicated by the lack of a universally accepted definition. According to the Pew Research Center, “[t]he IRS has the clearest definition: For corporate tax purposes, a closely held corporation is one where more than half of the stock is owned (directly or indirectly) by five or fewer individuals at any time in the second half of the year.” Drew DeSilver, *What Is a ‘Closely Held Corporation,’ Anyway, and How Many Are There?*, PEW RES. CTR.: FACT TANK (July 7, 2014), <http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/> [<http://perma.cc/QU7Z-UGVF>]; see also, e.g., Stephanie Armour & Rachel Feintzeig, *Hobby Lobby Ruling Raises Question: What Does ‘Closely Held’ Mean?*, WALL ST. J. (June 30, 2014, 2:56 PM), <http://online.wsj.com/articles/hobby-lobby-ruling-begs-question-what-does-closely-held-mean-1404154577?cb=logged0.016798734897747636> [<http://perma.cc/Z6ZZ-NEDT> (dark archive)] (“Closely held companies are owned by a relatively small number of investors, typically including their founding families and management. Roughly 90% of all companies in the [United States] are closely held, according to a 2000 study by the Copenhagen Business School.”).

81. *Hobby Lobby*, 134 S. Ct. at 2774.

82. *Id.*

83. *Id.* at 2768. The Court concluded that, because “RFRA itself does not define the term ‘person,’ we must therefore look to the Dictionary Act, which we must consult ‘[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.’” *Id.* (quoting 1 U.S.C. § 1 (2012)) (alterations in original). The Dictionary Act defines “the words ‘person’ and ‘whoever’ [to] include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .” *Id.*

84. See *id.* at 2769 (“No known understanding of the term ‘person’ includes some but not all corporations. . . . [N]o conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.”); see also *id.* at 2769 n.20 (“Not only does the Government concede that the term ‘persons’ in RFRA includes nonprofit corporations, it goes further and appears to concede that the term might also encompass other artificial entities, namely, general partnerships and unincorporated associations. (citing Brief for Respondents at 28, 40, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899, at \*17)). Justice Ginsburg, in her dissent, harshly criticized the majority for its failure to address the potential problems that could arise from such a widely defined parameter. See *id.* at 2797 (Ginsburg, J., dissenting).



are often both numerous and religiously diverse, will have a much harder time proving or successfully operating in accordance with a singular religious view.<sup>85</sup> Justice Alito unceremoniously dismissed concerns that the decision would invite larger for-profit corporations to litigate under RFRA.<sup>86</sup>

Seizing on the lack of precision in the majority's opinion, Justice Ginsburg attacked the Court for expanding RFRA's umbrella of protection to corporate entities wholly incapable of practicing religion.<sup>87</sup> Justice Ginsburg derided "[t]he Court [for] not even begin[ing] to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public."<sup>88</sup> Furthermore, Justice Ginsburg, in concluding that "'[c]losely held' is not synonymous with 'small,'" pointed out that "Hobby Lobby's case demonstrates [that RFRA] claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse."<sup>89</sup>

Many have echoed Justice Ginsburg's criticisms in the months since the *Hobby Lobby* ruling. Indeed, almost as soon as the opinions were released, legal scholars began questioning the tenability of Justice Alito's attempt to limit the breadth of the decision, with several suggesting that an eventual extension of RFRA personhood to the wider range of business entities is inevitable.<sup>90</sup> Not everyone, however, finds the Court's constraints impossibly unwieldy. Stephen Bainbridge, for example, has pointed to the Court's endorsement of state corporate law as the appropriate way to resolve intra-corporate

85. *See id.* at 2774 (majority opinion).

86. *Id.* ("HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights.")

87. *See id.* at 2797 n.19 (Ginsburg, J., dissenting).

88. *Id.*

89. *Id.* Justice Ginsburg further noted that "family-owned candy giant Mars, Inc., takes in \$33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than \$136 billion in revenues and employs some 140,000 persons." *Id.* (citing Andrea Murphy & Scott DeCarlo, *America's Largest Private Companies 2013*, FORBES (Dec. 18, 2013), <https://web.archive.org/web/20141027052442/http://www.forbes.com/largest-private-companies> [<http://perma.cc/E7HT-ZBJ6>]).

90. *See, e.g.*, Anne Tucker, *The Meaning of Hobby Lobby: Bedrooms, Boardrooms & Burdens*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/the-meaning-of-hobby-lobby-bedrooms-boardrooms-burdens.html> [<http://perma.cc/CK7J-HCL7>]. Tucker has pointed out that "[e]ven if we accept that the [extension of RFRA protection] is limited to closely held entities, where should we look for that definition? State law? IRS guidelines? Common law?" *Id.* Tucker, in arguing that, "while we have a general sense [of] what closely held means, the precise boundaries are more difficult," envisions one scenario in which "closely held entities become the new pornography where we only know it when we see it." *Id.*

religious disputes as illustrative of the Court's intention that lower courts also look to the law of the state (the state of incorporation, Bainbridge suggests) in deciding whether a business is closely held.<sup>91</sup> Still others argue that the Court's decision, even if construed as applying *only to closely held corporations*, has the potential to mushroom broadly.<sup>92</sup> University of Idaho College of Law's Sarah Haan, for example, has argued that "Justice Alito [h]as open[ed] the door to RFRA free exercise claims by a wide range of companies, the vast majority of which will bear no likeness to mom-and-pop businesses."<sup>93</sup>

Although the parade-of-horrors advanced in Justice Ginsburg's dissent and echoed in the cascade of academic literature that followed in its wake<sup>94</sup> have yet to materialize, the concern that larger for-profit companies will invoke the decision in an effort to save money is a valid one. In addition, the Court's failure to expressly define, or even offer guidelines for, what constitutes a "closely held" corporation for purposes of RFRA protection may likely require future clarification. Despite the theoretical possibility of large, publicly traded behemoths basing religious exercise claims on the Court's reasoning in *Hobby Lobby*, it seems unlikely that such claims would be successful with regard to other aspects of the ACA. The Court limited its decision in *Hobby Lobby* because a government framework already existed for insurance companies to provide contraception to employees of not-for-profit religious institutions. The possibility of large corporate

91. See Stephen Bainbridge, *What Is a "Close Corporation" for Purposes of the New Hobby Lobby Rule*, PROFESSORBAINBRIDGE.COM (July 1, 2014, 11:00 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2014/07/what-is-a-close-corporation-for-purposes-of-the-new-hobby-lobby-rule.html> [<http://perma.cc/YU3B-ZPV5>]. However, state law greatly differs on what qualifies companies as "closely held." See Sarah Haan, *Guest Post: Closely Held Means "Controlling Shareholder"?*, LAW PROFESSOR BLOGS NETWORK: BUS. L. PROF. BLOG (July 1, 2014, 2:30 PM), [http://lawprofessors.typepad.com/business\\_law/2014/07/guest-post-closely-held-means-controlling-shareholder.html](http://lawprofessors.typepad.com/business_law/2014/07/guest-post-closely-held-means-controlling-shareholder.html) [<http://perma.cc/T9Q3-8VP5>] (noting differences in the legal definitions of "closely held" in the states of Delaware and Maryland). Such state-law variance, Bainbridge and others argue, when viewed in light of "the important federal interests at stake in the ACA and RFRA statutes," may eventually compel the Court, in future litigation, to create "a uniform federal common law rule." Bainbridge, *supra*. Until then, perhaps state law will serve to dispel definitional confusion.

92. Haan, *supra* note 91. Professor Haan believes that if courts are to look to state as opposed to federal law definitions of "closely held," then "the sincerely-held religious beliefs of a closely held corporation may just be the sincerely-held religious beliefs of its controlling shareholder," since "[t]he most basic principles of state corporate law allow a controlling shareholder to, well, control the corporation." *Id.*

93. *Id.*

94. See *Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting); Tucker, *supra* note 90.

entities launching RFRA-based attacks on other current or future federal statutory schemes seems equally unlikely, given the collective-action hurdles that would stymie shareholder efforts to prove the corporation possesses the “unity of religious purpose” required to prove that a religious objection is sincere under RFRA.<sup>95</sup>

Nevertheless, Chief Justice Roberts refused to rule out the possibility of RFRA personhood applying in “other situations,” suggesting instead that “[it] is a question that we’ll have to await another case [to decide, although I don’t think] a large publicly-traded corporation [is going to] come[] in and say[], we have religious principles.”<sup>96</sup> Justice Scalia, too, seemed to entertain the notion that RFRA could apply to larger corporations by suggesting that shareholder disputes over whose religion trumps whose would not require the Court to step in as referee, because, as a matter of state corporate law, such disputes would be determined by “[w]hoever controls the corporation.”<sup>97</sup> Chief Justice Roberts then brought up a related corporate rights question in which the government had, conversely, argued for the extension of a traditionally personal right to the corporate entity:

**CHIEF JUSTICE ROBERTS:** Could I just raise [one question]—eight courts of appeals, [meaning] every court of appeal to have looked at the situation[,] have held that corporations can bring racial discrimination claims as corporations. Now, does the government have a position on whether corporations have a race?

**GENERAL VERRILLI:** Yes. We think those [decisions] are correct and that this situation is different.

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**CHIEF JUSTICE ROBERTS:** ... those ... eight cases involve construction of the term “person?”

**GENERAL VERRILLI:** Yes, but only “person.”

95. See David Masci, *The Hobby Lobby Impact: A Q&A*, PEW RES. CTR., FACT TANK (July 2, 2014), <http://www.pewresearch.org/fact-tank/2014/07/02/the-hobby-lobby-impact-a-qa/> [<http://perma.cc/L5XZ-SC2B>].

96. Transcript of Oral Argument at 52, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354 & 13-356), 2014 WL 1351985, at \*52.

97. See *id.* at 52–53.

**CHIEF JUSTICE ROBERTS:** So . . . the corporation can bring[,] as a person[,] a claim of racial discrimination[?]

**GENERAL VERRILLI:** That’s correct, but [it can]not exercise [] religion. That’s the difference. . . .

**JUSTICE ALITO:** If you say they can’t even get their day in court, you’re saying something pretty, pretty strong.<sup>98</sup>

The dissonance of the government’s positions is telling; it illustrates the uncertainty that has rendered unpredictable cases that touch the logical netherworld in which corporate rights exist. And, until the Court provides a workable framework for differentiating between corporate and natural personhood and their attendant rights, corporate litigants will continue to grope blindly in the dark. As one prominent constitutional law commentator has noted, it is nearly impossible to distinguish between “purely personal” and “somewhat personal” rights without the Court declaration of a bright-line test for “what constitutes an individual non-corporate right.”<sup>99</sup> It is long past time for the Court to abandon its “pragmatic, anti-theoretical approach to corporate right[.]”<sup>100</sup> creation, as such an “ad hoc, arbitrary”<sup>101</sup> process eschews conceptual rigor, undermines consistency, and ultimately weakens the rule of law.

#### B. Carnell Construction

On March 4, 2014, less than three weeks before the Supreme Court heard oral arguments in *Hobby Lobby*, the Fourth Circuit announced its corporate-friendly decision in *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*.<sup>102</sup> The Fourth Circuit’s conclusion—that corporations can acquire a racial identity—largely echoed the legal arguments invoked by the seven sister circuits that had previously decided the issue; yet, the *Carnell Construction* court’s decision took on added significance, given the legally-charged corporate law environment in which it was decided. As illustrated in

98. *Id.* at 53–55.

99. Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 798 n.19 (1996).

100. Mayer, *supra* note 10, at 621 (exploring the Court’s history of conferring Bill of Rights guarantees on corporations).

101. Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005).

102. 745 F.3d 703, 710 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 361 (2014).

Section II.A, the *Carnell Construction* decision caught the Supreme Court's attention in evaluating the corporate claims at stake in *Hobby Lobby*. Indeed, the conceptual parallels of *Carnell Construction* and *Hobby Lobby* left the government hard-pressed to defend its dual positions, which appeared divergent and contradictory to the Supreme Court. This apparent inconsistency provided the Chief Justice with a ready-made trap to capture the government, which could not readily free itself without hobbling its own argument. This Section digs deeper into the factual context surrounding the *Carnell Construction* litigation, explores the contractual feud that lies at its core, and ultimately questions both the soundness of the Fourth Circuit's reasoning and the extent to which its decision comports with the overarching federal framework of corporate personhood.

The case arose out of a contractual dispute between Carnell and the Housing Authority.<sup>103</sup> The Housing Authority awarded Carnell a contract to prepare the site of a newly planned public housing project in Danville, Virginia.<sup>104</sup> Although the Housing Authority managed the project, it was partially funded by a grant from the U.S. Department of Housing and Urban Development ("HUD").<sup>105</sup> After several months of work, the relationship between Carnell and the Housing Authority soured, leading Carnell's president, Michael Scales, to express concerns that the company, which was certified by the State of Virginia as a "minority owned business,"<sup>106</sup> was being targeted on the basis of its minority-owned status.<sup>107</sup>

103. *See id.* at 710–11.

104. *Id.* at 710. ("The contract specified a June 2009 completion date, stipulated a total price of \$793,541, and included a set of enumerated contract documents."). Officially titled the Blaine Square Project, the public housing initiative sought "to provide subsidized rental units to low-income residents of Danville." *Id.*

105. *See id.* The federal grant, which totaled \$20 million, was provided through HUD's Hope VI Program, which "allows private investors to contribute capital to public housing projects in exchange for tax credits." *Id.*

106. In the Commonwealth of Virginia, companies majority owned by African-, Asian-, Hispanic-, or Native-Americans can apply for minority-owned certification through the state's "Small, Women- and Minority-Owned Business" ("SWaM") program. *See* VA. DEP'T. SMALL BUS. AND SUPPLIER DIVERSITY, *SWaM Certification Procedures*, VIRGINIA.GOV, <http://www.dmbv.virginia.gov/swamcert.html> [<http://perma.cc/3QJM-RCPX>]. The program, administered by Virginia's Department of Small Business and Supplier Diversity ("SBSD") agency, aims "to enhance procurement opportunities for SWaM businesses participating in state-funded projects." *Id.* Similar minority-owned-enterprise ("MBE") contracting-set-aside programs have been statutorily enacted by most states and the federal government. *See* George R. La Noue, *Defining Social and Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 274, 277 (2012).

107. *Carnell Constr. Corp.*, 745 F.3d at 711.

Scales's concerns included "allegations that Carnell was 'being singled out as a minority contractor,' and was 'expected . . . to work for free' on 'excessive' project modifications."<sup>108</sup> Though Gary Wasson, the Housing Authority's Executive Director, submitted to Carnell's request for mediation, the parties' attempt to resolve the feud out of court floundered.<sup>109</sup> In May 2009, the Housing Authority advised Carnell that it would not offer Carnell the option to renew its contract, which was set to expire the following month.<sup>110</sup> Carnell was also told to "remove its equipment and personnel from the project site the following month regardless [of] whether the work had been completed."<sup>111</sup> Carnell complied with the Housing Authority's demand and requested reimbursement for alleged instances of unpaid work.<sup>112</sup> These requests were denied.<sup>113</sup>

Instead, the Housing Authority declared a default under Carnell's performance bond, which in turn prompted Carnell to sue the Housing Authority in federal court, alleging racial discrimination.<sup>114</sup> Carnell brought its racial discrimination claims under both Title VI of the Civil Rights Act of 1964<sup>115</sup> and § 1981,<sup>116</sup> which prohibit employers from using a person's race as the basis for refusing to enter, interfering with, or terminating an employment

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.* The racial discrimination claims centered on "certain statements made by the Housing Authority's Hope VI Program Director and Contracting Officer, Cedric Ulbing, as well as alleged disparate treatment with respect to contracting practices such as 'prepayment' for materials, 'retainage' of progress payments, and approval of change order requests." *Id.*

115. 42 U.S.C §§ 2000d-1 to -7 (2012). The law provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." § 2000d.

116. § 1981. Section 1981 provides, in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1981(a). Carnell's § 1981 claims were tacked on to the Title VI claims in Carnell's Third Amended Complaint, filed prior to the start of the second trial. Petition for Writ of Certiorari at 5-6, *Carnell Constr. Corp., cert. denied*, 135 S. Ct. 357 (Oct. 14, 2014) (No. 14-6).

contract.<sup>117</sup> Carnell's suit also alleged breach of contract, which spurred the Housing Authority to bring the same action through a counterclaim.<sup>118</sup>

The trial-court litigation proved to be lengthy and controversial. Chock full of recalcitrant attempts by the Housing Authority's attorney to discredit the sincerity of Carnell's discrimination claims, the proceedings, which spanned three separate trials, also included allegations that Carnell aggrandized contextual details "of the case to make out a race claim" and engaged in racial grandstanding in an attempt "to garner broader interest in the case in neighboring counties."<sup>119</sup> At the third and final trial before appeal, the jury found for the Housing Authority on the Title VI claims but for Carnell on the breach of contract claims and counterclaim.<sup>120</sup> The third jury

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117. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979) ("The package of statutes of which Title [VI] is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI... as creating a private remedy."); *id.* at 703 ("We have no doubt that Congress... understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."); *Runyon v. McCrary*, 427 U.S. 160, 168–69 (1976) ("It is now well established that § [1981]... prohibits racial discrimination in the making and enforcement of private contracts." (citation omitted)); *Johnson v. Ry. Express Agency*, 42 U.S. 454, 459–60 (1975) (explaining that § 1981 "relates primarily to racial discrimination in the making and enforcement of contracts," and holding "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race").

118. *Carnell Constr. Corp.*, 745 F.3d at 711. Carnell's contract claims revolved around "allegations that Carnell was directed to perform work for which it was never paid, and that Carnell was improperly removed from the project and declared in default of its contract obligations." *Id.* The Housing Authority's breach of contract counterclaim "framed Carnell's lawsuit as an example of 'occasions when false claims of race discrimination are made in order to cover up poor performance, [to] excuse poor performance, or to gain an advantage in a contractual situation.'" *Id.*

119. *Id.* at 711–13. After an initial jury verdict awarding Carnell \$3.1 million in race discrimination damages was vacated by a post-trial bench order that found portions of testimony admitted on Carnell's behalf to be false, the second trial also proved fruitless after the jury deadlocked on both the race discrimination and contract claims causing the judge to declare a mistrial. *Id.* at 711–12. The third trial was the charm, with the jury reaching a mixed verdict—siding with the Housing Authority on the race claims and with Carnell on both the breach of contract claims and counterclaim—and awarding Carnell a nearly \$1 million payday that was reduced to \$215,000 by a post-trial bench order. *Id.* at 712–13.

120. Carnell's § 1981 claims did not reach the jury, as the district court, quoting the Supreme Court's language in *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989), held that "Section 1981, while providing extensive rights, does not provide a remedy against state actors." *Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth.*, No. 4:10CV00007, 2012 WL 178341, at \*8 (W.D. Va. Jan. 23, 2012), *aff'd in part*, 745 F.3d 703 (4th Cir. 2014). Thus, the court "conclude[d] that that [the Housing Authority was] not amenable to suit under § 1981" and granted its motion for summary judgment. *Id.* On appeal, Carnell did not object to the district court's summary judgment on its § 1981 claims. See Petition for Writ of Certiorari, *supra* note 116, at 8–9.

awarded Carnell breach-of-contract damages nearing \$1 million, yet the amount was cut by nearly three-quarters in a post-trial ruling by the judge.<sup>121</sup> Both Carnell and the defendants appealed to the U.S. Court of Appeals for the Fourth Circuit.<sup>122</sup>

On appeal, the Fourth Circuit primarily addressed whether Carnell, as a minority-owned corporate entity,<sup>123</sup> met the standing requirements necessary to bring racial discrimination claims under Title VI.<sup>124</sup> The standing inquiry requires federal courts to consider whether the litigants in any given action are entitled to bring suit in federal court.<sup>125</sup> Moreover, the standing doctrine is often characterized as having both constitutional and prudential dimensions.<sup>126</sup> The Housing Authority conceded that Carnell met

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121. *Carnell Constr. Corp.*, 745 F.3d at 711–12.

122. *Id.* at 712–13.

123. *Id.* at 715 (“It is undisputed that Carnell properly was certified by the Commonwealth of Virginia as a [SWaM business] because its president and sole shareholder is African-American. Carnell publicly represented that it was eligible for consideration as a minority business enterprise when it contracted to work for the Housing Authority on a public project receiving federal funding assistance.”).

124. *Id.* at 710. Carnell’s § 1981 claims, *see supra* note 116 and accompanying text, though perfunctorily mentioned by the court in its disposition of separate issues raised by Carnell (including objections to the district court’s evidentiary proceedings and agency liability that required the court to engage in lengthy discussions of the Federal Rules of Evidence and Virginia contract law), were not included in the standing doctrine question presented to the court, and thus were not *directly* addressed by its discussion of the matter. *Carnell Constr. Corp.*, 745 F.3d at 710, 714–16. Nevertheless, it is important to note that the federal appellate court decisions cited by the Fourth Circuit in its consideration of Carnell’s Title VI standing included a number of cases, decided in other jurisdictions, that addressed § 1981 standing and reached similar conclusions as the court. *See* cases cited *supra* note 6.

125. *See* MICHAEL L. WELLS, WILLIAM P. MARSHALL & GENE R. NICHOL, CASES AND MATERIALS ON FEDERAL COURTS 281 (3d. ed. 2015) (“The doctrine of ‘standing’ originally identified *who* may sue in an Article III court and continues to address that question today. . . . [It] is the product of a profound struggle between competing conceptions of what federal courts are and what they do and ought to do in American public life. . . . Standing doctrine is therefore unruly, even incoherent, and by some accounts manipulable in the service of substantive goals.”).

126. *Carnell Constr. Corp.*, 745 F.3d at 713 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The Supreme Court has explained that the “irreducible constitutional minimum of standing” requires a plaintiff in federal court to establish three requirements: “(1) [plaintiff] has suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision.” *Id.* In addition to the Article III requirements, however, federal courts also impose “prudential” limitations on standing to ensure sufficient “concrete adverseness.” *United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Court in *Windsor* noted that prudential considerations inform the standing inquiry in cases involving third-party litigants, generalized grievances, and statutory zones of interest. *See id.* at 2686–87. *See generally*, Micah J. Revell, Comment, *Prudential Standing, the Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221 (2013) (contemplating whether the



constitutional standing requirements and thus only “assert[ed] that Carnell’s Title VI claims r[a]n afoul of one of the standing doctrine’s judicially imposed, prudential limits on federal jurisdiction, which requires that ‘a plaintiff’s grievance must arguably fall within the zone of interests protected or regulated by the statutory provision . . . invoked in the suit.’ ”<sup>127</sup> Therefore, the Fourth Circuit’s “relevant standing inquiry” concerned whether Carnell’s claims fell within the “zone of interests” Congress sought to protect in enacting Title VI.<sup>128</sup>

The court ruled in favor of Carnell on the question of Title VI standing.<sup>129</sup> The majority opinion rejected the Housing Authority’s call to vitiate the Title VI claims on grounds that Carnell, as a corporate entity, lacked a “race, color, or national origin” and thus fell outside the statute’s protective scope.<sup>130</sup> Instead, the court sided with Carnell, broadly construing Title VI’s protection to radiate beyond the “natural person” confines.<sup>131</sup>

Though the question of corporate standing under Title VI was one of first impression for the Fourth Circuit, neither the issue nor the court’s holding are novel. Indeed, the Fourth Circuit panel was the eighth circuit court to hold that prudential considerations<sup>132</sup> do not destroy standing for corporations asserting race discrimination claims.<sup>133</sup> In reaching its decision, the court “observe[d] that several

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zone of interests test is a constitutional, statutory, or prudential limit under the current law of jurisdiction).

127. *Carnell Constr. Corp.*, 745 F.3d at 713 (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

128. *Id.* As Justice Douglas wrote in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), “The question of standing . . . concerns, apart from the ‘case’ or ‘controversy’ test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Id.* at 153. The Supreme Court’s decisions expressly involving the zone of interest standing requirement have applied the zone test “generously.” See WELLS ET AL., *supra* note 125, at 357 (discussing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987) (explaining the zone of interest test as creating a “presumption” in favor of standing and characterizing the standard as not “especially demanding”)).

129. *Carnell Constr. Corp.*, 745 F.3d at 709–10.

130. *Id.* at 713–16.

131. *Id.*

132. For a discussion of prudential considerations, see generally Revell, *supra* note 126, at 221.

133. See *supra* note 6 and accompanying text. Further explanation of two cases is warranted. In *Des Vergnes v. Seekonk Water District*, 601 F.2d 9 (1st Cir. 1979), the First Circuit granted third-party standing to a corporate litigant alleging race discrimination. The court concluded the corporation had “an implied right of action against any other person who, with a racially discriminatory intent, interferes with his right to make

other federal appellate courts have considered this question, and have declined to bar on prudential grounds race discrimination claims brought by minority-owned corporations that meet constitutional standing requirements.”<sup>134</sup> Indeed, the majority opinion repeatedly cited the substantial number of sister circuits in support of their affirmative answer to the question of corporate standing on federal race claims.<sup>135</sup> In particular, the court cited with approbation the Ninth Circuit’s decision in *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc.*,<sup>136</sup> concerning § 1981 racial discrimination claims.<sup>137</sup> Although the Ninth Circuit ultimately decided that the corporate plaintiff had standing under § 1981, it had little choice but to concede the defendant’s assertion that

[t]he issue of whether corporations could assert § 1981 claims was cast into doubt by dictum in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>138</sup> in which Justice Powell observed that “as a corporation, [the plaintiff] has no racial identity and cannot be the direct target of the petitioners’ alleged discrimination.”<sup>139</sup>

The *Carnell* court buttressed the Ninth Circuit’s repudiation of the *Arlington Heights* dictum by pointing to a decades-old observation by the Second Circuit in *Hudson Valley Freedom Theater, Inc. v. Heimbach*,<sup>140</sup> a Title VI case where the court expressed disbelief “that the Supreme Court would deny standing to [a] corporation because it ‘has no racial identity and cannot be the direct target’ of the discrimination, while at the same time it would be obliged to deny standing to the stockholders on the sound ground that the injury was suffered by the corporation and not by them.”<sup>141</sup>

Convinced by the Second Circuit’s reasoning in *Hudson Valley* that “when a corporation satisfies constitutional requirements for standing, prudential considerations should not prohibit that

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contracts with non-whites.” *Id.* at 13–14. The Second Circuit, in *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982), employed similar logic in its decision to allow a corporate entity to assert racial discrimination claims in a controversy over disbursement of grant funds. *Id.*

134. *Carnell Constr. Corp.*, 745 F.3d at 714 (alteration in original).

135. *Id.*

136. 368 F.3d 1053 (9th Cir. 2004).

137. *Id.* at 1058–59.

138. 429 U.S. 252 (1977).

139. *Thinket Ink Info. Res.*, 368 F.3d at 1058 (quoting *Arlington Heights*, 429 U.S. at 263) (alteration in original).

140. 671 F.2d 702 (2d Cir. 1982).

141. *Id.* at 706 (quoting *Arlington Heights*, 429 U.S. at 263) (alteration in original).

corporation from alleging that a defendant, on racial grounds, has acted to obstruct purposes that the corporation was created to accomplish,” the Fourth Circuit panel construed the *Arlington Heights* dictum as inapposite.<sup>142</sup> The majority, employing language and logic foreshadowing the Supreme Court’s opinion in *Hobby Lobby*, distinguished *Carnell* by noting that

[i]n *Arlington Heights*, the Supreme Court was not required to consider whether a corporation had standing to assert that it suffered injury based on racial discrimination in violation of federal law, because one of the other plaintiffs in the case was an African-American individual who plainly had demonstrated standing to bring the action.<sup>143</sup> Thus, the quoted language from *Arlington Heights* was surplusage unrelated to the Court’s determination of the standing issue presented.<sup>144</sup>

After clearing the *Arlington Heights* hurdle, the Second Circuit in *Hudson Valley* appeared to prescribe guidelines to limit future assertions of corporate standing under Title VI.<sup>145</sup> In reasoning that “[p]rudent considerations should not prohibit [a corporation from] asserting that [another party], on racial grounds, [is] frustrating specific acts of the sort which the corporation was founded to accomplish,” the *Hudson Valley* panel fashioned a compass to guide future courts through the legal twilight it had traversed: a nexus must exist between a corporation’s purpose and the race-based claims of discrimination it seeks to pursue.<sup>146</sup> Recalling that “prudent limitations on standing [were imposed] to obtain ‘the assurance that the most effective advocate of the rights at issue [would be] present to champion them,’” the court concluded that “[i]t would indeed be paradoxical if prudent standing considerations were to limit the range of permissible plaintiffs . . . to those who would be required to file complaints indulging in the sort of speculation which the Court has found suspect under its constitutional standing analysis.”<sup>147</sup>

The Fourth Circuit, however, opted to adopt the Ninth Circuit’s more expansive “imputed racial identity” standard, which dispenses with the purpose-race nexus in favor of a minority-race certification process operationalized by a varied host of affirmative action

142. *Carnell Constr. Corp. v. Danville Redev. & Hous. Auth.*, 745 F.3d 703, 714–15 (4th Cir. 2014).

143. *Id.* at 715 (citing *Arlington Heights*, 429 U.S. at 263).

144. *Id.*

145. *See Hudson Valley Freedom Theater, Inc.*, 671 F.2d at 706–07.

146. *Id.* at 705–06 (alteration in original).

147. *Id.* at 706–07 (alteration in original).

programs that span all levels of government and requirement standards.<sup>148</sup> Thus, the Fourth Circuit's ruling enables corporate entities to litigate federal suits alleging racial discrimination wholly apart from their minority-race owners, assuming the asserted minority status ("racial identity") has been properly certified ("imputed") under applicable law.<sup>149</sup>

The court therefore found that the Virginia government properly certified Carnell as a "Small, Women- and Minority-Owned Business" and that Carnell publicly represented this certified eligibility when it contracted to work for the Housing Authority.<sup>150</sup> Moreover, the court concluded that Carnell's claims against the Housing Authority referred to actions that occurred during Carnell's performance of its contract, that Carnell sufficiently alleged discrimination on the basis of its owner's minority status, and that Carnell "suffered direct injury as a result of that racial discrimination."<sup>151</sup> The court thus held that "Carnell sufficiently has shown an imputed racial identity permitting us to conclude that Carnell's corporate status does not prevent its race discrimination claims from falling within the zone of interests protected by Title VI."<sup>152</sup>

The Fourth Circuit, having adopted the *Thinket* court's "imputed racial identity" standard, "conclude[d] that the district court correctly held that Carnell had standing to assert race discrimination claims against the Housing Authority," yet held that the district judge's decision to allow the Housing Authority to impeach Carnell's president was reversible error.<sup>153</sup> Thus, the court vacated the district court's judgment with respect to the race discrimination claims and remanded the case for a new trial, extending the parties' litigation saga.<sup>154</sup> Soon after, the Housing Authority sought clarification on the issue of corporate standing under Title VI by petitioning the Supreme Court for writ of certiorari.<sup>155</sup> Carnell responded by filing a conditional cross-petition that raised questions involving the Fourth

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148. *Carnell Constr. Corp.*, 745 F.3d at 715.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 715–16 (alteration in original).

153. *Id.* at 726.

154. *Id.*

155. Petition for Writ of Certiorari, *supra* note 116, at 20–21; see also Brian Mahoney, *High Court Asked To Decide if Companies Can Sue for Race Bias*, LAW360 (July 3, 2014, 6:29 PM), <http://www.law360.com/articles/554554/high-court-asked-to-decide-if-cos-can-sue-for-race-bias> [<http://perma.cc/ENH2-YE85>].

Circuit's decision on the breach-of-contract claims.<sup>156</sup> The Court denied both petitions in October 2014.<sup>157</sup>

In addition to reaching its decision on the theory of imputed racial identity, the Fourth Circuit also suggested that the “plain language may allow a corporation to have Title VI standing [because although] Title VI does not specifically define ‘person,’ [] the Dictionary Act does: ‘In determining the meaning of any Act of Congress, unless the context indicates otherwise,’ the word person ‘include[s] corporations.’”<sup>158</sup> Seemingly unable to identify the contextual considerations that must exist to warrant an alternative construction of the term, the Fourth Circuit suggested that the Dictionary Act's definition is authoritative.<sup>159</sup> Further, the Fourth Circuit pointed out that “[Title VI] prohibits a ‘person’ from being discriminated against ‘on the ground of race, color, or national origin,’ not ‘on the ground of *his or her* race, color, or national origin.”<sup>160</sup> The Fourth Circuit's clever remark on statutory construction further illustrates the idea of corporate personhood and the increasingly widespread trend in both federal and state courts to more thoroughly naturalize the corporate person.

### III. REORIENTING PERSONHOOD ANALYSIS IN THE JUDICIARY

As detailed above, the decisions in *Hobby Lobby* and *Carnell Construction* stand for the proposition that certain characteristics—Mr. Scales's African-American racial identity in *Carnell Construction* and the Green family's Christian beliefs in *Hobby Lobby*—impute from corporate owner to corporate entity. Moreover, the logic underlying each decision illustrates that, where federal law protects a

156. Conditional Cross-Petition for Writ of Certiorari, *Carnell Constr. Corp.*, cert. denied, 135 S. Ct. 361 (2014) (No. 14-117).

157. Khadijah M. Britton, *High Court Lets Stand Companies' Right To Sue for Race Bias*, LAW360 (Oct. 14, 2014, 2:21 PM), <http://www.law360.com/articles/586741/high-court-lets-stand-companies-right-to-sue-for-race-bias> [<http://perma.cc/8L3G-ANNA>] (“In its petition, the housing authority had asked the U.S. Supreme Court to clarify whether companies can have a racial identity and sue for racial discrimination.”).

158. *Carnell Constr. Corp.*, 745 F.3d at 714 n.4 (citing 1 U.S.C. § 1 (2012)).

159. The Supreme Court's endorsement of the Dictionary Act's personhood definition in *Hobby Lobby*, see *supra* Section II.A., suggests a ringing endorsement of the Fourth Circuit's approach.

160. *Carnell Constr. Corp.*, 745 F.3d at 714 n.4 (emphasis added) (citing 42 U.S.C. § 2000d). The court notes that a similar argument was made in a “corporate race” case decided by the Second Circuit, *Hudson Valley Freedom Theater v. Heimbach*, 671 F.2d 702, 705 (2d Cir. 1982), and finds supportive the Supreme Court's observation in *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1707–08 (2012), that Congress often uses the word “individual” to mean something different from its use of the word “person.” *Carnell Constr. Corp.*, 745 F.3d at 714 n.4.

traditionally personal characteristic and that characteristic is asserted on behalf of a corporation, the artificiality of the corporate entity does not preclude courts from endowing it with inalienable or civil rights, absent explicit legislation to the contrary. Neither the *Hobby Lobby* nor *Carnell Construction* courts seemed overly concerned with the long-term, cumulative consequences of transferring right-based guarantees of judicial recourse from the corporate owner to the corporation; rather, both accepted, at least implicitly, the corporate-personhood framework advanced by the corporations themselves. Indeed, as Professor Stefan J. Padfield has noted, “Justice Alito’s majority opinion [in *Hobby Lobby*] equated the closely held corporation with its controlling shareholders, and thus granted the corporation standing to claim interference with its free exercise rights, [while] Justice Ginsburg argued in the dissent that the corporation could not, as an artificial entity, exercise religion.”<sup>161</sup> Judge Keenan’s majority opinion in *Carnell Construction* similarly equated the contractor corporation with its president and sole shareholder and thus granted the minority-owned business standing to claim discrimination based on race.<sup>162</sup> Thus, in both cases, the respective court appeared to drink the corporation-as-an-association-of-individuals Kool-Aid endorsed by the corporate parties.

Nevertheless, the Fourth Circuit and Supreme Court took different paths to arrive at the same destination. The Supreme Court took a contextual approach; in defining RFRA personhood to include closely held, for-profit companies, the Court primarily rested its decision on the Dictionary Act’s expansive definition of the word “person.”<sup>163</sup> The Fourth Circuit banished the Dictionary Act’s support to a footnote, relying instead on a common law theory of imputed identity. In addition, the majorities in both cases took pains to cabin their decisions to certain subcategories within larger groups in attempts, one must surmise, to preclude their reasoning from gaining widespread applicability: i.e., the Fourth Circuit only sanctioned the imputation of racial identity to corporations that (1) allege discrimination under Title VI, and (2) are shown to be “properly certified as [minority-owned] under applicable law.”<sup>164</sup> Likewise, the

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161. Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 22 n.91 (2015) (citing Stefan J. Padfield, *The Role of Corporate Personality Theory in Hobby Lobby*, LAW PROFESSOR BLOGS NETWORK: BUS. L. PROF. BLOG (July 6, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/the-role-of-corporate-personality-theory-in-hobby-lobby.html](http://lawprofessors.typepad.com/business_law/2014/07/the-role-of-corporate-personality-theory-in-hobby-lobby.html) [<http://perma.cc/TVN4-FZM8>]).

162. See *Carnell Constr. Corp.*, 745 F.3d at 714–15.

163. See *supra* Section II.A.

164. *Id.*

Supreme Court only green-lighted the extension of religious exercise rights to for-profit corporations that (1) bring suit under RFRA, and (2) are deemed “closely held.”<sup>165</sup>

Rulemaking reticence and theoretical divergence permeate the corporate personhood case law<sup>166</sup> and illustrate the need for robust and uniform corporate rights standards. Such an undertaking will not be easy, especially given that the Supreme Court currently “has no systematic jurisprudence for corporate [personhood],” with the limited understanding it does possess being “the product of a dialectic between judges, who patched together corporate law from the corpus of eighteenth century common law, and scholars, who wanted to invigorate that doctrine with a simulacrum of internal coherence.”<sup>167</sup> Professor Malcom J. Harkins has argued that the development of a comprehensive and forward-looking framework that teases out the differences between corporate and natural personhood is necessary to return clarity and certainty to the law:

Rather than creating uncertainty and risk, the law should promote citizens’ ability to choose the benefits and burdens of proposed conduct. . . . It is long past time for the Supreme Court to establish a corporate person theory and concomitant decisional principles that should produce, if not consistent, at least understandable and rational outcomes when questions regarding the corporation’s entitlement to constitutional protection are raised.<sup>168</sup>

As Harkins suggests, the Supreme Court’s outdated and disjointed approach<sup>169</sup> to weighing corporate claims of personhood is simply

165. *Id.*

166. See, e.g., Mayer, *supra* note 10, at 650 (condemning the Court’s “pragmatic, anti-theoretical approach to corporate rights”); Charles R. O’Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1348 (1979) (noting a lack of consistency in constitutional jurisprudence on the nature of the corporation and its rights); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1465 (1992) (concluding that corporate rights cases generate “only legal conclusions,” after failing to find any coherent theories in corporate law jurisprudence that unify or explain the extension of corporate rights).

167. Miller, *supra* note 11, at 914.

168. Harkins, *supra* note 15, at 310 (citing *Cty. of San Bernardino v. S. Pac. R.R. Co.*, 118 U.S. 417, 423 (1886) (Field, J. concurring)).

169. See Tom Bennisson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 399 (2006) (discussing the “right-by-right basis” of corporate personhood decision making); Krannich, *supra* note 101, at 62 (describing the “ad hoc, arbitrary” extension of corporate constitutional rights and

unsustainable.<sup>170</sup> The ad hoc creation of corporate rights, wherein determinations are made on a case-by-case basis, offers a temporary solution that fails to address broader systemic concerns.

The Supreme Court's reliance on quick fixes has already proved problematic. For example, because questions of corporate personhood frequently intersect with questions of constitutional law, a seemingly benign Supreme Court decision concerning a question of statutory corporate rights, such as *Hobby Lobby*, could unknowingly jeopardize constitutional decisions that appear unrelated facially.<sup>171</sup> For example,

*Roe v. Wade*'s holding establishing a constitutional right to abortion rested, in part, on the Supreme Court's largely unexplained assertion "that the word 'person' as used in the Fourteenth Amendment, does not include the unborn." A Supreme Court decision identifying the attributes that allow an entity, artificial or natural, to claim the status of a legal person may confirm, or provide a basis to reexamine, *Roe*'s assertion about the meaning of the term "person" as used in the Fourteenth Amendment.<sup>172</sup>

In other words, although *Hobby Lobby* and *Carnell Construction* were decided on statutory grounds, the logic and textual interpretation underlying both decisions—and the countless other corporate rights cases that have come before and are sure to follow—could reopen constitutional doors that appear, at first blush, wholly unrelated.<sup>173</sup> In addition, the cumulative impact of a continued expansion of corporate constitutional rights could prove equally dangerous.

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pointing out that "different corporate metaphors have been used within the same case, even in interpreting different portions of the same Constitutional Amendment").

170. See Harkins, *supra* note 15, at 205.

171. *Id.*

172. *Id.* at 310.

173. *Id.* As Harkins further elaborates:

[I]t ought to be remembered that the corporate personhood debate in *San Mateo* and *Santa Clara* asked [whether] the protection afforded "persons" by the Fourteenth Amendment include corporations. As the RFRA claims alleged in *Hobby Lobby* and *Conestoga Wood* illustrate, the Fourteenth Amendment is merely one among many constitutional and statutory provisions affording protection to legal persons. Consequently, [the Supreme Court's] resolution of *Hobby Lobby* and *Conestoga Wood* may have impact far beyond the ACA claims at issue in those cases.

*Id.* (alteration in original).



Professor John D. Inazu's recent attempt to stitch together the First Amendment rights of speech, press, religion, and assembly (or, what Inazu labels the "Four Freedoms") into a single patchwork of protection from government interference powerfully illustrates the potential impact of corporate personhood jurisprudence, including *Citizens United*, *Hobby Lobby*, and *Carnell Construction*.<sup>174</sup> Inazu supports his accretive and interconnected understanding of the First Amendment, which he calls "strong pluralism," by investigating "connections among [the] rights evident at the Framing... [and] prominent during the 1930s and 1940s, when legal and political rhetoric recognized the 'preferred position' of the 'Four Freedoms.'" <sup>175</sup> At its core, Inazu contends, strong pluralism stands for the proposition that "government action should not be permitted to burden civic groups in their exercise of the four freedoms and, in particular, it should not interfere with membership and leadership decisions."<sup>176</sup>

Applying strong pluralism to corporate First Amendment rights could prove dangerous. Others have pushed back against such a theory<sup>177</sup> by challenging the unqualified outcomes that adherence to Inazu's theory would require, including the contention that "associations should have a constitutional right to limit membership on any ground, including race."<sup>178</sup> Professor Nelson Tebbe's criticism of strong pluralism, including his suggestion that the increased liberty boon provided by strong pluralism may simply not warrant the disposal of an "existing settlement between associational interests and equality values,"<sup>179</sup> presciently highlights the uncertainty and equality concerns that could become a reality if the current trend toward corporate conferral of constitutional freedoms and statutory rights is sustained.<sup>180</sup>

174. John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 782, 790–92 (2014).

175. *Id.* at 787–89.

176. Nelson Tebbe, Response, *Associations and the Constitution: Four Questions About Four Freedoms*, 92 N.C. L. REV. 917, 918 (2014); see also Inazu, *supra* note 174, at 794.

177. See, e.g., Tebbe, *supra* note 174, at 918.

178. *Id.* at 917.

179. *Id.* Professor Tebbe also attacks the pragmatism and conceptual soundness of Inazu's strong pluralism and raises constitutional concerns over its attempt to preserve "the ability of individuals to form associations that could limit membership in unlimited ways," while simultaneously "protect[ing] their ability to do so while retaining all government benefits that they would otherwise receive under general programs." *Id.* at 942.

180. See *id.* at 927–28.

As *Hobby Lobby* and *Carnell Construction* make clear, corporations are unlikely to run out of creative legal arguments upon which to ground their claims of corporate rights, and it is difficult to predict how lower courts will decide claims that assert corporate entitlement to new statutory or constitutional protections. “Corporate personality” theories, long ago developed by corporate law scholars to enable more robust academic discussions of corporate personhood, offer one path forward.<sup>181</sup> The use of such theories has transcended the corporate personhood debate by recasting the discussion in more nuanced terms.<sup>182</sup> As one corporate law authority has explained, “distinguishing corporate personality theory from corporate personhood [is necessary] because a thumbs up on corporate personhood . . . still leaves a number of important questions regarding the nature of this ‘person,’ which . . . theories of corporate personality . . . are well-positioned to answer.”<sup>183</sup>

Corporate personality scholars have identified three primary corporate personality theories: (1) artificial entity or concession theory, (2) real-entity theory, and (3) aggregate theory.<sup>184</sup> Courts and scholars utilize these three theories, often implicitly, to better conceptualize the rights and responsibilities of the corporate person at issue.<sup>185</sup> Such “[t]heories of corporate personality seek to define the nature of corporations so as to provide a framework within which to determine the rights and responsibilities of corporations vis-à-vis the rest of society.”<sup>186</sup>

Real entity theory views “the firm [as] a distinct, autonomous being that is separate from, and more than just the sum of, its individual (human) parts.”<sup>187</sup> This life-like conception of corporate entities differs markedly from aggregate theory, “which assumes that

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181. Professors John Dewey and Arthur Machen authored the seminal accounts. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926). See generally Arthur W. Machen, Jr., *Corporate Personality* (pts. 1 & 2), 24 HARV. L. REV. 253, 253–67, 347–65 (1911) (explaining his iconic conception of corporate personhood theory).

182. See, e.g., Padfield, *supra* note 161, at 19–20.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*, at 19.

187. Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PA. ST. L. REV. 1, 7 (2013). Machen described real entity theory as standing for the proposition that “[a] corporation is an entity—not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the Church.” Machen, *supra* note 181, at 262.

the firm is not more than a sum of its individual parts.”<sup>188</sup> Nevertheless, both “aggregate theory and real entity theory essentially presume corporations stand in the shoes of natural persons (shareholders in the former case, and the board of directors in the latter), and thus have available to them all the rights of natural persons in resisting government regulation.”<sup>189</sup> Artificial entity or concession theory, on the other hand, segregates corporate persons from their natural brethren, at least in the eyes of the law, by noting that the former, unlike the latter, depends on the state for creation.<sup>190</sup> A concession theorist, in other words, “views the corporation as fundamentally a state creation, and presumes the state has the right to regulate its creation as it sees fit.”<sup>191</sup>

While, like any theoretical framework, corporate personality theory is incomplete, its adoption—and, more importantly, its consistent application—by the Supreme Court would provide federal courts and corporate attorneys across the country with the conceptual power and organizational wherewithal necessary to bring greater coherence to the chaotic body of corporate-rights law and greater structure to corporate personhood’s patchwork legal existence. Unfortunately, the Court’s recent corporate personhood decisions eschew both logic and consistency.<sup>192</sup> The Court has instead demonstrated a proclivity for issuing fact-intensive rulings that narrowly frame the analytical discussion around protecting the jeopardized right rather than the corporate nature of the party seeking its protection. Such decisions provide little more than stop-gap measures, which collectively telegraph an untenable lack of doctrinal rigor.

Indeed, the Court has largely shunned the corporate personality framework altogether, with Justice Stevens explicitly noting in one

188. Petrin, *supra* note 187, at 7 n.22 (citing Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1066–68 (1994)).

189. Padfield, *supra* note 161, at 20.

190. *See id.*

191. *Id.*

192. *See, e.g.,* Petrin, *supra* note 187, at 14 (“Unlike in the civil law jurisdictions, in which discussion surrounding the nature of legal entities has mostly come to an end, here the debate indeed seems ‘endless’ and, as the U.S. Court of Appeals for the Second Circuit recently noted, ‘continues to evolve in complex and unexpected ways.’” (footnotes omitted)); *cf.* Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1141 (2012) (“[S]harp disagreement continues today over what legal rights should go along with modern understandings of corporate personhood. Importantly, pointed disagreement also continues today over what *responsibilities* should go along with twenty-first-century understandings of corporate personhood.” (footnote omitted)).

instance that personality theory played no part in the Court's decision.<sup>193</sup> Such intentional disavowals are ill-advised; they inject further confusion into the law by leaving the reader to guess at whether the Court's decision rests on an undisclosed novel alternative theory, or whether there is simply no logic at all. Moreover, such wholesale doctrinal rejections often contradict the Court's underlying reasoning—indeed, some scholars have argued recent corporate personhood decisions contain implicit references to corporate personality theories.<sup>194</sup>

As Miller recently explained,

One must consider the consequences of the Court's attempt to dodge corporate personhood, by focusing, *Citizens United*-style, on the scope of the right, rather than on the party asserting it. . . . [A]ttempting to sidestep the corporate form by focusing on the right simply assumes the equivalence of the corporate person and the natural person. Therefore, any restriction on the right for natural persons has to be identical to those of corporations. If the Court fashions a doctrine based on the "scope" of the [underlying right at issue] by reference to the "scope" of the right for corporations, it is simply employing a type of artificial entity determination in disguise.<sup>195</sup>

These evasive maneuvers fly in the face of the teachings of corporate personality theorists, who have long-since warned that "[t]he essence of juristic personality does not lie in the possession of rights but in subjection to liabilities. Those beings are 'persons' in law to whom the law both can and does address its commands."<sup>196</sup>

193. *Citizens United v. FEC*, 558 U.S. 310, 465 n.72 (2010) (Stevens, J., dissenting in part and concurring in part) ("Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, . . . a nexus of explicit and implicit contracts, . . . a mediated hierarchy of stakeholders, . . . or any other recognized model."). Stephen Bainbridge has, however, suggested Justice Stevens's opinion belies his reservations about corporate personality. See Stephen Bainbridge, *Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory*, PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 4:05 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fecstevens-pernicious-version-of-the-concession-theory.html> [http://perma.cc/D8BR-8KC2].

194. See, e.g., Miller, *supra* note 11, at 943 (discussing corporate personality theory in the context of the Second Amendment). Padfield, *supra* note 161, at 30 nn.120–21; Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 833 (2013) ("Despite protestations to the contrary . . . a closer reading of the *Citizens United* opinion reveals that both the majority and dissent not only adopted diverging theories of the corporation, but that those theories were likely dispositive.").

195. Miller, *supra* note 11, at 943–44.

196. Machen, *supra* note 181, at 263.

Moreover, as noted by one of America's earliest corporate personality scholars, "[w]e do not need to be instructed to regard a corporation as an entity and to regard that entity as a person[, as] our minds are so constituted that we cannot help taking that view."<sup>197</sup> Yet, as is often the case in assimilating commonsense principles and natural conceptions into legal analysis, corporate personhood doctrine "will tend to find its proper place in the law, if only we cease to regard it as something mysterious or technical."<sup>198</sup> Courts must, in other words, "fully recognize that the [personhood] conception is simple and natural," and then "endeavor to apply it . . . logically and consistently."<sup>199</sup>

As this Comment has shown, there is little doubt among jurists that the Court's imprimatur of corporate personhood in both statutory law, evidenced most recently by *Hobby Lobby's* extension of RFRA religious-freedom protections,<sup>200</sup> and constitutional law,<sup>201</sup> including the Supreme Court's extension of First Amendment free-speech protections in *Citizens United*,<sup>202</sup> has only further muddled corporate rights jurisprudence. The Court's position has also arguably emboldened covetous corporate litigants to reach for more.<sup>203</sup> And, given the myriad statutory protections and constitutional rights that remain, for now, outside the corporate rights wheelhouse, it seems unlikely that corporations will halt their forward advance anytime soon. There is simply too little to lose and too much to gain.<sup>204</sup> Indeed,

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197. *Id.* at 363.

198. *Id.*

199. *Id.* at 364.

200. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

201. *See, e.g., Mayer, supra* note 10, at 578 (surveying corporate claims to specific constitutional rights and characterizing the Supreme Court's conferral of significant Bill of Rights protections on corporations as symbolic of "the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives"); *see also* sources cited *supra* note 10.

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

203. Marc Galanter has argued that the state's tendency to "farm[] out" governmental functions such as "prison[], police, and even military operations," to the private sector has compounded a corporate campaign to "penetrate[] and patronize[]" educational, athletic, and medical institutions that has led to a "naturaliz[ation]" of corporate identity. Galanter, *supra* note 10, at 1399–1400 ("The[] presence [of business corporations] has been *naturalized*—they are not seen as inhabitants of the specialized realm of production, but as institutions of civic life. They have discarded their old names based on their work (e.g., AT&T, Standard Oil) to become Verizon or Exxon, sonorous invocations of institutional dynamism.") (alteration in original).

204. Marc Galanter has suggested that "[a]t the moment it appears that [corporations] are well on their way to capturing the legal profession and overwhelming or circumventing the courts. Whether the[y] can be tamed by the courts depends on the emergence of a democratic politics that is informed by the public's basic insight into dominance of

further erosion of the already porous barrier between natural and corporate personhood seems all but certain when one considers the mutual reinforcement of the Supreme Court's increasing coziness with equating corporate operations to human conduct and the lower courts' kindred willingness to graft human characteristics onto corporate skeletons.

#### CONCLUSION

Are corporations people? This question defies an easy answer. Recent decisions by the Supreme Court suggest that the nation's high Court thinks the answer is "Yes." Likewise, recent federal court rulings expanding corporate rights, including, most recently, a decision by the Fourth Circuit, suggest a judicial consensus that corporations are much the same as human beings. Therefore, at least for now, it seems the federal judiciary has tightly embraced the theory of corporate personhood. And, given the increasingly pervasive and important roles corporations play in modern society, the courts' take cannot be said to lack either merit or reason. Indeed, as Dean Ritz has observed, "[c]orporations today act in the capacity of governments. Energy corporations determine our nation's energy policies. Automobile corporations determine our nation's transportation policies. Military manufacturing corporations determine our nation's defense policies. Corporate polluters and resource extraction corporations define our environmental policies. Transnational corporations determine our trading policies."<sup>205</sup>

Despite the arguments in favor of corporate personhood theory, a lack of theoretical structure has plagued the concept of corporate rights since the start. And the absence is palpable. Strikingly, the Supreme Court, despite hearing numerous corporate rights cases begging for greater uniformity, has chosen to disregard this doctrinal void. While the Court continues to hear cases touching on the theory of corporate personhood, it has not managed to offer even the roughest of outlines setting out a theoretical framework for the scope and strength of corporate personhood. Rather, lower courts have been left to grope blindly in the dark in distinguishing natural from corporate personhood and determining whether and when a

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[corporate actors] and the distributive tilt of the legal system. It will also depend on the inventiveness of lawyers in coming up with new formats and devices for making public policy and effectively controlling [corporations]." *Id.* at 1417 (alteration in original).

205. DEAN RITZ, *DEFYING CORPORATIONS, DEFINING DEMOCRACY* xiv (Dean Ritz ed., 2001) (arguing that corporations "increasingly define our culture, our schools, our elections, and the operations of our government itself").

corporation can assume the rights of its owners or shareholders. Instead, the Supreme Court has sown corporate rights into the law in a distinctively ad-hoc pattern. Lower courts, left with little choice but to follow suit, have contributed in varied, arbitrary patterns of their own.

As this Comment has endeavored to show, the Supreme Court's case-by-case legal conclusions serve as poor substitutes for developing a robust theoretical framework that differentiates rights on the basis of corporate and natural personhood. Corporate personality theory arguably offers the best solution. Otherwise, the Court's corporate personhood house of cards will collapse.

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