Morally Regulatable Lives: Corporate Sovereignty, the Rise of *Burwell v. Hobby Lobby*, and the Ironic Demise of The Walt Disney Company's Reedy Creek Improvement District

Ashton P. Jones-Doherty[ϕΨ]

Burwell v. Hobby Lobby *is a misunderstood case. Since the decision in 2014, scholars have split into two camps, debating* Hobby Lobby*'s religious liberty concerns. One camp argues* Hobby Lobby *unconstitutionally allows corporations the right to enact religiously motivated policies where the corporate purpose is purely secular, whereas the other camp argues* Hobby Lobby *simply affirms an ownership's right to control the corporation pursuant to their religious interests without government intervention. Both camps miss* Hobby Lobby*'s underlying reasoning, debating the religious liberty interests while ignoring the case's constitutional affirmation of corporate sovereignty.*

A corporate sovereign, or leviathan, exists when a company controls territory and develops moral regulation based on a company leadership's/ownership's values for their employees and/or customers, a power called soulcraft. By describing this phenomenon, this Article advances Hobby Lobby*'s debate by exploring the implications of a corporate ownership's "power to impose" moral regulation onto employees, the*

ϕ At time of publication, Jones-Doherty is an associate at Bailey & Glasser. He has previously worked at the Department of Justice's Office of Legal Policy, the District Court for the District of Columbia, Georgetown's Environmental Law and Justice Clinic, International Rights Advocates, and the Department of Justice's Environmental and Natural Resources Division. The views expressed herein do not necessarily reflect the views of his current or previous employers. He is a graduate of Georgetown University Law Center, J.D., and the University of Georgia, B.A., Political Science. He also studied at the University of Oxford, Keble College.

Ψ This Article is indebted to Professor Donald C. Langevoort's guidance and care. Additionally, my mother and friends provided innumerable support during the drafting and publication process; I would be nowhere without them. Finally, I am deeply thankful for the editors at the *Arizona State Law Journal*, whose gracious time, energy, and passion made this publication possible.

essential characteristic of sovereignty. In doing so, it defines Hobby Lobby *as a broad constitutional protection of corporate sovereignty—a doctrine previously only affirmed in state statute, as with The Walt Disney Company's Reedy Creek Improvement District, or through pure corporate will, as with some company towns—not simply as a religious liberty case.*

Crucially, this Article does not claim corporate sovereigns, like Hobby Lobby and Disney, are as powerful as states, but neither does it diminish their regulatory authority over Americans. In its reasoning and holding, Hobby Lobby *constitutionally legitimizes corporations' sovereign power to morally regulate our lives. That power is formidable and should be acknowledged. This Article explores why.*

INTRODUCTION

"At present there is a moral question almost everywhere,
a moral question that is none other than the political question."
—Jean Paul Sartre to Simone de Beauvoir[1]

"[A]cknowledge yourself/ As market-made, a commodity[.]"
—W. H. Auden, *The Age of Anxiety: A Baroque Eclogue*[2]

Burwell v. Hobby Lobby is a misunderstood case.[3] Since the decision in 2014, scholars have debated its implications, focusing solely on *Hobby Lobby*'s religious liberty concerns.[4] One camp views *Hobby Lobby* as a direful case, arguing that "*Hobby Lobby* gives the owners of closed, secular for-profit corporations—businesses that by some estimates employ half the nation's workforce—the power to impose their own religious beliefs on their employees and deny them important federal rights[,]" such as access to contraceptive care.[5] According to the other camp, *Hobby Lobby* is a "simple case involving two straight forward issues" of whether corporations have rights and, if so, whether the government can "force[] the owners of [a]

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1. SIMONE DE BEAUVOIR, ADIEUX: A FAREWELL TO SARTRE 25 (Patrick O'Brien trans., Pantheon Books 1984).

2. W.H. AUDEN, THE AGE OF ANXIETY: A BAROQUE ECLOGUE 34 (2011).

3. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

4. *Compare, e.g.*, DAVID H. GANS & ILYA SHAPIRO, RELIGIOUS LIBERTIES FOR CORPORATIONS?: HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION 72 (2014) (debating *Hobby Lobby*'s holding), Leo E. Strine Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 73–76 (2015) (discussing how *Hobby Lobby* is a revival of "corporate paternalism"), KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 176–77 (2018) ("The ruling in *Hobby Lobby* was an embodiment of shareholder primacy, allowing the religious views of the dominant shareholders to be projected onto the corporate form, notwithstanding the views of the company's other stakeholders."), *and* LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, AND THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT 23 (2021) ("In his majority opinion, Justice Alito offered the reassurance that female employees would still get their cost-free contraceptives and the burden on women 'would be precisely zero.' If there was a basis for his certainty, he did not reveal it."), *with* Harry G. Hutchinson, Hobby Lobby*, Corporate Law, and Unsustainable Liberalism: A Reply to Chief Justice Strine*, 39 HARV. J.L. & PUB. POL'Y 703, 703–08 (2016) (arguing against Strine's "corporate paternalism" theory), *and* Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. L. 1, 22–23 (2014) ("The majority opinion in *Hobby Lobby* thus took a decidedly pluralistic view of corporate purpose and renounced the widely . . . held view that maximization of profits is legally mandated as the sole corporate purpose. Business corporations are not required to maximize profits and they violate no state law mandate when, as is frequently the case, they engage in activities that sacrifice profits for other values," thus *Hobby Lobby* can be used for progressive corporate experiments (footnotes omitted)).

5. *See* GANS & SHAPIRO, *supra* note 4, at 72.

closely held corporation[] to 'choose' between violating their religious beliefs and paying exorbitant fines."[6] The debate has barely progressed since 2014,[7] resulting in both camps missing how *Hobby Lobby* constitutionally protects corporate sovereigns.

Corporate sovereigns—Hobbesian leviathans hidden in the everyday and created from legal fiction—are companies that control territory *and* develop moral regulation based on a company leadership's/ownership's values for their employees and/or customers. And in exercising their regulation, these companies can become immensely powerful. Yet scholars have remarked little about these efforts.[8] This Article remedies that oversight, focusing on the moral regulations that are developed and exercised by corporations—and since 2014—deemed constitutionally permissible by the Supreme Court of the United States in *Hobby Lobby*. In doing so, this Article advances this debate by exploring the implications of a corporate ownership's imposition of moral regulation onto employees. Moral regulation is "a set of values and rules of action that are recommended to individuals through the intermediary of various prescriptive agencies such as the family[,] . . . educational institutions, churches, and so forth."[9] In short, moral regulation instructs people on implementing values into daily life.[10] Crucially, this Article does not claim corporate sovereigns are as powerful as states, but neither does it diminish their regulatory authority over Americans. In its reasoning and holding, *Hobby Lobby* constitutionally legitimizes corporations' sovereign power to morally regulate our lives. That power is formidable and should be acknowledged. This Article explores why.

Hobby Lobby is the culmination of litigation brought by three for-profit corporations—Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties—who jointly argued the Affordable Care Act's mandatory employer-paid contraceptive coverage violated each corporations' religious exercise under the Religious Freedom Restoration Act ("RFRA"), a statute passed in response to the Supreme Court's decision in *Employment Division,*

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6. *Id.*

7. *See* sources cited *supra* note 4.

8. *See generally* JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM 1–18 (2013) (discussing corporate sovereignty); Harvey Frank, *The Future of Corporate Democracy*, 28 BAYLOR L. REV. 39, 39–40 (1976) (comparing corporations to government entities).

9. *See* MICHEL FOUCAULT, THE USE OF PLEASURE: VOLUME 2 OF THE HISTORY OF SEXUALITY 29 (Robert Hurley trans., 1990).

10. *See id.*

Department of Human Resources of Oregon v. Smith.[11] In *Smith*, the Supreme Court held, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest."[12] RFRA is a statutory counter to *Smith*, mandating the "[g]overnment [to] not substantially burden a *person's exercise of religion* even if the burden results from a rule of general applicability."[13] If the government burdens religious exercise under RFRA, a person is entitled to a religious exemption unless the burden is "(1) . . . in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[14]

In *Hobby Lobby*, the plaintiffs sought a RFRA exemption for their religiously motivated pro-life values.[15] According to the plaintiffs, the Affordable Care Act requires corporations pay for "abortifacients"—contraception methods that "have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the

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11. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693–94, 701, 703–04 (2014); *see also* Johnson & Millon, *supra* note 4, at 5 ("The *Hobby Lobby* decision was the culmination of litigation initiated by three business corporations and their shareholders against [the U.S. Department of Health and Human Services].").

12. *Hobby Lobby*, 573 U.S. at 694 (quoting City of Borne v. Flores, 521 U.S. 507, 514 (1997)) (discussing Emp. Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872 (1990)).

13. *Id.* (emphasis added) (quoting 42 U.S.C. § 200bb(a)(2)).

14. *Id.* at 694–95 (quoting 42 U.S.C. § 2000bb-1(b)).

15. *See id.* at 703 ("Like the Hahns [who own Conestoga], the Greens [who own Hobby Lobby] believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after [fertilization]."). While on the Tenth Circuit, then Judge Neil Gorsuch noted in his concurrence:

> As the Greens explain their complaint, the ACA's mandate requires them to violate their religious faith by forcing them to lend an impermissible degree of assistance to conduct their religion teaches to be gravely wrong. No one before us disputes that the mandate compels Hobby Lobby and Mardel to underwrite payments for drugs or devices that can have the effect of destroying a fertilized human egg. No one disputes that the Greens' religion teaches them that the use of such drugs or devices is gravely wrong. It is no less clear from the Greens' uncontested allegations that Hobby Lobby and Mardel cannot comply with the mandate unless and until the Greens direct them to do so—that they are the human actors who must compel the corporations to comply with the mandate. And it is *this* fact, the Greens contend, that poses their problem. As they understand it, ordering their companies to provide insurance coverage for drugs or devices whose use is inconsistent with their faith *itself* violates their faith, representing a degree of complicity their religion disallows.

Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1152 (10th Cir. 2013) (Gorsuch, J., concurring) (footnote omitted), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

uterus"[16]—thereby requiring the corporation's ownership to violate their religious values.[17] However, there was a snag in the plaintiffs' argument: RFRA applies only to "persons."[18] The question then becomes: Are corporations "persons"?

Corporations defining themselves as "persons" is undeniably controversial. But *Hobby Lobby*'s plaintiffs had no choice: if they were to be granted RFRA's protection, corporations had to become "persons" under law. The plaintiffs, however, sidestepped the question. Instead of focusing on corporate personhood, the plaintiffs argued the corporation's ownership, such as Hobby Lobby's Green family, were the persons protected by RFRA and, despite entering the corporate form, did not relinquish their constitutional rights.[19]

Hobby Lobby, a chain of craft stores, was incorporated as an Oklahoma business corporation in 1972 by David and Barbara Green.[20] Since then, the

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16. *Hobby Lobby*, 573 U.S. at 697–98.

17. *See id.* at 691 ("The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions . . . .").

18. *Id.* at 707 ("RFRA applies to 'a person's' exercise of religion, 42 U.S.C. §§ 2000bb–1(a), (b), and RFRA itself does not define the term 'person.'").

19. *See, e.g.*, Brief for Respondents, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (No. 13-354), 2014 WL 546899, at *14 (arguing "the government's attempt to drive a wedge between the Greens and their businesses—where only the former have rights and only the latter suffer burdens—is a misguided shell game. The fact remains that the *Greens exercise their faith through Hobby Lobby and Mardel, and those beliefs are entitled to protection under a statute that draws no distinction between natural or corporate persons*, let alone between for-profit and non-profit corporations." (emphasis added)); *id.* at *30–31 ("Hobby Lobby and Mardel act only through the Greens. The record amply demonstrates how the Greens have pursued their religious commitments through their business activities . . . and there is no dispute about the precise religious exercise at issue here: the Greens cannot in good conscience direct their corporations to provide insurance coverage for the four drugs and devices at issue because doing so would facilitat[e] harms against human beings. Thus, forcing Respondents to comply with the mandate would directly burden the Greens' religious exercise. Threats against one's business and livelihood—like threats against one's home, bank account, or unemployment check—can obviously impose unbearable pressure. Here, the devastating consequences for non-compliance will be visited upon the *Greens* family businesses, and will occur only if the *Greens* continue to exercise their faith by excluding four products from their companies' health plan." (cleaned up and emphasis added)); *cf. Hobby Lobby*, 573 U.S. at 711–12 ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.").

20. *Our Story*, HOBBY LOBBY, https://www.hobbylobby.com/about-us/our-story [https://perma.cc/RA4N-C69T].

Greens' children have involved themselves in the corporation.[21] While the corporation is not public, Hobby Lobby's voting stock is controlled by various family trusts, not the Greens themselves.[22] The Greens, however, serve as the trusts' trustees—becoming so by signing a Trust Commitment.[23] This Commitment requires the trustee operate Hobby Lobby in accordance with the Christian Faith.[24] Mardel, also controlled by the Greens, has a similar stock design.[25]

Hobby Lobby evinces its commitment to Christianity with a written statement of corporate purpose.[26] The statement requires corporate ownership to "[h]onor[] the Lord in all we do by operating the company in a manner consistent with Biblical principles."[27] Interpreting this purpose broadly, the Greens, for example, close their stores on Sundays in observance of the Christian day of rest and promote anti-abortion policies through the corporation.[28] In turn, the Affordable Care Act's "abortifacients" mandate transgresses their religious commitments.[29] Accordingly, Hobby Lobby argued it should be granted a RFRA exemption to protect the Greens' corporate values.[30]

The majority of the Supreme Court, in an opinion authored by Associate Justice Samuel A. Alito Jr., did just that, holding that companies do not "forfeit[] all RFRA protection when they decided to organize their businesses as corporations."[31] In fact, "[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who

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21. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

22. *See* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1284 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

23. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1122.

24. *Id.*

25. *Id.*

26. *See Our Story*, *supra* note 20.

27. *Id.*

28. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 703 (2014); *Hobby Lobby Stores, Inc.*, 723 F.3d at 1122.

29. *See* Brief for Respondents, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (No. 13-354), 2014 WL 546899, at *10 ("[Hobby Lobby's] religious beliefs will not allow them to do precisely what the contraceptive-coverage mandate demands—namely, provide in Hobby Lobby's health plan the four objectionable contraceptive methods. But the government makes non-compliance costly.").

30. *Id.* at *16 ("Indeed, if RFRA means anything, it makes crystal clear that when the government grants exceptions for secular reasons, it cannot insist on enforcing that law in the name of comprehensiveness when it substantially burdens sincerely-held religious beliefs.").

31. *See Hobby Lobby*, 573 U.S. at 691.

wish to run their businesses as for-profit corporations in the manner required by their religious beliefs."[32] And with that holding, the Supreme Court—for the first time—constitutionally protected corporate sovereignty, by allowing Hobby Lobby to both design moral regulation using its ownership's religious values and implement that regulation onto the corporation's employees.[33]

Hobby Lobby, however, did not invent corporate sovereignty. These sovereigns are not new. Indeed, corporate sovereigns are some of the most successful American companies, including The Walt Disney Company ("the Company"). The Company, through the Florida legislature, created the Reedy Creek Improvement District: a semi-governmental body formed to construct and manage Walt E. Disney's Experimental Prototype Community of Tomorrow, or what Walt Disney called EPCOT—a futurist community in Orlando, Florida.[34] By "combin[ing] company town, visitor attraction, and experimental laboratory," EPCOT was a radical proposal.[35] Through EPCOT, Walt Disney sought to instruct America on how to "solve the problem of cities."[36] According to him, EPCOT remedies metropolitan ills by demonstrating how

> the city of tomorrow ought to be, a city that caters to the people as a service function. It will be a planned, controlled community, a showcase for American industry and research, schools, cultural and educational opportunities . . . . There will be no landowners and therefore no voting control. People will rent houses instead of buying them, and at modest rentals. There will be no retirees. Everyone must be employed. One of our requirements is that people who live in EPCOT must help keep it alive.[37]

He sought, in other words, to display his ideal future—one where Disney's values would be in effect—and instruct Americans on how to implement those values into their communities.[38] EPCOT was therefore Disney's moral

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32. *Id.*

33. *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

34. *See* BOB THOMAS, WALT DISNEY: AN AMERICAN ORIGINAL 339 (1994) ("What we're talking is an experimental prototype community of tomorrow. What does that spell? E-p-c-o-t, EPCOT. That's what we'll call it: EPCOT." (quoting Walt Disney)). *See generally infra* Part II.

35. *See* STEVE MANNHEIM, WALT DISNEY AND THE QUEST FOR COMMUNITY, at ix (2002).

36. *See id.* at xiii; *see also* RICHARD E. FOGLESONG, MARRIED TO THE MOUSE: WALT DISNEY WORLD AND ORLANDO, at xi (2001) ("I don't believe there's a challenge anywhere in the world that is more important to people everywhere than finding solutions to the problems of our cities.") (quoting EPCOT (Walt Disney Productions 1967)).

37. *See* THOMAS, *supra* note 34, at 349.

38. *Id.* at 333 (describing the goal of EPCOT as "planning and building a new kind of city that would show how people could live in a clean, handsome and simulating city"). Disneyland has a similar purpose: it "will be based upon and dedicated to the ideals, the dreams and hard facts

vision, a proposed moral regulation of tomorrow. By showcasing Walt Disney's moral vision for the American city, EPCOT exemplifies moral regulation.

EPCOT did not become reality within Walt Disney's lifetime.[39] But the Company would not let Disney's dream die.[40] With haste, the Company (and its subsidiaries, like WED Enterprises) marshaled its lobbying force on Florida's legislature to pass legislation empowering Disney with the authority "typically reserved for municipal and county governments"—ostensibly for Disney to easily implement EPCOT as imagined.[41] Their efforts resulted in the Reedy Creek Improvement District, a special government district "exist[ing] as [a] separate entit[y] with substantial administrative and fiscal independence from general-purpose local governments" that empowers private actors to otherwise operate, within the statutory guidelines, as governments.[42]

While Reedy Creek is not history's first special district, "Disney's version [is] unique in the broad scope of its authority."[43] Technically, Reedy Creek comes from three 1967 laws acting in tandem.[44] These laws allow the Disney Corporation to utilize "many technological advances achieved by American industry in developing new concepts in community living" and to "undertake a broad and flexible program of experimentation" in achieving said purpose within the District's two counties, Orange and Osceola, thereby requiring "a new quasi-governmental structure."[45] Reedy Creek's quasi-government's powers are breathtaking, prompting a description as the "Vatican City of leisure and entertainment."[46] These powers include "sovereignty over its own roads, the right to condemn private property, the right to impose penalties for

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that have created America . . . . And it will remind us and show us how to make these wonders part of our own lives." *Id.* at 246–47 (internal quotation marks omitted).

39. *See id.* at 353–54, 357.

40. *See generally* FOGLESONG, *supra* note 36, at 14–77 (describing Roy Disney's, Walt Disney's brother's, campaign to create the Reedy Creek Improvement District).

41. *See* Chad D. Emerson, *Merging Public and Private Governance: How Disney's Reedy Creek Improvement District "Re-Imagined" the Traditional Division of Local Regulatory Powers*, 36 FLA. ST. U. L. REV. 177, 178 (2009) (quoting OFF. OF PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, FLA. LEG., CENTRAL FLORIDA'S REEDY CREEK IMPROVEMENT DISTRICT HAS WIDE-RANGING AUTHORITY, REP. NO. 04-81, at 3 (2004)).

42. *Id.* at 179 (quoting 1 U.S. CENSUS BUREAU, U.S. DEP'T OF COM., 2002 CENSUS OF GOVERNMENTS, INDIVIDUAL STATE DESCRIPTIONS, at vi (2005)).

43. *Id.* at 178.

44. *See* MANNHEIM, *supra* note 35, at 105 ("Florida Governor Claude Kirk signed the three bills into law on May 12, 1967 [establishing the Reed Creek Improvement District].").

45. *Id.* at 105–06 (citing FLA. STAT. ANN. § 67-746 (1966)).

46. *See* JUDITH A. ADAMS, THE AMERICAN AMUSEMENT PARK INDUSTRY: A HISTORY OF TECHNOLOGY AND THRILLS 139 (1991).

non-compliance, exemption from eminent domain by other bodies, [the right to operate] airport facilities, [the right to provide] fire protection, the right to levy taxes, the right to issue bonds," and the right to borrow money.[47] And on the EPCOT site, these laws even allow Disney to establish police and municipal courts.[48] In total, Reedy Creek provides the Disney Corporation with immense powers of control over its 27,000-plus-acrage in Florida.[49]

Florida, in turn, statutorily protected corporate interests, for it approved such powers in order for Disney to easily implement EPCOT.[50] Yet, EPCOT was never built, at least not as Walt Disney's futurist city.[51] Instead, EPCOT underwent a transformation: by departing from Walt Disney's futurist city, it became Walt Disney World, a soulcraft playground based on the Company's leadership's values. At Walt Disney World, employees must display approved body language, hairstyles, and even smiles, while being possibly surveilled by undercover corporate agents, noting an employee's compliance to their employer's regulation.[52] Customers fare little better by having their movements tracked throughout the parks.[53] Consequently, despite not constructing a futurist city, the Company has used Reedy Creek to draft and promulgate a moral vision for regulating its community. In doing so, Disney taps into a quintessential, if overlooked, American tradition: corporations morally regulating employees and consumers.[54] Florida's statutory-trio enacting Reedy Creek simply protects such powers.

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47. *See* MANNHEIM, *supra* note 35, at 107–08 (footnotes omitted) (listing Disney's authority via the Reedy Creek Scheme).

48. *Id.* at 106.

49. *See* FOGLESONG, *supra* note 36, at 46 ("By June 1965, the [Walt Disney Company's] Project Winter group had bought or optioned 27,258 acres, far exceeding their original goal.").

50. *See generally id.* at 15–77 (describing Roy Disney's campaign to create the Reedy Creek Improvement District).

51. *See* MANNHEIM, *supra* note 35, at 130 ("[T]he company formally announced that EPCOT . . . was unworkable.").

52. *See generally id.* at 123–24 ("A 1955 booklet titled 'Your Disneyland: A Guide for Hosts and Hostesses' outlines many of the original park guidelines. For example, 'The Disneyland Look' consisted of natural-looking cosmetics, neat hair, clean hands and nails, shined shoes, a clean costume, and a fresh shave for men. Moreover, employees were instructed to 'try a smile.'"); Laruen A. Newell, *Happiness at the House of Mouse: How Disney Negotiates To Create the "Happiest Place on Earth*,*"* 12 PEPP. DISP. RESOL. L.J. 415, 470 (2012) (describing Disney's spy system).

53. *See* Kaitlyn Stone, Note, *Enter the World of Yesterday, Tomorrow and Fantasy: Walt Disney World's Creation and Its Implications on Privacy Rights Under the MagicBand System*, 18 J. HIGH TECH. L. 198, 223–24 (2017) (describing Disney's MagicBand system that "track[s] individual movement within the park").

54. *See infra* notes 227–244 and accompanying text.

Some may claim moral regulation is not overlooked, as moral regulation by states often dominates America's discourse. For instance, the Supreme Court of the United States' recent majority opinion in *Dobbs v. Jackson Women's Health Organization*—which overruled a constitutionally protected right of abortion as defined in both *Roe v. Wade* and *Planned Parenthood v. Casey*—defines itself as returning an impermissibly restricted "moral" debate to the states.[55] And the reactions, both in support and in rejection of the opinion, equally stress morality.[56] But *Dobbs* highlights this point: the case focuses on *state*, not *private*, moral regulation of abortion. America's discourse often ignores how private moral regulation—often created by government decisions—impacts our lives. Reedy Creek, created by Florida for The Walt Disney Company, is one such example of private moral regulation. And since the mid-twentieth century, Disney's moral leadership of Reedy Creek has remained unquestioned, allowing the Company to develop and implement moral regulation without state interference.

But recently the unquestionable became questionable, after The Walt Disney Company criticized Florida Governor Ronald D. DeSantis's Parental Rights in Education bill, which prevents public schools from discussing sexual orientation and gender identity with kindergarteners through third graders.[57] Governor DeSantis's retaliation over Disney's criticism was quick and shocking: the Florida legislature passed Senate Bill 4-C, eliminating Reedy Creek and reestablishing Florida state control over Disney's acreage by or after June 1, 2023.[58] After signing the bill, DeSantis promoted his public takeover of the Disney parks as restoring Floridan "control" over Reedy Creek's taxing authority.[59] Recently, the Florida legislature, though

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55. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240, 2284 (2022) ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views.").

56. *Compare* John McCormack, *McConnell:* Dobbs *Decision 'Courageous and Correct'*, NAT'L REV. (June 24, 2022, 11:32 AM), https://www.nationalreview.com/corner/mcconnell-dobbs-decision-courageous-and-correct [https://perma.cc/4NSE-TF5C] ("The Court has corrected a terrible legal and moral error . . . ."), *with* Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the* Dobbs *Decision*, N.Y. TIMES (July 22, 2022), https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html?smid=url-share [https://perma.cc/L6VR-JVSQ] (discussing *Dobbs* as a religiously moral text).

57. *See* Lori Rozsa et al., *Florida Legislature Passes Bill Repealing Disney's Special Tax Status*, WASH. POST (Apr. 21, 2022, 6:00 PM), https://www.washingtonpost.com/nation/2022/04/21/florida-legislature-passes-bill-repealing-disneys-special-tax-status/ [https://perma.cc/LRW6-C59Q].

58. *See* S.B. 4–C, 2022 Leg. (Fla. 2022).

59. *See generally* Richard Bilbao, *What Is Florida Gov. Ron DeSantis' Plan To Replace Disney's Reedy Creek*, ORLANDO BUS. J. (July 15, 2022), https://www.bizjournals.com/orlando/news/2022/07/15/florida-orlando-desantis-disney-reedy-creek-plan.html [https://perma.cc/4SPF-VARQ] ("More likely, the state will simply assume

DeSantis's urging, formally dissolved the former District and established state control over the District, leading to some heated disputes between Florida and Disney.[60] Regardless of the Districts reconstitution into a government controlled entity, the past cannot be undone. Florida, by approving Reedy Creek into law, constructed a corporate sovereign power, a kind of Hobbesian corporate leviathan, whose membership is involuntarily regulated by the Company ownership's moral values advanced in company policy.[61]

This Article analyzes corporate leviathans, like The Walt Disney Company, in American law. In doing so, it defines Hobby Lobby (after *Hobby Lobby*) and The Walt Disney Company as examples of corporate sovereigns: because these companies control territory, *i.e.*, Hobby Lobby's stores and the Company's Reedy Creek Improvement District, where either can impose moral regulations onto their respective employees/customers involuntarily, they are operating as sovereigns that can designate exceptions to employee/customer choices. And the time is due to acknowledge them as such.

This Article explores this issue in the following three sections. Part I, The Rise of *Burwell v. Hobby Lobby*, examines *Hobby Lobby*'s jurisprudential origins at the Supreme Court and how these origins both inform *Hobby Lobby*'s reasoning and break from its tradition. Part II, Corporate Sovereigns, *Hobby Lobby* and The Walt Disney Company's Reedy Creek Improvement District, explores case studies in corporate sovereignty compared to *Hobby Lobby*. A brief conclusion follows, discussing the future of *Hobby Lobby* in constitutional law.

I. PART ONE: THE RISE OF *BURWELL V. HOBBY LOBBY*

"Since the dawn of capitalism," Margaret M. Blair observes, "corporations have been regarded by the law as separate legal 'persons.'"[62] The first corporations—a word that originates "from the Latin word corpus, meaning body, because the law recognized that the group of people who formed the

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control and make sure we're able to impose the law and make sure we're collecting the taxes . . . .").

60. *See* Brooks Barnes, *DeSantis Declares Victory as Disney Is Stripped of Some 56-Year-Old Perks*, N.Y. TIMES (Feb. 10, 2023), https://www.nytimes.com/2023/02/10/business/disney-world-florida-tax-board.html [https://perma.cc/YKZ5-QD7H].

61. *See* FOGLESONG, *supra* note 36, at 165 ("Like Hobbes's *Leviathan*, [Disney's control of properties] guarantees . . . order through [its] web of controls.").

62. *See* Margaret M. Blair, *Of Corporations, Courts, Personhood, and Morality*, 25 BUS. ETHICS Q. 415, 415 (2015).

corporation could act as one body or one legal person"[63]—were "quasi-governmental bodies" created by the state to exist independently with their own rights.[64] Being a composite body with rights, like the ability to form contracts, a corporation's purpose "was simply to make it clear . . . [that] the contracts [the corporation's membership] made were not entered into on [the membership's] personal behalf, but only in [the corporation's] official capacity."[65] That is, a corporation's purpose was to serve its official function—be it for a governmental end or, since at least the nineteenth century, for shareholder profit[66]—without creating membership liability for corporate actions. Corporate personhood was thus required to separate the corporation from its membership to avoid membership liability. It is an anti-liability tool for collective actions.

The anti-liability approach to corporate personhood is ancient. For example, to William Blackstone, perhaps the most influential English jurist because of his *Commentaries on the Laws of England*, corporations are "artificial persons."[67] Once an artificial person is formed, "[the corporation] and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the

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63. *See* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 788–89 (2013). This definition was shared by Scottish philosopher Stewart Kyd, who described corporations as:

> [A] collection of many individuals, united into one body [that has] perpetual succession under an artificial form [and is] vested, by the policy of law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued[.]

See 1 STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS 2–4, 7, 10, 13 (1793) (emphasis removed).

64. *See* Andrew Lamont Creighton, The Emergence of Incorporation as a Legal Form for Organizations 34 (1990) (Ph.D. dissertation, Stanford University) (ProQuest); *see also* Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 245, 250 (Naomi R. Lamoreaux & William J. Novak eds., 2017) ("[M]any, if not all, of the corporations formed in the American colonies in the eighteenth century were formed to serve some public purpose and were regarded at least quasi-public in nature."); JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES 373 (2018) ("[M]ost American corporations were municipal bodies created for a public purpose.").

65. *See* Blair, *supra* note 63, at 789–90.

66. *See* WINNIFRED FALLERS SULLIVAN, CHURCH STATE CORPORATION: CONSTRUING RELIGION IN US LAW 102 (2020) ("Historian Margaret [M.] Blair argues that the notion of the corporation as simply private and transactional did not actually take firm hold until after the creation of general incorporation acts in the mid-nineteenth century under which proof of public benefit was no longer required." (citing Blair, *supra* note 63, at 806)).

67. 1 WILLIAM BLACKSTONE, COMMENTARIES *455–56.

individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic."[68] Blackstone makes two points in his description.[69] First, corporations are independent legal entities "in the eyes of the law, separate and distinct from the people who formed it."[70] Second, corporations have legally enforceable rights similar to natural persons.[71] Each of these rights, to Blackstone, was exercised in its own name.[72] The second point is crucial to Blackstone; he believed:

> The members of the corporation did not own the corporation's property, the corporation did. The members of the corporation were not personally bound by the corporation's contracts, the corporation was. The members of the corporation could not sue or be sued for legal controversies involving the corporation, only the corporation could. Corporations were their own independent entities under the law, separate and distinct from their members and with certain rights deserving of protection.[73]

While Blackstone's understanding of corporate personality is ancient—in fact, Edward Coke in 1612, a mere 153 years prior to Blackstone's *Commentaries*, defined the corporation through Roman law as "invisible, immortal, and rests only in the . . . consideration of the law"[74]—it is not an outdated understanding.[75] Corporate personhood defined through strict separation between the corporate entity and its membership is American corporate law's cornerstone.

Chief Justice John Marshall—using English Law for his decision in *Trustees of Dartmouth College v. Woodward*,[76] one of the first Supreme Court of the United States decisions on corporate rights—famously described the American corporation as:

> [A]n artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses

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68. *Id.* at *456.

69. *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 47 (2018).

70. *Id.*

71. *Id.*

72. *Id.* at 50.

73. *Id.*

74. *See* Case of Sutton's Hospital (1612) 77 Eng. Rep. 960, 973.

75. *See* WINKLER, *supra* note 69, at 51 ("Blackstone's understanding of the corporation is old but hardly outdated.").

76. *See* Philip Blumberg, *The Corporate Personality in American Law*, 38 AM. J. COMPAR. L. 49, 49 (1990).

> only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.[77]

Likewise, George Field, in his *Treatise on the Law of Corporation*, published in 1877, fifty-eight years after *Dartmouth College*, defined a corporation as a "'legal person' whose acts 'are considered those of the body, and not those of the members composing it.'"[78] Similarly, in the twentieth century, Robert Charles Clark, the dean of Harvard Law School, wrote: "One of the law's most economically significant contributions to business . . . has been the creation of fictional but legally recognized entities or 'persons' that are treated as having some of the attributes of natural persons."[79] In turn, by echoing Coke and Blackstone,[80] American law has consistently described the corporation as an "artificial person," which remains, according to the Supreme Court of the United States in 2001, a principle ingrained in our economic and legal systems.[81] Yet, while both accepting "corporations have a real, underlying social identity of their own, distinct from the identities of the people who form them"[82] *and* agreeing "[a] rights-bearing entity is simply what a corporation *is*,"[83] corporate personhood "is one of the most

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77. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 634–36 (1819). *Dartmouth College* was not the first corporate law case before the court; that case was *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809), where the Court found "[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporate aggregate, is certainly not a citizen." *See Deveaux*, 9 U.S. at 86; David Ciepley, *Member Corporations, Property Corporations, and Constitutional Rights*, 11 LAW & ETHICS HUM. RTS. 31, 32 (2017) ("They are held by the corporation itself, as a distinct legal entity, separate from the rights of the natural persons that associate with it. Of course, all of a corporation's rights have to be exercised by natural persons acting in its name as its agents and fiduciaries, since the corporation, as a bare legal entity, cannot act. But the consequences of their exercise are legally attributed to the corporation, not the actors.").

78. *See* WINKLER, *supra* note 69, at 51 (quoting GEORGE FIELD, A TREATISE ON THE LAW OF CORPORATIONS 1 (1877)).

79. *Id.*

80. *See* Ciepley, *supra* note 77, at 53 ("The wording [of American case law] echoes Blackstone and Coke . . . ."); Blumberg, *supra* note 76, at 49 ("The corporation was a creation of the legislature with certain 'core' rights including the capacity to sue and be sued, the capacity to hold and transfer property, and to have perpetual existence, irrespective of any change in its shareholders. This view has been alternatively called the *artificial person*, or *fiction*, or *concession* or *grant* doctrine.").

81. *See* Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 158 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status.").

82. *See* Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1075 (1994) (citing John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926)).

83. *See* Ciepley, *supra* note 77, at 31.

misunderstood doctrines in American legal history" because legal scholars and philosophers have struggled with defining and separating the legal person from its membership.[84] The Supreme Court, despite its ruling in *Dartmouth College* and its 2001 reaffirmance, is no exception.

In *The Commerce Clause Under Marshall, Taney, and Waite*, Associate Justice Felix Frankfurter declared, "The history of American constitutional law in no small measure is the history of the impact of the modern corporation."[85] This is ironic as the word "corporation" appears nowhere in the text of the U.S. Constitution.[86] Lacking express protections has—according to Adam Winkler, Elizabeth Pollman, Margaret Blair, and others—resulted in a revolution in corporate law.[87] The Court has been the prime mover of this revolution, which has ignored Blackstone's artificial persons and instead focused on the corporation's membership—known as "natural persons," who are expressly protected by the Constitution—in order to secure corporate Constitutional rights.[88] This revolution is dubbed "associational theory."[89]

This Part first reviews this revolution and then compares it to the countermovement advocating strict Blackstonian personhood, before defining how *Hobby Lobby* is a product of the former and a rejection of the latter.

A. The Revolution: Associational Theory

In his seminal essay, "*Santa Clara* Revisited: The Development of Corporate Theory," Morton J. Horwitz was perhaps the first legal scholar to notice—ironically, since the revolution happened in plain sight—the Supreme Court's development of associational theory.[90] Horwitz discussed

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84. *See* Blair, *supra* note 63, at 810 (quoting Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1640 (1988)).

85. *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 63 (1937).

86. *See* Ciepley, *supra* note 77, at 35.

87. *See generally* WINKLER, *supra* note 69, at 395 ("The Supreme Court has contributed to . . . looking through the corporate form and basing the rights of the corporation on the rights of the people associated together within it."); Blair & Pollman, *supra* note 64, at 285 (concluding that, prior to *Hobby Lobby*, the Supreme Court had "recognize[d] corporate rights only when it [was] necessary to protect the rights of human persons represented by the corporation").

88. *See generally* WINKLER, *supra* note 69, at 395; Blair & Pollman, *supra* note 64, at 285.

89. *See generally* Blair & Pollman, *supra* note 64, at 266, 268.

90. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 174–76 (1986). Horwitz's purpose in his essay was not to outline the development of the associational theory, unlike his successors. *Id.* at 175–76. In fact, he does not

what he calls "the real meaning of the *Santa Clara* [*County v. Southern Pacific Railroad*] Decision"[91]—a 1886 case often attributed to crystalizing corporate personhood rights and the holding that the Fourteenth Amendment applied to corporations just as it applied to natural persons.[92] Horwitz argued that *Santa Clara*, in fact, did not affirm corporate personhood.[93] Rather,

> the Supreme Court's use of the word person in this context was not intended to constitute recognition of the corporate entity as an independent, rights-bearing entity, but . . . was an assertion that the corporation was a stand-in for the natural persons that formed the corporation and owned its shares.[94]

Supporting his argument, Horwitz points to John Norton Pomeroy's brief for Southern Pacific Railroad in *Santa Clara*'s companion case, *San Mateo v. Southern Pacific Railroad*. Pomeroy argues that both state and federal constitutional provisions

> apply . . . to private corporation[s], not alone because such corporations are "persons" within the meaning of that word, but because *statutes violating their prohibitions in dealing with*

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use the term associational theory in his essay. *See generally id.* at 174–76. Instead, the paper's purpose was to question Legal Realism's conclusion that personhood theory was a "major factor in legitimating big business," since the court looks to natural persons for constitutional rights, not corporations. *Id.* at 176.

91. *Id.* (emphasis added).

92. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886) (holding that the Fourteenth Amendment applied to corporations as equally as natural persons). It is possible the Supreme Court's agreement in *Santa Clara* was fabricated. According to Adam Winkler, the Supreme Court's Reporter of Decisions, J. C. Bancroft Davis—who was given exclusive rights to sell the *United States Reports*, the official bound versions of the Supreme Court's opinions and used by every lawyer in the nineteenth century who practiced before the Court—inserted the following:

> One of the points made and discussed at length in this brief of counsel for defendants in error was that "corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." Before Argument, Mr. CHIEF JUSTICE WAITE said "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction that equal protection of the laws applies to these corporations. We are all of the opinion that it does."

See WINKLER, *supra* note 69, at 149–52. This insertion was, apparently, without the Court's consent, setting off a firestorm within the Court and caused Davis to be personally reprimanded by Chief Justice Waite, based on the Court had not ruled on the Fourteenth Amendment's applicability to corporate rights. *See id.* at 151–52. Yet, ironically, it is this insertion that is given as proof that the Fourteenth Amendment protects corporate rights. *See id.* at 153.

93. *See* Horwitz, *supra* note 90, at 176.

94. *See* Blair, *supra* note 63, at 803.

> *corporations must necessarily infringe upon the rights of natural persons.* In applying and enforcing these constitutional guaranties, *corporations cannot be separated from the natural persons who compose them*.[95]

This conclusion, Pomeroy argues, is intrinsic to our legal principles:

> Whatever be the legal natural of a corporation as an artificial, metaphysical being, separate and distinct from the individual members . . . in carrying out the technical legal conception, between property of the corporation and that of the individual members, . . . *these metaphysical and technical notions must give way to the reality*. The truth cannot be evaded that, *for the purpose of protecting rights, the property of all business and training corporations* IS *the property of the individual corporators*. A State act depriving a business corporation of its property without due process of law, does in fact *deprive the individual corporators of their property.* In this sense, and within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons or corporations, and natural persons.[96]

The Ninth Circuit's opinion, authored by Associate Justice Stephen J. Field, an ardent supporter of expansive corporate rights and a joiner of the majority in *Santa Clara*, practically plagiarized Pomeroy's brief; Field wrote:

> Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business . . . . It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation . . . On the contrary, we think . . . the courts will always look beyond the name of the artificial being to the individual whom it represents [when deciding if a constitutional right has been infringed].[97]

Field's opinion, Pomeroy's argument, and the Court's opinion in *Santa Clara* are thus a revolutionary shift from Blackstone's artificial persons. The Court—likely through the help of fabrication[98]—rejected centuries-old

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95. *See* Horwitz, *supra* note 90, at 177 (quoting Argument for Defendant, Cnty. of San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1882)).

96. *See id.* at 178 (quoting Argument for Defendant, Cnty. of San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1882)).

97. The Railroad Tax Cases, 13 F. 722, 743–44 (C.C.D. Cal. 1882).

98. *See supra* note 92.

personhood theory and created a theory where corporate personhood is simply there to protect the rights of individuals.[99] The corporation, according to this theory, is a jambalaya of individuals pursuing a singular interest via a collective body.[100] Thus, courts *must* protect these individuals over any fictitious artificial person, itself only a symbol of collective private actions.

To be sure, while the Supreme Court's decision in *Santa Clara* was the first time the Court adopted associational theory, the Supreme Court did not invent the theory. Horwitz credits Victor Morawetz's 1882 treatise, *A Treatise on the Law of Private Corporations*, as crafting the "first sustained effort" of defining associational theory.[101] The corporation, to Morawetz, "is really an association formed by the agreement of its shareholders, and . . . the existence of a corporation as an entity, independently of its members, is a fiction."[102] Morawetz's idea was quickly adopted. Echoing Morawetz in 1885, only a year before *Santa Clara*, Henry O. Taylor, in his *Treatise on the Law of Private Corporations Having Capital Stock*, sought to "dismiss[] this fiction" of corporate legal personality so that "a clearer view" of the rights of natural persons could be determined "without unnecessary mystification."[103] Morawetz and Taylor's ideas were a radical departure from corporate law's personhood heritage: Blackstone's artificial persons were rejected in favor of preserving the rights of natural persons, regardless of whether a natural person was acting individually or through a collective body.

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99. *See* Horwitz, *supra* note 90, at 178 ("Only this . . . theory can truly be said to personify the corporation and treat it 'just like individuals.'").

100. *See The Railroad Tax Cases*, 13 F. at 743–44; Horwitz, *supra* note 90, at 177–78.

101. *See* Horwitz, *supra* note 90, at 203.

102. *Id.*; *see also* VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS, at iii (2d ed. 1886). However, according to Winkler, Horace Binney is the real source of the associational theory. *See* WINKLER, *supra* note 69, at 52–70. While I am doubtful that Binney's theory was associational theory, as he did not use veil piercing logic, a principal piece of the theory, *see infra* notes 119 and 122, Winkler argues:

> [C]orporations and their members were not separate and distinct entities when it came to the Constitution. Instead, Binney argued, corporations were associations of individuals, and corporations should be able to assert the same rights as the people who come together within them. Unlike veil piercing in corporate law, which is used to extend the liability of the corporation to its members, Binney's version sought to extend the rights of the members to the corporation. Binney's way of thinking about corporations would be repeated often by corporationalists throughout American history and ultimately prove to be profoundly influential in shaping constitutional rights for corporations.

Id. at 53.

103. *See* HENRY O. TAYLOR, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK, at iv (1885); *see also* Horowitz, *supra* note 90, at 204.

This idea has been extraordinarily influential—perhaps one of the most significant ideas in legal history—for it is undeniable Morawetz and Taylor's ideas motivated the Court's opinion in *Santa Clara*, given, according to Horwitz, the idea "was supported by John Norton Pomeroy, the California lawyer who was simultaneously putting forth this argument on behalf of the corporation in the *Santa Clara* case."[104] This influence has continued unabated for more than a century. The Supreme Court no longer cared that the corporation was a creature of the state; instead, the Court along with "business people, judges, lawyers, and legal scholars began to think of corporations as having been created by the people who came together to form them."[105] In turn, the Court's jurisprudence began to focus on the corporation's membership as opposed to the corporation itself.

The Supreme Court has routinely, especially after Reconstruction, protected the constitutional rights of corporations—using associational theory to do so. In total, corporations have been granted several rights: corporations are "persons" under the Constitution for diversity jurisdiction purposes;[106] corporations are protected by the Fourteenth Amendment's Equal Protection and Due Process Clauses;[107] corporations have the Fifth Amendment Rights against unreasonable search and seizures, protection against double jeopardy, and some guarantees to jury trials;[108] corporations have expansive freedom of speech rights, including political speech rights, and any abridgement of free speech is subject to strict scrutiny;[109] and now corporations, at least those closely held, have religious freedom rights under RFRA.[110] Of course, the Supreme Court has denied some constitutional rights to corporations; for example, corporations are not considered "citizens" for

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104. *See* Horowitz, *supra* note 90, at 204.

105. *See* Blair, *supra* note 63, at 802.

106. *See generally* Bank of the U.S. v. Deveaux, 9 U.S. 61, 91–92 (1809); Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 558 (1844); Marshall v. Balt. & Ohio R.R. Co., 57 U.S. 314, 335 (1853); Dodge v. Woolsey, 59 U.S. 331, 379 (1855).

107. *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 409–10 (1886).

108. *See generally* Hale v. Henkel, 201 U.S. 43, 76 (1906) (unreasonable search and seizures); United States v. Martin Linen Supply Co., 430 U.S. 564, 567 (1977) (double jeopardy); Ross v. Bernhard, 396 U.S. 531, 532–33 (1970) (jury trials).

109. *See generally* Va. Citizens Consumer Council, Inc. v. State Bd. Of Pharmacy, 373 F. Supp. 683, 684 (E.D. Va. 1974), *aff'd sub nom.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (commercial speech rights); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 560–61 (1980) (commercial speech rights); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 881 (2010) (political speech rights); First Nat'l Bank of Bos. V. Bellotti, 435 U.S. 765, 788–79 (1978) (strict scrutiny application).

110. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683–87 (2014).

the Privileges and Immunities clause of Article IV[111] and corporations have no Fifth Amendment protections against self-incrimination.[112] Yet, despite the Supreme Court withholding a few constitutional protections, the Court's jurisprudence has been remarkably expansive and has "generally justified its granting of Constitutional rights to corporations not on a theory that corporations are themselves Constitutionally protected persons, as sometimes claimed, but on the logic that a corporation is an association of persons acting together."[113] Put differently, the Supreme Court has thoroughly adopted Morawetz and Taylor's ideas; it is an associational theory institution.

B. The Countermovement: Personhood Theory

The Supreme Court's adoption of association theory has not been universally accepted by *all* members of the Court; there has been a countermovement to decide corporate rights based on personhood theory. Although this paper is not a comprehensive overview of the Supreme Court's corporate law jurisprudence, it is important to emphasize this countermovement as having significant successes, especially during the Antebellum period. While members of this countermovement include Chief Justice William H. Rehnquist[114] and Associate Justice Hugo L. Black,[115] the

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111. *See* Bank of Augusta v. Earle, 38 U.S. 519, 596–97 (1839); *see also* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER & SPIRIT 22–30 (2021) (discussing how the Supreme Court has interpreted the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment).

112. *See Hale*, 201 U.S. at 83 (1906) (Brewer, J., dissenting).

113. *See* Blair, *supra* note 62, at 421.

114. In *Virginia Pharmacy*, then-Associate Justice "Rehnquist was the sole dissenter—and the only justice who foresaw the far-reaching implications of extending First Amendment protections to commercial advertising." *See* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 248 (2016):

> Rehnquist presciently predicted that "surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind." "Under the Court's opinion," Rehnquist said, "the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes and other products the use of which has previously been thought desirable to discourage[.]"

Id. (footnote omitted). This prediction would come to fruition in *Central Hudson Gas and Electric Co. v. Public Service Commission*, in which the Supreme Court ruled basically all prohibitions against commercial speech are unconstitutional. *See* 447 U.S. 557, 570–72 (1980).

115. Justice Black famously detested an expansive reading of corporate constitutional rights. In Black's view, the Fourteenth Amendment provided corporations no affirmative rights. *See* WINKLER, *supra* note 69, at 266. In *Connecticut General Life Insurance*, Black dissented:

most successful member is Chief Justice Roger B. Taney, whose corporate law decisions affirming corporate personhood have been overshadowed, rightfully, by his majority opinion in *Dred Scott v. Sandford*, where the Court rejected African Americans' legal rights under the Constitution.[116] It is a deep irony, then, that the *same* Supreme Court—who thought blacks were afforded no Constitutional rights—believed corporations have Constitutional rights because corporations, unlike African Americans, were "persons" under the Constitution.[117] Nevertheless, Taney's majority opinion in *Bank of Augusta v. Earle* is the apotheosis of the Supreme Court's personhood jurisprudence. In rejecting Daniel Webster's associational theory argument for the Bank of Augusta that "the [C]ourt should look behind the act of incorporation and see who are the members of it," Taney held:

> [T]he corporation "is a person for certain purposes in contemplation of law," "Whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that charter, and not the rights which belong to its members as citizens of a state." In Taney's view, corporate personhood required a strict separation between the rights of the corporation and the rights of its members.[118]

As a result, *Bank of Augusta* illustrates the Supreme Court has not always adopted the associational theory. Faced with Daniel Webster's associational theory argument, the Court choose to reject it. Regardless, Taney's personhood precedent remains essentially isolated to the Constitution's Article IV Privileges and Immunities Clause. And in mainly rejecting personhood theory, the Supreme Court choose a different path, the

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> Challenging a half-century of precedent recognizing corporations to have at least property rights under the Fourteenth Amendment, Black rested his case on the original meaning of the Fourteenth Amendment. No one who voted to ratify the Fourteenth Amendment knew they were "granting new and revolutionary rights to corporations," Black insisted. . . . [I]n Black's view, the Fourteenth Amendment was designed "to protect weak and helpless human beings," not "to remove corporations in any fashion from the control of state governments." People had constitutional rights; corporations did not.

Id. at 266–67.

116. *See* Dred Scott v. Sandford, 60 U.S. 393, 459–60 (1857).

117. *See* WINKLER, *supra* note 69, at 110 ("Taney, who wrote the infamous line about African Americans having 'no rights which the white man was bound to respect,' thought blacks were not legal persons but corporations were." (quoting Dred Scott v. Sandford, 60 U.S. 393, 407 (1857))).

118. *Id.* at 101–02 (quoting Bank of Augusta v. Earle, 38 U.S. 519, 587–88 (1839)).

associational theory. Its reasoning, as has been shown above, routinely protects the rights of natural persons over corporations themselves.

C. The Revolution's Progeny: Burwell v. Hobby Lobby

Because associational theory protects the rights of a corporation's membership over the corporation itself, scholars have consistently described the theory as using a piercing-the-corporate-veil logic, meaning the Supreme Court looks "right through the corporate form and bas[es] the rights of the corporation on the rights of the people associated together within it."[119] Using this theory, the Court has "rejected the core principle of corporate personhood: the independent legal standing of the corporation, with rights and duties separate and distinct from those of its members."[120] This much is true.[121] But describing the theory as using this logic obscures reality. Courts, when piercing-the-corporate-veil, assume a corporate form exists to be pierced,[122] i.e., there is a strict separation between the corporation and its membership, whereas the Supreme Court's associational theory disregards

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119. *See id.* at 395.

120. *Id.*

121. Associational theory is not universally accepted, although it is certainly the most prominent theory. For example, Professors Lyman Johnson and David Millon in "Corporate Law After *Hobby Lobby*" conclude that the Supreme Court's decision uses personhood theory: "The Supreme Court was correct to conclude that Hobby Lobby and the other corporations are 'persons' capable of 'exercising religion' for purposes of the RFRA," because no court, including the Delaware courts, have rejected corporate purposes beyond maximizing profit. *See* Johnson & Millon, *supra* note 4, at 31. Likewise, Rachel Alexander in "The Constitutional Theory of *Burwell v. Hobby Lobby*" argues the Court treats conservative Christians as a "discrete and insular minority" that receives extra protection under the Court's due process jurisprudence. *See* Rachel Alexander, *The Constitutional Theory of* Burwell v. Hobby Lobby, 175 L. & JUST. 209, 214–26 (2015). In this sense, *Hobby Lobby* is not about corporate law at all, but it is about modern substantive due process. *Id.* Jennifer S. Taub similarly argues, although she does not outright reject associational theory, that *Hobby Lobby* does not expand corporate personhood powers, but is "a tool for limiting previously recognized corporate constitutional rights." *See* Jennifer S. Taub, *Is* Hobby Lobby *a Tool for Limiting Corporate Constitutional Rights?*, 30 CONST. COMMENT. 403, 403 (2015).

122. The classic description of veil piercing is *Salomon v. A Salomon & Co Ltd.* [1895–99] All ER Rep. 33 (HL) (UK), where the House of Lords found that:

> [E]ither the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. . . . If it was not, there was no person and nothing to be an agent at all; and it is impossible to say at the same time there is a company and there is not.

Id. at 36. In other words, for a veil to be pierced, there must be an independent legal entity to begin with.

the corporate form entirely. Certainly, the Supreme Court pays lip-service to, as Margaret M. Blair calls, the corporate persona, meaning Supreme Court decisions both mention corporations by name and usually reference the corporation as a creature of the state.[123] But the Supreme Court clearly believes the corporation and its membership cannot be separated; both the natural and artificial persons are "co-extensive," impossible to separate.[124] Justice Alito's majority opinion in *Burwell v. Hobby Lobby* illustrates this belief.

"Corporations," Justice Alito writes, "[that are] 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[125] While Alito's conclusion is reductionist, it is pragmatic—echoing John Dewey's famous argument that corporate "'perso[nhood]' signifies what the law makes it signify."[126] The opinion also applies associational theory. But crucially, Alito's reasoning *does not* use veil-piercing logic, as Winkler and others have claimed.[127] Rather, Alito is transforming Hobby Lobby from an artificial person, a separate and distinct legal entity, into a *mirror* of its membership: Hobby Lobby only *reflects* the actions of those human beings that own, run, and are employed by it.[128] And if it mirrors the corporation's membership, Hobby Lobby certainly reflects the moral, religious, and political values of its membership. In this sense, Alito cares little about looking "through the corporate form," as there is no form to truly begin with. Thus, there is no veil to pierce; there is no separation between corporation and membership. Instead, the corporation, to paraphrase Hilary Mantel, "is a pale actor who sheds no luster of [its] own, but spins in the reflected light of" its membership.[129] If the membership's "light moves" the corporation "ceases to be."[130]

Fascinatingly, *Hobby Lobby* illuminates one more key aspect: It is the *first* Supreme Court case to define the association with, at least, for-profit

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123. *See* Blair, *supra* note 63, at 809–14, 819–20.

124. *See* Taub, *supra* note 121, at 417 (describing the *Hobby Lobby* decision as "see[ing] the business as co-extensive with the owners").

125. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014).

126. *See* Dewey, *supra* note 82, at 655.

127. *See* WINKLER, *supra* note 69, at 381 ("[T]he underlying logic of *Hobby Lobby* reflected instead piercing the corporate veil.").

128. Analogizing the Supreme Court's associational theory as a "mirror" has been inspired by, in part, Richard Rorty's classic critique of Western philosophy as developing an unhealthy obsession with comparing the mind to a mirror that reflects reality. *See generally* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 12–13 (1979). The Supreme Court, in comparison, treats the corporation as a mirror that reflects the membership's reality.

129. *See* HILARY MANTEL, THE MIRROR AND THE LIGHT 617 (2020).

130. *Id.*

companies like Hobby Lobby.[131] Oddly, before *Hobby Lobby*, while the Supreme Court used associational theory reasoning to support its expansive reading of corporate rights, the Court never defined the association; it was deeply unclear *who* or *what* composed the association. Was the association the owners, the employees, the shareholders, or any person associated with the corporation? *Hobby Lobby* answered that question in its holding: "The *owners* of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients."[132] In this sense, the Court has taken a side in the public corporation versus private corporation debate.[133] According to Elizabeth Pollman, "[t]he public view sees the corporation as a concession of the state, tinged with a public purpose and subject to state regulation[, whereas] [t]he private view sees the corporation as a matter of private contract, property, and activity."[134] Justice Alito's opinion views a corporation as a private entity, where the *interests of the owners*, not the interests of either the state or the company's employees, is paramount. This decision, to view the association as *only* the owners, is—it cannot be stressed enough—extraordinarily consequential. It means that the Supreme Court requires lower courts to preference ownership interests over employee interests, at least, in matters where religion is integrated into company policy.

Importantly, the Supreme Court's definition of association as company ownership has been reaffirmed via reasoning in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, where the Supreme Court did not question whether the religious views of Masterpiece Cakeshop's owner and operator, Jack Philips, were legally separable from the incorporate purpose of Masterpiece Cakeshop.[135] The fact that Jack Philips was making a religious freedom claim on behalf of his company was enough to justify the corporation has having the same purpose.[136] Again, like in *Hobby Lobby*, the Supreme Court believes the corporation mirrors the religious interests of its ownership.

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131. *See* Blair, *supra* note 62, at 422 ("Th[ese] right[s] had been recognized previously for non-profit religiously-based corporations such as churches, charities, and religious schools, but prior to *Hobby Lobby*, the Court had never before recognized that for-profit corporations have, and should be free to exercise, religious beliefs.").

132. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) (emphasis added).

133. *See* Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 155 (Micah Schwartzman et al. eds., 2016).

134. *Id.*

135. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1724 (2018).

136. *Id.*

In sum, the Supreme Court's corporate constitutional rights jurisprudence is reasoned using the associational theory, which believes, as shown in *Hobby Lobby* and in *Masterpiece Cakeshop*, that the corporation reflects its ownership's interests—most especially religious ones. That summation, however, is not the end of the inquiry. A question, by result of this conclusion, arises: Does preferring the ownership's interests create a new legal condition where company ownership has a constitutional right to regulate employees based on its values? To answer this question, *Hobby Lobby* must be understood as an act of creating the corporation into a sovereign.

II. PART TWO: CORPORATE SOVEREIGNS, HOBBY LOBBY AND THE WALT DISNEY COMPANY'S REEDY CREEK IMPROVEMENT DISTRICT

American capitalism is duplicitous. It tells laborers, when touting employer choice, "choose your [l]eviathan";[137] but once an employment decision is made, laborer choice ends. By design, a laborer's employer, a corporate leviathan, is dictatorial, with superiors routinely issuing orders to laborers, the superior's inferiors, without input from and accountability to them.[138] Disturbingly, inferiors have few legal avenues to contest a superior's orders, except in few narrowly defined cases like employment discrimination.[139] And inferiors are routinely regulated in and outside of work.[140] Superiors can enforce limitations on: dress, hairstyle, speech,

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137. *See* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 60 (2017) ("Laissez-faire liberals, touting the freedom of the free market, told workers: choose your Leviathan.").

138. *Id.* at 37–38. As Elizabeth Anderson describes:

> Imagine a government that assigns almost everyone a superior whom they must obey. Although superiors give most inferiors a routine to follow, there is no rule of law. Orders may be arbitrary and can change at any time, without prior notice or opportunity to appeal. Superiors are unaccountable to those they order around. They are neither elected nor removable by their inferiors. Inferiors have no right to complain in court about how they are being treated, except in a few narrowly defined cases. They have no right to be consulted about the orders they are given. . . . The form of government is a dictatorship.

Id.

139. *Id.*; 42 U.S.C.A. § 2000e-4 (creating the Equal Employment Opportunity Commission to evaluate employer discrimination).

140. *See* ANDERSON, *supra* note 137, at 39–40 ("Usually, those dictatorships have the legal authority to regulate workers' off-hour lives as well—their political activities, speech, choice of sexual partner, use of recreational drugs, alcohol, smoking, and exercise. Because most employers exercise this off-hours authority irregularly, arbitrarily, and without warning, most workers are unaware of how sweeping it is.").

political activity, and consensual sexual relationships or an employee's choice of spouse or partner.[141] Some employees undergo routine searches of their bodies, medical testing, and workplace surveillance.[142] Despite this wholistic regulatory scheme, a leviathan's punitive authority is limited; it cannot, for example, imprison anyone for violating its limitations.[143] Yet, even with limited punitive authority, leviathans do punish noncompliance through employment termination, and, conversely, reward compliance—and most employees will willingly comply since they profit—with promotions and income.[144] In sum, capitalism perversely demands laborers "choose" between one leviathan or another without any real legal recourse or the freedom of noncompliance.

If these leviathans were states, no person would think their citizens free.[145] Yet, these leviathans, the corporations around us, the Hobby Lobbies and Disneys, exist with almost absolute control of employees—even outside of the workplace. For most of American history, this system existed without affirmative constitutional protection. Instead, as an unremarkable, almost invisible, everyday occurrence—like cars passing outside a window—the system was a product of corporate private arrangements between employer and employee. America, then, simply accepted employment as a zone where employee rights were relegated to employer preference.

Burwell v. Hobby Lobby revealed this system by intertwining private employment arrangements as a right central to our constitutional fabric. Specifically, a corporation's ownership, like Hobby Lobby's Green family or Disney's corporate leadership, can create a *morality*-based arrangement—informed by the ownership's religious or secular values—to involuntarily regulate employee's choices, like reproductive decisions.[146]

As discussed in Part One, *Hobby Lobby*'s holding is a dramatic shift in constitutional law, and its critics rightly bemoan *Hobby Lobby* for this shift.[147]

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141. *Id.*

142. *See id.* at 37–40.

143. *Id.*

144. *Id.*

145. *Id.* at 39 ("Would people subject to such a government be free? I expect that most people in the United States would think not. Yet most work under just such a government: it is the modern workplace, as it exists for most establishment in the United States. The dictator is the chief executive officer (CEO), superiors are managers, subordinates ware workers. The oligarchy that appoints the CEO exists for publicly owned corporations: it is the board of directors.").

146. *See supra* Section I.C.

147. *See generally* Michael Hiltzik, *The Supreme Court's Awful* Hobby Lobby *Decision Just Spawned a Very Ugly Stepchild*, L.A. TIMES (Aug. 19, 2016, 11:35 AM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-hobby-child-20160819-snap-story.html [https://perma.cc/9RAQ-KWNK]; Katie McDonough, *4 Really Important Things You Should*

But in a way *Hobby Lobby* provides a public service: the once-invisible leviathans are now visible. America knows corporations, like Hobby Lobby and The Walt Disney Company, can regulate employee choices based solely on the leadership or ownership's values. The case is, therefore, a doorway to America's unspoken reality that corporations regulate much of our lives.

This Part goes through the doorway, explaining how *Hobby Lobby* transforms corporations into sovereign entities. This essay does not claim that corporations are as equally powerful as states. As Elizabeth Anderson has discussed, corporations have weaker punitive authority—unlike states which, even in America, can punish crimes with enslavement.[148] And laborers have lower migration costs between employers, unlike citizens of states, who risk becoming stateless persons through immigration.[149] Still, corporations "impose a far more minute, exacting, and sweeping regulation of employees than democratic states do in any domain outside of prisons and military."[150] *Hobby Lobby* protects a corporation's "minute, exacting, and sweeping" *moral* regulation—for nothing could be more so than regulating the health choices of employees. Corporate employee regulation is thus a major factor in American lives, and it cannot be ignored. *Hobby Lobby* is a vehicle to examine this fact.

A corporation can be a sovereign, to use Carl Schmitt's definition of sovereignty, if it "decides on the exception."[151] This Part proposes a corporation's ownership can decide the exception because (A) it controls

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Know About the Hobby Lobby *SCOTUS Case*, SALON (Mar. 25, 2014, 11:44 AM), https://www.salon.com/2014/03/25/4_things_you_need_to_know_about_the_hobby_lobby_scotus_case/ [https://perma.cc/QZK3-KEYU]; Kent Greenfield & Adam Winkler, *The U.S. Supreme Court's Cultivation of Corporate Personhood*, THE ATLANTIC (June 24, 2015), https://www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773/ [https://perma.cc/72L9-RR2L].

148. *See* ANDERSON, *supra* note 137, at 37–39; *see, e.g.*, U.S. CONST. amend. XII, § 1 ("Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (emphasis added)).

149. *See* ANDERSON, *supra* note 137, at 63 ("[T]he costs of emigration from oppressive private governments are generally lower than the costs of emigration from states.").

150. *Id.* ("Private governments impose controls on workers that are unconstitutional for democratic states to impose on citizens who are not convicts or in the military.").

151. *See* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (2005); *see also* BARKAN, *supra* note 8, at 6 (quoting Schmitt to define corporate sovereignty's origin). This Article does not endorse Schmitt's philosophical association with Naziism and concurs with the *Stanford Encyclopedia of Philosophy* that "Schmitt was an observe[r] and analyst of the weaknesses of liberal constitutionalism and liberal cosmopolitanism. But there can be little doubt that his preferred cure turned out to be infinitely worse than the disease." *Carl Schmitt*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 29, 2019), https://plato.stanford.edu/entries/schmitt/ [https://perma.cc/BY5J-DS62].

territory where (B) it can enforce *moral* regulation onto company membership without their consent, a power known as soulcraft.[152] Hobby Lobby and The Walt Disney Company have both elements, as do many corporations, and the following subsections describe corporate sovereignty and its applications in *Hobby Lobby*. However, this Part, while inspired by Elizabeth Andersons's work on corporate regulation of employees,[153] rejects her phrase "private government" as an apt description of *Hobby Lobby*'s holding and reasoning—for *Hobby Lobby* only validates corporate ownerships' sovereign right to impose moral regulation onto its employees, whereas private governance describes *all* private social ordering. This Article is not concerned with all private social arrangements; it does not claim, for example, private arrangements, like either dinner parties or political gatherings, are dangerous in themselves.[154] Rather, this Article is concerned only with private moral arrangements in the corporate context, and how legitimizing those arrangements without employee consent is dangerous. After all, most people would reject employers regulating their dinner guest list, so what is different when an employer regulates one's sex life? This Part is concerned about that very question. Equally, this Part is not a comprehensive history of corporate sovereignty. The corporate history selected was chosen to exemplify the corporate sovereignty's elements.

A. Corporate Sovereignty's First Element: Territory

Sovereignty and territory in Western philosophy are indivisible.[155] Famously, Max Weber defined territory as the "ideal typical . . . characteristic of the state," because a sovereign actor cannot exercise legitimate regulatory force without having an exclusive zone of influence, or territory.[156] A

152. *See infra* notes 220–222.

153. *See, e.g.*, ANDERSON, *supra* note 137, at 37–41.

154. Of course, neither does Anderson; the point is only a comparative hypothetical.

155. *See* BARKAN, *supra* note 8, at 87 ("Within Western modernity, sovereignty has implied territorial control." (footnote omitted)). *See generally* JOHN AGNEW & STUART CORBRIDGE, MASTERING SPACE: HEGEMONY, TERRITORY, AND INTERNATIONAL POLITICAL ECONOMY (1995) (discussing Western philosophy's attachment of state sovereignty to territory); STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (same).

156. *See* Max Weber, *Politics as a Vocation*, *in* MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H. Gerth & C. W. Mills eds., 1946); *see also* BARKAN, *supra* note 8, at 87 (using Weber's definition to define corporate sovereignty).

sovereign without "a given territory" has, simply put, no sovereignty.[157] Territorial control is, therefore, a prerequisite to sovereign authority.[158]

If sovereignty requires territory, do corporations control territory? Can a corporation, in other words, have a zone of influence? The answer, of course, depends on the corporation. But generally speaking, most corporations that actually have operations, employees, investors, and customers control territory. History (and the present) is filled with proof—especially in how the East India Company, American company towns, and The Walt Disney Company's Reedy Creek Improvement District were formed and operated. Multiple other examples exist; however, these three examples illustrate territorial sovereignty well.

Founded on New Year's Eve, 1600, The East India Company controlled its territory for more than 400 years; and at its height in the mid-eighteenth century, it was "the most powerful corporation in the world."[159] As a documentary memorably put it, the company "was like 'the CIA, the NSA, and the biggest, baddest multinational corporation on earth' wrapped into one corporation."[160] Edmund Burke concurred, pillorying the company "as 'a state in the disguise of a merchant.'"[161] The East India Company was, thus, "no 'mere merchant,' but rather blurred the lines between private and public and challenged the reach of municipal law and spatial dimensions of claims to jurisdiction and sovereignty."[162] The company, in short, was the quintessential leviathan.

For more than four hundred years, the East India Company maintained an international army and civil bureaucracy to govern global trade and manage its employee's "souls"— an authority explicitly allowed after the House of

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157. *See* Weber, *supra* note 156, at 78; *see also* BARKAN, *supra* note 8, at 87 (using Weber's definition to define corporate sovereignty).

158. *See* Weber, *supra* note 156, at 78; *see also* BARKAN, *supra* note 8, at 87 (using Weber's definition to define corporate sovereignty).

159. *See* WINKLER, *supra* note 69, at 26.

160. *See* Anita Singh & Jasper Copping, *BBC To Break 'Taboo' with 'Inaccurate' Portrayal of East India Company*, TELEGRAPH (Apr. 4, 2014), https://www.telegraph.co.uk/culture/tvandradio/bbc/10743407/BBC-to-break-Taboo-with-inaccurate-portrayal-of-East-India-Company.html [https://perma.cc/G47S-PEU3].

161. *See* PHILIP STERN, THE COMPANY STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 3 (2012) (quoting Burke). Burke's contemporaries, Thomas Babington Macaulay and Adam Smith, were incredibly perplexed by the East India Company. Macaulay called the Company "strange, very strange." *Id.* And Smith concurred, calling the Company a "strange absurdity." *Id.*

162. *See* Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 SEATTLE U. L. REV. 423, 425 (2016).

Lords' *East India Company v. Thomas Sandys* decision.[163] And in *Nabob of the Carnatic v. East India Company*, an English chancery court declared that it had "no jurisdiction" because the company's authority "is in fact that of [a] state" operating "as . . . sovereigns" over its territory.[164]

The company became sovereign-like for two reasons. First, it was "a great money engine of the [English] state whose credit was inseparably connected with government and the Bank of England," thereby making it impossible for a "minister [to] ever let the East India Company go to the wall."[165] England, thus, needed the company to maintain the English economy.[166] Second, the East India Company's charter officially mandated colony creation. And the company wasted no time; it colonized an entire subcontinent, India.[167] Specifically, one of its colonies was Bombay Island.[168] In claiming Bombay, the company gained "rights to dispose of alienate land, to draw rents and assess taxes to defend the island and use martial force, to appoint and dismiss its governors, and to make laws 'for the good Government, and other Use of the said Port and Island *Bombay*,' as long as they were 'not repugnant or contrary, but as near as may be agreeable to the Laws of this Our Realm of *England*.'"[169] Indisputably then, the East India Company, like the English state, controlled territory. A sovereign-like institution, such as the company, is effectively a sovereign—a fact contemporaneous English courts acknowledged.[170] Therefore, the East India Company easily satisfies corporate sovereignty's first element, territory.[171] But the company is not unique. American company towns also satisfy the territorial requisite.

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163. *Id.* at 433; STERN, *supra* note 161, at 15 ("Paying particular attention to the infamous case of *East India Company v. Thomas Sandys* (1682–84), it shows how Company governors in London and Asia took their exclusive trade to imply the responsibility to govern over that trade and thus over English subjects and even *souls* in Asia." (emphasis added)).

164. 1 FRANCIS VESEY, REPORTS OF CASE ARGUED AND DETERMINED IN THE HIGH COURT OF CHANCERY FROM THE YEAR MDCCLXXXIX to MDCCCXVII, at 372 (1884) (citing Nabob of Carnatic v. E. India Co., (1791) 30 ENG. REP. 391).

165. *See* WINKLER, *supra* note 69, at 27 (quoting JASON M. COLBY, THE BUSINESS OF EMPIRE: UNITED FRUIT, RACE, AND U.S. EXPANSION IN CENTRAL AMERICA 30–31 (2011)).

166. *See id.* (quoting COLBY, *supra* note 165, at 30–31).

167. *See* STERN, *supra* note 161, at 36 ("From streets and gardens to courts and coins, the Company's efforts at Madras, St. Helena, and Bombay were focused on establishing a form of effective colonial government."); Stern, *supra* note 162, at 433 (describing the East India Company's maintaining of "territory").

168. *See* STERN, *supra* note 161, at 23.

169. *Id.* at 23 (emphasis in original).

170. *See supra* notes 163–164 and accompanying text.

171. *See supra* note 167 and accompanying text; *cf.* Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1807 (2019) (discussing how corporate

American company towns are a historical and philosophical paradox. These towns are un-American, while there simultaneously the "essence of America['s]" tradition of private experimentation.[172] Being un-American, these towns were communities "where one business exerts a Big Brother-like grips over the population—controlling or even taking the place of government, collecting rents on company-owned housing, dictating buying habits and even administering where people worship and how they may spend their leisure time."[173] Despite evoking totalitarian control, company towns were a common experiment, totaling—at the beginning of the Twentieth Century—more than 2,500 American towns across the nation, from Lowell, Massachusetts to Valsetz, Oregon.[174]

With so many company towns, corporations have, unsurprisingly, controlled vast swaths of American territory. For example, Milton Hershey, founder of The Hershey Corporation and indisputably one of America's great businessmen and philanthropists, created and owned Hershey, Pennsylvania—a still existent company town located near Hershey's birthplace, Derry Church, Pennsylvania—that totaled, during Hershey's lifetime, 1,200 acres.[175] Likewise, at the turn of the Twentieth Century, textile corporations owned thousands of acres—where an estimated ninety-two percent of textile workers lived—in the South, from Roanoke Rapids, North Carolina, to Columbus, Georgia.[176] And U.S. Steel owned 9,000 acres known as Gary, Indiana, the largest constructed company town in America dubbed "the Magic City."[177] By creating and owning company towns, corporations, like The Hershey Corporation and U.S. Steel, controlled territory, fulfilling an element of sovereignty.

Territorial control is, to some, really *property ownership*. But The Hershey Corporation did not purchase land near Derry Church, Pennsylvania,

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sovereignty within "British law, which empowered joint-stock companies in imperial domains to establish their own courts, legislatures, laws and even armies" is illustrated in land companies).

172. *See* HARDY GREEN, THE COMPANY TOWN: THE INDUSTRIAL EDENS AND SATANIC MILLS THAT SHAPED THE AMERICAN ECONOMY 3 (2010).

173. *Id.*

174. *Id.*

175. *Id.* at 35 ("The Chicago trip, along with later journeys to England, had another major impact on Hershey. By 1903, he was laying the plans for the constitution of his own model town, somewhat in the mode of Pullman which he may have seen and of Bourneville, the English model town erected by British chocolate company Cadbury. First, he obtained 1,200 acres of real-estate options in Derry Church, Pennsylvania, near his birthplace.").

176. *Id.* at 97 ("The heyday of southern mill villages was between 1880 and the 1930s. At the turn of the twentieth century, 92 percent of southern textile workers lived in such hamlets, from Roanoke Rapids, North Carolina, to Honea Path, South Carolina, and Columbus, Georgia.").

177. *Id.* at 109–10.

to just acquire real property just as the East India Company did not acquire Bombay Island for its beaches. Corporations take ownership of land to facilitate their operational interests, not to simply take possession. The Walt Disney Corporation's Reedy Creek Improvement District is clear proof of such.

Over two years, The Walt Disney Company purchased—through multiple shell companies—27,258 acres in Florida, costing $5,018,779 across seventeen major transactions.[178] A large part of this acreage was destined for Disney's EPCOT.[179] To facilitate EPCOT's design, the Company was advised to advance legislation preventing an interference of Florida's "government's powers and responsibilities" over company decisions regarding EPCOT.[180] The interference's issues originated from EPCOT's design, requiring the city to "always be in a state of becoming," a constantly evolving community. But a constant "state of becoming" is at heart "a question of control: how, [these advisors] asked, could the community builder ensure that 'the full development program [would] be carried out as projected' and that 'nothing [would] happen[] that [would] emasculate the plan.'"[181] The advisors then offered a consequential compromise, by limiting principles of self-governance in favor of assisting the Company's operational interests.[182] EPCOT, in their shockingly anti-Americanist recommendation, "should be 'freed from the impediments to change, such as ridge building codes, traditional property rights, and elected political officials.'"[183] In other words, the advisors recommended Disney create an exclusive zone of influence over their 27,000-plus-acrage in order to promote EPCOT's operational interests.

After reviewing the recommendation, The Walt Disney Company sought to ensure a zone of influence over its acreage, thereby requiring, as it announced in its "Report to the People of Florida," to adopt the "'flexibility' of an autonomous political district," where the Company would control who

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178. *See* FOGLESONG, *supra* note 36, at 46, 48; *see also* MANNHEIM, *supra* note 35, at 70 ("In general, the company's overall approach to land acquisition is aptly described by biographer Bob Thomas as 'a two-year clock-and-dagger saga of deception, false identities, and dummy corporations.'" (quoting BOB THOMAS, BUILDING A COMPANY: ROY O. DISNEY AND THE CREATION OF AN ENTERTAINMENT EMPIRE 277 (1998))).

179. *See* FOGLESONG, *supra* note 36, at 51.

180. *Id.* at 58, 61.

181. *Id.* at 62 (quoting ECON. RSCH. ASSOCS., EXPERIMENTAL PROTOTYPE CITY OF TOMORROW: OUTLINE OF PRESENTATION [TO] DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 22 (1966)).

182. *Id.* at 61 ("[T]he consultants offered a compromise solution to their governance problem—to the problem of reconciling democracy and capitalist land development.").

183. *Id.* at 62 (quoting ECON. RSCH. ASSOCS., *supra* note 181, at 20).

voted and what policies impacted its property.[184] This autonomous political district is the Reedy Creek Improvement District.[185] In Reedy Creek, the Company controls everything—since voting power is allocated by land ownership and Disney, being the predominate land owner in Reedy Creek, has a monopoly over District decisions.[186] In exchange for this control, Florida would get an economic boost.[187] It was a deal Florida would not refuse; the Florida legislature bought-in fully, granting Walt Disney his posthumous dream of an "experimental absolute monarchy."[188] Florida's Reedy Creek "legislation clearly gave the district immunity from state and county regulation of buildings, land use, airport and nuclear power construction, and even distribution and sale of alcoholic beverages" on top of a political monopoly.[189] In sum, The Walt Disney Company, through the ascent of the Florida legislature, gained territorial control over its Florida property.

Without Reedy Creek, the Company's zone of influence would be lacking. Certainly, the Florida acreage was required for an amusement park's construction. Yet, the Company's operational interests may have been potentially hindered if Florida had not created Reedy Creek. In other words, The Walt Disney Company purchased the acreage to further its amusement park interests and to utilize that land to justify a statutorily protected zone of interest. Without the acreage, the zone of interest could never have been granted. Land ownership begets corporate influence, making it the reason

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184. *Id.* at 70.

185. *Id.* at 55–77 (describing the connection between Reedy Creek and the Economic Research Associates compromise).

186. *See* Emerson, *supra* note 41, at 193 ("The unanswered question placed Disney in a precarious situation because the ability to control 'voting' within the District was a key requirement for the company. To do this, Disney intended to limit the ability of prospective Reedy Creek residents to participate in the governance of the District through voting powers. One method for accomplishing these goals would be to allocate voting power by land ownership. With Disney as the predominate land owner, the company would be able to control votes related to the District." (footnotes omitted)).

187. *See* FOGLESONG, *supra* note 36, at 70 ("In return, Floridians would get more tourists, more sales and gasoline taxes, more jobs in construction and services, and more construction spending. That was the basis for the proposed economic development marriage.").

188. *Id.* at 59 ("Walt wanted his own private government. During early discussions of the Florida property, one company executive said that he seemed to want 'an experimental absolute monarchy.' 'Can I have one?' Walt responded. The answer was supposedly 'no,' *yet his corporate successors got something close to a kingdom all their own*." (emphasis added) (footnotes omitted)).

189. *Id.* at 71.

why corporations purchase land, a conclusion the Supreme Court of the United States acknowledged in *Marsh v. Alabama*.[190]

Marsh is a deceptively simple case. On Christmas Eve 1943, Grace Marsh was arrested in Chickasaw, Alabama, a company town owned and operated by the Gulf Shipbuilding Corporation, where she was charged for distributing the *Watchtower*, the official magazine of the Jehovah's Witnesses.[191] The sheriff's deputy who arrested Marsh—based on company policy prohibiting the distribution of literature on the streets—was not a state employee; instead, he was paid by the Gulf Shipbuilding Corporation to police Chickasaw.[192] Marsh sued, claiming her arrest violated the First Amendment as incorporated via the Fourteenth Amendment's equal protection and due process clauses.[193]

Under Supreme Court precedent, Marsh's argument was flimsy. Repeatedly, the Supreme Court enforced its "state action" doctrine, thereby limiting the Fourteenth Amendment's purview to states actors.[194] The doctrine's application is simplistic: the Fourteenth Amendment says, "No *State* shall" deny equal protection and due process, but never mentions non-state actors, such as a sheriff's deputy hired by Gulf Shipbuilding Corporation; thus, the Fourteenth Amendment applies only to state actors, making non-state actors immune to constitutional violations.[195] Consequently, *Marsh v. Alabama* should have been an easy case. Under this doctrine, there was no constitutional violation because Gulf Shipbuilding Corporation, not the State of Alabama, prevented Marsh from exercising her religion.[196] Yet, Associate Justice Hugo L. Black approached *Marsh* differently.

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190. Marsh v. Alabama, 326 U.S. 501, 506–09 (1946).

191. *See id.* at 502–04 ("[Grace Marsh], a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post-office and undertook to distribute religious literature."); WINKLER, *supra* note 69, at 268 (describing Grace's "religious literature" as "copies of *Watchtower*, the official magazine of the Jehovah's Witnesses").

192. *Marsh*, 326 U.S. at 502–04.

193. *Id.* at 503–04.

194. *See generally id.* at 504–05; WINKLER, *supra* note 69, at 267, 269–70 (describing the "state action" doctrine).

195. *See generally Marsh*, 326 U.S. at 504–05; WINKLER, *supra* note 69, at 267, 269–70 (describing the "state action" doctrine).

196. *See Marsh*, 326 U.S. at 504 ("Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company-town it would have been clear that appellant's conviction must be reversed."); WINKLER, *supra* note 69, at 267, 269–70 (describing the "state action" doctrine).

In his majority opinion, Associate Justice Black acknowledged Gulf Shipbuilding Corporation was not the State of Alabama.[197] But the Gulf Shipbuilding Corporation owned and operated a *town.*[198] Chickasaw "looked like any of the hundred other small towns that dotted the South."[199] Its "[h]ouses crowed around a short business block, which had a barbershop, drugstore, post office, and a grocery—a southern variant of a *Saturday Evening Post* tableau."[200] To the average person, Chickasaw was just a *town*, like any other in Alabama, despite being owned and controlled by a corporation.[201] And operating a town, Gulf Shipbuilding Corporation has duties—like any state—to respect the constitutional rights of Americans; for the "more an owner, for his advantage, opens up his property for use by the public in general," the greater obligation an owner has to respect constitutional rights.[202] Chickasaw's business block, where Marsh had distributed the *Watchtower*, was "accessible to and freely used by the public in general"; thus, Gulf Shipbuilding Corporation, like a state, could not silence Marsh's religious exercise.[203] In turn, *Marsh* reinterprets Gulf Shipbuilding Corporation as a sovereign rather than a corporation, thereby affirming that corporations can control territory.[204]

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197. *See Marsh*, 326 U.S. at 505 ("The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention.").

198. *See id.* at 507–08 ("Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.").

199. *Id.*; WINKLER, *supra* note 69, at 268.

200. WINKLER, *supra* note 69, at 268; *see Marsh*, 326 U.S. at 507–08.

201. *See Marsh*, 326 U.S. at 507–08.

202. *See id.* at 506.

203. *See id.* at 507–08.

204. *See id.* at 508–09 ("Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." (footnote omitted)).

Marsh is concerned, while using the language of property law, with Gulf Shipbuilding Corporation's zone of influence over Chickasaw and its ability to violate constitutional rights with its influence.[205] A zone of influence is then what separates territorial ownership from property ownership. Gulf Shipbuilding Corporation did not own and operate Chickasaw to simply possess it; rather, as Justice Black saw, the Gulf Shipbuilding Corporation sought to influence a town's operations for its benefit. Grace Marsh threatened its influence, by not abiding by company policy, and Gulf Shipbuilding Company unconstitutionally penalized Marsh for that threat.

In this way, *Marsh v. Alabama* is a pragmatic opinion—for, as Adolph Berle Jr. asserted in 1952, "[s]ome of these corporations are units which can be thought of only in somewhat the way we have heretofore thought of nations."[206] A key element of "these corporations," as *Marsh* recognized, is undeniably territorial control.[207] American company towns—like Chickasaw and England's East India Company's control of Bombay as well as The Walt Disney Company's control of Reedy Creek—prove that point.[208] And Hobby Lobby continues the corporate territorial tradition.

Hobby Lobby is the anti-*Marsh.* It utilizes the logic of *Marsh*, treating Hobby Lobby as a sovereign over its employees, while preferring a corporation's ownership's religious values over employee reproductive anatomy.[209] Imagine if the Supreme Court agreed the religious values of Gulf Shipbuilding Corporation's ownership banned distribution of the *Watchtower*, then you have *Hobby Lobby*'s holding. *Hobby Lobby*'s defenders may view this hypothetical as inapplicable. But remember, in Part One, it was emphasized that an ownership's religious values trump employee rights.[210] So, this hypothetical is not illogical. Rather, by preferring the corporation over its employees, Associate Justice Alito's majority opinion affirms an ownership's ability to enact religious policy over any employee's dissent.[211] To do this, Alito emphasizes Hobby Lobby's territory:

> David and Barbra Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started and arts-and-crafts *stores* that has grown into a

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205. *Id.*

206. Adolph A. Berle Jr., *Constitutional Limitations on Corporate Activity: Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PENN. L.R. 933, 942–53 (1952).

207. *See Marsh*, 326 U.S. at 505–06.

208. *See supra* notes 34–35, 167–168, 190–202, and accompanying text.

209. *See generally* Burwell v. Hobby Lobby, Inc., 573 U.S. 682, 734–35 (2014).

210. *See supra* text accompanying notes 23–26.

211. *See Hobby Lobby*, 573 U.S. at 692–93.

> nationwide chine called Hobby Lobby. *There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees*.
>
> Hobby Lobby's state of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." . . . Each family member has signed a pledge to run the business in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. . . . In accordance with those commitments, *Hobby Lobby* . . . *stores* close on Sundays, even though the Greens calculated that they lose millions in sales annually by doing so.[212]

Hobby Lobby's brief to the Supreme Court makes identical territorial claims.[213] In total, according to the Supreme Court, territory is required for enacting ownerships religious interests. Otherwise, why emphasize the Greens' ownership over "500 Hobby Lobby stores"? No other answer is logical: The Supreme Court understands, like it did in *Marsh*, that territorial control, a corporation's zone of influence, is a perquisite to enacting influence. That zone, the Supreme Court found, is in Hobby Lobby's stores.

One critic, however, believes the stores are used by Alito to exemplify the Greens as a paradigm of the American Dream.[214] This is a point well taken, for it is certainly a minor litigation strategy utilized by Hobby Lobby. However, the point does not explain why Alito adopted an insignificant litigation strategy as Supreme Court reasoning—given the same point can be made by mentioning the Greens' industriousness, e.g., the family started with a single loan and created a multi-million-dollar company, instead of the stores themselves. After all, health insurance has *nothing* to do with Hobby Lobby's stores. Yet Alito parrots Hobby Lobby's litigation strategy throughout his opinion.[215] He does so to highlight Hobby Lobby's territory—its stores—not to solely highlight the Greens' American Dream.

Hobby Lobby's stores are, of course, not identical to previous corporate territories. The East India Company controlled a subcontinent. Likewise, The

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212. *Id.* at 701–03 (cleaned up and emphasis added).

213. *See* Brief for Respondents, *supra* note 29, at *7–8 ("Founded in 1970 by David Green, Hobby Lobby has grown from a single arts-and-crafts store in Oklahoma City into a nationwide chain with over 500 stores and more than 13,000 full-time employees. In 1981, Mart Green founded Mardel, an affiliated chain of Christian bookstores, which now has thirty-five stores and about 400 full-time employees.").

214. *See* Noa Ben-Ash & Margot J. Pollans, *The Right Family*, 39 COLUM. J. GENDER & L. 1, 40–49 (2019) (discussing how *Hobby Lobby* utilizes Reagan-era talking points about how Christianity and Christian families fulfill the American Dream).

215. *Compare Hobby Lobby*, 573 U.S. at 701–03, *with* Brief for Respondents, *supra* note 29, at *7–8.

Hershey Corporation and the Gulf Shipbuilding Corporation controlled entire towns, and The Walt Disney Corporation controls an entire special government district.[216] Hobby Lobby only controls stores. Yet, the size of a corporation's territory is insignificant, as it is with states. For example, the Holy See is only 109 acres, a territory far smaller than Hershey, Pennsylvania's 1,200 acres.[217] But no one can argue the Vatican City—a territory controlled by the most successful corporation in history, the Roman Catholic Church—is not a state (or, for that matter, a sovereign).[218] Indeed, as noted previously, Walt Disney Company's control over Reedy Creek is comparable to the Vatican City, a comparison that emphasizes the irrelevancy of territorial size.[219] Wherever a corporation controls territory, it has operational influence and can enact moral regulations onto its employees.

B. Corporate Sovereignty's Second Element: Soulcraft

Once a corporation has territory, its ownership can impose—if it so chooses—moral regulations onto its employees. With this imposition, an ownership enters into Keatsian "vale of soul-making," or soulcraft, where moral regulation, like government legislation, involuntarily "conditions the action[s] and the thought[s] of" its employees in "broad and important spheres [of] life."[220] Moral regulation is thus the enactment and implementation of policies "that proscribe, mandate, regulate, or subsidize behavior that will over time, have the predictable effect of nurturing, bolstering or altering habit, dispositions and values on a broad scale."[221] In this way, by rejecting humanity as "a finished product, a polished creation on a pedestal," a corporation's ownership "tutors" its employees into performing and accepting the ownership's values.[222]

Corporations, for most of American history, have tutored employees by imposing the ownership's values onto their corporate community. American company towns offer a plethora of examples; here are two. In Hershey,

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216. *See supra* text accompanying notes 41–42.

217. *Background Notes: The Holy See*, U.S. DEP'T OF STATE, https://1997-2001.state.gov/background_notes/holysee_0007_bgn.html [https://perma.cc/L4Z3-35G9].

218. *See generally* Aaron Cole, *The Bishop's Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 46 J. CATHOLIC LEGAL STUD. 65, 75 (2007) (describing the Roman Catholic Church's incorporation).

219. *See* ADAMS, *supra* note 46, at 139.

220. *See* GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 19 (1983) (quoting Keats).

221. *Id.* at 19–20.

222. *Id.* at 24, 58.

Pennsylvania, the company town owned and operated by The Hershey Company, Hershey employees "got a cornucopia of benefits, including insurance, medical coverage and a retirement plan," in exchange for being regulated by the company's "moral police."[223] Hershey's moral police were George Orwell's dark fantasy. "Riding around town and taking notes as to which homes were not being maintained and receiving reports from private detectives as to which employees were too fond of alcoholic refreshments," the moral police kept a close eye on the town, keeping it paternalistically in line with Hershey's religious values.[224]

Likewise, in Lowell, Massachusetts, a textile town originally owned and controlled by Francis Cabot Lowell's Boston Manufacturing Company, moral police enforced a range of religiously motivated moral regulations for female employees:

> [Employees] were required to attend church (paying a "pew fee" to support the institutions), and their morals were the object of close scrutiny by a "moral police" in which the boardinghouse keepers and even the other [employees] played a key part. [The Boston Manufacturing Company] has the power to fire anyone charged with immoral conduct, including consuming alcoholic beverages or even attending dancing classes. . . . Anyone who fell afoul of the moral policing of failed to serve out her [contractually obligated] term of work would be denied an "honorable discharge" upon leaving—and would be blacklisted from employment in the area.[225]

To many, Lowell's moral regulation was tantamount to slavery, where the company controlled every facet of employee life without regard for employees' individuality.[226] Like the textiles Lowell's women produced, they were products to be crafted for distribution into society.

The Walt Disney Company learned from America's company town history in performing soulcraft at Reedy Creek.[227] Crucially, in understanding the Company's soulcraft practices, Walt Disney's moral vision for EPCOT must be separated from Reedy Creek's reality. While Disney's vision clearly informs the reality—as Marty Sklar, a former Company executive in charge of constructing its properties, admitted, given Disney's original ideas inform current property design—the Company's vison and the reality are not the

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223. *See* GREEN, *supra* note 172, at 38.

224. *Id.*

225. *Id.* at 18.

226. *Id.* at 19 ("The system had its critics: Some [contemporaneous] intellectuals likened [it] to slavery.").

227. *See supra* text accompanying notes 49–54.

same.[228] The Company merely utilizes Disney's vision for its soulcrafting ends. Through Disney vision, the Company's leadership maintains exclusive political control to craft social uniformity under constant surveillance. And it has been uniquely successful in its approach.

Florida's statutory scheme for Reedy Creek granted The Walt Disney Company exclusive political control by "allocating voting power by land ownership."[229] Since the Company controlled most of Reedy Creek's land, it exclusively held the voting power.[230] But if EPCOT were to be a city, would not its residents expect property ownership? This problem consumed Disney until he decided that all EPCOT residents would be permanent renters, not landowners.[231] There would be no EPCOT landowners besides the Company, ensuring all land would remain in the Company's control and, as a result, would retain exclusive political control.[232] Of course, Disney's perpetual renters plan never materialized, since the Company never constructed EPCOT as a futurist city. But the Company still ensured exclusive political control over Reedy Creek, even after it built Celebration—the Company's "planned, living community" described as "the last little[,] tiny speck of the [EPCOT] idea"—by excising the community's land out of the Reedy Creek Improvement District in exchange for property ownership rights for residents.[233] Yet, even here, the Company "retains veto power," i.e., an exclusive political control, over community decisions as long as it owns a piece of property in Celebration.[234] Since the Company owns Celebration's entire downtown, its veto power is everlasting.[235] In total, the Company's decisions maximize its political control. This maximization ensured its soulcraft decisions on social uniformity and surveillance would not be hampered at Walt Disney World.

At Walt Disney World, soulcraft is explicit. Every park employee—known as cast members and often recruited through its Disney College Program, an initiative eerily similar to Lowell, Massachusetts's scheme—are required to undergo the Company's Traditions program, which incorporates "a 'mix of company legend, behavior guidelines, and psycho-social

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228. *See* MANNHEIM, *supra* note 35, at 134 ("Walt's original ideas are still very much alive. We never really forgot about them. It was just a question of saving them for the right moment." (quoting Mary Sklar)).

229. *See* Emerson, *supra* note 41, at 193.

230. *Id.*

231. *See* MANNHEIM, *supra* note 35, at 113.

232. *Id.*

233. *Id.* at 135.

234. *See* FOGLESONG, *supra* note 36, at 164.

235. *Id.*

bonding'" to instill the Company's "values and traditions" into the new hires.[236] Through it all, these newly-minted cast members "learn" how to preserve the Company's experience, by being "instructed to smile, to make eye contact, and to seek out guests in a manner [the Company] terms 'aggressively friendly,'" while avoiding any non-universally appropriate body language, in part to avoid any unwanted damping of guest happiness.[237] Moreover, the hires lose their individual identity—becoming a Walt Disney Company commodity—by donning uniforms, by learning to "play" a set role, by operating on a first-name basis, and by adhering to Company standards of acceptable appearance and conduct.[238] At its most banal, the standards prohibit "[c]hewing gum, eating, smoking, using a cell phone, having poor posture,"[239] and promote "natural-looking cosmetics, neat hair, clean hands and nails, shined shoes, a clean costume, and a fresh shave for men."[240] Whereas at its most extreme, the standards forbid cast members to remove character costumes in front of guests, even if the employee is ill or has passed out, and will automatically terminate an employee if he or she does so.[241] Further, once a cast member learns the Traditions, he or she is not permitted to socialize with fellow performers while working in the Parks, where the Company considers the employee to be "On Stage" for guests.[242] Socialization can thus only occur during lunch break—which is often isolating since the Company has an "internalized practice of not associating with [cast members] from other [Park] sectors."[243] In total, by expressing its Traditions, the Company "invites [cast members] to become part of the [Company's] culture." Cast members, to use the Company's parlance, learn to put on a "show": New cast members learn what it means to be Disney, to becoming the "new breed of . . . people."[244] Unsurprisingly, the Company's Traditions is soulcraft at its most pervasive.

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236. *See* Newell, *supra* note 52, at 429, 451 ("Traditions begins with an explanation of Disney's corporate values and traditions, and proceeds to on-the-job trainings.").

237. *Id.* at 429–30.

238. *Id.* at 451–52, 472; *see also* MANNHEIM, *supra* note 35, at 123 ("In explaining Disney's training philosophy, France noted that Disney 'had established own unique school for training his animators, and he could understand why a new breed of 'show people' had to be developed.'").

239. *See* Newell, *supra* note 52, at 472.

240. *See* MANNHEIM, *supra* note 35, at 123.

241. *See* Newell, *supra* note 52, at 472 ("Disney is particularly stringent in its rules concerning Character costumes, the removal of which in front of guests, even if the [cast members] become ill or pass out, is cause for automatic dismissal.").

242. *Id.* at 471.

243. *Id.* at 470–71.

244. *See* MANNHEIM, *supra* note 35, at 123.

Like with all corporate sovereigns, company leadership is dictatorial, operating as a "corporate monolith, a vast empire where the" leadership singlehandedly—and likely believes rightfully—controls money and corporate policy.[245] Of course, cast members can post ideas for improving the Company on bulletin boards,[246] but "complaints are not welcome from [cast members] who hope for advancement."[247] According to one cast member, the Company resents complaints:

> You've got to keep your mouth shut. You can't tell [the Company] your opinion. *You have to do everything they say* . . . Never say anything negative. Everything's positive.[248]

In turn, The Walt Disney Company's wiliness to pursue policy outside of leadership proclivities is "questionable" at best.[249]

To top it off, the Company clearly believes cast members are poor learners of its Traditions, because the Company "constantly spies on its" employees while On Stage.[250] For instance, the Company employs "shoppers," who are cast members disguised as park visitors trying to provoke other cast members into breaking character.[251] Equally dystopian is the Company's "foxes" program, where cast members monitor park visitors' activities.[252] As a consequence of these programs, the Company is consistently reminding employees (and even customers) of their involutory existence; the Parks are

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245. *See* Newell, *supra* note 52, at 468–69.

246. *Id.* at 459 ("Another means by which Disney attempts to appreciate the [cast members] is by encouraging [cast member] feedback through the use of comments posted on area bulletin boards.").

247. *Id.* at 459 n. 280 (emphasis added).

248. *Id.*

249. *Id.* at 459.

250. *Id.* at 470.

251. *Id.*

252. *Id.* at 470 n.319; *see also* Stone, *supra* note 53, at 223 (describing the Magicband system that tracks people throughout the park). Outside of the Company's shopper and fox programs, the Company also enforces its policies with its "security hosts," a private police force created to serve the "corporate interest rather than the public interest." FOGLESONG, *supra* note 36, at 141. Security hosts, while working with Florida state police, are deputized to enforce traffic laws, to conduct criminal investigations, and to control the local 911 system. *Id.* at 139–41. The Company's control of the 911 system is particularly astounding, since "a Reedy Creek official decides whether" the call warrants Florida police involvement. *Id.* at 141. Horrifying, the Company has, at times, failed to report burglaries, rapes, and robberies to state police, in hopes to not alarm park visitors. *Id.* Finally, as a Florida appellate court has held, the security hosts are not providing a public function and thus are not required to abide Florida transparency laws, putting into grave doubt whether criminal constitutional limitations apply to these hosts. *See* Sipkema v. Reedy Creek Imp. Dist., 697 S.2d 880, 882 (Fla. Dist. Ct. App. 1997) (per curiam) (mem.) (Harris, J., concurring) (stating that Disney's security hosts are not a police force under Florida law).

the Company's domain, not the employees.[253] Notably, the Company will flex its authority when necessary, as it did to one Reedy Creek female firefighter who sued the District for allowing sexual harassment.[254] This firefighter, during discovery, provided a Company leadership letter inviting her to a Traditions training to "study the philosophy and organization of our Company."[255] Even in litigation, the Company will revert to its soulcraft, seeming to believe leadership values will solve such complex problems as sexual harassment.[256] It is, at best, a naïve assumption. Yet it exemplifies soulcraft's ultimate premise: by tutoring employees on leadership's morality, those employees' problems will dissipate, for their problems—being assumed moral defects—can be, in part, corrected through proper study.

Hobby Lobby continues the tradition of corporate moral tutorage, given that the Greens openly commit soulcraft by tutoring their employees on "biblical principles."[257] For instance, Hobby Lobby is committed to "[s]erving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families" in line with the Greens' Christian faith.[258] Building character, strengthening individuals, and nurturing families is just another way of "nurturing, bolstering or altering habit, dispositions and values" of their employees.[259] And one such policy tutoring their employees is the nonpayment of employee birth control products, a policy the Greens enacted prior to the Affordable Care Act's passage and created to prevent the Greens from paying for "items that risk killing an embryo."[260] By upholding

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253. *See* Newell, *supra* note 52, at 470.

254. *See* FOGLESONG, *supra* note 36, at 144; *see also* Lang v. Reedy Creek Imp. Dist., 888 F. Supp. 1143, 1145 (M.D. Fla. 1995) (describing the firefighter sexual harassment).

255. *See* FOGLESONG, *supra* note 36, at 144.

256. *See id.*

257. *Our Story*, HOBBY LOBBY, https://newsroom.hobbylobby.com/corporate-background [https://perma.cc/EQ6R-3HXU] ("From the beginning, the company's core values have formed a foundation to guide decision making, establish the corporate culture and determine how business is conducted. Hobby Lobby's values include: Honoring the Lord in all we do by operating the company in a manner consistent with biblical principles . . . Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals and nurture families . . . While retail strategies change, Hobby Lobby's core values remain.").

258. Johnson & Millon, *supra* note 4, at 6.

259. WILL, *supra* note 220, at 19.

260. *See* Brief for Respondents, *supra* note 29, at *9–10 ("Respondents believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion. Hobby Lobby's health plan therefore excludes drugs that can terminate pregnancy, such as RU-486. The plan likewise excludes four drugs or devices that can prevent an embryo from implanting the womb - namely,

Hobby Lobby's right to enact that policy (and likely any others) consistent with the Greens' faith, *Hobby Lobby* affirms soulcraft as constitutionally legitimate for corporations.[261]

At bottom, it is *this* fact that separates *Hobby Lobby* from previous corporate tutorage. Before *Hobby Lobby*, the Supreme Court had never legitimized soulcraft as a constitutional corporate exercise. To be clear, however, I am not implying that *Hobby Lobby* sprung, to paraphrase Alexander Bickel's famous description of *Marbury v. Madison*, fully formed out of the constitutional vapors.[262] *Hobby Lobby* is the product of American corporate history already discussed *and* the Supreme Court's jurisprudence, known as the "right to privacy" cases, preferring private regulation over state regulation.[263]

It is beyond this Article's scope to examine the "right to privacy" cases holistically.[264] It is a long jurisprudential history, including some of the most famous cases in American constitutional law: *Roe v. Wade*, invalidating certain restrictions on abortion access;[265] *Griswold v. Connecticut*, invalidating restrictions on married people's use of contraception;[266] *Eisenstadt v. Baird*, invalidating restrictions on unmarried people's use of contraception;[267] *Lawrence v. Texas*, invalidating sodomy laws;[268] and *Boy Scouts of America v. Dale*, invalidating a New Jersey law preventing organizations, like the Boy Scouts, to restrict membership to only heterosexuals.[269] However, in all of these cases, despite a difference of

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Plan B, Ella, and two types of intrauterine devices. Indeed, when Respondents discovered that two of these drugs had been included—without their knowledge—in the plan formulary, they immediately removed them." (citations omitted)).

261. *See* Burwell v. Hobby Lobby, 573 U.S. 682, 691 (2014).

262. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1986) ("Congress was created very nearly full blow by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did. If any social process can be said to have been 'done' at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of *Marbury v. Madison*.").

263. *See infra* note 270 and accompanying text.

264. For an overview on the origins of the right to privacy, see AMY GAJDA, SEEK AND HIDE: THE TANGLED HISTORY OF THE RIGHT TO PRIVACY 3–92 (2022).

265. Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

266. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

267. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972).

268. Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

269. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

particulars, there is a common theme crucial to understanding *Hobby Lobby*. The Supreme Court, in its "right to privacy" jurisprudence, prefers "the private ordering of social norms"—thereby preventing states from imposing moral restrictions on private actors' choices on reproduction, on sexual intercourse, and on membership rolls.[270]

Dale is particularly pertinent in this regard. In 1990, shortly after Scoutmaster James Dale, a student at Rutgers University and co-president of the University's Lesbian/Gay Student Alliance, was photographed at a seminar on homosexual health needs, the Boy Scouts expelled Dale from the organization.[271] Dale sued the Boy Scouts, based on New Jersey's antidiscrimination law, because they fired Dale for his homosexuality.[272] In response to Dale's suit, the Boy Scouts of America argued incorporating Dale (and other homosexuals) into the Boy Scouts would threaten the organization's values.[273] The Scouts "teach that homosexual conduct is not morally straight" and discourages members from engaging in homosexuality because it is not "a legitimate form of behavior."[274] Having a homosexual scoutmaster, therefore, would undermine this core value.[275]

The Supreme Court agreed with the Boy Scouts.[276] "We are not," the majority concluded,

> guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message.[277]

Indeed, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one,

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270. John McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 485–89 (2002); *see also* ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 73 (2009).

271. Boy Scouts of Am. v. Dale, 530 U.S. at 643–45.

272. *Id.* at 645.

273. *Id.* at 650.

274. *Id.* at 651.

275. *Id.* at 650–51.

276. *Id.* at 654.

277. *Id.* at 661.

however enlightened either purpose may strike the government."[278] *Dale* is thus the epitome of the Supreme Court's preference towards "private ordering of social norms."[279] The Boy Scouts of America can promote its own moral regulation onto its membership, i.e., no homosexual need apply, and therefore can prevent *any* person from joining who may threaten that regulation.

Hobby Lobby is a continuation of the Supreme Court's preference for private ordering—most especially *Dale*'s version of instilling values onto membership. The Supreme Court prefers the Greens' moral regulation to the Affordable Care Act's contraception mandate. And like the Boy Scouts, Hobby Lobby's private social ordering can be written off. Americans might say: You do not *have* to work at Hobby Lobby, like you do not have to be a Boy Scout. While true, this point is an oversimplification. The problem is not an employee's inability to change employers as equally as it is not James Dale's inability to remain a Scoutmaster for being homosexual. The problem is the Supreme Court's simplistic approach in *Dale* and *Hobby Lobby*, often preferring private social orderings without question, despite, in *Hobby Lobby*, those private orderings resulting in corporate sovereignty. In doing so, "[t]he social world that [the Supreme Court] envisions is not a society of free and equal persons."[280] The Greens, like previous corporate sovereigns, believe their employees need tutoring from company leadership. This employee/employer relationship is definitionally unequal; the Greens consider themselves on another level from their employees.[281] Consequently, the Greens' world, one affirmed by the Supreme Court, "resembles feudalism."[282] In this world, the Greens rule over their territory, Hobby Lobby's stores, practicing soulcraft onto their employees.

In this way, *Hobby Lobby* signals a schism in the "right to privacy" jurisprudence. *Griswold*, *Eisenstadt*, and *Lawrence* allow *individuals* to morally regulate themselves.[283] In comparison, *Dale* and *Hobby Lobby* allow *collectives*—the Boy Scouts, and the Greens, respectively—to morally regulate individuals.[284] We thus fool ourselves if we consider moral

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278. *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos., 515 U.S. 557, 579 (1995)).

279. *See* McGinnis, *supra* note 270, at 485.

280. *See* KOPPELMAN & WOLFF, *supra* note 270, at 3.

281. *Unequal*, Encyclopedia.com, https://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/unequal [https://perma.cc/D7H9-9MDP] (defining unequal as "a person or thing considered to be different from another in status or level").

282. *See* KOPPELMAN & WOLFF, *supra* note 270, at 3.

283. *See supra* notes 266–268 and accompanying text.

284. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000); Burwell v. Hobby Lobby, 573 U.S. 682, 691 (2014).

regulation to be on the decline. The providence of states to morally regulate citizens has certainly diminished,[285] although *Dobbs* may signal a return to state control. Regardless, private regulatory authority, most especially via corporations, has increased. Indeed, *Hobby Lobby* is the apogee of this reordering. Corporations are now constitutional sovereigns imbued with the power of soulcraft—a power so intrusive it can impact reproductive decisions of employees.

Perhaps this development is behind Winnifred Fallers Sullivan's fascinating critique of *Hobby Lobby*, where Sullivan derides the opinion as constructing Hobby Lobby into a church.[286] "We are encouraged," Sullivan writes, "to understand [Hobby Lobby] as having [a] religious conscience[], [a] religious conscience[] that deserve[s] our respect."[287] And through that respect, we must "honor the religious rights of the corporate over the individual, giving the corporate religious entity the power to resist the law—a kind of sovereignty—that was denied to" the employees.[288] In other words, this religious sovereignty makes "Hobby Lobby . . . [into a] church[] because [it] oppose[s] the contraception mandate and [it] oppose[s] the contraceptive mandate because they are conservative [C]hristians."[289]

By highlighting how the Supreme Court misses the difference between churches and corporations, Sullivan's piece is thought-provoking. True, churches, as Blackstone informs us, can be incorporated.[290] But there are two key differences between churches and Hobby Lobby. First, Hobby Lobby is not incorporated as a church.[291] And the Supreme Court never assumed Hobby Lobby is one. Second, a church's moral regulations are *voluntary*. Churches do not "choose the exception" for their membership, the literal definition of sovereignty. Churches are where parishioners seek voluntary

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285. *See* WILL, *supra* note 220, at 19 ("Ever since the church replaced the city as the custodian of virtue, the political order has been at best ambivalent about the need to be concerned about the inner lives of the people."). Of course, *Dobbs v. Jackson Women's Health Organization* signals a potential return of state moral regulation, but the case's reasoning and holding is currently limited to only abortion. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240–43 (2022). But *Dobbs* may be a portent of other reversals, however. *Id.* at 2300–04 (Thomas, J., concurring) (discussing that the Court, in light of the majority's holding, should revisit past right to privacy cases).

286. *See* SULLIVAN, *supra* note 66, at 93–125.

287. *Id.* at 109.

288. *Id.* at 94–95.

289. *Id.* at 118.

290. 1 WILLIAM BLACKSTONE, COMMENTARIES *458–59 (discussing corporations can be religious or secular).

291. *See generally* Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

moral guidance. If Hobby Lobby were a church, people might expect *voluntary* moral regulation, because churches routinely promote moral regulations to their memberships. For example, a priest can assign a parishioner three Hail Marys, but he cannot force the parishioner to perform them. Hobby Lobby's contraception plan, like The Walt Disney Company's Traditions program, is involuntary; the corporation *chooses* for the employees.

Hobby Lobby thus transforms corporations into sovereign entities by making the "views of the dominant shareholders . . . projected onto the corporate form, notwithstanding the views of the company's other stakeholders," like employees.[292] Ultimately, this transformation is the case's legacy: Constitutionally affirming a corporation's ability to morally regulate its employees' lives involuntarily. Such a legacy should not be trivialized. *Hobby Lobby* allows any corporation, if it controls territory and practices soulcraft, to become sovereign entities by "decid[ing] on the exception" for its employees.[293]

III. CONCLUSION

Associate Justice Neil M. Gorsuch—whose Tenth Circuit concurrence in *Hobby Lobby v. Burwell* was largely adopted as Justice Alito's *Burwell v. Hobby Lobby* majority opinion[294]—believes courts should not focus on case results, when accurate legal application is Article III's true purpose.[295] Justice Gorsuch is not entirely wrong. After all, a judge's legal application should be accurate. Yet his claim misses the issue. Courts focus on case holdings because their legal application, or their reasoning, is inseparable from results. Legal reasoning *always* guides outcomes; it is not an either/or situation but a both/and one. And a court's reasoning often binds future courts, as is the case with both Tenth Circuit's and Supreme Court's decisions, a principle known as *stare decisis*.[296] Accordingly, Article III cannot divorce itself from results,

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292. *See* GREENFIELD, *supra* note 4, at 176–77.

293. *See* SCHMITT, *supra* note 151, at 5.

294. *See supra* note 15 and Section I.C.

295. *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 114 (2019) (discussing legal reasoning, like originalism, can "lead to a result you happen to dislike in this or that case. [But s]o what? The 'Judicial Power' of Article III of the Constitution isn't a promise of all good things. Letting dangerous and obviously guilty criminals who have gravely injured their victims go free just because an officer forgot to secure a warrant or because the prosecutor neglected to bring a witness to trial for confrontation seems like a bad idea to plenty of people. But do you really want judges to revise the Constitution to avoid those 'bad' results?").

296. For Gorsuch's interpretation of *stare decisis*, see *id.* at 211–20.

when court reasoning and outcomes are conjoined principles authoring law's future.

Hobby Lobby, a case Justice Gorsuch is intimately familiar with, has stark consequences for Americans because of its impactful reasoning, not merely its outcome. Where the result prevented Hobby Lobby's employees from accessing certain forms of birth control, the case's reasoning is far broader—of "startling breadth," as the principal dissent put it—by constitutionally affirming a corporation's right to morally regulate their membership based on the ownership's values.[297] Consequentially, under *Hobby Lobby*, Americans live morally regulatable lives—not purely by state regulation, but by private corporate regulation as well—and *Hobby Lobby* is an endorsement of the latter's regulatory authority. By doing so, a corporation like Hobby Lobby can become a sovereign, if it can choose the exception for its employees. Hobby Lobby chooses the exception through its religious policy of nonpayment for employee birth control products. In sum, *Hobby Lobby*'s impact is its broad reasoning. And attorneys have noticed.

In 2020, a case was filed in the Northern District of Texas, seeking *Hobby Lobby* exemptions for religiously affiliated employers from underwriting health insurance coverage that provides pre-exposure prophylaxis, or PrEP, drugs.[298] PrEP prevents Human Immune Deficiency syndrome, which, as the complaint alleges, "forces religious employers to provide coverage for drugs that facilitate and encourage homosexual behavior, prostitution, sexual promiscuity and intravenous drug use."[299] Notably, as the government has described, one of the employers, Kelley Orthodontics, asserts no religious objection, despite its Christian affiliation.[300] Kelley Orthodontics seemingly believes *Hobby Lobby* vests itself with the right of corporate sovereignty, since its ownership wants to stop employees from using PrEP to hinder homosexual behavior. The corporation thus wants soulcrafting authority and believes *Hobby Lobby* grants such powers.

Kelley Orthodontics is not incorrect. *Hobby Lobby*'s reasoning is broad, affirming a corporation's ability to morally regulate its employees lives involuntarily. And Kelley Orthodontics wishes to take advantage of this reasoning. The Northern District of Texas agreed with Kelly Orthodontics, relying upon both the Supreme Court and Gorsuch's Tenth Circuit opinions,

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297. *See* Burwell v. Hobby Lobby, 573 U.S. 682, 739 (2014) (Ginsburg, J., dissenting).

298. *See* First Amended Complaint at ¶¶ 108–11, Kelley v. Azar, No. 4:20-CV-00283-O, 2021 U.S. Dist. LEXIS 193489 (N.D. Tex. Feb. 25, 2021).

299. *Id.* at ¶ 109.

300. *See* Defendant's Reply in Support of Motion To Dismiss at 13, Kelley v. Azar, 4:20-CV-00283-O, 2021 U.S. Dist. LEXIS 193489 (N.D. Tex. Feb. 25, 2021).

by framing its reasoning around protecting the employers right to uphold moral values: "Indeed, 'it is beyond question' that religious employers have Article III standing to challenge a government mandate that infringes on their religious liberties 'by requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong.'"[301] In other words, when an employer disagrees with government policy based on religious values, *Hobby Lobby* grants employers standing to enforce their moral teachings on their employees. Accordingly, the Northern District of Texas directly continues *Hobby Lobby*'s affirmation of corporate sovereignty.[302] The District understood the Supreme Court's directive substantially.[303] Its opinion thus exemplifies *Hobby Lobby*'s future—a future haunted by Florida's dissolution of Reedy Creek.

The Walt Disney Company is a singular authority in Reedy Creek, engaging in strict control of membership, ranging from regulation of body language to actual surveillance of employees, while equally making state law enforcement abide by the Company's requirements. The Company, in turn, rules Reedy Creek; the zone is its fiefdom. Shockingly, the state of Florida authorized such authority, thereby statutorily protecting a corporate sovereign. But what Florida gave was taken away: After the Company criticized Governor DeSantis's Parental Rights in Education bill, the Florida legislature authorized the dissolvement of Reedy Creek. Reedy Creek thus represents a corporate sovereign's death by state hands. Yet Disney's reign has been enormously successful, and any corporation would love such authority to promote its interests. *Hobby Lobby*'s reasoning provides such an

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301. Braidwood Mgmt. Inc. v. Becerra, No. 4:20-CV-00283-O, 2022 WL 4091215, at *5 (N.D. Tex. Sept. 7, 2022) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (Gorsuch, J., concurring)).

302. *Id.* at *20.

303. The Northern District of Texas is not the only institution to have noticed *Hobby Lobby*'s broad reasoning. Yeshiva University recently asked the Supreme Court to allow the institution to block the inclusion of a LBGTQ alliance based purely on the institution's "sincere religious beliefs about how to form its undergraduate students in Torah values." Emergency Application for Stay Pending Appellate Review at 1, Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1 (2022) (No. 22A184), 2022 WL 4287266, at *1. While the Supreme Court did not grant this request on procedural grounds, *see Yeshiva Univ.*, 143 S. Ct. at 1, the brief is an extremely blunt affirmation of corporate sovereignty. *See generally* Application for Stay Pending Appellate Review, *supra.* The case will likely return to the Supreme Court once the proper procedural order happens. Amy Howe, *In 5-4 Vote, Court Denies Yeshiva University's Request To Block State Ruling on LGBTQ Recognition*, SCOTUSBLOG (Sept. 14, 2022, 8:18 PM), https://www.scotusblog.com/2022/09/in-5-4-vote-court-denies-yeshiva-universitys-request-to-block-state-ruling-on-lgbtq-recognition/ [https://perma.cc/S9LL-UMVR].

opportunity since the case is the imbuement of corporate sovereignty in constitutional law. Nevertheless, Reedy Creek is also a warning for *Hobby Lobby*'s future: State and corporate moral regulatory interests will clash. The state and private sovereigns will be at constant loggerheads over *whose* moral regulation takes preference. Ironically, Reedy Creek's dissolvement emphasizes *Hobby Lobby* cannot protect corporate sovereigns from state actions, despite endorsing sovereignty itself, leading to a presumption that many states may—perhaps unfairly—win these battles. Indeed, the Supreme Court, in a confusing turn with *Dobbs*, has undercut corporate moral regulation by endorsing state moral regulation of abortion, making it unclear, at least with abortion, whether state or private regulatory interests are paramount. Consequentially, *Hobby Lobby*'s future may well be constitutional disorder, an irony given Justice Alito, the author of both *Hobby Lobby* and *Dobbs*, largely created this aimlessness.

For their part, Texas state legislators have noticed and taken advantage of our constitutional uncertainty. Recently, the Texas Freedom Caucus, an eleven-member group of hardline conservative legislators, issued a letter threating Sidley Austin (and other law firms) with civil and criminal sanctions for "aiding and abetting" so-called illegal abortions, if the firm helped employees, who reside in Texas, fund travel for abortion care.[304] Currently such threats are empty. However, the Caucus means business, given it has "prepared a raft of . . . legislation, including a bill that would impose criminal penalties on employers for covering elective abortions in their health insurance."[305] Such a law is antithetical to *Hobby Lobby*'s broad allowance of corporate sovereignty. Yet, if corporate ownership believed abortion care was key to its religious beliefs, the *literal* holding of *Hobby Lobby*, the Caucus's proposed law would nullify such rights. These threats to *Hobby Lobby* are the direct result of *Dobbs*; it is an unavoidable truth, one directly linked to *Hobby Lobby*'s future.

But the future is a funny thing. The past outlines it, yet later actions decide it. Lawyers and courts will be essential in writing *Hobby Lobby*'s future. After all, what are lawyers if not storytellers? Courts if not publishers? Our constitutional law is a continual story told by many with court curation. Part

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304. *See* Jacqueline Thomsen, *Texas Lawmakers Target Law Firms for Aiding Abortion Access*, REUTERS (July 8, 2022, 4:19 PM), https://www.reuters.com/legal/legalindustry/texas-lawmakers-target-law-firms-aiding-abortion-access-2022-07-08/ [https://perma.cc/SMW2-RSN7].

305. *See* Becky Sullivan, *Texas Conservatives Have a Plan To Get Around DAs Who Won't Enforce Abortion Laws*, NPR (July 15, 2022, 5:00 AM), https://www.npr.org/2022/07/15/1111383520/texas-abortion-laws-prosecutors [https://perma.cc/L7CS-QRJU].

of that story is *Hobby Lobby*, a chapter legitimatizing corporate sovereigns in constitutional law. The next chapter, however, might shift into a triumph of state moral regulation, as Reedy Creek's dissolution and *Dobbs* endorses. Or it may look like Kelley Orthodontics' wishes to amplify *Hobby Lobby*'s protections, as the Northern District of Texas found. Our current constitutional order gives no clear solution to this conflict. All currently known is state and corporate interest will—as they did in *Hobby Lobby*—seek judicial review to clarify *whose* interests, either state or private, are paramount. Article III's judicial power demands courts' reasoning produce results. To determine whether private or public moral regulation is preferred, some courts will rely upon *Hobby Lobby*, whereas others on *Dobbs*. Undoubtedly, the Supreme Court will resolve many such cases. In time, *Hobby Lobby*'s will become synonymous with this conflict. *Who* regulates: Is it corporate ownership or states?