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VENTURING INTO A MINEFIELD: EMPLOYER PRACTICES IN A POST BURWELL V. HOBBY LOBBY STATE

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Introduction

Traditionally, First Amendment rights were largely in the realm of individuals. Employees, not corporate owners, filed lawsuits asking for exemptions to corporate policy or secular law. This changed in *Burwell v. Hobby Lobby*. When the Supreme Court decided that Hobby Lobby did not have to provide contraception to its employees because doing so would violate the owners' (and therein the corporation's) religious beliefs, the ruling raised numerous questions about the scope of religious freedom and corporate rights. And, despite religious conservatives arguing that the *Burwell* decision would not substantially impact future Court decisions, many worried that the Court had expanded corporate rights to the detriment of the individuals the Constitution was designed to protect.

This paper considers what kind of effects *Burwell v. Hobby Lobby* will have on future Court decisions regarding employee non-discrimination litigation. While the legal system moves slowly, a case like *Burwell* has the potential to impact the relationship between millions of employers and employees. Analyzing where the case came from and how it could change important economic relationships in our society can help policymakers, legal teams and everyday Americans understand the wider implications of a seemingly narrow Supreme Court ruling. I first lay out the relevant background of the case itself: who was involved, what were the basic arguments, and what exactly did the Court decide. Then I turn my attention to relevant legal precedent, which sheds light on the reasoning of the Court and the possible scope of the *Burwell* decision. After finding

that most of the *Burwell* decision was unprecedented, I then focus on some of the immediate and possible long-term effects of the *Burwell* case for employees. While I find multiple impacts of this decision on corporations and on free exercise law more generally, the most profound (and perhaps unintended) consequence of the *Burwell* ruling is a new balancing act in federal and state legal systems: religious freedom claims made by one individual (in this case on behalf of a corporation) versus the identity claims of another.

Relevant Legislative Background and Case Law

The Affordable Care Act (ACA), enacted in 2010, mandates employers with 50 or more full time or equivalent employees (FTEs) to provide health insurance that meets certain basic requirements. Otherwise, the employer has to pay a fine to the IRS of $100 per day for each affected employee.[1] These basic requirements include access to emergency medical services, vaccinations, prescription drug coverage, and laboratory services (HealthCare.gov, 2014). As a part of setting these requirements for health insurance, the Department of Health and Human Services asked the Institute of Medicine (IOM), a nonprofit organizations affiliated with the National Academy of Sciences, to conduct a study to find what specific health services for women were necessary for their health and well-being (U.S. Department of Health and Human Services, 2014). IOM's study found that health insurance should cover all 20 forms of birth control approved by the Food and Drug Administration (FDA) to ensure that all women have the access to the reproductive services that they need without worrying about cost. HHS adopted these guidelines, and they went into effect for plans that started after August 1, 2012.[2]

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[1] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 7/49
[2] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 8/49

When the Obama Administration announced these rules, HHS officials also announced that religious organizations and religious non-profit corporations were exempt from the contraception requirement. This exclusion was not without precedent; frequently, religious non-profit organizations are granted exemptions from legal mandates. To give one example, Title VII of the Civil Rights Act, which requires companies to hire without looking at an applicant's race, gender, or religious faith, has an exemption for non-profit religious groups, particularly with regards to members of their clergy.[3] The exemption to the contraception mandate is not the only exemption for religious groups in the ACA. If one is a member of a religious group that objects to medical insurance, Social Security or Medicare, or if one belongs to a religious "mutual aid system" outside of traditional insurance, one does not have to pay the fine associated with not having health coverage (Madigan, 2014). However, all for-profit corporations, religious or not, were required to provide contraception to their employees.[4]

Hobby Lobby is a for-profit corporation that is primarily owned by one family: the Greens. The Greens objected to the new health insurance requirements because their religious faith said that certain forms of contraception were forms of abortion.[5] Under the Affordable Care Act, the Greens were required to cover these devices or pay $475 million dollars in penalties to the IRS, a figure derived from the stated penalty amount multiplied by the number of Hobby Lobby employees who received health insurance.[6] Hobby Lobby sued the Department of Health and Human Services asking for a religious exemption to the contraception requirement. The U.S. District Court for the Western

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[3] The U.S. Equal Employment Opportunity Commission (2011)
[4] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 9/49
[5] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 8/49
[6] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 15/49

District of Oklahoma denied a preliminary injunction and ruled against Hobby Lobby, saying that the mandate did not violate the Green's religious freedom. Hobby Lobby appealed the decision to the Tenth Circuit Court of Appeals. The Court of Appeals disagreed with the lower court, and ruled that Hobby Lobby was a person that could raise a claim under the Religious Freedom Restoration Act and that the contraception mandate violated Hobby Lobby's right to the free exercise of religion. The case was appealed again and in *Burwell v. Hobby Lobby Stores, Inc.* the Justices of the U.S. Supreme Court agreed with Hobby Lobby and granted the corporation an exemption in a 5-4 ruling. This decision marked the first case where a for-profit corporation was granted any sort of religious freedom protection. In plain terms, *Burwell* took a right generally reserved to individuals and expanded it in ways that could completely change free exercise jurisprudence.

To understand the decision in *Burwell*, it is important to examine the briefs from the petitioner and the respondent. The petitioner, the Department of Health and Human Services, used the text of the Religious Freedom Restoration Act (RFRA) and various Supreme Court cases to argue that granting an exemption to Hobby Lobby would broaden the scope of RFRA far beyond what Congress had intended.[7] The government argued that even if Hobby Lobby counted as a "person" in RFRA, the exemption would still fail because the burden of providing contraceptive coverage is indirect. The mandate fulfills a compelling government interest in public health and gender equality, and it is the least restrictive means for providing female employees access to contraception.[8] The respondents, the Green family, used the definition of "person" under the Dictionary Act

[7] Brief for the Petitioner, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014) p.13
[8] Brief for the Petitioner, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014) p.15

to argue that RFRA would apply to Hobby Lobby a legal entity with personhood rights.[9] They also argued that even indirectly providing abortifacients is a substantial burden on their religious values, and the broad "interests" asserted by the government in this case are not compelling interests because they are too general and vague. Finally, the Green family maintained that mandate is also not the least restrictive means for providing contraception access because multiple groups have already received exemptions without harming the entire system.[10]

The decision in *Burwell v. Hobby Lobby Stores, Inc.* dealt with two separate, but related issues. The first involved the scope of First Amendment protection from neutral laws. Most laws do not have any effect on religious practice. However, some laws have unintended consequences for people of faith. Either they can follow the law and violate their personal religious code, or follow their faith and risk fines and legal punishment. Many religious individuals file lawsuits asking for narrow exemptions to secular law to avoid this burden on their conscience. By looking at the cases that the Court used in the background sections of its opinion, as well as the cases directly cited in the substantive part of the majority opinion, we see how much of the *Burwell* decision was based on the logic of legal precedent in free exercise cases.

The second, and more complex, part of this review focuses on the cases that supported the idea that for-profit corporations could have religious freedom rights. There is very little case law on this second aspect of *Burwell*. Very few businesses have ever raised religious freedom claims; they have either been non-profit groups (who have won certain exemptions) or sole proprietors of very small for-profit businesses (who have

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[9] Brief for the Respondents, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014) p.14
[10] Brief for the Respondents, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014) p.15-16

never succeeded in getting an exemption). This expansion of corporate rights is important for understanding *Burwell* because this part of the ruling has generated the most controversy, particularly related to the ruling's scope. Only by looking at the history of both of these issues can the *Burwell* decision be understood as either a natural progression from previous cases or an abrupt departure from them.

The First Amendment to the Constitution states that Congress cannot make a law that prohibits the free exercise of religion. But what happens when a neutral law conflicts with a religious belief? Numerous Supreme Court cases address this very issue. However, all of these cases only addressed either an individual's right to object to secular law on the basis of religious faith or a solely religious group or congregation that saw a secular statute as violating some fundamental part of religious practice. As such, these religious freedom cases inform some of the reasoning in *Burwell*, but they do not fully explain why the Court decided to expand these rulings to for-profit corporations.

The history of free exercise law can be rather convoluted. Throughout its history, the court has created various legal "tests" to determine if a law infringes on religious belief and, if so, if the individual should get an exemption. One of the more recent tests created by the court was the compelling interest test, which was first written in *Sherbert v. Verner* (1963). Under the compelling interest test, if a law creates a "substantial burden" on religious faith, the government has to prove that the law itself is "narrowly tailored" to achieve a "compelling government interest." If the government cannot prove either of those two conditions, the Court requires that the religious individual be granted an exemption. [11] In the case of *Sherbert*, South Carolina had to pay the plaintiff unemployment benefits because she was fired for refusing to work on days that would

[11] *Sherbert v. Verner* 374 U.S. 398 (1963)

violate her religious faith.[12] This compelling interest test remained a Supreme Court standard for 20 years until *Smith* (1990), which identified the "neutral law of general applicability."

While both the petitioner (the Department of Health and Human Services) and respondent (Hobby Lobby) made passing mentions to *Sherbert* in their legal briefs, the respondent only used the case in its brief overview of the history of free exercise law. The petitioner, however, used *Sherbert* to argue that the Court should reject Hobby Lobby's claim because the compelling interest test only protects individuals, not corporations. Both petitioner and respondent tied their argument to *Sherbert* for two reasons. The first is to hopefully connect their argument with one of the hallmark cases in free exercise law. By citing *Sherbert*, the lawyers were trying to claim that their respective arguments arose from significant precedent, even if the respondent is trying to broaden what sort of organizations free exercise law should apply to. Both sides also used *Sherbert* to tie their argument to the Religious Freedom Restoration Act, which played a central role in *Burwell* and will be discussed in greater detail later.

The legal test changed in 1990 away from *Sherbert* and compelling interest in *Employment Division, Dept of Human Resources v. Smith.* In *Smith,* the Supreme Court ruled that an individual cannot violate a "neutral law of general applicability", in this case drug laws, simply because of their religious faith. As long as the law was neutral, a religious individual could not challenge it in the court system. The decision in *Smith* severely curtailed the claims that religious individuals could make in the courts. While the petitioner used *Smith* to further bolster the argument that corporations should not have

[12] The plaintiff refused to work on Saturdays and when she failed to show up for work on Saturdays, she was fired. *Sherbert v. Verner* 374 U.S. 398 (1963)

any religious freedom claims, the respondent used the case in a very different way. Hobby Lobby argued that the ruling in *Smith* shows that abstaining from certain acts (like refusing to support certain types of birth control) is a part of religious free exercise. The majority of the Supreme Court agreed with the respondent's interpretation of *Smith*, even though the opinion itself only made passing references to the decision.

Because *Smith* appeared to change the entirety of free exercise law, religious individuals and groups lobbied Congress to reinstate religious freedom protection in the federal courts. The result was the Religious Freedom Restoration Act (RFRA), a 1993 law that states that if a "sincerely-held religious belief" contradicted a neutral law, the government had to prove that the law was narrowly tailored to achieve a compelling government interest; otherwise the law is an unconstitutional burden on religious practice. The language should seem familiar; it was directly borrowed from *Sherbert*. In fact, the law itself was framed as simply a "restoration" of the compelling interest test. However, after the law was passed, scholars raised questions about whether the law would be the best way to protect the balance between religious freedom and the goals of secular society.

The first concern speaks to the broadness of the statute itself. While congressional legislation is usually vague, RFRA does not provide any clarifying meaning for what constitutes a "compelling government interest" or "a substantial burden" on religious practice. Instead the bill's supporters decided to let the courts decide what these terms meant. The main reason for this was purely practical; the bill's coalition of sponsors was so broad that groups on the right and on the left could not agree on a standard (Berg, 1994). Some scholars view RFRA's vague wording as a positive. Because Congress

decided to pass a law directing the judicial branch to use a particular standard, in theory cases involving free exercise claims are held to a higher standard of scrutiny (Berg, 1994, 29). However, others argue that RFRA is only a symbolic victory because the courts have consistently used the same vague language to wiggle out of protecting religious freedom (Ryan, 1992, 1414).

RFRA returns the judicial branch to the compelling interest test, which in theory returns the Court to a higher level of scrutiny for free exercise cases. However, the case law under the compelling interest test is actually not very sympathetic to religious interests. Eisbruber and Sager (1994) argue that the Supreme Court has tried to escape the compelling interest test since it decided *Sherbert* because the test's system of balancing was unworkable (443). The Supreme Court rejected the appeals of religious individuals in 13 out of the 17 religious freedom cases that came before the Court after *Sherbert* (Ryan, 1992, 1414). Lower federal courts were no better. The Courts of Appeals heard 97 free exercise cases. They rejected the claims of religious individuals in 85 of them (Ryan, 1992, 1417). *Smith* only made explicit what many people knew to be the case: that religious people could very rarely rely on the judicial system to uphold their claim of religious freedom from neutral laws (Ryan, 1992, 1416). Even the bill's supporters agreed that case law before *Smith* was less than an ideal standard. Berg (1994) emphasizes the courts should defer more to religious freedom under RFRA than they did in the cases before *Smith* (26-27, 30-34) on the grounds that a legislative statute provides a much firmer basis for decisions that protect civil liberties. With that firmer base, the Court should be able to protect religion more substantively (Berg, 1994: 29).

Scholars at the time of RFRA's passage were also divided on the kind of effect that RFRA would have in free exercise cases. Eisgruber and Sager (1994, 455) argue that RFRA could be interpreted to mean religious practice supersedes any sort of government law or regulation because there is *always* a "less-restrictive means" of producing the same result. Without a definition of compelling interest, courts could argue that no law ever meets that standard. Ryan (1992) was much less optimistic about the fate of religious exercise under RFRA, arguing that RFRA was a purely symbolic victory that would allow Congress to feel like they had done something without actually making substantial gains for religious freedom. Berg's position is halfway between the two. In his view, the Court would (and should) use moderation when applying RFRA, rather than using the compelling interest test language without upholding the spirit of the law. He strongly believed that the "substantial burden" language used in RFRA would limit when the law could be used to benefit religion (Berg, 1994: 48).

Since RFRA was passed, very few cases about religious freedom have reached the Supreme Court and none of them fully dealt with the scope of RFRA's religious freedom protection for individuals. However, one case that came before the Supreme Court in the early 2000s gave some indication that RFRA would broaden the scope of religious freedom protection. In *Gonzales v. O Centro Espirita Benficiente Uniao do Vegetal* (2005), the Supreme Court ruled that the use of a drug called hoasca in religious ceremonies should be allowed under the Controlled Substances Act. The law needed to make this exemption because the government did not successfully prove that it had a "compelling interest" in allowing no exemptions to drug laws.[13] Such a shift in rulings

[13] *"Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal"*

from *Smith* to *Gonzales* shows that RFRA provided a stronger shield for individual religious freedom, just as Congress had intended.

Even though some cases showed that RFRA could radically expand religious freedom protections, other Court cases strictly limited what government entities to which RFRA could apply. RFRA as a statute originally applied to federal, state and local governments. In *City of Boerne v. Flores* (1996), the Supreme Court struck down RFRA's provisions that applied to the states (Hamilton 2005). While the decision did not declare the entire law unconstitutional, it seriously weakened the effects of RFRA. In response, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, which, in the process of limiting what state practices would be affected by federal religious freedom protections, deleted any direct references to the First Amendment.[14] While the original constitutional question of whether or not Congress can require states to have equal protections for religious freedom is irrelevant to the *Burwell* decision, the majority opinion uses the distinction between RFRA/RLUIPA protections and First Amendment claims when deciding the *Burwell* case.[15]

In both *Gonzales* and *Boerne*, the Supreme Court ruled in ways that expanded religious freedom for individuals. When these cases were decided, the Court, and perhaps original sponsors of RFRA, were focused on protecting individual freedom. Their claim that for-profit corporations are entitled to that same strong shield is a new demand. Corporations are a legal entity separate from the person(s) that own them. Most companies become corporations to protect the owner from having to pay any debts that

[14] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 6-7/49

[15] This argument was cited in Alito's majority opinion (*Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 6-7/49). This point was ignored by Kennedy's concurring opinion (who sided with the majority because the government showed a less restrictive alternative to the mandate) and Ginsberg's dissent (who disagreed with the decision based on the harm to third parties).

the corporation might accumulate over time. If a corporation goes bankrupt, its owners don't lose their life savings trying to pay back the corporation's debt because the corporation is seen as a separate legal person. The *Burwell* case was unusual because it specifically tried to break that mindset of corporate separateness. The Green family in this case was arguing that when their corporation provided its employees with certain forms of contraception, it violated their freedom of religion. When the Court decided to rule in favor of Hobby Lobby, it expanded religious freedom to a legal entity that had never had that right.

That is not to say that religious groups and non-profit corporations had not asked for exemptions to neutral employment laws before *Burwell*. The so-called ministerial exception was first created in 1972 and was designed to allow churches to choose their own clergy without fear of anti-discrimination lawsuits (Hamilton 2005). In theory, this exception was narrowly tailored, and any secular employees hired by a religious organization (janitors, secretaries) were still subject to federal nondiscrimination policies (Hamilton 193). The ministerial exemption also, at least in its original form, only applied to organizations that were entirely religious in nature. In *EEOC v. Mississippi College*, 652 F.2d 477 (5th Cir. 1980), the 5th Circuit Court of Appeals ruled that a religiously affiliated college did not qualify for exemptions to Title VII because it was not a religious entity (Hamilton 2005).

The only time the Supreme Court has dealt with the ministerial exception is in 2011. In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the Court ruled that a teacher who was fired from a ministry

position could not sure her employer for violating the Americans With Disabilities Act.[16] It is the first case where the Supreme Court confirmed a ministerial exception to employment law. While this exemption is narrow, it is the first indication that the Supreme Court might allow an employer's faith to impact employment processes.

The ministerial exemption allowed only non-profit and exclusively religious organizations to bring free exercise claims, not for-profit corporations. The expansion of religious freedom rights to for-profit corporations is largely unprecedented. According to the majority opinion in *Burwell,* the Supreme Court has only dealt with one free exercise claim involving religious businesses. *Gallagher v. Crown Kosher Market* was a case decided in 1961, long before RFRA or *Smith.* Orthodox Jewish business owners brought a lawsuit against blue laws (laws that mandated business closure on Sundays to provide a "day of rest") in the state of Massachusetts.[17] The Supreme Court decided against Crown Kosher Foods, saying Sunday blue laws were constitutional and that they had the secular purpose of providing a day of rest.

While on first glance, *Gallagher* would not support a corporation's right to free exercise claims under the First Amendment, Justice Alito (the writer of the majority opinion in *Burwell*) argues that this case is important because the earlier Court's decision did not reject the case because the party bringing the lawsuit was a business. Instead it decided the case purely based on the merits of the free exercise claim. The fact that the Court did not reject the claim entirely means that earlier Courts would have supported giving closely held corporations religious freedom exemptions, according to the majority opinion. Other scholars have also cited *United States v. Lee* 455 U.S. 252 (1982) and

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[16] *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* 565 U.S. ___ (2012)
[17] *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961)

Braunfield v. Brown 366 U.S. 599 (1961) as other cases where sole proprietors of businesses were allowed to raise free exercise complaints, even though the Supreme Court did not cite them as such in the opinion (Colombo 2015).

While the Supreme Court itself found very few cases where for-profit corporations have been given religious freedom rights, supporters of corporations have identified a few more, albeit weaker, precedents. Before *Burwell,* two district courts recognized the right of for-profit corporations to bring free exercise claims (Colombo 160). This reasoning is not limited to district courts either. The Eleventh Circuit Court in the case *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v Broward County* (2006) stated that corporations have "Fourteenth Amendment rights of equal protection, due process, and, through incorporation, the free exercise of religion" (Colombo, 2015: 162). In *Storemans Inc. v. Selecky,* 586 F.3d 1109 (9th Cir. 2009), the Ninth Circuit Court of Appeals gave a closely held for-profit corporation standing in a lawsuit because of "associational standing." Associational standing is the idea that corporations can have standing as proxies for the owners. It's a slightly different argument than the one used in *Burwell* (that corporations themselves have free exercise rights), but it is related (Colombo 2015). Some scholars see these cases, as well as *State ex rel. McClure v. Sports and Health Club, Inc. 370 N.W.2nd 844 (Minn. 1985),* as possible precedent for *Burwell,* although none of these cases was cited in the opinion (Colombo 2015). While none of these cases were cited, these cases are important because they show that the idea of giving a for-profit corporation some sort of religious freedom protection is not a new legal concept. Court members might have heard about *Broward County* and *Selecky* when they were decided, and the legal rationale used in these cases might have informed their

logic in *Burwell*. In other words, while *Burwell* is the first Supreme Court case to endorse religious freedom for corporations, the legal rationale did not completely rise out of nowhere.

Potential Effects of *Burwell v Hobby Lobby*

The majority in *Burwell* ruled that Hobby Lobby should receive a religious exemption to the contraception mandate because it violated the religious beliefs of the owners. According to Justice Alito, author of the majority opinion, the Green family should not have to violate their religious faith simply because the issue in the case dealt with their role as business owners. Instead, the Court should come to a decision on this case just like they would on any other religious freedom case: by applying the compelling interest test found in RFRA.[18] The contraception mandate violated RFRA because the government had already proved that a less-restrictive way to provide contraception could work. The majority then ruled that Hobby Lobby should be able to separate out contraception from their health plan and have the insurance company pay for the entire cost of birth control, just like certain religious non-profits under the ACA's original guidelines.[19]

After the Court released its decision, which included a fiery dissent read from the bench by Ruth Bader Ginsburg, I wanted to determine what impacts, if any, *Burwell* would have on corporate practices and future Supreme Court cases. These impacts can be separated into two groups: immediate impacts and long-term impacts. Immediate impacts include the other cases in front of federal courts requesting exemptions to the contraception mandate, as well as the impact on female employees who have lost their

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[18] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 16-31/49
[19] *Burwell v. Hobby Lobby* 573 U. S. ____ (2014) p. 43/49

birth control coverage because of the beliefs of their employer. After considering these immediate impacts, I then turn to the possible long-term impacts of *Burwell v. Hobby Lobby*. Here I consider possible shifts in the relationship between shareholders and corporate directors, raising the threshold for what is considered a "compelling government interest," possible new challenges to "essential" health care. Further, I evaluated the Court's newest challenge: trying to determine if corporate religious values are more worthy of protection that anti-discrimination based on individual identity groups, or vice versa.

The *Burwell* decision obviously had immediate impacts on Hobby Lobby's female employees who lost access to essential contraception because of the corporate owners' religious beliefs. Even though these women still qualify for contraception at a separate health exchange set up by the Obama administration, this additional step may discourage women who may want to use birth control but are not aware of the federal program that subsidizes the cost. Hobby Lobby is required by law to inform their employees in writing of any insurance changes, so these women are aware that they no longer have access to these four kinds of birth control. However, it is unclear how much information this letter contains; Hobby Lobby might not have even told their female employees that the exchange exists. Instead, the insurance company would have sent out a separate publication with that information. It is also unclear how confusing using that secondary system might be to use. If the system is unclear or confusing, female employees might not even think something like an IUD is an option for them, even if a doctor recommends it.[20]

[20] Financial burden is the major reason why low-income women do not get IUDs, though studies have shown many of them would use one if the cost is reduced because they last longer. See Sonfield (2014).

However, the ruling did not just apply to Hobby Lobby. It also applied to all "closely held, family corporations" who had a religious belief on contraception. After the Hobby Lobby decision was issued this past summer, other corporations proceeded to sue the Department of Health and Human Services for an exemption. There are 49 separate lawsuits being argued in lower courts, involving 193 different for-profit corporations that are asking for some sort of exemption to the contraception mandate (The Becket Fund).[21] Not all of these lawsuits are carbon copies of *Burwell*, but all of them could use that decision as support for their respective case. For example, Hobby Lobby only objected to 4 of the 20 FDA-mandated types of birth control. While some of these new lawsuits only object to the same types of birth control that Hobby Lobby opposed, other plaintiffs (such as Eden Foods) object to all kinds of birth control and want a complete exemption from providing contraception to their employees. Critics of the decision fear that *Burwell* would allow a company to provide no contraception to their employees, even though that was not what Hobby Lobby itself was seeking. If these lawsuits are successful (two have been remanded by the Supreme Court after the *Burwell* decision, and many are still awaiting a ruling), many more women would be without necessary medical coverage because their boss objected to their ability to access contraception on religious grounds.

Other than the challenges to the contraception mandate, there has been little action by government officials or corporations in the aftermath of the Court's decision. The decision itself may have been largely unprecedented, but it also has not thus far caused for-profit corporations to claim a religious faith to discriminate against individual employees like opponents worried it would. One scholar has gone as far as to say that the

[21] This number does not include the 56 additional cases raised by 140 different non-profit plaintiffs (religious organizations and religiously-affiliated schools) objecting to the same mandate.

controversy over *Burwell* is not based on the decision itself. Instead, the controversy is a reflection of the debate over whether or not there should be religious exemptions to secular law in the first place (Horwitz 2014). This larger culture war about the place of religion in society has only grown more heated since mainstream public opinion shifted towards supporting same-sex marriage (Horwitz, 2014). The actual decision in *Burwell*, according to Horwitz, was a straightforward application of RFRA. Without the larger culture war about the place of religion in public life, *Burwell* would have not sparked the same level of debate as it did in the summer of 2014 (Horwitz, 2014).

While Horwitz believes we might be making a big deal out of a straightforward decision, the fact remains that *Burwell* is a significant departure from existing case law and it will shape a multitude of legal questions. Because of the speed of the legal system itself, cases invoking *Burwell* as precedent might not reach the Supreme Court for a few years. However, the decision has some potential to change how individual corporations work with their shareholders and has generated numerous new legal questions that the Court will have to navigate in the coming years.

While most of the popular media coverage over *Burwell v Hobby Lobby* has focused on the harm that could come to progressive causes because of this decision, other scholars see it as a potential opportunity to affect change within the corporate structure. Currently shareholders can pass proposals, or motions, about corporate policy either related to the internal workings of the company or about social issues, including women's rights, LGBT rights or environmental protection (Neitz, 14). These motions are not binding and many activists have avoided using them because the dominant focus of corporations has historically been profit maximization. If the proposal did not fit this

narrow goal of maximizing profit, activists felt like it would be pointless to even bring it up in the boardroom because the company would either vote it down or pass the proposal and then choose to ignore it later.

However, the decision in *Burwell* gave some corporations another possible goal that might be more sympathetic to activists' demands: to conduct business in a way that promotes their religious beliefs. With this decision, activists could appeal to a corporation's religious viewpoint to pass these proposals. Neitz argues that, with time, this ruling will expand to corporations who have "moral values" that are not directly tied to religious faith (26). Because corporations can be held more accountable for their decisions, activists might have more success convincing corporations to become leaders in making moral decisions, not just the ones that are best for the bottom line (Neitz, 30). The most recent high profile example of a corporation acting morally despite cutting into profits is CVS Pharmacy. The company recently decided to stop selling tobacco products in its stores. Even though selling cigarettes creates millions of dollars in revenue, CVS felt like selling them went against their mission of providing products that promote health and wellness (Neitz, 30). Neitz believes that because of the *Burwell* decision, more companies will start making decisions based on moral and religious values rather than profit maximization. Some of these values can include stronger environmental protection, equal pay, and equal opportunity in the workplace (Neitz 2014).

Neitz's argument is an interesting and compelling one. However, this strategy of corporate morality is unlikely to be as effective as he hopes. Religion and religious liberty occupy a special place in case law precedent that does not transfer to moral values

not grounded in religious belief or practice. While we might see some of this change as the result of *Burwell*, it will come from within the corporation, not from the legal system.

While the change in relationship between shareholder and corporate owners is by no means guaranteed, there are many other legal impacts of the *Burwell* decision. The majority opinion also created three new legal difficulties that later Supreme Courts will have to navigate. To give one example of a new legal hurdle created by *Burwell*, the decision creates a much higher standard that the government has to follow to show a law is the least-restrictive policy available. In the majority opinion, the justices decided that the most straightforward way to ease religious burdens would be for the government to directly provide contraception to its citizens out of its own budget (Melone 2014). Regardless of the cost of such a program, simply letting the government pick up the tab for particular parts of health insurance that might cause religious objections could lead to a much more expansive role for the government (Melone 2014). It could also discourage federal departments from creating their own narrower religious accommodations for fear that they will be used in court cases to prove there is a "less restrictive" way of providing a service (Melone 2014).

The Supreme Court also has to deal with more challenges related to what is considered "essential health care." When Congress passed the ACA, the law created minimum standards for health insurance coverage. One of those standards was the prevision of contraception, but the Court decided that the contraception mandate violated religious freedom. The Supreme Court in its decision decided not to clarify if other exemptions would be required to satisfy religious objections, but it is likely that the Court will have to decide cases on other aspects of health care and religious freedom because of

this case. After all, religious objections to different health care practices are not limited to contraception. Different religious groups object to animal tissue used in surgeries; certain types of in-vitro fertilization and fertility treatments; vaccines containing fetal tissue, blood particles or animal parts; any medical treatment derived from stem cells; mental health treatments; hospice care or any medical intervention at all.[22] Because so many individuals receive health insurance through their employer, thousands of people could be affected if an employer decides not to cover blood transfusions or certain vaccines because of their own religious faith. [23] When the Court decided not to clarify if any other exemptions would be required under RFRA, it opened up a new can of worms for future Court cases.

The most far-reaching change in Supreme Court decision-making that *Burwell v. Hobby Lobby* affected is a new balancing act between religious freedom claims and so-called identity claims. Since the beginning of the Civil Rights Movement in the 1950s, traditionally marginalized groups (people of color, women, and LGBT individuals) have asked the courts for increased legal protection and programs to ensure equal opportunity under the law. Many of cases are anti-discrimination lawsuits, where a member of a minority group sues against an employer or business for treating him or her differently because of some aspect of their identity. In previous decisions, the Court system treated all for-profit companies under the same lens of scrutiny, but that could change if the company was arguing that their religious belief required discriminatory treatment. In amicus briefs, opponents cautioned that if corporations were given religious freedom

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[22] Brief for the American College of Obstetricians and Gynecologists as Amicus Curiae, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014)
[23] Brief for the Jewish Social Policy Action Network as Amicus Curiae, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014)

protection, they might use it as a reason to not comply with equal opportunity employment guidelines.[24] Opponents worry that if the case is interpreted broadly, the Supreme Court could undo decades of civil rights legislation under the guise of protecting religious freedom.

It is not just opponents of the *Burwell* decision that see that giving corporations religious freedom rights could change how anti-discrimination cases are handled. One such supporter of religious freedom rights for corporations is Ronald Colombo. In his recently published book, Colombo tells the story of *Elane Photography v. Vanessa Wilock* (2008), a New Mexico lawsuit. Wilock wanted Elane Photography to take photos at her and her partner's commitment ceremony. However, the photographer refused, saying that her religious faith objected to same-sex couples. The Supreme Court of New Mexico found that Elane Photography violated the New Mexico Human Rights Act (Colombo 2015). Colombo argues that this decision is wrong because it institutes majoritarian values onto people whose viewpoints are less common (Colombo 2015). Wilock should have just used another photography business, rather than insisting on this particular photographer. Colombo gives another example of protected corporate behavior under the First Amendment; he would allow a group of pharmacists to refuse to carry the "morning after pill" as long as a sufficient number of pharmacies still carried the drug (2015: 218).[25] Both of these cases could be seen as examples of discrimination that would be allowable under the *Burwell* decision.

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[24] Brief for the American Civil Liberties Union, et. al. as Amicus Curiae, *Burwell v. Hobby Lobby Stores Inc.* 573 U. S. ____ (2014)

[25] It is important to note that separating out family planning services (like the morning-after pill) from places where people routinely get health care can lead to less effective contraception use and therefore more unplanned pregnancies. See Sonfield (2014).

While neither of these examples is as extreme as refusing to hire someone because of their race or their gender, Colombo does not provide a clear line between behavior that would be protected under religious freedom and behavior that is unfairly discriminatory. Without a clearly defined limit for protected behavior, corporations could hold beliefs that are flawed by our modern standards (racial segregation for example) and the judicial system could protect the corporation and not the individuals affected. Colombo does try and limit the impact that granting religious freedom to for-profit companies would have by arguing that existing exemptions for religion under current law have remained narrow in practice. No religious group has used its exemption to Title VII, for example, to systematically exclude racial minorities from employment. Religious groups only use this exemption to ask candidates about their religious faith in interviews, and to exclude groups (mostly women and LGBT people) from the clergy that they believe should not lead their congregation. Colombo argues that it would be unlikely that for-profit companies would try to expand exemptions based on religious faith to things like racial segregation, because their non-profit counterparts have not (Colombo 2015). Other than the argument that certain things (like racial discrimination) will not happen because no group has tried to use an exemption in that manner, Colombo gives no clear reason why religious individuals could not use an exemption to discriminate against minority groups and why the Court should protect individuals, not business owners, in those cases.

Without judicial relief, groups that feel like they have been discriminated against by a business would have to resort to boycotts or other forms of direct action against corporations to change their policy (Colombo 2015). Many family-owned religious

companies are large and have a wide customer base. Boycotts against these companies can work because of increased negative media coverage, but many of them are unsuccessful at shutting down a business or making them change their employment practices. To give one example, after the decision in *Burwell*, many people decided to boycott Hobby Lobby, either individually or in online petitions circulated by liberal groups (Bradford 2014). Despite the boycott, this year Hobby Lobby made $3.3 billion dollars in revenue, according to Forbes (Hobby Lobby 2014). Once a business has a following, boycotts are hard to organize and likely do not work in the way that organizers hope they would.

While some of these implications are very severe, others interpret the decision narrowly, arguing that only small, "closely held" for-profit corporations could have a religious faith. However, nowhere in the *Burwell* decision is a "closely held family corporation" defined. In fact, different agencies of the federal government have different definitions of a closely held corporation. The IRS defines it as a corporation "where more than half of the stock is owned (directly or indirectly) by five or fewer individuals at any time in the second half of the year" (Desilver 2014). Hobby Lobby is actually a different kind of corporation, an S corporation, that cannot have more than 100 shareholders overall, but where the family itself all counts as one shareholder. U.S. securities law makes the distinction on whether or not a company is closely held by whether or not the corporation has more than 2,000 shareholders, a completely different rule than the IRS (Desilver).

Because of these different definitions, companies that are much larger than Hobby Lobby can claim to be "closely held" including Cargill, one of the largest private

corporations in the country (Desilver 2014). If Cargill decides to not cover a product on their health insurance plan because of religious reasons, all 143,000 of its employees would be affected by the change (Desilver 2014). Hobby Lobby, by contrast, only has 23,000 employees (Hobby Lobby, 2014). Neither business is very small; the decisions of these "closely held" corporations could impact more people than the Court might have intended it to. Companies that are not closely held or even private could possibly claim free exercise rights as well. The Supreme Court in its decision tore down the difference between non-profit and for-profit corporations, yet did not explain why its decision had to be limited to these closely held corporations. A future Court could decide that the distinction is unworkable and grant *all* corporations religious freedom rights, even if they have thousands of unrelated shareholders (Neitz 2014).

The legal system is designed to be slow moving. While we have seen some challenges to the contraception mandate, corporations have been reluctant to declare a new religious faith or ask for exemptions to other areas of employment law- at least so far. However, companies might find it beneficial to declare a religious faith as more groups begin to ask for protections based on identity claims. Deciding whether a group should get specific protections based on one characteristic is already difficult. By adding in religious faith into the conversation, *Burwell* only complicated that process. The Court in later cases will have to decide which claim is stronger: faith or individual identity.

Conclusion

In considering *Burwell v. Hobby Lobby*, I examined what kind of impacts this decision will have on individual employees, corporations and on free exercise law more generally. I found that this decision, while having some support from previous Court

decisions, is largely unprecedented. Even though the full effect of the decision is not clear, the Court will undoubtedly hear future legal challenges based on this decision. After all, hundreds of companies are in the federal court system right now trying to get their exemption to the contraception mandate. However, the issues in *Burwell* are much broader than contraception. By introducing the concept of religious freedom for for-profit corporations, the Court opened up a multitude of new legal questions, chief among them this new balancing act between corporate religious freedom on one hand and individual anti-discrimination claims on the other. It is unclear whether the Supreme Court will hear similar religious freedom challenges by corporations. Regardless of the outcome, the Court will have to weigh these arguments in the future, and that is the chief impact of *Burwell v. Hobby Lobby*.

The recent debate over state-level RFRAs in Indiana and Arkansas spells out another impact of the *Burwell* ruling. While fully analyzing the connections between the Court's ruling and the actions of these state legislatures would require another paper, it is fairly clear that the public debate over the *Burwell* decision brought RFRA back into the public discourse. Certain religiously observant state legislators saw how the federal version of RFRA provided a wide shield of protection for actions that are based on religious faith for both companies and, more importantly in this case, individuals. In fact, in their original form, these state-level RFRA bills passed in the last few weeks could shield individuals from charges of discrimination against other people if they did not agree with their "lifestyle." The law in Indiana (the one in Arkansas had not passed at the time of this writing) sparked massive controversy, and state legislators are currently in the process of adding in anti-discrimination portions to it because of the backlash. While

the Supreme Court certainly did not intend to spark a wave of new state-level RFRAs, these bills show a massive unintended consequence of the ruling and a further area for research.

It will also be interesting to see whether future Supreme Courts embrace or ignore new challenges to the issues left unresolved by the Court's *Burwell* ruling. While this paper highlighted a number of possible legal ramifications from the *Burwell* case, the Supreme Court may never hear them because the Court has total control over the cases it hears. If a case does make it on appeal to the Supreme Court, the justices could refuse to grant cert and let the lower federal courts decide on how to best equalize corporate religious freedom and employee identity claims. While it is unclear if the Supreme Court will definitively rule on these new legal challenges, this new balancing act between corporate religious freedom and individual anti-discrimination claims will substantially affect free exercise cases moving forward.

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