

## Comments

# Standing Before the Law: A Perspective on the Intersection of Law and Society

By ALEXANDER GUNNEY\*

### Introduction

CHIEF JUSTICE MARSHALL ONCE EXPLAINED that a “corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>1</sup> He continued that as a legal fiction, a corporation possesses only those rights and powers that are conferred upon it through its creation—expressly or incidental to its purpose.<sup>2</sup> There has been a shift in this view since Chief Justice Marshall’s proclamation in the 1800s.<sup>3</sup> Recently, courts have extended First Amendment rights to corporations.<sup>4</sup> Seemingly in conflict with this expansion of rights, courts have previously identified “purely personal” constitutional guarantees unavailable to corporations, which “depend[ ] on the nature, history, and purpose of the particular constitutional provi-

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1. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

2. *Id.*

3. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 343 (2010) (rejecting the argument that corporations should be treated differently under the First Amendment because such associations are not natural persons); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (2013) (“Such corporations can be ‘persons’ exercising religion for purposes of the statute. Second, as a matter of constitutional law, Free Exercise may extend to some for-profit organizations.”); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014) (finding nothing in the text of the Religious Freedom Restoration Act (RFRA) or existing Supreme Court precedent that would preclude a corporation from exercising religious rights).

4. *Citizens United*, 558 U.S. at 342–43.

sion.”<sup>5</sup> To settle this conflict, the Supreme Court of the United States granted certiorari in two cases to address whether the First Amendment permits a corporation to seek exemption from the Affordable Care Act’s (ACA) contraception mandate as an impermissible infringement on its free exercise of religion.<sup>6</sup>

This Comment will analyze the contraception cases by using theories explained in *The Commonplace of the Law: Stories from Everyday Life* that identify and reconcile competing approaches regarding the meaning and efficacy of law in contemporary society.<sup>7</sup> *The Commonplace of the Law* explores the intersection of law and society, and presents three theories that demonstrate how society’s perception of the law impacts its outcome.<sup>8</sup> This approach is a significant departure from a classic jurisprudential analysis. A hybrid approach, examining the issues from a philosophical, sociological, and functional perspective, helps understand not only the legal result, but also the Court’s underlying intellectual journey. A fuller understanding of the forces at play in the U.S. legal system rationalizes the emerging jurisprudence and provides a framework for challenging the inherent structure. Part I argues that the First Amendment protects a corporation’s practice of religion using the philosophy of Franz Kafka’s parable “Before the Law.”<sup>9</sup> Part II explores how a corporation can work with the law by using its financial resources and the established socio-legal system to manipulate unprecedented outcomes. Part III identifies how amici briefs, with the aid of personal stories from affected parties, work against the law to disrupt the existing power structure. Ultimately, this Comment argues that the use of storytelling provides a middle ground that harmonizes the frameworks presented in Kafka’s

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5. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978).

6. *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 134 S. Ct. 678 (2013); *Burwell*, 134 S. Ct. at 2759 (“[D]ecid[ing] whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners.”).

7. PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998).

8. JOHN J. BONSIGNORE ET AL., *BEFORE THE LAW: AN INTRODUCTION TO THE LEGAL PROCESS* xi–xii (8th ed. 2006).

9. FRANZ KAFKA, *THE TRIAL: DEFINITIVE EDITION* (Willa & Edwin Muir trans., Alfred A. Knopf, A Division of Random House, Inc. 1984) (1937), reprinted in BONSIGNORE ET AL., *supra* note 8, at xiii–xv. Franz Kafka was a Czechoslovakian-born lawyer and writer, who often found the practice of law conflicted with his philosophical views, which permeate much of his writing.

parable—“Before the Law,” “With the Law,” and “Against the Law.”<sup>10</sup> This Comment contributes to the expanding body of literature concerned with the perceived recent corporatization of U.S. constitutional law. The Comment calls for additional research into the subjective effect of legal outcomes on individuals and calls for the development of an approach better able to present these impacts, in the hopes of creating a more responsive judiciary.

## I. Before the Law

This section considers the issues raised before the Supreme Court in *Burwell v. Hobby Lobby*<sup>11</sup> and *Conestoga Wood Specialties Corp. v. Burwell*<sup>12</sup> (collectively *Burwell*) with the help of Franz Kafka’s parable, “Before the Law.”<sup>13</sup> Although a nearly century old parable might not be considered a conventional analytical tool, Kafka’s story captures the profound psychological effect that law, as an institution, delivers. In the story, a man begs for admittance to “the Law,” but the doorkeeper maintains that he cannot admit the man.<sup>14</sup> The doorkeeper explains that he is but one of many doorkeepers, all of which are more powerful than him.<sup>15</sup> The man thinks that the Law “should be accessible to every man and at all times,” but after hearing that behind the first door are other doorkeepers, the man decides to wait for permission.<sup>16</sup> The man waits for years, occasionally engaging in brief conversation with the doorkeeper, but eventually dies waiting for admittance.<sup>17</sup> Just before the man dies he asks the doorkeeper why, in all the years he waited before the Law, nobody else had come seeking admittance.<sup>18</sup> The doorkeeper responds: “No one but you could gain admittance through this door, since this door was intended only for you. I am now going to shut it.”<sup>19</sup>

The parable is intentionally enigmatic and illustrates the dual nature of Kafka’s concept of legality.<sup>20</sup> On the one hand, law is objective,

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10. *Id.*

11. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

12. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

13. KAFKA, *supra* note 9.

14. *Id.* at xiii.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at xiv.

19. *Id.*

20. EWICK & SILBEY, *supra* note 7, at 75.

impartial, and indifferent “to the particularities of biography and personality.”<sup>21</sup> Kafka’s story places the man perpetually outside of the Law and unable to gain admittance.<sup>22</sup> The man is not alone in his view that the law is remote and separate from one’s daily life.<sup>23</sup> On the other hand, the parable reveals the illusory nature of the law’s authority, which the man’s cooperation and deference sustain.<sup>24</sup> While remaining outside of the Law, the doorkeeper reveals the vital and direct connection between the man and the law; indeed, the door was intended only for the man.<sup>25</sup> Thus, standing before the law gives it an authority that is severed and independent of the social practices and relationships that enable it.<sup>26</sup> Despite its direct connection with individuals, the law appears “external, unified, and objective.”<sup>27</sup> Law and daily life are “seen in juxtaposition and possibly opposition, rather than connected and entwined.”<sup>28</sup> The man died before the Law because he mistakenly believed entering required some special permission, when in reality the entrance was intended only for the man and closed upon his death.<sup>29</sup>

Underlying Kafka’s parable is the concept of reification—a process that legitimizes abstract concepts by treating them as though they were real, concrete manifestations.<sup>30</sup> Thus, the man gives the law the power to exclude him by conceptualizing it as something concrete and substantive. The man’s death highlights this power transfer.<sup>31</sup> When standing before the law, people do not see themselves as the authors of the law, but rather see the law as authors of individuals, their behaviors, needs, desires, and values.<sup>32</sup> The reification process separates law from daily life through the loss of agency of the individual.<sup>33</sup> This is illustrated through the invocation of “supernatural beings as causal agents determining the affairs of the world,” which is

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21. *Id.* at 76.

22. *Id.*

23. *Id.* at 61, 68 (telling stories of Rita Michaels and Dwayne Franklin, who describe their perception of the courts as distanced from and outside of their daily life).

24. *Id.* at 75.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 76.

29. *Id.* at 77.

30. *Id.* at 78–79.

31. *Id.* at 79.

32. *Id.* at 80.

33. *Id.* (“[P]eople endow the law with the capacity to construct those persons and groups.”).

the quintessential example of reification.<sup>34</sup> When standing before the law, the law becomes a supernatural being that dictates life, rather than a human-created system of organization and regulation.<sup>35</sup>

Viewing the legal issue presented in *Burwell*—whether a corporation can seek an exemption from the ACA’s contraception mandate on religious grounds<sup>36</sup>—through the lens of Kafka’s parable supports the view that a corporation can hold and practice religious beliefs. The judicial ability to confer constitutional rights upon non-human entities can be understood as the result of the reification process, which is evident in First Amendment precedent.<sup>37</sup>

In *First National Bank of Boston v. Bellotti*, a seminal First Amendment case, the Court held that First Amendment protection extends to corporations.<sup>38</sup> To reach this conclusion, the Court reified the First Amendment: “The proper question therefore is not whether corporations ‘have’ First Amendment rights. . . . Instead, the question must be whether [the statute in question] abridges expression that the First Amendment was meant to protect.”<sup>39</sup> The Court, through a reified First Amendment, extends rights intended for the protection of individuals to serve the corporate fallacy.<sup>40</sup>

The Court’s reasoning in *Bellotti* closely mirrors the reasoning seen in Kafka’s “Before the Law.” In the same way that the man created the power that he is controlled by, and ultimately succumbed to, the Court in *Bellotti* is constrained by its own construction of the First Amendment. The Law, which is the First Amendment in *Bellotti*, gained independence from its creators.<sup>41</sup> By rewording the issue—shifting the focus of the inquiry away from the corporation and toward the constitutional guarantees—the Court changed the First Amendment from a set of rights that a corporation may possess to a

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34. *Id.* at 81.

35. *Id.* at 82 (“[D]ehumanization is achieved by locating power within social institutions, such as the law, the state, the economy . . .”).

36. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

37. See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”).

38. *Id.* at 776.

39. *Id.*

40. Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections As People?*, 39 W. ST. U. L. REV. 203, 214–15 (2012); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

41. EWICK & SILBEY, *supra* note 7, at 80 (“Rather than seeing persons as the authors of the law, people understand the law as the author of individuals . . .”).

causal agent that compelled protection.<sup>42</sup> The Court subtly shifts from a view of the First Amendment as something that a corporation may or may not “have” to an interpretation in which the First Amendment *protects* a set of rights.<sup>43</sup> Thus, the First Amendment becomes a causal actor that protects, rather than just an abstract ideal. The uncertainty regarding the appropriate conception of the First Amendment is identifiable in the Third and Tenth Circuit’s distinct inquiries, and helps account for the competing outcomes in *Hobby Lobby* and *Conestoga*.<sup>44</sup>

Once law is reified, it obtains a sense of impartiality and objectivity; it disassociates from the historical, biographical, and social influences, and thus is not self-interested.<sup>45</sup> As an impartial entity, independent of its creators, the reification process leads to an understanding of the First Amendment as located within a set of rules and regulations that “seem to produce effects independent of human action and afford legal decision makers little choice in interpreting. . . matters before them.”<sup>46</sup>

The lack of power is highlighted in *Citizens United v. FEC*, where the Court relied on *Bellotti* to overturn previously upheld limits on corporate expenditures.<sup>47</sup> The Court, by asserting the constraints placed upon it by the First Amendment, struck down two prior cases, demonstrating that the law by “limit[ing] and constrain[ing] human action also makes action possible.”<sup>48</sup> Like the man in Kafka’s parable who ascribes ultimate power to the gatekeeper, the Supreme Court,

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42. *Id.* at 79 (“In part, reification is achieved through language.”).

43. *Bellotti*, 435 U.S. at 776.

44. The Third and Tenth Circuits appear to articulate different conceptions of the First Amendment’s proper analytical role. The Tenth Circuit concluded that corporations enjoy religious protection after framing the inquiry as “requir[ing] us to determine whether the [RFRA] and the Free Exercise Clause protect the plaintiffs.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). The Third Circuit, on the other hand, concluded that corporations do not enjoy religious protection after framing the inquiry as “whether a for-profit, secular corporation is able to engage in religious exercise under the Free Exercise Clause of the First Amendment and RFRA.” *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 381 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

45. EWICK & SILBEY, *supra* note 7, at 83 (“When people describe what we are calling reified legality, they repeatedly refer to the law as impartial and objective.”).

46. *Id.* at 88.

47. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 355 (2010) (quoting *Bellotti*, 435 U.S. at 792 n.31) (“[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.”).

48. EWICK & SILBEY, *supra* note 7, at 91. Interestingly, *Citizens United*, a 2010 case, overturned a 2003 case and a 1990 case, by relying on a 1978 Supreme Court case, *Bellotti*. While *Bellotti* was binding on all three decisions, the dynamic factor was the composition of

too, evokes the First Amendment's plenary reach, but in a more selective and calculated manner.

The opinion, written by Justice Kennedy, echoes the view of the First Amendment as a causal actor, rather than as a set of rights. "There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations."<sup>49</sup> The Court boldly suggests, without any precedential support, the central idea of reification—that the First Amendment is the author of individuals, rather than individuals being authors of the First Amendment.<sup>50</sup> As such, the First Amendment has the power to permit or to prohibit certain actions, leaving the Court only the incidental power to announce what the First Amendment does and does not find permissible. That power—which the Court assigned to the First Amendment in *Bellotti*<sup>51</sup>—both obligates and constrains judicial action in much the same way that the man in Kafka's parable both gave power to, and was controlled by, the law.<sup>52</sup>

Further, this lack of influence can be seen in the multiple doorkeepers. In Kafka's parable, the first doorkeeper is only one in a series of increasingly powerful doorkeepers that "renders unnecessary, the authority of any particular doorkeeper."<sup>53</sup> Since the Supreme Court is constrained by the principle of *stare decisis*, lower courts deny any power to issue holdings contrary to the superior doorkeeper.<sup>54</sup> The Tenth Circuit opinion in *Hobby Lobby* explains that it sees "no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression."<sup>55</sup> This abdication of power to superior doorkeepers, like in Kafka's parable, is illusory, since other courts have reached the opposite conclusion.<sup>56</sup>

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the Supreme Court. This further illustrates that the constraints on law—precedent—can be used to make action possible.

49. *Citizens United*, 558 U.S. at 353.

50. EWICK & SILBEY, *supra* note 7, at 80.

51. *Bellotti*, 435 U.S. at 776.

52. EWICK & SILBEY, *supra* note 7, at 75.

53. *Id.* at 89.

54. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

55. *Id.* (referencing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342–55 (2010)).

56. *See, e.g., Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) ("[T]he Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion.").

How, then, do two courts, both representing the doorkeepers in Kafka's parable, come to entirely opposite views on the same issue? This difference is attributable to a second view in the parable, referred to as *With the Law*.<sup>57</sup> Whereas *Before the Law* envisions law as separate from everyday life, *With the Law* sees the law as being "enframed by everyday life."<sup>58</sup>

## II. *With the Law*

*With the Law* is a theory that understands legality as a tool that may be used to further one's own self-interests.<sup>59</sup> In contrast with *Before the Law*, which envisions legality as outside of everyday life,<sup>60</sup> *With the Law* frames the law as a collection of actors, organizations, rules, and procedures that can be used to manage daily life.<sup>61</sup> Where the reification process removes any self-interest and frames law as objective and impartial, *With the Law* recognizes self-interest as a legitimate end.<sup>62</sup> In doing so, the ability to use the law to serve one's own interests "encompasses an understanding of legality as available to others as well."<sup>63</sup> Thus, when law is placed in the social context of everyday life, it is no longer objective and impartial, and legal outcomes "must be open ended and dependent upon the particularities of each case."<sup>64</sup>

In this sense, the law may be viewed as a game, in which the rules are "designed with degrees of freedom around which outcomes are produced but not predetermined."<sup>65</sup> The rules of the game also dictate relevance.<sup>66</sup> For example, a game of checkers may be played with marble divots or bottle caps, so long as each player can identify her pieces and the other material rules are followed.<sup>67</sup> This provides freedom while ensuring some formal equality and closure to the issues.<sup>68</sup> The duality of law reappears in *With the Law* through the paradoxical guarantees of contingent outcomes and formal closure.<sup>69</sup> *With the*

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57. EWICK & SILBEY, *supra* note 7, at 108.

58. *Id.* at 48.

59. *Id.* at 131.

60. *Id.* at 129.

61. *Id.* at 131.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 136.

66. *Id.*

67. *Id.* at 136-37.

68. *Id.* at 131.

69. *Id.* at 146.



Law, or a game-like view of legality, creates a space within which action can occur, as opposed to Before the Law, where the law exists outside of daily life and power is abdicated.<sup>70</sup>

In the game-like view, the “rules of due process provided by the American Constitution and elaborated through statutes and court decisions provide a means of keeping the substance of decisions uncertain while simultaneously ensuring that some outcome will be produced.”<sup>71</sup> This game-like view of the law is exemplified in *Conestoga Wood*, where the Third Circuit appears to announce its deviation from the set path that corporations receive protection under the First Amendment.<sup>72</sup> Whereas the Tenth Circuit renounces any power to challenge the Supreme Court in *Hobby Lobby*,<sup>73</sup> the Third Circuit in *Conestoga Wood* follows the game-like approach and uses the “rules,” or in this circumstance case law, to create space (contingency) in which the court may issue a formal ruling (closure).<sup>74</sup> Interestingly, *Conestoga Wood* relied on *Bellotti* to limit First Amendment protection, whereas *Citizens United* used it to expand First Amendment protection to corporations.<sup>75</sup>

In following the formal rules of due process, the *Conestoga Wood* decision highlights another aspect of the game-like theory—the bracketing of the everyday world.<sup>76</sup> Even though With the Law is situated within daily life, the rules “do not neatly correspond to the rules and

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70. *Id.* (“Whereas a reified view of law understands substantive guidelines . . . as limiting and at times preempting human action, the game-like view . . . interprets rules as creating space . . . within which action can occur and advantage be taken.”).

71. *Id.* at 147.

72. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 383–84 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1987) (“Thus, we must consider whether the Free Exercise Clause has historically protected corporations, or whether the ‘guarantee is “purely personal” or is unavailable to corporations’ based on the ‘nature, history, and purpose of [this] particular constitutional provision.’”)).

73. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (“We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”).

74. *Compare Conestoga*, 724 F.3d 377 (citing *Citizens United* thirteen times within a ten page span), *with Hobby Lobby*, 723 F.3d 1114 (citing *Citizens United* only twice in a forty-seven page majority opinion).

75. *Conestoga*, 724 F.3d at 383 (citing *Bellotti*, 435 U.S. at 778 n.14); Zachary J. Phillips, *Non-Profits: Why For-Profit, Secular Corporations Cannot Exercise Religion within the Meaning of the First Amendment*, 46 CONN. L. REV. ONLINE 39, 58 (2014) (relying on *Bellotti*, and distinguishing *Citizens United* on the grounds that Supreme Court precedent supported the position that there is a long history of protecting corporations’ rights to *free speech*) (emphasis added).

76. EWICK & SILBEY, *supra* note 7, at 141.

norms that operate elsewhere in social life.”<sup>77</sup> The rules of due process “distinguish the law’s moral space from the everyday sphere of action where the pursuit of self-interest may be modulated by ethical considerations. . . .”<sup>78</sup> In other words, the framework of law allows people to ignore—and perhaps act contrary to—the moral rules that govern daily life and replace them with the rules of the courts.

The contraception cases illustrate this bracketing. Surprisingly absent from *Conestoga Wood*, and *Hobby Lobby* for that matter, is any discussion of the parties directly impacted by the decisions—women.<sup>79</sup> Underlying both opinions is the moral interest in preserving public health and ending gender discrimination, however, neither case discusses at any length the impacts of the decision on women.<sup>80</sup> The rules that dictate relevance in the game-like theory also “suspend or render irrelevant many of the [moral] everyday constraints on unmitigated self-interestedness, such as ethical or practical considerations dictating some degree of empathy or reciprocity.”<sup>81</sup> Thus, even though the decision in *Conestoga Wood* may be more beneficial to the groups impacted, it is difficult to identify protection of women’s rights as the motivating factor.<sup>82</sup>

This ability to bracket morality also underscores a criticism of *With the Law*. In *With the Law*, the rules of the game specify what does and does not matter.<sup>83</sup> As such, the moral impact on women is

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77. *Id.*

78. *Id.*

79. See generally Karen Gantt, *Balancing Women’s Health and Religious Freedom Under the ACA*, 17 QUINNIPIAC HEALTH L.J. 1 (2013–2014) (considering the numerous lawsuits filed by religious organizations over the contraceptive mandate in the context of the tension between the government’s ability to legislate for the public interest and religious liberty).

80. See Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006) (“Government may substantially burden a person’s free exercise of religion only if it demonstrates application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering the governmental interest.”); *Conestoga*, 724 F.3d at 412 (Jordan, J., dissenting) (“Preserving public health and ending gender discrimination are indeed of tremendous societal significance.”); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013) (“The government asserts two interests here: ‘the interest in [1] public health and [2] gender equality.’ Aple. Br. at 34.”); Adam Sonfield, *Contraception: An Integral Component of Preventative Care for Women*, 13 GUTTMACHER POL’Y REV. 2, 4 (2010), available at <http://www.guttmacher.org/pubs/gpr/13/2/gpr130202.pdf> (discussing the social, economic, and medical costs of unintended pregnancies).

81. EWICK & SILBEY, *supra* note 7, at 141.

82. Phillipps, *supra* note 75, at 58 (“The Third Circuit relied on cases emphasizing religious liberty for *individuals* in concluding that no such history existed for *corporations*.”).

83. EWICK & SILBEY, *supra* note 7, at 136.

not the focus of the framework of Free Exercise claims.<sup>84</sup> It is because of this that the game-like theory of legality results in the commodification of the law.<sup>85</sup> Lawyers are seen as “experienced gamesmen who shape the process of justice.”<sup>86</sup> First, the rules of the game are not easily understood, which favors those familiar with the game.<sup>87</sup> And, to the extent that the rules of the game may be even-handed or favor the “have-nots,” the game’s organization and the imbalance in resources favor repeat players or those representing the “culturally dominant interests.”<sup>88</sup>

The Supreme Court’s recognition of an increasingly expansive First Amendment and a legal system driven by self-interest create ample opportunity for corporations to assert religious exemptions. Selective challenges to “morally questionable issues” become more effective,<sup>89</sup> and have the potential to drastically alter well-established constitutional precedent. *Against the Law* suggests an approach—focusing on the stories of individuals impacted by the Court’s corporate-centric decisions—that can better focus judicial decision making and restore to the law a much needed human element.

### III. Against the Law

Whereas *Before the Law* and *With the Law* envision legality as having some relationship with daily life—either independent from it<sup>90</sup> or enframed by it<sup>91</sup>—*Against the Law* sees participation in legality through resistance of the law.<sup>92</sup> This resistance takes several forms—retaining a sense of dignity and humor during legal proceedings, exacting revenge, or avoiding the law and its costs, even if only momentarily.<sup>93</sup> Resistance of the law is defined through three key features:

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84. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006) (“Government shall not substantially burden a person’s exercise of religion . . .”).

85. EWICK & SILBEY, *supra* note 7, at 142–43 (discussing Alan Fox, who views his legal skills as a commodity to be distributed at his will).

86. *Id.* at 153.

87. BONSIGNORE ET AL., *supra* note 8, at 86. (“Finally, the rules are sufficiently complex and problematic . . . that differences in the quantity and quality of legal services will affect capacity to derive advantages from the rules.”).

88. *Id.*

89. Gantt, *supra* note 79, at 29.

90. EWICK & SILBEY, *supra* note 7, at 47. (“[L]egality is envisioned and enacted as if it were a separate sphere from ordinary social life . . .”).

91. *Id.* at 48. (“Rather than being discontinuous from everyday life and its concerns, the law is enframed by everyday life.”).

92. *Id.*

93. *Id.* at 48–49.

first, an understanding of a power disparity; second, a consciousness of opportunity; and third, an assessment of the disparity and available opportunities.<sup>94</sup> In contrast to standing Before the Law, resistance sees legality as an “ascendant power to which one conforms.”<sup>95</sup> Rather than viewing legality as a game, it is a “net in which [people] are trapped and within which they struggle for freedom.”<sup>96</sup>

In “plotting to remake an unfair situation as it stands, resistance lies at the intersection of the power of legality and the possibilities for escaping it.”<sup>97</sup> Those who stand against the law experience “law’s failure to acknowledge or take their situations into account as subverting, rather than ensuring, justice.”<sup>98</sup> Legality is not blind, as in the reified view of law; instead, legality “is whatever those with power—the judge, the police, the utility company, the supervisor—say is legal.”<sup>99</sup> Thus, resistance may be a conscious attempt to reunite legality and justice.<sup>100</sup>

In terms of the three defining features of resistance, the amici brief for Lambda Legal (hereafter “Lambda Legal” or “amici brief”) presents interesting arguments that should be classified as resistance.<sup>101</sup> Indeed, the arguments demonstrate a consciousness of an inequality in power, an opportunity to intervene, and an assessment of imbalance that produced the situation.<sup>102</sup> Lambda Legal’s ultimate argument focuses on the impact of the Supreme Court’s review of the *Hobby Lobby* and *Conestoga* cases: “Granting the Companies the exemptions they seek would. . . open the door to increased use of religion to deny LGBT persons, those with HIV, and other vulnerable minorities equal compensation, health care access, and other equitable treatment in commercial interactions.”<sup>103</sup>

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94. *Id.* at 183.

95. *Id.* at 183–84.

96. *Id.* at 184.

97. *Id.*

98. *Id.* at 190.

99. *Id.* at 191.

100. *Id.* at 193 (“Other respondents also described encounters that undermined their sense of any connection between legality and justice . . .”).

101. Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae Supporting the Government, *Sebelius v. Hobby Lobby*, 133 S. Ct. 641 (2012) (No. 13-354), 2014 WL 334441 [hereinafter Brief for Lambda Legal].

102. *Id.* at \*3–7.

103. *Id.* at \*6–7.

### A. Understanding of a Power Disparity

A consciousness of being less powerful in a relationship of power requires a “particular understanding or positioning of self and others, of being up against something or someone.”<sup>104</sup> In the amici brief, Lambda Legal identifies itself as “the nation’s leading nonprofit advocacy organization working to protect and advance civil rights of lesbian, gay, bisexual, and transgender (LGBT) people.”<sup>105</sup> The amici originated to challenge a range of inequalities, from employment discrimination to disparities in access to healthcare.<sup>106</sup> The brief identifies that the exemption for “for-profit, secular businesses from federal requirements” would materially harm society, “and, more specifically, the related individual interest in managing one’s own reproductive functions and health.”<sup>107</sup> Thus, Lambda Legal’s awareness of the power imbalance is not limited to the LGBT community as “being up against” the law, but includes any group that has been discriminated against “based on sex, gender identity and expression, sexual orientation, race, national or ethnic origin, age, disability, religion or political views.”<sup>108</sup> However, the amici brief uses this recognition of power inequity among many groups as an opportunity to intervene on behalf of LGBT rights.<sup>109</sup>

### B. Consciousness of Opportunity in Which One Might Intervene and Turn to One’s Advantage

Although neither *Hobby Lobby* nor *Conestoga* directly discusses the rights of the LGBT community, Lambda Legal wrote in support of the government as a means of turning a power imbalance into an advantage.<sup>110</sup> This element of resistance entails “a consciousness of both constraint and autonomy, of power and possibility.”<sup>111</sup> As seen in the previous section, Lambda Legal understands the imbalance affecting several groups,<sup>112</sup> and uses this imbalance as an opportunity to further

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104. EWICK & SILBEY, *supra* note 7, at 183.

105. Brief for Lambda Legal, *supra* note 101, at \*1 (also supported by Gay and Lesbian Medical Association and Pride at Work—AFL-CIO).

106. Brief for Lambda Legal, *supra* note 101, at \*1–2.

107. *Id.* at \*4.

108. EWICK & SILBEY, *supra* note 7, at 183; Brief for Lambda Legal, *supra* note 101, at \*3.

109. Brief for Lambda Legal, *supra* note 101, at \*6 (“Of particular interest to Amici are laws protecting LGBT persons and those with HIV from discrimination in commercial contexts, including health care services.”).

110. *Id.* at \*6.

111. EWICK & SILBEY, *supra* note 7, at 183.

112. Brief for Lambda Legal, *supra* note 101, at \*3 (“Pride at Work opposes all forms of discrimination . . .”).

the rights of the LGBT community.<sup>113</sup> The amici brief demonstrates the dichotomy of constraint and autonomy through its use of case law.<sup>114</sup> Much like the game-like theory uses law to create space,<sup>115</sup> the Lambda Legal brief works within the framework that it is challenging to achieve its resistance.<sup>116</sup>

Lambda Legal resists the traditional First Amendment framework, which fails to consider the impacts on third parties, by focusing the Court's attention on the consequences of its decision.<sup>117</sup> In stories of resistance, the law is often described "as a giant, hobbled by its size and blinded by its formality."<sup>118</sup> In this view, the size of the law renders it unable "to respond to the sorts of ordinary troubles that characterize everyday life."<sup>119</sup> Thus, the law is "[m]ired in formal procedure, captured by bureaucratic structures and. . . unable to effectively resolve disputes, recognize truth, or respond to injustice."<sup>120</sup> The amici brief resists this criticism by grounding the arguments in personal stories.<sup>121</sup> The brief introduces Kara, a lesbian whose doctor told her that her sexual orientation was "'against the Bible, [and] against God[.]'"<sup>122</sup> Another individual, Joe, tells a story of visiting his doctor for depression after breaking up with his boyfriend of eight years, and having his doctor recommend that Joe contact a minister "who could help gay men repent and heal from sin" and that he should date a woman to "get over" his depression.<sup>123</sup>

The amici brief further challenges and resists legality by recognizing a power imbalance and using that imbalance to assert non-traditional legal arguments.<sup>124</sup> This form of resistance is similar to the example explained in *Commonplace of the Law*, in which Egyptian wo-

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113. *Id.* at \*6 ("Of particular interest to Amici are laws protecting LGBT persons . . .").

114. EWICK & SILBEY, *supra* note 7, at 183; Brief for Lambda Legal, *supra* note 101, at \*21 (referencing *United States v. Lee*, 455 U.S. 252, 261 (1982)).

115. *See supra* Section II.

116. Brief for Lambda Legal, *supra* note 101, at \*22 ("This Court's conclusion in *Lee* is the governing rule.").

117. *See supra* Section II (discussing that the legal framework of Free Exercise claims do not consider the impacts on third parties).

118. EWICK & SILBEY, *supra* note 7, at 196.

119. *Id.*

120. *Id.*

121. Brief for Lambda Legal, *supra* note 101, at \*32.

122. *Id.* at \*32-33.

123. *Id.* at \*33.

124. *Id.* at \*30 ("Amici sound alarm bells here because discriminatory limitations on family health insurance . . . already contribute to persistent health disparities affecting the constituencies they represent.").

men donned veils in order to continue working in the public sphere.<sup>125</sup> Through the use of “a traditional symbol of female subordination,” Egyptian women were able to “achieve a level of autonomy and financial security” that otherwise would have been difficult to attain.<sup>126</sup> In the same way, Lambda Legal uses the legal formality of an amici brief in order to promote the rights of groups that are not parties to the litigation, which is a unique form of resistance.<sup>127</sup>

### C. Assessment That Power Produces Unfair Constraints and Opportunities

Resistance involves a synthesis that the power imbalance produces unfair constraints as well as unique opportunities.<sup>128</sup> Not every act of defiance is resistance; resistance “involves a justice claim and an attribution of responsibility for the unfair situation.”<sup>129</sup> In the Lambda Legal brief, responsibility for the imbalance is attributed to religiously motivated discrimination, and to those who perpetrate it.<sup>130</sup> The brief takes the stance that religious beliefs cannot be used to subordinate the rights and autonomy of others.<sup>131</sup> And, “permitting owners of for-profit companies to interject themselves into employees’ home lives . . . would subvert compelling interests in autonomy, public health, and gender equity served by the rule the Companies resist.”<sup>132</sup> The brief continues that the corporations’ “proposed elevation of religious rights to the detriment of others’ needs would, in addition to its adverse effects for women’s health access and equality, worsen circumstances for LGBT people. . . .”<sup>133</sup> Ultimately, Lambda Legal argues that if the Court recognizes a religious exception to the ACA, the ripple effects would be long-lasting and potentially disastrous.<sup>134</sup> Thus, the imbalance, originating in religious discrimination, is furthered by the corporations’ requested religious exemption, because “the princi-

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125. EWICK & SILBEY, *supra* note 7, at 186.

126. *Id.* at 186.

127. *Id.* at 183 (“[R]esistance is not defined by the means that are employed, nor by whether the action effectively realizes its objectives.”).

128. *Id.*

129. *Id.*

130. Brief for Lambda Legal, *supra* note 101, at \*25.

131. *Id.*

132. *Id.* at \*29.

133. *Id.* at \*31.

134. *Id.* at \*35 (“[T]he Companies’ quest for religious exemptions for commercial activity poses a potentially devastating threat with distressing historical echoes.”).

ple the Companies offer is not necessarily confined to employer-provided health insurance or medical services.”<sup>135</sup>

Consideration of the possible long-term effects focuses the assessment of the power imbalance. If accepted, *Hobby Lobby* and *Conestoga Wood*'s argument “would transform our society into one in which for-profit businesses generally could claim religious immunity from the full spectrum of generally applicable laws protecting people.”<sup>136</sup>

The claim for justice, therefore, is the “insistence that large commercial enterprises provide comprehensive health insurance to all of their employees.”<sup>137</sup> But, in the same breath, the brief acknowledges that “[r]eligious freedom is a core American value and burdens on it can make for hard cases.”<sup>138</sup> Although the means are clearly biased, the goal of the amici is one shared by both parties: “a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation.”<sup>139</sup> How, then, should the opposing views be reconciled?

#### IV. Reconciliation

Reconciliation of opposing arguments at the heart of *Hobby Lobby* and *Conestoga Wood* may only be accomplished by abandoning “the sharp distinctions that [have] been drawn between the concepts of structure and consciousness.”<sup>140</sup> The reconciliation of legality requires the harmonious coexistence of all the previously discussed theories, all at once—legality’s power “rests on its ability to be played like a game, to draw from and contribute to everyday life, and yet exist as a realm removed and distanced from the commonplace affairs of particular lives.”<sup>141</sup>

The duality that appeared in several theories of legality reappears in the reconciliation. It is the marginalized whose experiences are least likely to have a voice in the culturally dominate schema of law and who are most restricted in their access to the law, but are most subject to its power.<sup>142</sup> As a response, it is their voices that most need

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135. *Id.* at \*34.

136. *Id.* at \*21.

137. *Id.* at \*36.

138. *Id.*

139. *Id.*

140. EWICK & SILBEY, *supra* note 7, at 224.

141. *Id.* at 234.

142. *Id.* at 234–35.



to be heard.<sup>143</sup> An opportunity to rectify this power imbalance comes in the form of storytelling.<sup>144</sup> Stories of resistance “are a potent means through which individual lives and experiences are able to transcend the immediate and personal in such a way as to become socially meaningful and potentially transformative.”<sup>145</sup>

The stories of those impacted should play a role in the Supreme Court’s decision-making process. Stories of individuals facing the “overwhelming power” of reified law can identify cracks in “legality’s institutional facade” and “insist on human agency,” where legality seeks to displace it.<sup>146</sup> And, “by recognizing and reconciling the dual threads of legality,” stories can create a middle ground “between the conception of generalized reified legality and individual gamesmen competing for themselves through legal forms.”<sup>147</sup>

While this Comment uses *Hobby Lobby* and *Conestoga Wood* as model cases to illustrate the different views of the law—Before the Law, With the Law, and Against the Law—the Supreme Court’s recent decision, *Burwell v. Hobby Lobby, Inc.*, merits comment. Does the reification process produce a false sense of objectivity? The Comment argued that the reification process rendered a concept of the law as impartial—but is that concept accurate?

To answer this question, a distinction must be drawn between the law itself and its application. Although one can hardly exist without the other, even if the law—as an enduring body of generally accepted principles—may be objective, its application cannot be. Ultimately, any objectivity that the law obtains through the reification process must be filtered through its inherently un-objective interpretation and application by a judicial body.

In *Burwell*, the majority dutifully applies the Religious Freedom Restoration Act (RFRA) framework to the Hahns’ and Greens’ case, and Justice Ginsburg writes a sharp dissent; however, both the majority and dissent illustrate how the legal framework limits the judicial ability to consider the full spectrum of concerns presented by *Hobby Lobby* and *Conestoga Wood*. Justice Alito, writing for the majority, and Justice Ginsburg, writing the dissent, accept and embrace the tradi-

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143. *Id.* at 236 (“The lack of correspondence between dominant cultural meanings and the lives of the powerless persons can be discerned in the patters that emerged in the numbers of problems . . .”).

144. *Id.* at 241.

145. *Id.*

146. *Id.* at 244.

147. *Id.*

tional RFRA analysis.<sup>148</sup> The framework is well defined—the government cannot substantially burden a person’s exercise of religion unless the government can prove that the challenged regulation is in furtherance of a compelling government interest and uses the least restrictive means possible.<sup>149</sup> Even so, the two opinions come down on opposite sides of the issue—divided over the compelling government interest and the narrow tailoring of the mandate.

Both the majority and dissent use storytelling to strengthen their views. Immediately before establishing that corporations are persons entitled to pursue a RFRA claim, the majority discusses the Hahns and the Greens, owners of the plaintiff corporations.<sup>150</sup> While the owners of the corporation have no impact on the legal analysis, humanizing the corporations undoubtedly makes the majority’s decision an easier pill to swallow. Although it is well established that a corporation is an independent entity,<sup>151</sup> telling the story of the corporations’ owners has the subliminal effect of conflating where the owners’ interests end and the corporations’ begin.<sup>152</sup> Justice Ginsburg,<sup>153</sup> meanwhile, struggles to emphasize what the majority<sup>154</sup> neglects—the burden that a

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148. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–85 (2014) (identifying and applying the RFRA framework outlined in 42 U.S.C. §§ 2000bb-1(a)–(b) in sections III, IV, and V); *id.* at 2791–804 (Ginsburg, J., dissenting) (identifying and applying the RFRA framework outlined in 42 U.S.C. §§ 2000bb-1(a)–(b) in section III).

149. RFRA, §§ 2000bb-1(a)–(b).

150. *Burwell*, 134 S. Ct. at 2764–67.

151. A corporation is defined as “a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.” BLACK’S LAW DICTIONARY 415 (10th ed. 2014).

152. *See Burwell*, 134 S. Ct. at 2768. To the Third Circuit’s reasoning that secular, for-profit corporations lack RFRA protection because business corporations “do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion,” the Majority responded “[a]ll of this is true—but quite beside the point.” Instead, in a near boundless endorsement of corporate personhood, Justice Alito wrote that “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.” *Id.*

153. *Id.* at 2787 (Ginsburg, J., dissenting) (“In the Court’s view, RFRA demands accommodation for a for-profit corporation’s religious belief no matter the impact that accommodation may have on third parties who do not share the corporation owner’s religious faith . . . .”); *id.* at 2790 (“Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.”); *see generally id.* at 2803–06 (considering the potential breadth of the majority’s religious exemption reasoning, identifying the interest in having courts refrain from evaluating the merits of religious claims against one another, and lamenting the Court’s “venture[ ] into a minefield”).

154. *Id.* at 2779–83 (majority opinion). The majority appears skeptical of the government’s asserted compelling interest in “promoting public health and gender equality,” merely assuming, but not deciding, that “the interest in guaranteeing cost-free access to

Free Exercise exemption places on women—while staying within the prescribed framework.

The selective use of storytelling creates drastically different focal points. The majority's narrative of the Hahns and Greens focuses on the burdens placed on the corporations' religious exercise to the exclusion of the burden placed on women. This use of storytelling is not the application of objective rules to objective facts, but rather the adoption of a partial, and politicized, story to resolve the case.<sup>155</sup> If, then, we accept that the law's application is not objective, and we allow the majority to tell a story of the corporate owners that is wholly irrelevant to the legal analysis, then why not include a consideration of the third parties impacted by the decision as a means of equalizing the power imbalance between the culturally dominant ideology and those without the voice to influence it?

### Conclusion

At the heart of Kafka's parable is the ambiguity regarding who holds the power—the man, the doorkeeper, or the law. The doorkeeper appears to be the least powerful, admitting to being the lowest of the doorkeepers, but in reality stands between the man and his access to the law.<sup>156</sup> The man's death as an outsider to the law, having never gained access, highlights the fatal implications of unequal access to the law. Without equal access to the law, the system not only "robs the poor of their only protection, but it places it in the hands of their oppressors the most powerful and ruthless weapon ever invented."<sup>157</sup> Thus, the use of storytelling creates a route into the law without having to circumvent the gatekeepers. It allows the court to consider the full spectrum of legal issues while adhering to the prescribed legal framework.

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the four challenged contraceptive methods is compelling within the meaning of RFRA," and cautioning that "[e]ven a compelling interest may be outweighed in some circumstances by another weightier consideration." *Id.* at 2779–80. While assuring that its religious exemption reasoning would not doom all insurance-coverage mandates, the Court further assaults the legitimacy of ensuring universal access to contraceptive devices, explaining that some requirements, like immunizations, supported by different—and presumably more compelling interests—would survive. *Id.* at 2783.

155. Lisa Sarmas, *Storytelling and the Law: A Case Study of Louth v. DiProse*, 19 MELB. U. L. REV. 701, 702 (1993–1994).

156. KAFKA, *supra* note 9, at xiii.

157. REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES 9 (1972).

Through the use of story, legality can be reduced back to a social construction, which is subject to change and challenge by the people.<sup>158</sup> Legality is no longer “a fixed and external entity,” but rather a construct authored by humans, and thus subject to change.<sup>159</sup> In this way, the framework that binds the Court’s ability to make decisions in *Hobby Lobby* and *Conestoga Wood* can be harmonized with the need to protect and recognize the rights of third parties, including women and the LGBT community. And through this process, the opposing arguments may be able to coexist in a diverse religious and secular nation.

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158. EWICK & SILBEY, *supra* note 7, at 244.

159. *Id.*