

Dangling Threads: *Hobby Lobby* and Corporate Law Issues

J. WILLIAM CALLISON*

I. THE <i>HOBBY LOBBY</i> DECISION	447
II. <i>HOBBY LOBBY</i> , AGENCY PRINCIPLES, AND POTENTIAL SHAREHOLDER LIABILITY	454
III. <i>HOBBY LOBBY</i> AND CORPORATE PURPOSE	456
IV. CONCLUSION	461

The United States Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*¹ threw into question aspects of previously settled corporate law. These include issues of corporate personhood, corporate purpose, and the agency relationship between a corporation and its shareholders.

These issues are primarily matters of state law and, therefore, one can treat the Court’s analysis as dictum to the extent it exceeds the ambit of federal statute. The Court surfaced powerful questions, and it is likely that state courts will respond. It is not clear what those responses will be.

I. THE *HOBBY LOBBY* DECISION

The issue in *Hobby Lobby* was simple: did governmental regulations implementing the Patient Protection and Affordable Care Act of 2010 (“ACA” or “Obamacare”) violate the Religious Freedom Restoration Act of 1993 (“RFRA”) by requiring three closely held

* Partner, Faegre Baker Daniels LLP, Denver, Colorado; Visiting Professor of Law, Tilburg University School of Law, the Netherlands; Am. Bar Ass’n Delegate, United Nations Commission on International Trade Law Working Group I. J.D., Order of the Coif, University of Colorado Law School (1982); LL.M., Yale Law School (2000); Ph.D., Tilburg University (2017).

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

corporations to provide health-insurance coverage for contraceptive methods that violated the sincerely held religious beliefs of the corporations' shareholders?² The Court concluded that regulations pursuant to the ACA violated RFRA. First, the Court held that RFRA protects corporations since "the plain terms of RFRA make it perfectly clear that Congress did not discriminate . . . against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs."³ In reaching this conclusion, the Court rejected arguments that use of the corporate form distinguishes closely held corporations from "sole proprietorships or general partnerships."⁴ Second, the Court held that the HHS regulations substantially burden the exercise of religion and do not constitute the least restrictive means for serving a compelling governmental interest.⁵ Thus, the HHS regulations, as applied to the appellee corporations, violated RFRA.⁶

2. *Id.* at 2759.

3. *Id.*

4. *Id.* This implies the Court's view that use of the general partnership form might have obviated all need for discussion. The Court failed to address the fact that, under contemporary general partnership law, partnerships are entities, and not aggregates of their individual owners, for most purposes. See UNIF. P'SHIP ACT (1997) §201, 6 U.L.A. 91. Thus, general partnerships are fundamentally different from the sole proprietorships with which the Court lumps them. The Court did not discuss RFRA's application to limited liability companies.

5. See *Hobby Lobby*, 134 S. Ct. at 2777–79, 2780–85. Congress enacted RFRA in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court held that the First Amendment allowed "neutral, generally applicable laws [to be] applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (citing *Smith*, 494 U.S. at 888). Under RFRA, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(a), 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1(a) (2012)). If there is substantial burden, the government must demonstrate "that application of the burden to the person—(1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest" for the governmental rule to apply. 42 U.S.C. § 2000bb-1(b) (2012). In effect, RFRA creates a strict-scrutiny standard. The Court assumed that ACA regulations satisfied the compelling interest requirement, but held that they failed the least restrictive means requirement. *Hobby Lobby*, 134 S. Ct. at 2780–85.

6. *Hobby Lobby*, 134 S. Ct. at 2759–60.

The Court's decision that RFRA applies to corporations required consideration of questions about corporate personhood and corporate purpose. First, is a business corporation a person under RFRA? Second, assuming it is a person, can such a corporate person exercise religion?

The Court addressed the first question by noting that RFRA applies to "a person's" exercise of religion and that RFRA does not define "person."⁷ Therefore, the Court considered the Dictionary Act, which applies "in determining the meaning of any Act of Congress, unless the context requires otherwise."⁸ The Court decided that RFRA's context does not "indicate[] otherwise," and it ruled that, under the Dictionary Act, "the wor[d] 'person' includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."⁹ The Court's context-indicating-otherwise analysis is somewhat mysterious. Rather than endeavoring to place RFRA's use of "person" into the religion-based context of RFRA, the Court simply accepted the government's concession that nonprofit corporations can be persons for RFRA purposes, and it stated that "[n]o known understanding of the term 'person' includes *some* but not all corporations."¹⁰ One wonders whether an objective analysis would have yielded a different result had the Government not conceded the nonprofit-corporation question. One also wonders what the Court's conclusion would have been if it had discussed the obvious question of whether an administrative agency has a valid basis for differentiating religiously based nonprofit corporations from other

7. *Id.* at 2767–68.

8. *Id.* at 2768. It is undisputable that corporations are "persons" in many legal contexts. They have a legal status separate from their shareholders, and can own property, enter into contracts, commit torts, sue and be sued, be taxed separately, and provide asset partitioning between corporate assets and shareholder assets. *See generally* 18 AM. JUR. 2D *Corporations* § 2 (2018). The question in *Hobby Lobby* is whether they are "persons" in the context of RFRA.

9. *Hobby Lobby*, 134 S. Ct. at 2768–69.

10. *Id.* at 2769. Here, one could argue, as did Justice Ginsburg in a powerful dissent, that nonprofit, religiously based corporations are qualitatively different from for-profit corporations. *Id.* at 2796–97 (Ginsburg, J., dissenting). However, that is not a topic for this Essay.

nonprofit and for-profit corporations, thereby creating a “known definition” even if one had not previously existed.¹¹

The Court then focused on the government’s primary argument that RFRA does not protect for-profit corporations because they cannot “exercise religion.”¹² The Court concluded that corporations can exercise religion, but rather than provide a positive basis for its conclusion that state corporate law permits corporate religious exercise, the Court debunked several straw arguments. First, it stated that “the corporate form” does not militate against religious exercise since, as noted above, the government conceded that RFRA protects nonprofit corporations.¹³ Again, the Court did not delve into distinctions between nonprofit corporations and for-profit corporations. It also stated that the “profit-making objective” does not militate against religious exercise because a prior decision of the Court indicated that individuals who attempted to make a profit as retail merchants might have free-exercise claims, and the Court asked, “if . . . a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can’t [corporations] do the same?”¹⁴ In grounding corporate free-exercise rights on the free-exercise rights of sole proprietors, the Court made an egregious mistake. Sole proprietorships are not entities; “sole proprietor” is simply a label for an individual conducting business in personal form.¹⁵ As individuals who can think religiously, sole proprietorships think religiously. The “why can’t corporations do the same” analysis rests on the nature of corporations as entities that are *not* individuals, unless one reaches the conclusion that closely held corporations are mere extensions of their individual shareholders and thus are akin to sole proprietorships.¹⁶ As discussed below, the Court’s analysis supports an argument that closely held corporations are indeed merely extensions of their

11. “Rose is a rose is a rose is a rose.” GERTRUDE STEIN, *Sacred Emily*, in GEOGRAPHY AND PLAYS 178, 187 (Dover ed., Dover Publications, Inc. 1999) (1922).

12. *Hobby Lobby*, 134 S. Ct. at 2769.

13. *Id.* at 2768–69.

14. *Id.* at 2769–70 (citing *Braunfeld v. Brown*, 366 U.S. 599 (1961)).

15. *Sole Proprietorship*, BLACK’S LAW DICTIONARY (10th ed. 2014).

16. Note here the Court’s earlier misbegotten reference to general partnerships. *Hobby Lobby*, 134 S. Ct. at 2759. The Court seems to confuse aggregate and entity concepts, or at least to use aggregate concepts to reach a desired, but not well-considered conclusion.

stockholders and are akin to sole proprietorships (or perhaps an older, aggregate-based form of general partnership).

The second argument the Court raised and debunked is that “RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money.”¹⁷ Without providing any significant authority, the Court simply asserted that “[t]his argument flies in the face of modern corporate law.”¹⁸ In the Court’s view, not all corporations are soul-less, profit-seeking devices, and modern corporate law does not require for-profit corporations to pursue profit at the expense of non-monetary objectives. In fact, the Court stated that many do not do so.¹⁹ While one can believe and hope that this is the case, the Court’s bald assertions have generated considerable discussion in recent years, and the outcome is not as clear as the Court indicated.²⁰ A Court that has not analyzed corporate purpose should not be so certain of its assertion that something “flies in the face of modern corporate law.”²¹ For example, the Court referred to the fact that numerous states “recognize the ‘benefit corporation,’ a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners,” but it failed to recognize that a rationale for benefit corporations is to *create* a corporate form in which profit is not paramount.²² None of the appellant corporations in *Hobby Lobby* were

17. *Id.* at 2770.

18. *Id.*

19. *Id.* at 2771 (noting that “[n]ot all corporations that decline to organize as nonprofits do so in order to maximize profit,” and continuing by giving examples and citations to support this proposition).

20. *Cf., e.g.,* Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405 (2013).

21. The Court’s scanty analysis is muddled. It noted that “for-profit corporations, with ownership approval support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.” *Hobby Lobby*, 134 S. Ct. at 2771. *Hobby Lobby*, however, is not a case of “ownership approval” of a corporate entity’s purpose but is instead a case in which the owners’ religious views transfer onto the corporation. Further, the statement concerning “ownership approval” goes too far since corporations frequently do good without specific ownership approval and directors are protected by the business judgment rule as long as the corporate actions bear at least some relationship to the corporation’s business purpose.

22. *Hobby Lobby*, 134 S. Ct. at 2771. *See* J. William Callison, *Benefit Corporation, Innovation and Statutory Design*, 26 REGENT U. L. REV. 143 (2014); J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit*

benefit corporations. Further, a conclusion, even if correct, that modern corporate law recognizes that corporations can engage in activities that do not make money does not address the question of whether corporations can exercise religion. To say that Hobby Lobby Stores, Inc. can do good things is not to say that it can think religiously and act on its thoughts.

Having concluded that corporations are “persons” and can “exercise religion,” the next question is *how* corporations, which are legal constructs without brains, hearts, or souls, go about exercising religion.²³ Although the Court did not engage in an extended analysis, it is clear that it concluded that corporations can carry out the “sincerely held religious beliefs of [their] owners,” the shareholders.²⁴ It noted that members of the family who own and control appellee Conestoga Wood Specialties are devout members of the Mennonite Church, which opposes abortion and believes that “the fetus in its earliest stages . . . shares humanity with those who conceived it.”²⁵ The Conestoga Wood shareholders believe that “human life begins at conception.”²⁶ Similarly, the family members that own and control appellees Hobby Lobby and Mardel “[h]onor[] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.”²⁷ The Hobby Lobby/Mardel shareholders also believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after conception.²⁸ The Court focused on the shareholders’ religious beliefs, and therefore *Hobby Lobby* makes sense only to the extent that the shareholders’ beliefs transport to the corporations they own.²⁹

Corporations Address Fiduciary Duties, the Dangers Created, and Suggestion for Change, 2 AM. U. BUS. L. REV. 85 (2012).

23. One can theoretically break this question into two parts: how do corporations possess religion? and, once having religion, how do they exercise it? The latter part seems easiest; once a corporation has religion, it exercises it just as it exercises other powers, namely through its directors and officers. The Court seems to focus on the first question and to consider how a corporation has religion.

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

25. *Id.* at 2764.

26. *Id.* (internal quotation marks omitted).

27. *Id.* at 2766 (internal quotation marks omitted).

28. *Id.*

29. The Court’s analysis ignores decades of corporate law scholarship analyzing the distinction between ownership and control. See, e.g., J. William

The Court's facile repudiation of the government's argument that it would be difficult to ascertain the sincere beliefs of a corporation buttresses the shareholder focus of the Court's decision. The Court responded to the argument that there could be battles over the religious identity of large corporations with the rejoinder that, "[t]hese cases, however, do not involve publicly traded corporations, and it *seems unlikely* that the sort of corporate giants to which HHS refers will *often* assert RFRA claims," since "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs *seems* improbable."³⁰ The Court also concluded that state corporate law can readily resolve shareholder disputes over the application of religious principles to corporate activities.³¹ But the Court did not analyze the method for this ready means of resolution. It is not clear that such ready means exist, particularly in the region of belief.³²

Again, the Court focused on the shareholders' beliefs and concluded that, when shareholders sincerely hold them, these beliefs become the corporation's beliefs, which it may then freely exercise under RFRA. As discussed below, this focus on shareholders, and on the corporation only by reflection, carries the seeds of difficult questions of corporate law, including the availability of limited liability protections for shareholders.

Callison, *Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business*, 26 J. CORP. L. 98, 108–11 (2002).

30. *Hobby Lobby*, 134 S. Ct. at 2774 (emphasis added).

31. *Id.* at 2774–75.

32. There seems to be a conundrum when shareholders of a closely held corporation do not share religious beliefs. If Hobby Lobby, Inc. had a shareholder (assume through stock inheritance, rather than stock purchase) who had a sincere religious belief that contraceptives should be available to those who choose them, then at least arguably the imposition of the majority shareholders' no-contraceptive beliefs would hinder the minority's free exercise. The Court provides no guidance other than leaving corporate governance questions to state corporate law. The Court's decision gives no indication of how directors, who have fiduciary duties, balance their decisions.

II. *HOBBY LOBBY*, AGENCY PRINCIPLES, AND POTENTIAL SHAREHOLDER LIABILITY

The common law of agency encompasses the legal consequences of relationships in which one person (the “principal”) manifests assent that another person (the “agent”) shall, subject to the principal’s right of control, have power to affect the principal’s legal relations through the agent’s acts on the principal’s behalf.³³ Since business organizations are artificial persons created by law and cannot act without a human agent, business organization law is rife with agency relationships. Corporate law provides governance rules specifying who can act on behalf of the entity. For example, a general partner in a general partnership is the partnership’s agent for the purpose of its business, and the partner’s acts for apparently carrying out the partnership’s business bind the partnership.³⁴ Similarly, in a limited partnership, the general partner is the partnership’s agent,³⁵ and in a limited liability company, either the managers or the members are the company’s agents.³⁶ Corporations also have agents, including their officers, who carry on the business activities of the corporation and, by their actions on behalf of the corporation, bind it.³⁷

Under agency principles, when an agent makes a contract on behalf of its principal, the principal and the third party with whom the contract is made are the parties to the contract.³⁸ Thus, if the principal breaches the contract, the principal has liability on the contract. Further, under agency principles, the principal has direct liability to third parties whom the agent’s conduct harms if the agent has actual or apparent authority to act, and either the agent’s conduct is tortious or the agent’s conduct, if it was the principal’s, would subject the principal to liability.³⁹

33. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

34. UNIF. P’SHP ACT § 301(1), 6 U.L.A. 101 (1997).

35. REV. UNIF. LTD. P’SHP ACT § 403(a), 6B U.L.A. 222 (1976).

36. UNIF. LLC ACT § 407(b), 6B U.L.A. 483–84 (2006).

37. *See, e.g.,* McCormick v. Dunn & Black, P.S., 167 P.3d 610, 621 (Wash. Ct. App. 2007) (“A corporation’s directors are its executive representatives charged with its management . . .”).

38. *See* RESTATEMENT (THIRD) OF AGENCY § 6.01 (disclosed principal); § 6.02 (unidentified principal); § 6.03 (undisclosed principal).

39. RESTATEMENT (THIRD) OF AGENCY § 7.03(1)(a)(i)–(ii).

Because contract and tort liability flow to the principal, it is critical to identify when an agency relationship exists and, when it does, the identities of the principal and the agent. In business-entity law, this has generally been relatively simple—the entity is the principal and the partner, and the manager or officer is the entity’s agent. Thus, the entity typically has liability for the actions, and the inactions, of its partners, managers, or officers. Unless the entity’s owners are also general partners, managers, or officers, they are not agents of the entity, and their actions neither bind the entity nor create liability for it.⁴⁰ If a principal/agent equation arises, however, such that the entity is the agent of its owner-principals and acts on behalf of its owners, the liability equation arguably also reverses such that the owners can have liability for the entity’s contracts and the tortious acts.⁴¹ By holding that the closely held corporations in *Hobby Lobby* possess their shareholders’ religious views, the Court appears to reverse the historical agent/principal approach in which a corporation, as a legal entity, is the principal that acts through its agents, which do not include shareholders in their capacity as shareholders.⁴² By making the shareholders the principals for RFRA purposes, the Court’s analysis may have opened a Pandora’s box—namely, whether and the extent to which the shareholders of closely held corporations, who effectively control the corporations’ actions, are principals for other purposes, including that they are personally liable for their corporation’s torts and contracts. Stated differently, is there a legal distinction between, for example, a sole proprietorship or a general partnership and a corporation with one shareholder? Two shareholders? Nine shareholders? Is a corporation now an aggregate

40. Cf. *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham*, 185 F.3d 61, 66 (2d Cir. 1999) (“But under New York law (and probably the law of all states), ‘[a] principal attribute of, and in many cases the major reason for, the corporate form of business association is the elimination of personal shareholder liability.’” (quoting *We’re Assocs. Co. v. Cohen, Stracher & Bloom, P.C.*, 480 N.E.2d 357, 359 (N.Y. 1985))).

41. See generally, e.g., J. William Callison, *Rationalizing Limited Liability and Veil Piercing*, 58 BUS. LAW 1063 (2003). Although conceptually related, liability based on agency theory is different from liability based on veil-piercing or alter-ego theory. See Carol Goforth, *A Corporation Has No Soul, and Doesn’t Go To Church: Relating the Doctrine of Piercing the Veil to Burwell v. Hobby Lobby*, 67 S.C. L. REV. 73, 81–87 (2015).

42. Agents may include officers who are also shareholders.

of its shareholders⁴³ and thus a “conductor” of liability to its shareholders?⁴⁴

III. *HOBBY LOBBY* AND CORPORATE PURPOSE

Business corporations are creatures of state law and derive their powers from state law. A fundamental issue in *Hobby Lobby* was whether state corporate law authorizes corporations to exercise religion.⁴⁵ The Court stated that the government’s case rested on a simplistic argument that, as a matter of state law, business corporations cannot do things that do not involve the pursuit of financial gain.⁴⁶ Therefore, in the government’s view, religious exercise without a connection to profit maximization would be beyond a corporation’s

43. Professors Lyman Johnson and David Millon argue that the Court upheld the “institutional heft” of separate corporate legal personality by emphasizing “the corporate capacity and corporate positions and roles played by [the human shareholders],” but they also note that “this theoretical point could have been made a stronger and more readily comprehensible.” Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 16–17 (2014). Although I see the point, I disagree that the Court’s statements recognizing that the shareholders were also officers and directors provides the separation of ownership and control that Johnson and Millon argue. The Court could have attempted to provide clarity, but it did not. In fact, the Court pointed out how corporations could resolve *shareholder* disagreements about corporate purpose. Johnson and Millon note that “the Court does not fully explain how the interests of humans (and which ones) within a corporation are needed to support the conclusion that the corporation itself is a rights-bearing person, there is little doubt that, *as an alternative*, it could have quite easily reached that conclusion.” *Id.* at 19 (emphasis added). To say that the Court could have used some alternative approach, however, does not weaken its chosen approach. See J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 130 n.118 (1997) (discussing use of term “dictum” by some scholars).

44. The Court previously has referred to corporations as “nonconductors.” See *Klein v. Bd. of Tax Supervisors*, 282 U.S. 19, 24 (1930) (“It leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with interest that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.” (citing *Donnell v. Herring-Hall-Martin Safe Co.*, 208 U.S. 267, 273 (1908))).

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

46. *Id.* at 2767.

purpose and hence its power. The Court stated the government's position in simple terms: "[T]he companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the [HHS] regulations . . . apply only to the companies and not to the owners as individuals."⁴⁷ In essence, the government argued that a person must forego the corporate form if he or she seeks to preserve RFRA rights in a business context.

The Court made short shrift of this argument, and reasoned:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.⁴⁸

Thus, the Court appears to have concluded that, under state corporate law, corporations are not subject to a legal mandate to maximize profits or to act in a profit-seeking manner. The debate over a profit-maximization requirement is a longstanding one, and at a minimum the Court should have backed up its assertion with some supporting authority. It did not.

The Court's analysis failed to provide any meaningful guidance on the profit-maximization issue, in part because the Court sets up and knocks down straw arguments. First, few take the position that corporate law always requires corporations to "pursue profit at the

47. *Id.*

48. *Id.* at 2771.

expense of everything else” or that corporations must take every opportunity to make a profit.⁴⁹ Corporations can forego a short-term profit maximizing opportunity because it is not in the corporation’s overall short- or long-term interests, and such actions do not violate some profit-maximization requirement.⁵⁰ Second, the Court proved nothing by its use of examples of pollution controls or working conditions beyond those the law requires. Corporations can justify these expenditures under a profit-maximization standard as efforts to avoid long-term costs, to improve employee morale, recruiting, and retention, or to enhance reputation and create good will.⁵¹ Third, the Court missed the point when it stated that corporations can pursue charitable causes “with ownership approval.”⁵² To the extent it exists, the profit-maximization obligation arises from a duty to act in the shareholders’ best interests together with a belief that profits are in the shareholders’ best interests. To the extent that all shareholders want the corporation to engage in non-profit-maximizing activities the corporation can do so. This generally would require unanimous agreement, however, and it simply redefines the shareholders’ best interests to be something other than profit-maximization. The remaining question is whether a corporate board of directors can engage in activities that will diminish profitability and will not create countervailing corporate benefits *without* unanimous shareholder consent. *Hobby Lobby* failed to provide meaningful guidance.

In *Dodge v. Ford Motor Co.*, for example, the Michigan Supreme Court held that

[a] business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of the directors are to be employed for that end. The

49. *Id.*

50. *Cf. Steven v. Hale-Haas Corp.*, 23 N.W.2d 620, 628 (Wis. 1946) (“[A] court will not substitute its judgment for that of the board of directors and assume to appraise the wisdom of any corporate action.”).

51. *Cf. Walter Frick, Study: Green Advertising Helped BP Recover from the Deepwater Horizon Spill*, HARV. BUS. REV. (Feb. 5, 2014), <https://hbr.org/2014/02/study-green-advertising-helped-bp-recover-from-the-deepwater-horizon-spill> (describing how British Petroleum’s “greenwashing” ad campaign following a Gulf oil spill lessened the extent to which consumers “punished” it).

52. *Hobby Lobby*, 134 S. Ct. at 2771.

discretion of directors is to be exercised in the choice of means to attain that end; and does not extend to the end itself.⁵³

In *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Chancery Court stated,

[t]he corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment Having chosen a for-profit corporation form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.⁵⁴

The court continued to state that corporate policies that seek “not to maximize the economic value of a for-profit Delaware corporation for the benefit of its shareholders” are invalid.⁵⁵ Although one can parse and criticize these opinions, they support the profit-maximization principle. To the extent the *Dodge* and *Newmark* cases accurately reflect state corporate law, the *Hobby Lobby* conclusions constitute gross over-reaching.⁵⁶

Specifically, the Court made blanket statements of what are fundamentally state-law questions. It did not state that corporations may further other objectives only as a means for maximizing profits, and it did not state that such other objectives needed to be consistent with a “control objective” of making money.⁵⁷ The Court seems to state that corporations can forego profits when the pursuit of profits is “at the expense of everything else,” but it neither set any boundaries

53. 170 N.W. 668, 684 (Mich. 1919).

54. 16 A.3d 1, 34 (Del Ch. 2010).

55. *Id.*

56. Most state courts have not addressed the profit-maximization principle, one way or the other.

57. The *Hobby Lobby* corporations’ religious pursuits were not consistent with profit-maximization, and the Court did not attempt to rationalize them into the profit-maximization domain.

on “everything else” nor described what “everything else” means.⁵⁸ Since corporations can, and in the Court’s view do, forego profits to pursue something else, the Court concluded that they have the legal power to pursue religious objectives as well.⁵⁹ Because corporations are free to act in ways that do not pursue profits, the Court held that they are free to “exercise religion.”

The Court recognized the primacy of state corporation law and cited to the corporation laws of Pennsylvania and Oklahoma, the states of the petitioners’ organizations, as support for its conclusion that non-profit-seeking purposes are permissible.⁶⁰ This raises the question of how RFRA would apply in a state where corporate purposes are not as broad as the Court indicates.

The United States Supreme Court’s views on corporate purpose are not binding on state courts or legislatures. A fundamental question is the extent to which the *Hobby Lobby* analysis would persuade a state court. Although there is no case law that directly addresses how state courts will respond to the Supreme Court’s interpretation, one can derive some insight from how state courts have treated federal court decisions in similar situations. When a federal court has to decide a question of state law in a diversity jurisdiction case, the court makes an “*Erie* guess” as to how the state’s courts would answer the question.⁶¹ Essentially, although *Hobby Lobby* was a federal question case, the Court’s conclusion regarding corporate purpose was an *Erie* guess on how the state courts in fifty states would interpret their states’ corporate law. Scholars who have considered the precedential value of *Erie*-guess decisions have concluded that the state court treatment

58. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 1751, 2771 (2014).

59. *Id.*

60. *Id.* at 2771–72. Pennsylvania law provides that “[c]orporations may be incorporated under this subpart for any lawful purpose or purposes,” 15 PA. CONS. STAT. §1301 (2001), and Oklahoma law provides that “[E]very corporation, whether profit or nonprofit [may] be incorporated or organized . . . to conduct or promote any lawful business or purpose.” OKLA. STAT. tit. 18, §§ 1002, 1005 (2012). These seem to be slender reeds on which to hang the Court’s decision. The “any lawful business” statutory provisions were designed to give corporations flexibility to pursue different kinds of business without inclusion of laundry lists of permissible business in their articles of incorporation. They were not designed to give corporations the power to do anything “lawful” in “business.”

61. See generally *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and its progeny for the scope of supplemental jurisdiction as it may be exercised by federal courts.

of federal court decisions on state law varies widely from ignoring the federal decision to deferring to federal court guidance.⁶² Although *Erie*-guess decisions of the United States Supreme Court may receive greater weight than lower court decisions, the unreasoned nature of *Hobby Lobby*'s federal conclusions suggests that the Court's opinion will be of questionable persuasive power in state courts. In addition, scholarship on state court treatment of federal court decisions suggests that state courts feel less compelled than federal courts to closely follow Supreme Court analysis.⁶³ This disconnect between federal and state courts suggests even greater uncertainty concerning how state courts will treat federal interpretations of state law.

IV. CONCLUSION

Although *Hobby Lobby*'s treatment of corporate purpose supports a position that corporate law permits corporations to undertake nonmonetary, socially oriented, objectives, it is too early to reach this conclusion. This result depends on whether corporate directors and officers, and corporate legal counsel, treat the Court's state-law dictum as persuasive, whether they are willing to risk litigation by disgruntled shareholders, and whether state courts follow *Hobby Lobby*'s conclusions. The *Hobby Lobby* decision lacked intellectual rigor, perhaps because the majority could not muster any, and this lack of rigor mutes the persuasive value of its conclusions.

62. See Jed I. Bergmon, *Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969 (1996) (concluding that lower federal courts also vary in the precedential weight given to *Erie*-guess decisions); Benjamin C. Glassman, *Making State Law in Federal Court*, 42 GONZ. L. REV. 237, 305 (2006).

63. Sara C. Bensch & Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795, 816 (2009); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOC. REV. 579, 582 (2003).