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The Real Persons are the Corporations we Made Along the Way

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Introduction

The Constitution makes twenty-four references to the "person[s]" and "people" it protects in its first seven Articles and first ten Amendments. With the proceeding seventeen Amendments, the number rounds out to thirty-four. In fact, the only agents mentioned more frequently are the "states," "president," and "congress." For a document that is not even 8,000 words, it would seem that "persons" make up a pretty important—and deliberate—part.

By way of example, the Reconstruction Amendments best illustrate the careful choices Congress made regarding whom it intended to safeguard. Compare the Fourteenth Amendment's text, which guarantees "[n]o *person* shall be denied equal protection of the law,"[1] to the Thirteenth Amendment, which ensures "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the *party* shall have been duly convicted, shall exist. . . ."[2] These Amendments articulate varying degrees of protection depending on the agent: while the Fourteenth Amendment is limited to *persons*, the Thirteenth Amendment expansively protects *parties*.

And a party, of course, isn't always a person.[3]

Despite plenty of references to "people," "persons," the "states," "president," and "congress," the Constitution and its Amendments do not even allude to the corporate form. This omission permitted Congress and the Supreme Court to intervene in state law and make disruptive determinations about corporate personhood. While this Article will not criticize corporate personhood (at least explicitly), it will consider how the Supreme Court put corporate personhood on a collision course with individual natural rights.

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Since the revolution against the British, individual rights have driven American identity. From speech, to guns, to voting, to gender equality,

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1. U.S. CONST. amend. XIV, § 1 (emphasis added).

2. U.S. CONST. amend. XIII, § 1 (emphasis added).

3. *See* Fed. R. Civ. P. 17(a)-(b) (Listing the types of "real part[ies] in interest" that have the "[c]apacity to sue [and] be sued").

people and persons across all walks of life have relied on the Constitution to vindicate their rights.[4] But just as natural persons fought since the Founding Era to secure constitutional rights, another quieter revolution took place in the intersection of constitutional and corporate law. Alongside the substantial gains made to further human rights, corporations also fought for equal protection in the eyes of the law.[5]

Today, both the Supreme Court and Congress recognize corporations as persons.[6] But despite this label, corporations are not exactly human. They do not look or sound like us: their essence can be carefully crafted through highly tested sound bites or mascots rather than a fleshy bipedal form.[7] They do not age like us: they can perpetuate long after their original owners and managers have died.[8] And they do not behave like us: their existence is controlled by officers who make decisions based on their fiduciary duty to shareholders, rather than love, family, or some the greater good.[9] Given these differences, the Supreme Court has only *selectively* provided the constitutional rights cherished by natural people to corporations.[10]

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Given such selective incorporation, this Article considers how close to natural people—in particular, owners, managers, and employees—corporations can become. While the Supreme Court has incorporated individual rights for corporations since the Founding Era,[11] the Court has rarely discussed how racial identity factors into its decision making.[12] Even though (as Part I-A explains), the Supreme Court allows

4. *See generally* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972).

5. *See* Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 Va. L. Rev. 581 (2022) (describing how corporate litigants partnered with racial minorities in the late 1800s to expand the Fourteenth Amendment's scope).

6. The Dictionary Act defines "person" as "includ[ing] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[.]" The Dictionary Act, 1 USCS § 1 (2012).

7. *See* Stephen A. Greyser & Mats Urde, *What Does Your Corporate Brand Stand For?*, Harv. Bus. Rev., Jan. - Feb. 2019, at 80.

8. *See* Andrew A. Schwartz, *The Perpetual Corporation*, 80 Geo. Wash. L. Rev. 764, 766 (2012)

9. *See id.* at 804.

10. For example, a corporation has the right to speak but it does not have the right to remain silent. *See* 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, 796 (1996). *See also* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. Pa. L. Rev., 95, 108, 110–111 (2014) (describing the "selective incorporation" of constitutional rights to corporations in relation to Article III standing).

11. *See infra* Part I.

12. Such avoidance conforms with the Supreme Court's "color-blind" approach to constitutional law. For greater discussion on the Court's perspective and the wisdom of this model, *see generally* Michael B. Rapport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71 (2013).

a corporation to acquire sincerely-held religious beliefs, a corporation's ability to acquire a racial identity remains uncertain. That said, appellate courts have shown little restraint in designing mechanisms for corporations to demonstrate or acquire a racial identity, even without the Supreme Court's input.[13]

Thus, this Article will explore the humanization of corporations regarding racial identity. Part I provides a background on corporate personhood: describing the pedigree of corporate rights in front of the Supreme Court; identifying the precedent for the present day; and reviewing how appellate courts applied this theory to corporate racial identity. Part II analyzes where certain appellate courts correctly theorized corporate racial personhood and how these courts diverged from (or ignored) the Supreme Court's limited jurisprudence on this topic. Rather than making a judgment on corporate racial personhood's wisdom, Part III discusses why the Supreme Court has dodged the question of corporate racial personhood and articulates what confronting that question head-on would reveal about corporate personhood and the Supreme Court.

I. BACKGROUND: A BRIEF HISTORY OF CORPORATE PERSONHOOD

Corporate personhood originated long before English common law,[14] but its meaning has long precipitated confusion and contradiction in federal courts. Chief Justice John Marshall led the Supreme Court's first foray into corporate law in *Trustees of Dartmouth College v. Woodward*.[15] In that case, the New Hampshire legislature sought to control Dartmouth College, a private corporation, by reinstating the deposed president, giving the governor appointment power over the board, and giving the state veto power over trustee decisions.[16] Because Dartmouth had been granted a legitimate private charter by King George III, the Court held that New Hampshire could not unilaterally alter Dartmouth's charter to advance its own interests.[17]

More importantly, the Court offered its first theory of corporate personhood as an "artificial being."[18] This theory recognized that a

13. *See infra* Part I-C.

14. *See* Leonardo Davoudi, Christopher McKenna & Rowena Olegario, *The Historical Role of the Corporation in Society*, 6 J. BRITISH ACAD. 17, 22, 24 (2018) (identifying the first historical examples of corporate personhood in India and the Roman Empire); *see also* Christopher Wolfe, "*An Artificial Being": John Marshall and Corporate Personhood*, 40 HARV. J. L. & PUB. POL'Y 201, 210–212 (2017) (describing English common law cases where Lord Blackstone and Lord Coke made landmark determinations about corporate personhood).

15. 17 U.S. 518 (1819).

16. *Id*. at 626, 654.

17. *Id*. at 627.

18. *Id*. at 636.

corporation owed its existence to state law, and that a corporation only had rights and privileges explicitly granted by the state government itself.[19] As such, states could condition corporate charter grants on certain restrictions to curtail corporate power and size.[20]

The "artificial being" theory was sidelined with industrialism and replaced with a partnership theory based in property-protection.[21] As a result, the corporate charter became a floor establishing the minimum, self-imposed prohibitions on corporate action, rather than a ceiling that prevented unenumerated corporate actions.[22] In doing so, the Court expanded corporate power by giving these entities standing to protect private property through the Fourteenth Amendment.[23]

Ultimately, the Court found that this property-protection approach was inadequate and began laying the groundwork for the theory that a corporation was a "real person" under the law.[24] This theory contemplated a corporation as a natural person, meaning it acquired rights from its existence, rather than their ownership.[25] However, what it means for a legal entity to be a "real person" has precipitated confusion and debates further elucidated in Section A, B, and C.

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This extremely brief history of corporate personhood offers insight as to why district and appellate judges might struggle when applying

19. *Id*.

20. *Id.* ("Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created"); *see also* Gregory Mark, *Hobby Lobby and the Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value*, 65 DePaul L. Rev. 535, 552 (2016) (describing how early courts aggressively enforced corporate charters by voiding certain corporate acts, legal moves practically unthinkable today).

21. *See Santa Clara v. Southern Pac. R.R Co.,* 118 U.S. 394, 397 (1886) (records note that the Chief Justice did "not wish to hear argument on the question whether the provision in the Fourteenth Amendment . . . applies to these corporations [because] [w]e are all of opinion that it does."). However, there is some controversy over whether *Santa Clara* also inaugurated constitutional protections for corporations. Many courts have taken the Chief Justice's comment as *the* opinion of the Court rather than *an* opinion the Court expressed. Broader historical evidence indicates that "it is clear that the Justices had no intention of dismissing the fictive conception of the corporation, even if, for the purpose of protecting property, they were willing to look to the corporators and not the corporation as the real owner of corporate property." Gregory Mark, *Personification of the Corporation*, 54 U. Chi. L. Rev. 1443, 1464 (1987).

22. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (rejecting, and characterizing as "extreme," the view that "corporations, as creatures of the State, have only those rights granted them by the State."). Importantly, this view removed the reach of the state from "the inner life of a corporation." Mark, *supra* note 20, at 1456; *see also* Mark, *supra* note 19, at 551 (describing how an "any lawful ends" clause in corporate charters gave corporations unrestricted autonomy to act).

23. Mark, *supra* note 20, at 1461 (describing how the Court agreed property held in a corporate form ought to be protected).

24. *Id*. at 1442.

25. *Id*.

corporate law. Because the Supreme Court has not defined (or stuck with) a clear theory of corporate personhood, it is not immediately apparent what rights a corporation can legitimately claim. The corporate form's purpose compounds this problem because corporations *shield* shareholders from liability that arise from business decisions.[26] Despite that, the Supreme Court has protected these entities from large swaths of litigation that a natural person might face, while paradoxically entitling them to the same rights as that same natural person. As the following three sections describe, the Court's case-by-case analysis for constitutional protections—rather than a full incorporation or prohibition on corporate constitutional rights—created a patchwork of corporate identity theories that stoke confusion and undermine legal stability.

Rather than focus on the procedural rights that emanate from property ownership or criminal liability, such as Takings or Double Jeopardy, the next two sections focus on the unique civil liberty claims—Religion and Speech—that corporations have capitalized on in recent years, and what that means for the future of corporate identity. Section A and Section B will respectively discuss Supreme Court decisions that relate to statutory and constitutional claims of corporate personhood. Section C will conclude by identifying the three categories of federal court decisions discussing corporate racial identity.

A. *"In [Corporations] We Trust"*[27]

In its most recent foray into corporate personhood, the Supreme Court attended to corporate religious identity in *Burwell v. Hobby Lobby Stores, Inc*.[28] The Court considered whether the Government could require corporations to offer health insurance coverage for certain drugs and procedures that would violate the sincerely held religious beliefs of a closely-held company's owner.[29] Starting with the Religious Freedom Restoration Act ("RFRA"), the Court recognized that any

26. *See* Garrett, *supra* note 10, at 146 ("[N]othing could be more fundamental to modern corporate law than the complete separation of the owners from the legal entity itself"); *see also Cedric Kushner Promotions, Ltd. v. King*, 553 U.S. 158, 163 (2001) ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges *different* from those of the natural individuals who created it, who own it, or whom it employs.") (emphasis added).

27. 36 U.S.C. § 302.

28. 573 U.S. 682 (2014).

29. *Id*. at 689-690. The Court considers the corporations in question as closely held because "[t]he Hahns . . . control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and Chief Executive Officer (CEO)" and "David, Barbara, and their children retain exclusive control of both companies. David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO." *Id*. at 700-01, 702-03.

attempt to regulate the exercise of religion—even through broadly applicable laws—required the Government to satisfy strict scrutiny.[30]

At issue in *Hobby Lobby* was the Patient Protection and Affordable Care Act's ("ACA") requirement that corporations provide minimum health insurance coverage including contraception and sterilization procedures.[31] The ACA provided exemptions for religious employers such as churches and other religious nonprofits.[32] Additionally, the ACA exempted pre-existing health insurance plans that did not comply with certain coverage requirements.[33] Taken together, over one-third of insurance policies were not required to offer contraception.[34]

The Court then discussed the owners of the plaintiff-corporations, Conestoga Wood and Hobby Lobby. According to the Supreme Court, the owners were devout Christians and either shared control of their respective companies with their families or exercised sole ownership, giving these individuals complete control over business decisions.[35] As the Court went on to explain, Hobby Lobby and Conestoga Wood were operated in accordance with their owners' beliefs. For example, Hobby Lobby provided donations to religious organizations and closed its stores on the Sabbath (even at a cost to its bottom line).[36] Based on these beliefs, these owners felt that providing contraceptive coverage, as mandated by the ACA, violated their sincerely held religious beliefs.[37]

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30. *Id*. at 691-692. *See* 42 U.S.C. § 2000bb–1(a)-(b) ("In general Government shall not substantially burden a *person's* exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest") (emphasis added).

31. *Hobby Lobby*, 573 U.S. at 697. Another significant—and underdiscussed—aspect of *Hobby Lobby* is that the Court deferred to the characterization of the offending contraception as an abortifacient and the corporations' belief that life begins at conception. This deference when determining what it means for a corporation to express it beliefs raises substantial questions about the reach of religious accommodations, especially for corporations, and their relationship to regulations. *See* Meredith Rachel Mandell, *When Religious Belief Becomes Scientific Opinion:* Burwell v. Hobby Lobby *and the Unraveling of Federal Rule 702*, 12 NW. J. L. & Soc. Pol'y 92, 116 (2016).

32. *Hobby Lobby*, 573 U.S. at 698.

33. *Id*. at 699.

34. *Id*. at 699-700.

35. *Id*. at 700-704. This characterization by the Supreme Court is not exactly correct for Hobby Lobby, at least. As the District Court discussed, Hobby Lobby was managed through a trust rather than direct ownership. That means the owners actively sought to legally separate themselves from corporate management. Although the Court does not discuss if a *trust* can maintain a religious belief, it is not clear how the owners can vicariously extend their beliefs through not one, but two legal shields. For greater discussion, *see* Mark, *supra* 19, 543-44.

36. *Hobby Lobby*, 573 U.S. at 701, 703. In addition to these actions, the Court highlighted marketing materials, internal pledges by Hobby Lobby's officers to act in accordance with their religious beliefs, and the company's statements of purpose. *Id.*

37. *Id*.

The Court granted certiorari after circuits split over whether a corporation could exercise religious beliefs through either RFRA or the First Amendment.[38] Conestoga Wood lost its RFRA and First Amendment claims in the Third Circuit because "for-profit, secular corporations cannot engage in religious exercise."[39] In contrast, the Tenth Circuit found in favor of Hobby Lobby, holding that (1) Hobby Lobby, a corporation, was a person under RFRA, (2) the ACA substantially burdened its exercise of religion, and (3) the Government could demonstrate neither a compelling interest nor that the ACA was the least restrictive means of accomplishing its goals.[40]

An implicit question in the grant of certiorari was whether a corporation had standing to file suit as a "person" under RFRA.[41] The Supreme Court answered this question in the affirmative—with some caveats.[42] The Court reviewed RFRA's history as the congressional response to *Employment Division v. Smith* and determined that *Hobby Lobby's* interpretation conformed with the language of the statute.[43] Echoing earlier theories of corporate identity, the Court held that corporate personhood was a fiction designed to shield human beings from liability to further those humans' desired ends.[44] Moreover, because these laws were enacted to protect *people*, the Court reasoned that those same laws could be similarly extended to protect *associations of people* in the

38. *Id*. at 705.

39. *Id*. at 704 (quoting *Conestoga Wood Specialties Corp. v. Sec'y of HHS*, 724 F. 3d 377, 382, and n. 5 (CA3 2013)).

40. *Hobby Lobby*, 573 U.S. at 704.

41. "We must decide in these cases whether the Religious Freedom Restoration Act of 1993 permits the United States Department of Health and Human Services to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." *Id.* at 688-90 (cleaned up).

42. *Id*. at 705. In addition to Article III standing, the Court requires that those who bring a claim "fall[] within the class of plaintiffs whom Congress has authorized to sue under" by looking to "(1) whether the plaintiff falls within the statute's 'zone of interest' and (2) whether the plaintiff's alleged injuries were 'proximately caused by violations of the statute.'" *Lexmark International, Inc. v. Static Control Components, Inc*., 572 U.S. 118, 127-28 (2014). Although the Court discussed the Dictionary Act and the definition of a "person," it did not explicitly apply the statutory standing test by inquiring into the zone of interest or proximate causation elements.

43. *Hobby Lobby*, 573 U.S. at 693-96. In *Emp. Div. v. Smith*, the Supreme Court held that the "First Amendment has not been offended" when "prohibiting the exercise of religion is not the object of a law, but merely the incidental effect of a generally applicable and otherwise valid provision." 494 U.S. 872, 878 (1990). In a "bipartisan rebuke," Congress sought to overrule *Smith* by reinstating strict scrutiny for state and federal policies that could burden religion. *See* Jonathon Griffin, *Religious Freedom Restoration Acts*, 23 NCSL 17 (2015).

44. *Hobby Lobby*, 573 U.S. at 706-07 ("But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.").

corporate form.[45] As part of its analysis, the Court harkened back to a pre-RFRA religious case to illustrate the necessity of this conclusion:

In *Braunfeld v. Brown*, Jewish merchants claimed that a Pennsylvania law requiring shop closures on Sunday violated their religious freedom, as their shops were already closed on Saturday for the Jewish Sabbath.[46] If they were forced to close for two days in a row would severely harm their business.[47] The *Hobby Lobby* Court ruled that if the Government's interpretation was adopted—and if the Jewish merchants in *Braunfeld* had incorporated their businesses—the Court would not have been able to craft a remedy since the business form precluded it from arguing its closure was for religious reasons (since the business was a distinct entity from the owners).[48] Thus, the Court held that corporate access to RFRA was necessary to prevent a forced choice between protecting sincerely held religious beliefs and seizing a business opportunity.[49]

While long-held corporate law jurisprudence understands businesses as a mechanism solely to realize a profit and limit shareholder liability, the Court was tasked with determining if and how a sole owner's power to dictate a corporation's direction, goals, and philanthropy impacted its religious expression.[50] The concern was whether profit motive distorted or undermined a corporation's claim to religious views; the Court held that it did not.[51]

The Court also pushed back against two other issues raised by the Government and Justice Ginsburg's dissent. First, the Court rejected an argument that this broad reading would encourage erroneous RFRA claims because of practical restraints such as obtaining shareholder consensus or the inquiring into the sincerity of a corporation's beliefs.[52]

45. *Id*.

46. 366 U.S. 599, 600 (1961).

47. *Id.*

48. *Hobby Lobby*, 573 U.S. at 710. The Government and Justice Ginsburg's dissent argued that "[b]y incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation." *Id*. at 756 (Ginsburg, J., dissenting). Oddly enough, the plaintiffs were unsuccessful in their suit. It is not clear why the majority uses an adverse judgment to support its opinion.

49. *Id*. at 710 (internal citations omitted) ("[A] law that operates so as to make the practice of . . . religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion").

50. *Id*. at 710-12.

51. *Id*. The Court noted that Hobby Lobby "lose[s] millions in sales annually" by closing on Sundays as part of its commitment to Christian values. *Id*. at 703.

52. *Id*. at 717-18; *see also* Tyson C. Leonhardt, *Hobby Lobby, Carnell Construction, and the Theoretical Deficit of Second-Class Personhood: The Indecipherable Calculus of Corporate Rights*, 94 N.C.L. Rev. 648, 664 (2016) (noting that "the parade-of-horribles advanced in Justice Ginsburg's dissent and echoed in the cascade of academic literature that followed in its wake have yet to materialize," drawing skepticism regarding whether corporations have actually abused the Court's allowance for adopted identarian statuses).

Second, the Court did not see internal disagreements about the 'proper' way to exercise religion as problematic because disputes were inevitable in corporations of all sizes, and religion-based choices—such as whether to work on Sunday or donate money—could be resolved through typical state law mechanisms such as arbitration or derivative suits.[53] Once the Court explained why corporations had standing to sue under RFRA, it permitted a religious exemption for closely-held corporations.[54]

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Hobby Lobby's significance did not stem from the relatively uncontroversial opinion that a corporation acts at its owner's behest rather than its own volition. What made *Hobby Lobby* unique was that the Court determined an "entity's belief system [was] adopted by members, not the other way around."[55] This seemingly semantic distinction disrupted how a corporation's "views" are created. By not *solely* locating a corporation's belief system in its equity owners, the question became whose beliefs and identities matter when determining a corporation's religious identity. For the Court, the corporate person embodies the "shareholders, officers, and employees."[56] But this also creates an odd situation: the Supreme Court recognized that a corporation may function as an extension of its owners' beliefs, but the existence of the corporate structure *primarily* functions to wall off the entity from the owner.

Most interestingly, the Court did not reach the First Amendment question, instead finding that RFRA was sufficient to warrant a reversal of *Conestoga Wood* and affirmation of *Hobby Lobby*.[57] This sparked greater skepticism into what constitutional claims a corporation could affirmatively assert, and to what extent corporations could act as a statutory "person."[58]

B. *"Corporations are People, My Friend"*[59]

Unmentioned in *Hobby Lobby* was that the Court had already endorsed a sweeping theory of First Amendment protections for

53. *Hobby Lobby*, 573 U.S. at 718.

54. *Id*. at 719.

55. Mark, *supra* note 19, at 540.

56. *See id*. at 540-41 (discussing who defines a corporation's beliefs or speech).

57. *Hobby Lobby*, 573 U.S. at 736.

58. Although the Court has long accepted corporations as persons, history and tradition may not comport with such a broad reading for constitutional purposes. *See Citizens United v. FEC*, 558 U.S. 310, 428-429 (2010) (Stevens, J., dissenting in part) (expressing substantial skepticism that the original understanding of corporations would allow for such broad constitutional protections).

59. Ashley Parker, *'Corporations are People,' Romney Tells Iowa Hecklers Angry Over his Tax Policy*, N.Y. Times (August 11, 2011) (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?").

corporations four years earlier. In that notable—but definitely not first—foray into corporate personhood, the Supreme Court handed down *Citizens United v. Federal Election Commission*, broadly affirming First Amendment protections for corporate speech.[60]

The *Citizens United* decision considered the *possibility* that the FEC could *hypothetically* suppress political documentaries during election season. Citizens United was a non-profit entity that produced "Hillary: The Movie," a 90-minute documentary critical of then presidential candidate, Hillary Clinton.[61] However, under the Bipartisan Campaign Reform Act ("BCRA"), Citizens United would be prohibited from making the documentary available on-demand thirty days before the election because corporations and unions were barred from using their general treasury funds for electioneering.[62] Citizens United sought a declaratory judgement and injunction against FEC enforcement of those prohibitions and the BCRA's disclosure requirements for campaign donations.[63] After the district court and court of appeals denied Citizens United relief, the Supreme Court granted certiorari.[64]

The Court rejected modest restrictions on independent political action committee (PAC) donations to preserve political speech jurisprudence.[65] Concerned about the chilling effects that would come from a favorable FEC decision, the Supreme Court specifically declined to adopt a narrow view of the First Amendment.[66] Tracing history, the Court reasoned that the First Amendment was established in response to English licensing laws that created a prior restraint on acceptable speech.[67] Given the criminal sanctions that accompanied these FEC enforcement actions, the Court reasoned that a favorable FEC decision could be a Trojan horse for censorship.[68]

After establishing the requisite harm, the Court subjected the FEC regulations to strict scrutiny.[69] Without going into much analysis, the Court rejected a different standard for corporations over natural

60. *Citizens United*, 558 U.S. at 310.
61. *Id*. at 319.
62. Bipartisan Campaign Reform Act (BCRA), Pub. L. No 118-19, 52 U.S.C.S. § 30118, *invalidated by Citizens United v. FEC*, 558 U.S. 310 (2010). Electioneering is "any broadcast, cable or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary or 60 days of a general election and is targeted to the relevant electorate." 11 CFR § 100.29 (2014).
63. *Citizens United*, 558 U.S. at 340.
64. *Id*. at 322.
65. *Id*.
66. *Id*. at 329.
67. *Id*. at 335.
68. *Id*. at 340-41.
69. *Id.* at 340.

people.[70] The Court found that this suppression of speech warranted repudiating FEC rules.[71] Specifically, the Court rejected the FEC's anti-corruption and anti-distortion justifications, finding that neither were sufficiently compelling.[72] Rather than diving into the minutia of corporate law, the Court broadly held that the First Amendment protects any entity or individual that creates speech.[73] Moreover, the Court noted that under the Government's position, the FEC could cut off small non-profits from the political sphere while still allowing unlimited campaign spending by wealthy, individual donors.[74]

Most relevant to this discussion, the Court reasoned that because corporations were nothing more than an association of citizens and shareholders, internal disagreements about corporate speech and messaging could be resolved through "corporate democracy," and limits on corruption could be enacted through state corporate law rather than federal election legislation.[75] The Court held that the social cost of denying corporations the right to speak imposed an unconscionable burden on speech— especially when these entities had expertise on the topics to which they were speaking.[76]

The "association of citizens" interpretation of the corporate form unwittingly erased the clearly established legal distinction between a corporation and its shareholders.[77] While the BCRA sought to segregate voluntarily contributed electioneering money from the regular profits of a business, the Supreme Court held that this bifurcation burdened the corporation *and its shareholder's* ability to associate and speak

70. *Id*. at 342-43. ("[P]olitical speech does not lose First Amendment protection simply because its source is a corporation. . . .The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons") (citations omitted) (internal quotation marks omitted).

71. *Id*. at 336.

72. *Id*. at 351-55, 356-61.

73. *Id*. at 333. The Court did not need to answer hard questions about corporate personhood because the Free Speech Clause protects speech rather than people. The Court was also especially perturbed that the FEC could legitimately ban books under the current construction of the statute. Justice Scalia also opined that the absence of substantial corporate election regulations at the time of the Founding indicated a distaste for such restrictions. *Citizens United*, 588 U.S. at 387-391 (Scalia, J., concurring).

74. *Id*. at 355-56.

75. *Id*. at 361-63 ("There is, furthermore, little evidence of abuse that cannot be corrected by shareholders through the procedures of corporate democracy.") (internal citations omitted). Although not defined by the Court, Justice Steven's dissent assumes "corporate democracy" to mean that shareholders could use derivative suits or voting rights to change corporate donations they disagreed with. *See* Citizens *United*, 558 U.S. at 477 (Stevens, J., dissenting in part and concurring in part).

76. *Id*. at 364.

77. *See* Jonathan Macey & Leo E. Strine Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 460-61 (2019).

through their directors.[78] In essence, this holding *eliminated* the "corporate veil" for constitutional considerations by rendering a corporation's viewpoints inseparable from its shareholders.[79] Thus, corporations could legally be an extension of its shareholders' identity without exposing its shareholders to civil liability.

C. *Corporations: Now Available in Color*

As seen in the previous sections, the Supreme Court has struggled to stick with just one theory of corporate personhood. However, accepting that the Supreme Court would keep with the "association of citizens" theory found in *Hobby Lobby* and *Citizens United*, it is plausible that a corporation could claim the racial identity of its shareholder(s). Notably, federal appellate courts have advanced three distinct theories of corporate racial identity, but none have considered how *Hobby Lobby* and *Citizens United* fit into the puzzle. And, while appellate courts have reached out to resolve these controversies, the Supreme Court has largely deferred or avoided questions about corporate racial personhood.[80]

Consider what happened in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[81] When an Arlington Heights religious order decided to devote its land to low-income housing, it recruited the Metropolitan Housing Development Corporation ("MHDC") to develop the area.[82] The Arlington Heights community resisted the planned development, which required rezoning the land, because it had concerns with impacts on property value and statutory compliance.[83] After the city denied the rezoning permit, the MHDC and three Black individuals filed a lawsuit seeking declaratory and injunctive relief.[84] The district court assumed MHDC—a corporation—had

78. *Id*.

79. *Id.* at 482. The "corporate veil" is the name for the legal mechanism that separates the entity, or corporation, from the owner. *See also* Joshua C. Macey, *What Corporate Veil*, 117 Mich. L. Rev. 1195 (2019). Macey theorized that the Supreme Court's jurisprudence does not pierce the corporate veil, a mechanism which he describes as a "fact-intensive inquiry designed to show that there is no genuine separateness between a particular corporate entity and its shareholders." *Id.* at 1206. Instead, he proposes that "the Supreme Court refuses to recognize the very existence of the corporate form in those cases altogether" meaning that "there is simply no veil to be pierced." *Id.* at 1199, 1207.

80. *See e.g., Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n.1 (2006) ("[W]e have no occasion to determine whether, as a corporation, it *could* have brought suit under § 1981. We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims.").

81. 429 U.S. 252 (1977).

82. *Id*. at 256.

83. *Id*. at 257-58.

84. *Id*. at 258.

standing to bring the suit, but held that the denial of rezoning was not intentionally discriminatory and would not have a discriminatory effect.[85]

The Seventh Circuit reversed the lower court, finding that the rezoning denial must be viewed "in light of its 'historical context and ultimate effect.'"[86] Because neither property values nor statutory compliance justified the resulting segregation, the panel determined that the City of Arlington Heights's decision was neither narrowly tailored nor in service of a compelling interest—therefore violating the Equal Protection Clause.[87]

The relevant part of the *Arlington Heights* decision concerned standing. Petitioners challenged "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[88] Deciding the standing question on narrow grounds, the Court first held MHDC had standing regarding the rezoning denial since the municipal deci`sion was an absolute barrier to the completion of its contract and MHDC had a "right to be free of arbitrary or irrational zoning actions."[89]

The second, more salient, standing question was whether MHDC had standing to raise an Equal Protection claim against Arlington Heights. In full, the Court determined:

> *As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination*. In the ordinary case, a party is denied standing to assert the rights of third persons. *But we need not decide whether the circumstances of this case would justify departure from that prudential limitation and permit MHDC to assert the constitutional rights of its prospective minority tenants*. For we have at least one individual plaintiff who has demonstrated standing to assert these rights as his own.[90]

Despite this seemingly conclusive assertion, the Court shortly thereafter passed up an opportunity to reapply this principle. In *Fullilove v. Klutznick*[91] (decided only three years later), the Court heard a lawsuit from "several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work" who asserted an Equal Protection claim against the Minority

85. *Id*. at 259.
86. *Id.* at 259-60.
87. *Id*. at 260.
88. *Id*. at 260-61.
89. *Id*. at 263.
90. *Id*. at 563-64 (emphasis added).
91. 448 U.S. 448, 455 (1980).

Business Enterprise provision[92] contained in the Public Works Employment Act of 1977. Instead of finding that the plaintiffs lacked standing (as *Arlington Heights* would instruct), the Court reached the merits without addressing standing.[93] This created an unusual situation where the Court had expressed skepticism about corporate racial personhood but permitted such entities to bring a lawsuit when it was convenient to consider important constitutional questions.

Left with these two decisions, appellate courts have generally looked unfavorably on *Arlington Heights*, and instead sought to craft cogent theories of corporate racial identity—or at least mechanisms for corporations to bring racial discrimination claims. These theories can be broken down into three categories: Third-Party Standing, Organizational Standing, and Imputed Identity Standing.[94]

1. Category One: Third-Party Standing

Third-Party Standing permits a corporation to sue when its employee experiences discrimination and that discrimination injures the corporation. For instance, in the first corporate racial identity case after *Arlington Heights*, Heritage Homes (a Massachusetts corporation) and its sole stockholder (Roger Des Vergnes) sought review when Seekonk Water District denied Heritage's petition to include its real estate in the district.[95] Des Vergnes, a White real estate developer, argued that the

92. *See* 42 U.S.C. § 6705(f)(2) ("Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Asian American, Native Hawaiian, Pacific Islanders, African American, Hispanic, Native American, or Alaska Natives.").

93. The Court ultimately determined that "the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws." *Id*. While the Court, did not explicitly impute a racial identity onto the corporations based on their owners, this decision foreshadowed the considerations of the Fourth and Ninth Circuit described in *infra* Part I-C-3. Of course, the *Fullilove* Court's allowance of racial quotas for minority-owned businesses was later overruled when the Court changed the standard of review for racial classifications. *See Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

94. Third-Party Standing remains controversial at the Supreme Court, but it has not been totally foreclosed. *See e.g., June Med. Sers. L.L.C. v. Russo*, 140 S. Ct. 2103, 2142-49 (2020) (Thomas, J., dissenting) (criticizing third-party standing). The latter two doctrines have only been clearly recognized by lower courts and their viability remains to be seen.

95. *Des Vergnes v. Seekonk Water Dist*., 601 F.2d 9, 11 (1st Cir. 1979).

denial was based on racial animus stemming from his previous sales to Black residents.[96] Des Vergnes argued Seekonk violated the Fourteenth Amendment and three of the Civil Rights Acts because the corporation intended to contract with Black residents.[97] Here, the question was not whether the corporation could claim a racial identity, but if a corporation could bring a civil rights claim.[98]

While addressing the §1981 claim, the First Circuit was untroubled by Des Vergnes's racial identity or the Supreme Court's dicta about corporate identity in *Arlington Heights*. Instead, the panel readily analogized causes of action where plaintiffs were not members of the protected racial class nor able to identify specific members who may suffer discrimination.[99] The panel held "a person has an implied Right of action against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites."[100] Applied to the facts, the court held that "[t]he denial was for the purpose of keeping black people out of the District."[101]

The § 1983 claim was similarly analyzed. The court held that:

> [The State] may not through one of its creatures, punish or discriminate against a corporation for its willingness, past or present, to make contracts with blacks. And if it does so, then the person so punished or discriminated against has a § 1983 right of action.[102]

Moreover, the First Circuit determined that Heritage's interests were nearly identical to Des Vergnes's, but dismissed his individual claim because *only* Heritage's rights were violated.[103] In doing so, the court recognized that the corporation—not Des Vergnes—executed contracts

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96. *Id*. at 12-13.

97. *Id*. at 11. Two of the Civil Rights claims are relevant to this discussion: the first, 42 U.S.C. § 1981(a), provides "[a]ll *persons* . . . 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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other" (emphasis added), and the second, 42 USCS § 1983, provides "[e]very *person* who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other *person* within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" (emphasis added).

98. *Des Vergnes*, 601 F.2d at 13.

99. *Id*. at 13-14. The First Circuit discussed *Sullivan v. Little Hunting Park, Inc*., 396 U.S. 229, 237 (1969) where the Supreme Court "gave a cause of action to a white person against another who had injured the white person because he had made an assignment of property to a black" and two other lower court decisions with similar association-based findings. *Des Vergnes*, 601 F.2d at 13-14.

100. *Id*. at 14.

101. *Id*. at 16.

102. *Id*. at 17.

103. *Id*. at 16.

with Black individuals, and, therefore, was being treated differently than a 'White' entity doing business with White individuals.[104]

The *Des Vergnes* decision became the model for corporations bringing racial discrimination suits *without* claiming a racial identity. In *Gersman v. Group. Health Association*, the D.C. Circuit heard its first case about corporate racial identity when a corporation alleged discrimination against its "Jewish Identity."[105] Computer Security International ("CSI") was a computer software storage company solely owned by Alan Gersman and his wife, who were both Jewish.[106] CSI had a contract to maintain computer software for Group Health Association (GHA) for four years, but their agreement was terminated after the new manager inquired about Gersman's religion and discovered that he was Jewish.[107] Despite CSI's attempt to salvage the relationship, GHA insisted on termination.[108]

Gersman and CSI brought a claim under 42 U.S.C. § 1981 and § 1-2511 of the District of Columbia Human Rights Act.[109] The district court dismissed both claims because (1) Gersman had no legal remedy as an individual when his corporation suffered the racial discrimination and (2) CSI could not acquire a racial identity because it was not intended to promote the Gersman's racial or religious identity.[110]

On appeal, the D.C. panel flipped the inquiry on its head: "Rather than assume that racial identity is a predicate to discriminatory harm, we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm."[111]

After reviewing two Supreme Court decisions that granted standing for White plaintiffs who were harmed after trying to advance minority interests, the D.C. panel found the inquiry into CSI's racial identity unnecessary because corporations were *separate* from employees, officers,

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104. *Id.* at 17.
105. 931 F.2d 1565, 1567 (1991).
106. *Id*.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*. This district court's reasoning offers an interesting juxtaposition to the Organizational Standing arguments discussed in *infra* Part I-C-2 and the reasoning the Supreme Court would eventually adopt in *Hobby Lobby*. While *Hobby Lobby* allowed the incidental views and beliefs of the owners to influence whether a discrimination claim would be sustained, the District Court in *Gersman* determined that a "functional nexus [must] exist[] between the purpose or activity of the corporation and the identity of the members of that corporation." *Gersman v. Group Health Ass'n*, 725 F.Supp. 573, 578 (D.D.C. 1989). For example, churches and synagogues offer a clear example of organizations explicitly established for the purpose of religion.
111. *Gersman*, 931 F.2d at 1568.

and stockholders.[112] Thus, the panel held that corporations could experience harm from a discriminatory action regardless of the corporation's "identity."[113]

Recently, the Fifth Circuit adopted a similar view in a §1981 claim against a Texas Methodist Hospital.[114] The plaintiff, White Glove Staffing, was a kitchen staffing agency contracted by the Methodist Hospital of Dallas.[115] The hospital chef requested Hispanic staffers and terminated White Glove's contract after the agency twice sent a Black staffer.[116] When asked if White Glove's contract was being terminated because it sent a non-Hispanic worker, the hospital's chef confirmed that was the case.[117]

The district court dismissed the discrimination claim on the grounds that White Glove lacked a racial identity.[118] On appeal, the Fifth Circuit joined the First Circuit and D.C. Circuit in finding that the *Arlington Heights* decision did not control whether a corporation could bring a racial discrimination claim.[119] Even though White Glove was not minority-owned, the Court found that fact largely irrelevant to whether White Glove could bring a racial discrimination claim; it instead adopted the *Gersman*'s zone-of-interest test as adequate to protect corporate rights without necessitating corporate racial identity.[120]

Taken together, these cases reflect "Third-Party Standing," the idea that a corporation may file suit when racial animus toward a corporation's employee interferes with that corporation's ability to do business. However, the success of these lawsuits may stem from the broad scope of §1981, rather than a liberal reading of corporate personhood. As such, these statutory claims remain a powerful mechanism for corporations to remedy particularized racial animus against their employees but poor vehicles for determining whether corporations can have a racial identity.

2. Category Two: Organizational Standing

In contrast to Third-Party Standing, a corporation has Organizational Standing to sue when an entity whose purpose is the advancement of

112. *Id*. at 1569.
113. *Id*.
114. *White Glove Staffing, Inc. v. Methodist Hosp. of Dallas*, 947 F.3d 301 (5th Cir. 2020).
115. *Id*. at 303.
116. *Id*. at 303-04
117. *Id*.
118. *Id*. at 304.
119. *Id. a*t 306-7.
120. *Id*. at 303.

racial justice suffers racial discrimination.[121] In the second corporate racial identity decision after *Arlington Heights* was handed down, the Second Circuit adopted reasoning that would foreshadow the *Hobby Lobby* decision. In *Hudson Valley Freedom Theater v. Heimbach,* the Second Circuit reviewed a motion to dismiss by a non-profit theatre servicing Black and Hispanic communities.[122] The Hudson Valley Freedom Theatre (HVFT) sued the County of Orange and various officials and administrators, alleging racial animus fueled a local grant denial.[123] Unlike *Des Vergnes*, HVFT sued on its own behalf, alleging that as a corporation "established for the very purpose of advancing minority interests," its rights were violated.[124]

Relying on *Arlington Heights*, the district court held that "a corporation, as a faceless creature of the state, may not assert claims of racial discrimination under the Fourteenth Amendment on its own behalf, and cannot be the 'target' of racial discrimination."[125]

In reversing the district court, the Second Circuit held that an outright denial of standing for corporations to assert a Fourteenth Amendment claim was legally incoherent.[126] The court considered a hypothetical where a city denied building contracts to a construction company because its owners were Black.[127] Traditional corporate law would preclude stockholder standing when a corporation suffers an injury, but denying racial identity to the corporation would leave the owners and corporation remediless. The Second Circuit reasoned that HVFT's claim could not be precluded by prudential limitations because the entity was in the best position to champion the rights violation.[128]

The Eighth Circuit conducted a similar analysis in *Oti Kaga, Inc. v. S.D. Housing Development Authority.*[129] Oti Kaga was a non-profit with the "purpose to acquire, construct, and operate rental housing and

121. Shortly after the following case was decided, the Supreme Court handed down its own theory of Organizational Standing in *Havens Realty v. Coleman.* 455 U.S. 363, 379 (1982). Despite *Havens Realty,* lower courts undergo a similar but distinct analysis when applying Organizational Standing to racial identity.

122. 671 F.2d 702, 703 (2d Cir. 1982).

123. *Id.* at 703-04. (HVFT cited (1) racist statements on the denial form, (2) actions by officials to discourage participation in the program, and (3) unfavorable public statements by defendants designed to discredit the theatre).

124. *Id*. at 706.

125. *Id*. at 704 (quoting *Hudson Valley Freedom Theatre v. Heimbach*, 513 F. Supp. 250 254 (S.D.N.Y 1981). Compare the similar language to Justice Marshall in *Dartmouth College*, 17 U.S. at 636 ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").

126. *Hudson Valley Freedom Theatre*, 671 F.2d at 705-06.

127. *Id*. at 706.

128. *Id*.

129. 342 F.3d 871 (8th Cir. 2003).

related facilities on the Cheyenne River Sioux Indian Reservation" who sought state and federal tax credits to build housing for poor Native individuals.[130] After being denied funding, Oti Kaga filed suit under multiple statutes for racial discrimination and the district court dismissed the claim for lack of standing and intentional discrimination, as well as the expiration of the statute of limitations.[131]

The Eighth Circuit reversed the standing determination, holding that the alleged discrimination "directly affected Oti Kaga's economic interests and its *ability to realize its corporate purpose*."[132] Most importantly, claims by any other plaintiffs, such as potential renters or residents, were too speculative and prospective to challenge the discriminatory actions of the State.[133]

Organizational Standing is distinct from Third-Party Standing because the corporation sues on its own behalf. *Des Vergnes, Gersman,* and *White Glove* all involved corporations that were injured because their *employees* experienced racial animus for reasons unrelated corporation's existence. Unlike those cases, *Hudson Valley* and *Oti Kagas's* discrimination claims were based on animus against their purpose (organizations designed to benefit racial minorities), not an individual person.

3. Category Three: Imputed Identity Standing

The last theory of corporate identity is Imputed Identity Standing. This doctrine permits an entity recognized by the legislature as a minority-owned business to sue on its own behalf. Minority-owned businesses, also known as minority business enterprises ("MBE"), are for-profit corporate entities that are either government-certified or self-identified.[134] To be certified as an MBE, these businesses must be owned and operated by individuals who belong to the Asian-Indian, Asian-Pacific, Black, Hispanic, or Native American communities, and those individuals must own at least 51% of the shares in the company.[135] Federal agencies, as well as state and local governments, offer certain benefits to MBEs to encourage business ownership amongst minorities.[136]

130. *Id*. at 874-75.
131. *Id*. at 877.
132. *Id.* at 882 (emphasis added).
133. *Id*.
134. *See* 15 USC § 9007(a)(3).
135. *Id.* (Minority-owned businesses are "a for-profit business enterprise— (A) not less than 51 percent of which is owned by 1 or more socially disadvantaged individuals, as determined by the Agency; and (B) the management and daily business operations of which are controlled by 1 or more socially disadvantaged individuals, as determined by the Agency.").
136. *See* U.S. DEP'T COM., MINORITY BUS. DEV. AGENCY, *State of Minority Business Enterprise Data by State* (1997) https://www.mbda.gov/sites/default/files/migrated/files-attachments/SMOBE_1997_States.pdf (Accessed March 24, 2023).

The Ninth Circuit considered the imputation of racial identity in *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc*.[137] Thinket Ink was a minority-owned technology services contractor with exclusively Black shareholders that reaped federal benefits under the United States Small Business Administration's business development program.[138] Thinket submitted an application to become a preferred supplier for Sun Microsystems, but despite Sun Microsystems acknowledging the quality of their work on individual projects, the application was rejected three times without any explanation.[139] Although Sun eventually issued a contract, Thinket filed a lawsuit alleging that the previous rejections were based on racial animus against the company.[140]

The district court dismissed the claim for lack of standing.[141] The Ninth Circuit disagreed, holding Thinket's Article III standing was indisputable and that the analysis turned on whether a corporation—rather than its individual shareholders—could assert a discrimination claim.[142] The court noted that the typical 'associational standing' doctrine would be inappropriate because members of the corporation did not have individual standing to sue (a necessary element of associational standing) since Thinket (as an MBE), was discriminated against, rather than its shareholders.[143] Like the First and Second Circuit, the Ninth Circuit questioned *Arlington Heights*. After reviewing the other circuits' approach, the Ninth Circuit concluded that Thinket had a racial identity because it reaped federal benefits as a minority-owned business.[144] Thus, the Ninth Circuit held that corporations have standing to bring a racial discrimination claim when it "suffers discrimination harm cognizable under § 1981, or has acquired an imputed racial identity."[145]

This view was reaffirmed ten years later in the Fourth Circuit. There, Carnell Construction filed a 42 U.S.C. § 2000d[146] racial discrimination claim after the Danville Housing Authority terminated a federally

137. 368 F.3d 1053 (9th Cir. 2004). The Ninth Circuit has two, non-mutually exclusive theories of corporate personhood. In *Marshall v. Kleppe,* 637 F.2d 1217 (9th Cir. 1980), the Ninth Circuit applied a Fifth Amendment equal protection claim to corporate personhood and reasoned that the corporation suffered a financial harm (but did not require the business be minority-owned to levy the claim) which similar to the *Hudson Valley* framework.

138. *Thinket Ink*, 368 F.3d at 1055. *See* 15 U.S.C. 637(a) (2022).

139. *Thinket Ink*, 368 F.3d at 1055-56.

140. *Id*. at 1056-57.

141. *Id*. at 1057.

142. *Id.* at 1057-59.

143. *Id.* at 1059.

144. *Id*. at 1057-60.

145. *Id*. at 1055.

146. "No *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." (emphasis added).

financed construction contract.[147] Prior to filing suit, the parties attempted and failed to mediate an informal complaint submitted to the Housing Authority about racial animus.[148] Ultimately, the Government asked that Carnell Construction leave the site and cease work on the project on the last day of the contract despite the work being incomplete.[149]

Carnell Construction's filed a racial discrimination suit which relied on disparate treatment regarding contracting practices, unpaid labor, and the unfair removal of Carnell Construction from the project.[150] The Housing Authority asserted in district court that prudential limits prohibited Carnell Construction, a corporation, from bringing a claim under Title VI.[151]

On appeal, the Fourth Circuit found Article III standing *alone* justified bringing a racial discrimination claim when a defendant punished a party due to racial animus.[152] Like *Thinket*, the court held that when a certified minority-owned business was the direct object of discriminatory action, it may impute the racial identity of its shareholders.[153]

Thinket Ink and *Carnell Construction* represent Imputed Identity Standing, the most formalist reading of corporate racial identity. Unlike Third-Party or Organizational Standing, Imputed Identity Standing holds that state or federal recognition of a corporation's racial identity makes that corporation itself a minority (for standing purposes). While no Supreme Court case has gone this far, *Carnell Construction* offers an important perspective into Congress's ability to establish standing for corporate rights.

II. ANALYSIS: CORPORATIONS, THEY'RE JUST LIKE US!

Whether corporations can neatly find standing for race-based claims depends on how the Supreme Court locates corporate identity. For this reason, the Third-Party Standing cases do very little to further the corporate racial identity debate because "persons" were never precluded

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

148. *Id.* at 711. *See generally id* (the owner, Michael Scales, frequently butted heads with the Housing Authority with regards to quality, due diligence, planning, and strategy which he contended was a product of racial animus toward a minority contractor).

149. *Id*.

150. *Id*. at 712.

151. *Id*. at 713. Like other defendants, the Housing Authority relied on *Arlington Heights* when asserting a corporation lacks the typical identarian markers that could warrant racial discrimination. *Id.*

152. *Id*. at 715-16.

153. *Id.* at 715.

from asserting §1981 claims based on their identity.[154] Thus, it is not particularly novel to allow corporations—as persons—statutory standing for lost business opportunities resulting from racial animus toward an employee. Despite the relative popularity of this view in academic writing,[155] it does not answer whether corporations *could* have racial identities. As if following the Supreme Court's example, this theory entirely skirts the question.

The real issue is whether the Supreme Court's jurisprudence aligns with finding corporate racial identity from a corporation's 'purpose' or from its legal status as an MBE. Both *Hobby Lobby* and *Citizens United* support Organizational Standing while not precluding Imputed Identity Standing. In these Supreme Court decisions, corporations are perceived as "associations of citizens" that serve as vehicles for accomplishing specific objectives or embodying particular values.[156] This understanding permits corporations to embrace their shareholders' perspectives.

While the "association of citizens" theory was cemented in *Citizens United*, the facts and reasoning are not particularly illustrative because that case concerned expressive freedom rather than corporate identity.[157] As such, *Citizens United* is instructive for how the Supreme Court understands corporate personhood, while *Hobby Lobby* provides a tangible example of how that logic is applied. Although Organizational Standing and Imputed Identity Standing are not mutually exclusive, Part II-A and Part II-B articulate how *Hobby Lobby* best aligns with Organizational Standing.

Despite this, no federal appellate court has cited *Hobby Lobby* or *Citizens United* in any meaningful capacity for a corporate racial identity claim. This gives the Supreme Court broad discretion when applying these cases to conceptualize corporate racial identity.[158]

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154. *See Barrows v. Jackson*, 346 U.S. 249, 259 (1953) (sometimes, a white person is "the only 'effective adversary' of the unworthy covenant.").

155. *See* Recent Case: *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, 134 Harv. L. Rev. 872, 878-79 (arguing that §1981 is sufficient to vindicate racial discrimination and that developing a theory of corporate racial identity would be unnecessarily confusing); William Wyatt Allen, *Justice for All: Why the* Gersman v. Group Health Association *Analysis for Standing Should be Universally Adopted for Cases Involving Companies Asserting Racial Discrimination Claims*, 18 Rutgers Race & L. Rev. 29, 52-56 (arguing that a valid Third-Party claim would be indistinct from the other theories if a corporate brings a true §1981 claim); Jonathon Bailyn, *A Critical Race Theorist Account of Corporate Racial Standing*, 16 Scholar 725, 746-47 (Finding it "unnecessary" to "[i]nquir[e] into [a] corporation's intent in advancing particular minorities' interests").

156. *See generally Citizens United,* 558 U.S. at 349; *see also Hobby Lobby*, 573 U.S. at 695 ("A corporation is simply a form of organization used by human beings to achieve desired ends").

157. *Citizens United*, 558 U.S. at 339 ("Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process.").

158. Oral arguments from *Hobby Lobby* indicate that the Court found theories of corporate racial identity highly relevant to whether corporations could claim religious beliefs. Transcript of

As a final note, *Hobby Lobby* has been poorly interpreted by academics who do consider how *Hobby Lobby* relates to corporate racial identity. Rather than rely on the Court's predominant theory of corporate personhood, those willing to apply *Hobby Lobby* nevertheless dodge questions that the Court has already answered.[159] Instead of taking *Hobby Lobby* at face value, academics seek to entirely reorganize federal corporate jurisprudence around novel and untested theories of corporate law rather than apply the law as stated.[160] In contrast, this Article endeavors to apply the Court's prevailing theory of corporate personhood to corporate racial identity.

A. Hobby Lobby *and Organizational Standing*

Organizational Standing complements the Court's analysis in *Hobby Lobby* and articulates a manageable theory of corporate racial identity. Importantly, adopting a theory of Organizational Standing does not foreclose otherwise valid Third-Party Standing §1981 claims.[161] Rather, it broadens the available causes of actions and remedies when corporations bring discrimination claims to court.

Take the intuitive line from *Hudson Valley* to *Hobby Lobby*. Although Hudson Valley was a non-profit, the standing considerations were nearly identical. Both entities made business decisions to further their respective mission: advancing religious[162] and racial representation.[163] Even if alternative purposes were conceivable or plausible, their missions and goals lent to their 'identity' by influencing business decisions.[164] Finally, these entities experienced discrimination that could not have occurred

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

159. *See* Tyler Larson, *I'm a Real Boy: Imputing Racial Identity to Corporations for Racial Discrimination Standing*, 54 U. LOUISVILLE L. REV. 483, 503 (2016) ("By aggregating a corporation's rights or identity, the Court would obviously require more racial identity determinations to be made by federal courts."). Larson's skepticism over how *Hobby Lobby* applies to race ignores that divining different tests for the religious and racial identities of corporations makes corporate litigation far more onerous.

160. *See* Leonhardt, *supra* note 52, at 205 ("[T]he Supreme Court's case-by-case legal conclusions serve as poor substitutes for developing a robust theoretical framework that differentiates rights because of corporate and natural personhood. Corporate personality theory arguably offers the best solution.").

161. As explained in Part I-C, Third-Party Standing cases do not rely on a theory of corporate personhood because § 1981 cases make discrimination the focus of the analysis rather than the party being discriminated against.

162. *Hobby Lobby*, 573 U.S. at 701 ("The Hahns believe that they are required to run their business in accordance with their religious beliefs and moral principles.").

163. *Hudson Valley*, 671 F.2d at 706 ("HVFT was established for the very purpose of advancing minority interests whereas for MHDC this was simply an incidental, although important, by-product.").

164. *Id*.

but-for their acquired identity. Taken together, Organizational Standing allows for a corporation to vindicate the rights of individuals who participate and perpetuate its mission.

Of course, *Hobby Lobby* asked whether a closely held, *for-profit* entity could assert a religious identity. And unlike Hobby Lobby and Conestoga Wood, Hudson Valley and Oti Kaga were both non-profit entities and, therefore, lacked shareholders.[165] Hudson Valley and Oti Kaga were also not compelled to participate in a mandatory government program; they competed for government grants designed to support special interest groups.[166] Also distinguishable from *Hobby Lobby* or *Conestoga Wood*,[167] these non-profits had an easily discernible purposes.[168] As such, critics argue that it may be difficult to determine how courts could identify the racial identity of a for-profit corporation.[169]

These concerns are misguided. Just as there was no legal principle preventing public corporations from advancing a religious identity in *Hobby Lobby*,[170] the for-profit status of an organization could not limit a corporation's racial identity. Of course, all the problems described in Justice Ginsburg's *Hobby Lobby* dissent come into play: director disputes, managerial concerns, and funding allocation.[171] But the Supreme Court differentiated those as *practical* concerns rather than *legal* obstacles, indicating that the former could be addressed through

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165. *See generally supra* Part I-C-2.

166. *Id.*

167. *Hobby Lobby*, 573 U.S. at 703. For the Court, the for-profit nature of Hobby Lobby and Conestoga Wood meant that the companies' goals could have been fractured between profit and religious devotion whereas non-profits tend to be narrowly focused on a particular public interest concern. However, the Court also heavily considered that Hobby Lobby required "[e]ach family member [to] sign[] a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries." *Id.*

168. As described in Part I-C-2, neither *Hudson Valley* nor *Oti Kaga* discussed the non-profit charters, like *Hobby Lobby*, the appellate courts looked to the actions taken by the entities to draw conclusions about whether to assign them 'identities'

169. Larson, *supra* note 159, at 501 ("The Second Circuit's decision in *HVFT* is far too fact intensive and muddled to stand for a general rule.").

170. Although the Court repeatedly asserted that its decision only applied to closely held corporations, there is no principled reason a public company making similar business decisions as Hobby Lobby and Conestoga Wood could not seek similar religious exemptions under RFRA. *See* Amy Howe, *Court rules in favor of for-profit corporations, but how broadly? In Plain English,* SCOTUSblog (Jun. 30, 2014, 5:17 PM), https://www.scotusblog.com/2014/06/court-rules-in-favor-of-for-profit-corporations-but-how-broadly-in-plain-english/ ("Notwithstanding the Court's repeated caveats, it seems likely that other religiously based challenges to various insurance mandates are inevitable, by for-profit corporations of all stripes"); *see also* Leonhardt, *supra* note 52, at 665-66. (highlighting questioning by Justice Roberts and Justice Scalia as to why any framing of corporate religious identity would exclude public companies).

171. *See Hobby Lobby*, 573 U.S. at 757 n.19 (Ginsburg, J., dissenting).

the "corporate democracy" measures described in *Citizens United* and *Hobby Lobby*.[172]

Conversely, some scholars have found *Carnell Construction* to be the logical extension of *Hobby Lobby.*[173] This view is similarly misguided. *Hobby Lobby* is distinguishable in several meaningful ways. Primarily—and precipitating the case itself—neither Hobby Lobby nor Conestoga Wood were legally recognized religious organizations.[174] The entire point of *Hobby Lobby* was to determine whether a business *not* recognized by the state or federal government as a religious organization had standing to assert a religious claim.[175]

In contrast, *Carnell Construction* concerned a for-profit construction company incorporated to do construction.[176] Aside from its ownership, Carnell Construction lacked a "functional nexus" between its business purpose and the racial minority interests identified in *Hudson Valley* or *Oti Kaga*.[177] Additionally, there was no evidence that Carnell Construction pursued a goal or purpose related to its racial minority status.[178] For Carnell Construction, race only mattered to the entity because the corporation was classified as an MBE.[179] In contrast, Hobby Lobby and Conestoga Wood actively participated in religious activities to further their religious beliefs.[180]

Analogies to *Hobby Lobby* are admittedly imperfect. While racial identity is immutably visible and tied to the flesh, believers can alter or

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172. *Id*. *Citizens United*, 558 U.S. at 361-62. For example, whether a for-profit corporation devotes company resources to social justice campaigns is business judgement matter. If shareholders disagree, the directors can be voted out. *Compare generally* Tamas Barko, Martjin Cremers, & Luc Renneboog, *Shareholder Engagement on Environmental, Social, and Governance Performance,* 180 J. BUS. ETHICS 777 (2022) (describing how activist investors pressure corporate management into complying with environmental, social and governance (ESG) goals).

173. *See* Leonhardt, *supra* note 52, at 675-76.

174. *See Hobby Lobby*, 573 U.S. at 701, 703 (noting that the case would not have occurred if Hobby Lobby and Conestoga Wood had been traditionally recognized religious entities since churches, synagogues, and mosques—to name a few—had already been afforded statutory exemptions).

175. *Id.* at 689 (considering the owner's beliefs, decisions to close on the Sabbath, and substantial donations to religious organizations).

176. *See* Carnell Construction, Inc. Business Filing, SOUTH CAROLINA SECRETARY OF STATE: BUSINESS ENTITIES ONLINE, https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/91f1329f-0331-43f1-a7a3-a86feb75bae0 (Accessed April 21, 2024).

177. *See* Allen, *supra* note 155, at 47.

178. *Carnell Construction*, 745 F.3d at 715.

179. *Id.* ("We agree with the Ninth Circuit that a minority-owned corporation may establish an 'imputed racial identity' for purposes of demonstrating standing to bring a claim of race discrimination under federal law. We hold that 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.") (internal citation omitted).

180. *Hobby Lobby*, 573 U.S. at 700-05.

hide distinguishing religious markers to alleviate discrimination.[181] Furthermore, the Court's expansive reading of *Hobby Lobby* and *Citizens United* complicate attempts to create a race-based interpretation into corporate personhood. These cases broadly prioritized the individuals within the corporations without any limiting principle. However, *Hobby Lobby* is particularly helpful for entities seeking the advancement of racial progress—either directly as a nonprofit or tangentially related to its for-profit exercises—because these entities were oftentimes closely-held organizations.[182] Thus, if those who control a corporation are Black, Hispanic, or Native American,[183] and their corporation pursues goals in that capacity, it is difficult to see how the Supreme Court would not apply the same logic.

B. *The Problem with Imputed Identity Standing*

In contrast to theories of corporate purpose, the Court's skepticism about affirmative action programs[184] makes Imputed Identity Standing an unlikely vehicle for corporate racial identity. Specifically, limiting racial identity solely to a federal or state classification may exacerbate substantial Equal Protection issues where the Court has already casted

181. For greater discussion, *see generally* Patrick Michael Casey, *The Racialization of American Muslim Converts by the Presence of Religious Markers*, 21 Ethnicities 521 (discussing how the frequency of discrimination against white Muslims is generally dependent on outward expressions of their beliefs while discrimination toward non-white Muslims is relatively constant, demonstrating a substantial distinction between race and religion: while religion is expressive, race is inherent).

182. Every matter discussed in this Article concerned a closely-held business or non-profit.

183. This list is not exhaustive for an entity seeking a racial identity. Nor is this to say that it is *necessary* that an entity have a majority of racial minority shareholders. Rather, when an entity that has (1) minority owners or managers and (2) the purpose of racial progress, that is *sufficient* to demonstrate a racial identity under Organizational Standing. As illustrated by *Hobby Lobby*, running a corporation in accordance with certain views may be similarly sufficient to garner statutory protections. Thus, a white individual may own an entity pursuing minority justice and advancement, and that organization may be recognized as having a racial identity despite its non-minority shareholder.

184. *See supra* text accompanying note 92. In *Students For Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, the Court considered the constitutionality of race-conscious admissions. 600 U.S. 181 (2023). It highlighted the dangers of racial classifications devolving into "illegitimate stereotypes" and using race "as a negative—to discriminate against those racial groups that were not the beneficiaries of the race-based preference." *Id.* at 211-12. Because strict scrutiny serves as a check against government classification rather than self-identification, Organizational Standing would be unaffected by *Students For Fair Admissions*. That said, this decision poses substantial dangers for benefit schemes that prioritizes MBEs when making government contracting decisions. *See id.* at 367 (Sotomayor, J., dissenting) (describing the racial categories the government uses for "data collection, compliance reporting, and program administration purposes"). Two district courts have already struck down MBE statutes on these grounds. *See Ultimata Servs. Corp. v. United States Dep't of Agric.*, 2023 U.S. Dist. LEXIS 124268 (E.D. Ten. July 19, 2023); *Nuziard v. Minority Bus. Dev. Agency*, 2023 U.S. Dist. LEXIS 97066 (N.D. Tex. June 5, 2023). Ultimately, *Students For Fair Admissions* is only relevant to this article insofar as it limits the benefits that corporations *with* racial identities may claim, not whether they can exist.

doubt.[185] While the Court has cautiously permitted the MBE classification, broadening the definition to impute the owners' racial identity may not sit well with a Court that has vigorously upheld the principle of color-blind justice.[186] Thus, the more amenable approach may be the holistic and case-by-case Organizational Standing analysis, which accounts for the actions and purpose of the corporation rather than just the shareholder's racial identities.[187]

That said, Imputed Identity Standing cases are not mutually exclusive with *Hobby Lobby* and the Organizational Standing cases. Instead, the MBE legal status functions as a stipulation for what would have been a fact-finding exercise.[188] Under Organizational Standing cases—as seen in *Hobby Lobby, Hudson Valley,* and *Oti Kaga*—courts analyze the factors such as the purpose, business decisions, and funding allocation of the entity.[189] From there, courts discern whether the purpose aligns with the claim the corporation is making. In contrast, Imputed Identity Standing makes this factual inquiry unnecessary since the corporation's racial identity is preestablished.

III. FOR WHOM DOES THE CORPORATE IDENTITY BELL TOLL?

The Supreme Court and lower courts tend to address struggles around corporate personhood by avoiding the question.[190] For instance, *Citizens United* is infamously heralded as the case that inaugurated corporations as people.[191] But even there, the Court went through great pains to "dodge corporate personhood, by focusing . . . on the scope of the right rather than on the party asserting it."[192] Theories of corporate

185. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) ("Simply because [government] may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.")

186. *See* Rapport, *supra* note 12.

187. *See Adarand Constructors*, 515 U.S. at 238 (severely restricting affirmative action programs for minority-owned businesses while leaving in place the classification and leaving open case-by-case determinations about the distribution of benefits).

188. *See e.g.*, *Carnell Const.*, 745 F.3d at 715 ("Carnell [Construction] alleged that the defendants discriminated against Carnell during its performance on the contract based on the minority status of its owner, and that Carnell suffered direct injury as a result of that racial discrimination.").

189. *See supra* Part I-A and Part I-C-2.

190. *See* Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933, 946 (2022) ("[T]hese cases have mostly *ignored* corporate personhood, instead relying on an older and largely discarded theory—the aggregate model, according to which a corporation is merely the sum of other individuals.").

191. *See e.g.,* Timothy Egan, *The Conscience of a Corporation,* N.Y. Times (April 14, 2015), https://www.nytimes.com/2015/04/03/opinion/timothy-egan-the-conscience-of-a-corporation.html ("In 2010, those five judges created the notion of corporate personhood—giving companies the unfettered right to dominate elections.").

192. Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 943 (2011) (describing how firearms manufacturers

racial identity follow a similar pattern. The *Arlington Heights* Court dodged the question explicitly, locating standing for a different plaintiff.[193] Then, the *Des Vergnes*, *Gersman,* and *White Glove* Courts dodged again by abstracting their inquiries to the consequences of racial discrimination rather than the discrimination suffered. In other words, the scope of the right rather than the party asserting it.

Naturally, these decisions evade the issue because corporate personhood is a jumbled collection of ideas knit to an increasingly frayed doctrinal blanket without a view toward consequences. Today, corporations have rights "against illegal search and seizures; under the Due Process Clause; under the Takings Clause; to political speech; to commercial speech; to negative speech; and under Double Jeopardy."[194] The application of individual rights to corporations—which were created to limit liability of their owners and maximize profits—requires continually answering unnecessary questions. It makes sense that the Supreme Court would not want to further complicate these discussions by adding racial identity into the mix.[195]

But the tensions in corporate personhood jurisprudence do not make theorizations about corporate racial identity unproductive. Nor does recognizing a shortcoming in the construction of the law necessitate crafting a perfect solution. The Supreme Court's role only requires determining how previous rulings shape a decision without considering the outcomes and then use those principles to make a judgment in a new situation.[196]

There are admittedly serious questions as to whether corporate racial identity even matters. There are no minority exemptions comparable to those for disability or religious beliefs. The statutes under which racial discrimination claims arise—§ 1981 and § 1983— have been heavily litigated and provide broad remedies for injured litigants. Despite this, considerations about corporate racial identity are important:

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could assert Second Amendment claims by focusing on the broad scope of the right because their injury would be identical person).

193. *Arlington Heights*, 429 U.S. at 263.

194. Tyler Larson, *I'm a Real Boy: Imputing Racial Identity to Corporations for Racial Discrimination Standing*, 54 U. Louisville L. Rev. 483, 483-84 (2016).

195. Another substantial and under-theorized consideration is whether a white supremacist organization could assert whiteness as grounds for a discrimination claim when a private entity refuses its business because of its views. While this Article did not address this hypothetical, this controversy offers a fruitful point for future research (and a persuasive reason why Imputed Identity Standing may be preferable over Organizational Standing from a policy perspective).

196. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022) ("We do not pretend to know how our political system or society will respond to today's decision . . . We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly.").

a decision's impact is not determined by what it purports to say or do but by what it justifies.

As the Court breaks new ground in race voting, religion, free speech, and LGBTQ+ rights, determining the application of these cases and what they reveal about the Court's mood regarding other scenarios becomes paramount. For instance, the outcome in *Hobby Lobby* was undoubtedly correct as a matter of statutory interpretation,[197] but its focus on the corporate action expanded the scope of corporate rights to the extreme by proposing that "the entity's belief system is adopted by members, not the other way around."[198] These small, seemingly semantic, distinctions have profound consequences.[199] Although corporate racial identity was seemingly foreclosed in *Arlington Heights*, tangential and unrelated legal developments have renewed the possibility in novel ways, as described in the above in the *Hobby Lobby* analysis. Or alternatively, the Supreme Court's decisions may prompt legislation that could strengthen or empower what could have otherwise been an inconsequential decision.[200]

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197. *See* Mark, *supra* note 19, at 538 (describing how the Court could have decided *Hobby Lobby* as a matter of statutory interpretation) ("At first glance, *Hobby Lobby* seems both an easy case and correctly decided. RFRA applies to persons, but it does not define "person." The Court therefore turned to the Dictionary Act for guidance. The Dictionary Act defines "persons" under federal law to include corporations. In *Hobby Lobby*, the plaintiffs included business corporations. The plaintiffs claimed that their religious beliefs were burdened by the contraceptive mandate of the Patient Protection and Affordable Care Act (ACA). In keeping with its self-imposed stricture barring inquiry into religious sincerity, the Court eschewed an inquiry into the sincerity of this belief. The Court then asked if the burden met the "least restrictive" method test embodied in RFRA. The mandate failed the statutory test because there was another way to pay for the mandated contraceptive coverage other than requiring the corporations to purchase insurance providing for payment of certain contraceptives. Therefore, the mandate violated rights protected by RFRA. Simple case. The problem with the simple, albeit extended, syllogism is that it does not accurately capture what the Court did.").

198. *See* Mark, *supra* note 19, at 540.

199. This is particularly true when corporate personhood comes from a common law legal fiction that lacks any meaningful legislative constraints. Given the tremendous responsibility the Supreme Court has when interpreting the law, one would expect greater care when approaching matters generally outside its jurisdiction, "given that corporate law is regarded as the province of the states." Mark, *supra* note 19, at 537. Unlike purely legal questions whose impact may only tangentially affect the business world, the way the Supreme Court describes and conceptualizes corporate personhood ripples throughout the market. By failing to meaningfully theorize the language and justifications that shape how businesses will make decisions, the Supreme Court risks creating unnecessary and difficult burdens for policy makers, regulators, corporate boards, and lower courts. *See* Mark, *supra* note 19, at 537 ("I would be more concerned about *Hobby Lobby* were it the decision of the Delaware Supreme Court."); s*ee also generally* Gregory Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403 (1997).

200. For example, after the Supreme Court noted that "the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure," *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978), Congress passed the Privacy Protection Act of 1980 to prohibit third-party searches of newspapers. *See* Jose M. Sariego, *The Privacy Protection Act of 1980: Curbing Unrestricted*

As a final note, it could be said that neither Organizational nor Imputed Identity Standing cases extrapolate a 'true' theory of corporate personhood. However, as the Supreme Court has expanded corporate rights, the veil that separated the entity from the owner has slowly dissipated—if it ever existed.[201] Specifically, Organizational and Imputed Identity cases are less about the actual corporation than they are about the associations and relationships between owners, shareholders, and employees.[202] While this distinction may matter in some sense, recent court decisions[203] and public perception[204] have largely rendered it a distinction without a difference.

Conclusion: Beyond the Veil

Two-hundred years after the Founding, Jorge Luis Borges, an Argentine storyteller, wrote of fictional beings that lived in harmony alongside our universe in relative peace.[205] Until they waged a bloody war against human, that is:

> "In those days the world of mirrors and the world of men were not, as they are now, cut off from each other. They were, besides, quite different; neither beings nor colors nor shapes were the same. Both kingdoms, the specular and the human, lived in harmony; you could come and go through mirrors. One night the mirror people invaded the earth. Their power was great, but at the end of bloody warfare the magic arts of the Yellow Emperor prevailed. He repulsed the invaders, imprisoned them in their mirrors, and forced on them the task of repeating, as though in a kind of dream, all the actions of men. He stripped them of their power and of their forms and reduced them to mere slavish reflections. Nonetheless, a day will come when the magic spell will be shaken off . . . .Little by little they will differ from us; little by little they will not imitate us."[206]

What can this uncanny tale teach us about the fiction of corporate personhood and the Supreme Court? Rather than minimize and

Third-Party Searches in the Wake of Zurcher v. Stanford Daily, 14 U. MICH. J. L. REFORM 519, 519-520 (1981).

201. *See* Macey & Strine, *supra* note 77, at 482 ("Rather than viewing *Citizens United* as a case that pierces the corporate veil, it would be more accurate to view the decision as reflecting a view that there is no corporate veil in the first place. Viewing the corporation as an association of shareholders eliminates all separation between the corporation and its shareholders.").

202. *Id.* at 462.

203. Miller, *supra* note 192, at 915 ("The Court's avoidance of corporate personality does not make the issue disappear; it simply becomes a judicial silence, pregnant with implication.").

204. Frank James, *Romney's 'Corporations are People' a Gift to Political Foes*, NPR (Aug. 11, 2011, 3:13 PM) ("[W]e think we understand what Mitt Romney meant . . . [s]till, he gave his Democratic opponents an early Christmas gift by . . . ma[king] their goal of pushing the narrative that he is a tool of corporate America much easier").

205. Jorge Luis Borges, The Book of Imaginary Beings (Harmondsworth 1974).

206. *Id.* at 67-68.

delineate the differences between natural persons and corporations, we are witnessing corporate persons become mirrors of ourselves. Not only has the Supreme Court allowed corporations to grow beyond their charters, it has encouraged their forced presence in constitutional law. Unlike the mirror people whose power was stripped, corporate persons have been empowered to speak, hold religious beliefs, and organize politically (to rehash just a few). Much less than stripped of their power, corporations have assumed all the benefits of a natural person while escaping the legal limits that permit a society to function.[207] In fact, Borges might as well have been speaking of the corporate veil when he concluded his story with the chilling prediction that "[the Mirror People] will break through the barriers of glass or metal and this time will not be defeated."[208]

Rather than limit corporate power or restrain the expansion of corporate rights, the Supreme Court has run head-first into a controversy of its own making. One need not advocate for corporate racial personhood to recognize its possibility. As the Supreme Court has made abundantly clear, the "persons" and "people" considered by the Constitution make up more than those who look like our close friends and family. But it never established a limiting legal principle that says corporations cannot *look* like them.

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This Article has considered what an adoption of corporate racial identity might look like based on the Supreme Court's First Amendment and RFRA jurisprudence. Every federal circuit that has considered the question has recognized that corporations have some standing to allege racial discrimination. What corporate racial identity means in practice is a different question. Just as RFRA was not crafted with corporate rights in mind, the full effects of corporate racial identity remain to be seen. Although theories of corporate personhood may be incoherent when viewed in relation to traditional corporate law, corporate racial identity is at least consistent with the Supreme Court's past jurisprudence on corporate rights and identity.

The *Hobby Lobby* Court demonstrated that practical and legal considerations were not so constrictive to prevent the expansion of corporate identity, nor was the inquiry for determining identity all that complicated. In other words, the limits of corporate personhood could be better characterized as limits of the imagination.

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207. *See e.g.,* Why *BP Isn't a Criminal*, ROBERT REICH (Nov. 16, 2012) https://robertreich.org/post/35848994755 (illustrating the unique privilege that corporations possess, a former United States Secretary of Labor quipped, "I'll believe corporations are people when Texas executes one.")

208. Borges, *supra* note 205, at 68.