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Corporate Law and Theory in *Hobby Lobby*

Elizabeth Pollman*

BUSINESS CORPORATIONS DOMINATE the U.S. economy. The vast majority of the largest businesses are organized as corporations, as are many small businesses. The corporate form, which has “served as the symbolic embodiment of American business,”¹ provides a number of useful features including limited liability for shareholders, transferability of stock, perpetual existence for the entity, and a governance structure that allows for centralized management or what is commonly referred to as the separation of ownership and control. Legal personality allows the corporation to hold property, to contract, and to sue and be sued in its own name and capacity. Over the past two hundred years, the Supreme Court has recognized that corporations hold many of the same rights as individuals under the U.S. Constitution, including, in recent decades, protections related to commercial and political speech. Business corporations have come to represent all of this under the law and in society, but does a business corporation constitute a “person” who can “exercise religion” under the Religious Freedom Restoration Act of 1993 (RFRA)?²

* Associate Professor of Law, Loyola Law School, Los Angeles. For helpful comments and discussions, I thank Brietta Clark, Michael Guttentag, Therese Maynard, James Nelson, Jennifer Rothman, Anne Tucker, participants at the Hobby Lobby Conference at the Wharton School of the University of Pennsylvania, and editors Chad Flanders, Zoë Robinson, and Micah Schwartzman.

¹ Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 130 (2004).

² 42 U.S.C. §§ 2000bb-1(a), (b).

This was one of the key questions in *Burwell v. Hobby Lobby Stores, Inc.*,³ in which the Supreme Court held that RFRA applied to three closely held business corporations, allowing them to claim a religious exemption from providing certain contraceptive coverage to their employees under the Patient Protection and Affordable Care Act. Before this 2014 case, the Court had entertained free exercise claims brought by individual merchants and RFRA claims brought by nonprofit religion-based organizations, but the question remained open as to the RFRA claims of business corporations (also known as “for-profit” corporations).⁴

This chapter examines the Supreme Court’s theory and interpretation of business corporations and corporate law as embodied in the *Hobby Lobby* opinion. Although the case raised a number of important issues, after discussing the background of the case this chapter narrows its focus to the corporate law issues driving the Court’s analysis: (1) the theory of the corporation as a right holder; (2) corporate purpose; (3) the “closely held” category; and (4) state corporate law as a mechanism for resolving disputes about a corporation’s religious activity or purpose.

A close examination of these issues shows that the Court’s anemic treatment of corporate law in *Hobby Lobby* provides little guidance on how to implement and limit this landmark ruling. The Court, for example, extended RFRA protection to business corporations in order to derivatively protect the religious liberty of those who “own and control” the corporations, but did not explain why those would be the only corporate participants whose interests count.⁵ This approach overlooked minority shareholders, employees, and the competing interests of corporate participants. Further, in recognizing that corporations can pursue goals besides shareholder wealth maximization, the Court did not make clear whether it understood the pursuit of other goals to require contracting around a default rule of governance. This oversight leaves unclear the method for determining which business corporations have taken sufficient steps to demonstrate a religious purpose or identity. In addition, although the Court extensively relied on the “closely held” terminology in seemingly cabining its holding, the Court never defined this term for its purposes, and no singular definition exists in corporate law to clearly limit the scope of *Hobby Lobby*’s reach. And, despite the Court’s instruction to rely on corporate law as a mechanism for resolving disputes regarding religion among corporate participants, the Court’s analysis obscured the role of the board of directors to direct the affairs of the corporation in the interests of the corporation and shareholders. As a result, the *Hobby Lobby* opinion recognizes the religious liberty of business corporations but leaves quite murky the corporate law mechanics of establishing and limiting this liberty.

This chapter further argues that although the *Hobby Lobby* opinion leaves much unexplained, it nonetheless adds weight to the work of corporate law in ordering

³ 134 S. Ct. 2751 (2014).

⁴ *Braunfeld v. Brown*, 366 U.S. 599 (1961) (merchants); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (church).

⁵ See *Hobby Lobby*, 134 S. Ct. at 2768.

the rights of organizations and their social and religious roles, raising new questions for future exploration. With business corporations having more latitude to act in political and religious spheres after *Citizens United v. FEC*⁶ and *Burwell v. Hobby Lobby*, should corporate law adjust in some way to better bear this weight? Do these recent cases strengthen arguments for regulating corporations through corporate law? Is religion different from other social values that might be pursued in business corporations, such as environmental sustainability and employee safety? Are there socially acceptable bounds of allowing business corporations to opt out of generally applicable federal regulations? The chapter concludes by offering several criticisms of the *Hobby Lobby* decision and identifying the difficult questions it has left in its wake.

1. LEGAL AND FACTUAL BACKGROUND OF HOBBY LOBBY

The *Hobby Lobby* case arose in response to a provision of the Patient Protection and Affordable Care Act of 2010, which requires employers with fifty or more full-time employees to offer health insurance that meets certain minimum coverage standards, including preventive care for women.⁷ The Health Resources and Services Administration, charged with defining such preventive care standards, included all FDA-approved contraceptive methods in its guidelines.⁸ The Department of Health and Human Services (HHS) provided an exemption for religious employers with religious objections, such as churches, and an accommodation for other religious non-profit organizations. The accommodation allowed an eligible organization to notify its insurer of a religious objection and to have the insurer separately pay for the employees' contraceptive services.

For-profit business corporations that did not fit into the existing exemption or accommodation brought suit to challenge the HHS regulations on the basis of their asserted religious liberty. Two of these cases were consolidated before the Supreme Court: *Conestoga Wood Specialties* and *Hobby Lobby*.⁹ *Conestoga Wood Specialties* involved a woodworking business organized as a for-profit corporation under Pennsylvania law. The Hahn family, two parents and three children, all of whom are devout members of the Mennonite Church, own all shares of the corporation's stock. The family members also control the corporation's board of directors and one of the sons serves as president and CEO. The business has 950 employees. The Hahns asserted that their unanimous religious beliefs would be violated if Conestoga Wood Specialties complied with the contraceptive provision of the HHS regulations. According to the Hahns' religious beliefs, several

⁶ 558 U.S. 310 (2010).

⁷ 42 U.S.C. § 300gg-13(a)(4).

⁸ *Hobby Lobby*, 134 S. Ct. at 2762.

⁹ *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dept. of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc).

of the FDA-approved contraceptives constitute “abortifacients,” an immoral and sinful termination of a human life.¹⁰ As evidence that their religious beliefs were incorporated into the governance and operations of the corporation, they referred to “Vision and Values Statements” affirming the corporation’s mission to pursue “a reasonable profit in [a] manner that reflects Christian heritage” and to a board-adopted “Statement on the Sanctity of Human Life.”¹¹

The other case before the Supreme Court, *Hobby Lobby Stores, Inc.*, involved two corporations with stock owned by the Green family, two parents and three children, all of whom are Christians. One of the corporations, Hobby Lobby, is a nationwide chain of arts and crafts stores with more than 500 stores, 13,000 employees, and \$3 billion in annual revenue.¹² The other corporation, Mardel, is a chain of 35 Christian bookstores that employs nearly 400 people. Both Hobby Lobby and Mardel are for-profit corporations incorporated in Oklahoma. The Greens control the stock of both corporations through a trust in which the five family members serve as trustees. Green family members also serve as executive officers of the corporations. The Greens referred to various corporate statements and practices to evidence the incorporation of their unanimous religious beliefs into the corporations, including Hobby Lobby’s statement of purpose to “operat[e] the company in a manner consistent with Biblical principles” and each family member’s written pledge to run the businesses in accordance with the family’s religious beliefs.¹³ Faith-based business practices included closing the Hobby Lobby and Mardel stores on Sundays, refusing to do business that facilitates or promotes alcohol use, contributing to Christian missionaries and ministries, and advertising religious messages. Like the Hahns, the Greens claimed it would violate their religious beliefs if Hobby Lobby and Mardel complied with the HHS regulations.

The novel question before the Court was whether RFRA applies to business corporations like Conestoga, Hobby Lobby, and Mardel, and specifically whether the HHS regulations violated RFRA as applied to these corporations.¹⁴ RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion

¹⁰ *Hobby Lobby*, 134 S. Ct. at 2759, 2765. The plaintiffs claimed a belief that pregnancy begins at fertilization, rather than implantation, of an egg. See *Hobby Lobby*, 723 F.3d at 1122. As Douglas NeJaime and Reva Siegel have noted: “By contrast, the scientific community and federal law define pregnancy as beginning with the implantation of a fertilized egg in a woman’s uterus. . . . The methods of contraception characterized as abortifacients in *Hobby Lobby* do not operate post-implantation, and so do not cause abortion in the view of medical science or the federal government.” Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, n.273 (2015).

¹¹ *Hobby Lobby*, 134 S. Ct. at 2764.

¹² *Hobby Lobby*, 134 S. Ct. at 2765; *Hobby Lobby Stores*, FORBES, <http://www.forbes.com/companies/hobby-lobby-stores/> (last visited Nov. 1, 2014) (noting 23,000 employees, 600 stores, and \$3.3 billion in annual revenue).

¹³ *Hobby Lobby*, 134 S. Ct. at 2766.

¹⁴ Given its RFRA ruling, the Supreme Court declined to address claims under the Free Exercise Clause of the U.S. Constitution. See *Hobby Lobby*, 134 S. Ct. at 2785 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).

even if the burden results from a rule of general applicability” unless that action constitutes the least restrictive means of serving a compelling governmental interest.¹⁵ Thus, the important threshold question was whether business corporations are “persons” capable of the “exercise of religion” within the meaning of RFRA. In a 5–4 decision, the Court attributed the religious beliefs of the shareholders to the corporations and ruled that the HHS regulations violated RFRA as applied to the corporations.¹⁶

2. CORPORATE LAW AND THEORY

This part examines the *Hobby Lobby* ruling from a corporate law perspective. It highlights the ambiguities and weaknesses in the Court’s analysis regarding its theory of the corporation as a right holder, corporate purpose, “closely held” status, and using state corporate law as a mechanism for resolving disputes about a corporation’s religious activity or purpose. This discussion uncovers hidden problems in the *Hobby Lobby* opinion and underscores the inadequate guidance it provides on how to implement and limit this landmark ruling.

A. Theory of the Corporation as a Right Holder

The corporate form has a long history, with antecedents dating back to ancient Rome.¹⁷ By the seventeenth and eighteenth centuries, when chartered joint stock companies emerged in Europe, a set of predecessor concepts or elements of the business corporation had developed such as transferable shares, locked in capital, and limited liability for investors.¹⁸ From these important origins came the corporation, which Scottish writer Stewart Kyd defined in the eighteenth century as “a collection of many individuals, united into one body” that has “perpetual succession under an artificial form” and is “vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of

¹⁵ 42 U.S.C. §§ 2000bb-1(a), (b) (emphasis added). In *Employment Division v. Smith*, the Supreme Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability’ . . .” 494 U.S. 872, 879 (1990). RFRA is a legislative response to *Smith*, with a stated purpose to “restore the compelling interest test” as set forth in pre-*Smith* case law. 42 U.S.C.A. § 2000bb(a)(4), (b)(1) (1993).

¹⁶ See *Hobby Lobby*, 134 S. Ct. at 2775, 2785.

¹⁷ Henry Hansmann, Reinier Kraakman, & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1358–61 (2006); David A. Skeel, Jr., *Christianity and the Large-Scale Corporation*, in CHRISTIANITY AND LAW 314–15 (John Witte, Jr. & Frank S. Alexander eds., 2008); Henry Hansmann, Reinier Kraakman, & Richard Squire, *Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce*, (European Corp. Gov. Inst., Working Paper, No. 271, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506334; see also Andreas M. Fleckner, *Roman Business Associations*, in ROMAN LAW AND ECONOMICS (forthcoming Oxford University Press), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472598 (discussing Roman business associations and distinguishing them from corporations).

¹⁸ Hansmann, Kraakman, & Squire, *supra* note 17, at 1378.

contracting obligations, and of suing and being sued.”¹⁹ Corporations could be “ecclesiastical” in nature, such as churches and monasteries, or “lay,” which referred to “public” corporations such as counties, cities, and towns, and to “private” corporations engaged in commercial activity.²⁰

Since these beginnings, a foundational principle of the corporate form has been legal personality—the separate existence of the corporation as an entity or “legal person” under the law. This separate legal identity serves several important functions, including allowing for the perpetual existence of the corporation not tied to the life span of any particular individual and for separating pools of assets to lock capital into the corporation and limit shareholder liability.²¹ These features of the business corporation encourage investment and enable the pursuit of large-scale and long-term ventures.

While state corporate law has established essential corporate characteristics such as legal personality, other areas of law have had to address or interpret the treatment of corporations including determining whether corporations can be understood as holding certain rights. A key example is the question of how to treat corporations under the U.S. Constitution, which does not specifically mention corporations in its text but does establish rights for “persons,” “people,” and “citizens.”²² Interpretation issues also arise under statutory laws, both state and federal, because statutes that do not expressly include corporations or define “person” to include corporations may give rise to ambiguity that must eventually be interpreted by courts.²³

Corporate theory, or various understandings of the nature of corporations, have often played a role in these determinations. Scholars have debated whether corporate theory should play such a role; whether it is better to inquire into the metaphysical or ontological nature of corporations and then deduce whether they are the kinds of beings that can or should have rights, or whether it is better to instead take a realist approach that looks at society’s interests and the functional relations involved.²⁴

¹⁹ STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS, vol. i, at 2–4, 7, 10, 13 (1793).

²⁰ JAMES KENT, COMMENTARIES ON AMERICAN LAW 221 (O. Halsted ed., 1826–1830). For a discussion of the history of business corporations in the United States, see Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

²¹ Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. REV. 785; Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 423–24 (2003); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392–93 (2000).

²² ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 10–15 (2010) (noting the absence of textual reference or explanation of the treatment of corporations in the Constitution).

²³ See, e.g., FCC v. AT&T Inc., 562 U.S. 397 (2011) (interpreting whether corporations have a right of “personal privacy” for purposes of the Freedom of Information Act’s exemption 7(C)).

²⁴ For a discussion of historically important theorists in the debate on the nature of legal entities, such as Friedrich Carl von Savigny, Otto von Gierke, Frederic William Maitland, and Ernst Freund, see Martin Petrin, *Reconceptualizing the Theory of the Firm: From Nature to Function*, 118 PENN ST. L. REV. 1 (2013). For classic realist work arguing against a deductive methodology focused on the conceptual nature of groups, see H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

Scholars have also noted the rhetorical influence of corporate theory²⁵ as well as the dynamic process by which corporate theory is created and how it in turn can shape social practice.²⁶

Without wading deeper into the normative aspects of these debates about the role of theory in corporate rights determinations, we can usefully observe here that a few dichotomies or views of the corporation have endured over time and evolved into variants on themes highlighting different aspects of the corporate form. One set of questions asks whether the corporation has a separate existence, reified or real, from the persons connected with it and whether the emphasis in understanding the nature of the corporation should be on the separate legal entity or on the aggregate of individuals involved.²⁷ This is known in corporate theory debates as the entity/aggregate dichotomy.²⁸ The entity and aggregate views imply opposing ideas about whether it is appropriate to equivocate the corporation and the people behind it in rights determinations. Another dichotomy focuses on the corporation's nature and origins as being either "public" or "private." The public view sees the corporation as a concession of the state, tinged with a public purpose and subject to state regulation. The private view sees the corporation as a matter of private contract, property, and activity.²⁹ The public/private dichotomy implies opposing viewpoints about the appropriateness of regulation and whether corporate rights are those granted by the state or arising from the natural persons composing the corporation.

A neoclassical variant of the aggregate or private view sees the corporation as a legal fiction that serves as a nexus for contracting among individual factors of production.³⁰ Under this "contractarian" view, rooted in economics, the separate legal identity of the corporation is given little analytical weight. From this view, neoclassical theorists constructed a model of governance with the shareholders envisioned

²⁵ For literature examining the rhetorical influence and function of corporate theory in rights analysis, see Richard Schragger & Micah Schwartzman, Chapter 17, *Some Realism about Corporate Rights*, in this volume, and Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629.

²⁶ David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 243 (1990) ("Theories about the corporation depend in large part on perceptions of what corporations look like. Law embodies beliefs about what is legitimate, and these beliefs influence the way people behave. Legal theory shapes social practice and practice informs theory—at the same time.").

²⁷ *Id.* at 201; William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475 (1989).

²⁸ Millon, *supra* note 26, at 201. Sometimes this is also referred to as theorizing the corporation as a real entity, fiction, or aggregate. Pollman, *supra* note 25, at 1660–62.

²⁹ See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–66 (1992) (discussing how "two quite different and inconsistent" conceptions of the corporation, as a social institution and as private property, have "coexisted in our thinking over the last century"); see also ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 109–31 (2013) (discussing the public/private distinction for business firms).

³⁰ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779 (1972); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

as “principals” and the managers (directors and officers) as their “agents” who work to maximize shareholder value. This picture implies a limited role for corporate law, which is largely regarded as a set of contractual defaults aimed at reducing the agency costs arising from the diverging interests of shareholders and managers.³¹

By contrast, a variant on the entity or public view sees the corporation as a social institution and provides for a more regulatory conception of corporate law to promote the interests of various constituencies and the public interest in a richer set of social values.³² Early articulations of this stakeholder view provided a theoretical basis for the corporate social responsibility movement, which has pushed for the integration of stakeholders’ social, environmental, and other concerns into the operation of corporations.³³

The *Hobby Lobby* litigants and opinion echoed these timeworn theories of the corporation. The parties invoked the entity/aggregate dichotomy: The government argued that RFRA does not include for-profit corporations within its reach, and the family members could not be heard under RFRA because the HHS regulations apply to the corporations not the individuals composing them.³⁴ The respondents argued that both the family members and their corporations could sue under RFRA because “they are indistinguishable for purposes of this case.”³⁵ Writing for the majority, Justice Alito began the analysis by reframing the government’s argument as putting “merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.”³⁶ From this start, the opinion placed itself in the perspective of the individuals composing the corporation, asking “[i]s there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests?”³⁷

The answer, according to the majority, is that “Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of ‘persons.’”³⁸ The purpose of the “legal fiction” of the corporation “is to provide protection for human beings.”³⁹ RFRA applies to for-profit corporations because “[a] corporation is simply a form of organization

³¹ Bratton, *supra* note 27, at 1480; see also HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* 1–28 (1995) (contrasting the contractual and concession/regulatory theories of the corporation).

³² Millon, *supra* note 26, at 201–202, 216.

³³ See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); see also RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 59–64, 93–99 (2014) (discussing corporate social responsibility).

³⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014).

³⁵ Brief for Respondents, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13–354), 2014 WL 546899 at *32.

³⁶ *Hobby Lobby*, 134 S. Ct. at 2767.

³⁷ *Id.*

³⁸ *Id.* at 2768.

³⁹ *Id.*

used by human beings to achieve desired ends.”⁴⁰ Emphasizing the corporation’s nature as a legal fiction representing the people composing the corporation reflected the aggregate, private, and contractarian sides of the classic dichotomies in corporate theory. In taking this approach, the Court downplayed the separate legal identity of the corporation and its public and institutional characteristics.

Further, the Court articulated a view of the corporation as only holding the right on a derivative basis.⁴¹ In the Court’s words, extending RFRA protection to the corporations “protects the religious liberty of the humans who own and control these companies.”⁴² To argue, as the government did, that the corporation cannot exercise religion is “beside the point”: “[C]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”⁴³ The Court thus emphasized a view of the corporation as an aggregate of individuals and as a tool for humans to organize their private activity rather than as an entity with a real or reified existence.

While these long-standing themes from corporate theory are relatively clear in the opinion, the Court gives little insight into why the people who count in the derivative analysis are only those who own and control the corporations. In this way, the Court drew upon corporate theory to reason about the corporation as a right holder, or perhaps for rhetorical purpose in justifying its result, but it did not fully work out or explain the application of this theory of the corporation for analyzing religious rights. For example, the Court stated:

An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations’ financial well-being. And protecting the free exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.⁴⁴

The Court thus generally explained the concept of derivative rights for corporations by reference to protecting “shareholders, officers, and employees.” And its examples identified the people being protected as varying by the right at stake, so

⁴⁰ *Id.*

⁴¹ The Supreme Court has a long history of approaching corporate rights as derivative of the persons composing the corporation. Blair & Pollman, *supra* note 20.

⁴² *Hobby Lobby*, 134 S. Ct. at 2768.

⁴³ *Id.*

⁴⁴ *Id.* (emphasis in original).

that the Fourth Amendment, which serves to protect privacy interests, is extended to protect “employees and others associated with the company,” and property protections are extended to protect “all those who have a stake in the corporation’s financial well-being.” The Court followed this logic of derivative rights in asserting that protecting the free exercise rights of the *Hobby Lobby* corporations would protect the people involved in these corporations.

But it did not explain why the relevant people to protect with corporate religious rights would be only those who own and control the corporations. Why not consider the interests of minority shareholders? In *Hobby Lobby*, the shareholders were unanimous in their beliefs, but the Court’s phrasing could be interpreted to suggest that the aim of protection was only the shareholders who control a corporation. In corporate law, the concept of control generally refers to shareholders who hold sufficient voting power to elect a majority of the corporation’s board of directors, which manages the corporation’s affairs in its own business judgment. The Court did not explain why this level of stock ownership and voting power was significant for purposes of RFRA protection and why minority shareholders would not be included.

Furthermore, why not also consider the interests of employees? Some of the Court’s examples involved protecting employees, yet the Court ignored them here despite the issue at stake concerning employee healthcare benefits.

Finally, the Court’s derivative rights logic elided the competing interests among corporate participants. With the Court’s examples of Fourth Amendment rights and protection from government seizure of property, it seems likely that the people associated with the corporation would have common interests that are being protected. Not so with rights pertaining to religious exercise because the people associating through the corporate form might have common economic interests in the business but varying religious beliefs. To be sure, we could imagine reasons why the religious convictions of the shareholders who control the corporation might be privileged above those of others, but the Court did not explain why this would be so nor does its implicit theory of the corporation imply a reason.

In sum, the Court’s opinion relied upon corporate theory in justifying the extension of rights to corporations, but this theory only partially explained the Court’s analytic choices and gives somewhat limited visibility into future jurisprudence on corporate religious liberty. As a result, there is significant space for scholarly work to interpret and theorize answers to the difficult questions of which people associated with the corporation should count for corporate rights determinations and what to do when people associated with the corporation have competing interests.⁴⁵

⁴⁵ For a sampling of literature that is developing on this topic, see Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1563–71 (2012) (arguing that size, internal cohesion, and organizational message should play a role in determining institutional claims of conscience); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1617–18 (analyzing how the legal, social, and economic norms of business corporations undermine the formation of a constitutive community among corporate constituents); Blair & Pollman, *supra* note 20 (discussing which corporate participants should count in corporate rights analysis).

B. Corporate Purpose

In addition to leaving much unexplained regarding its theory of the business corporation as a religious right holder, the *Hobby Lobby* Court also engaged the long-standing debate of corporate purpose and left a key point unclear. To fully understand this point and why it matters, some background is in order.

The question of corporate purpose has divided corporate law scholars for nearly a century. For what purpose, or to what end, is the business corporation to be run? At one end of the spectrum are scholars who maintain that the law requires business corporations to be run so as to maximize shareholder wealth.⁴⁶ At the other end of the spectrum are scholars who assert that the purpose of the business corporation is not to maximize shareholder wealth or value; instead, the law gives the board of directors discretion to run the corporation with other goals in mind, including serving the interests of the public and various stakeholders.⁴⁷ In between these ends of the spectrum are scholars who assert, for example, that the law is ambivalent about corporate purpose,⁴⁸ and that the law requires only that the board not disregard shareholder interests for those of nonshareholders.⁴⁹

The reference points in the corporate purpose debate are by now predictable, including: statutory law about the legal powers of a corporation “to conduct or promote any lawful business or purposes”;⁵⁰ fiduciary duty law which specifies that directors owe fiduciary obligations to “the corporation and its shareholders”;⁵¹ case law espousing a shareholder value view such as the classic 1919 case *Dodge v. Ford Motor Co.*,⁵² hostile takeover cases from the 1980s,⁵³ and the more recent Delaware

⁴⁶ E.g., STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 53 (2008); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 184 (2013). Sometimes the term “shareholder primacy” is used interchangeably with shareholder wealth maximization, but “shareholder primacy” is less precise because it can also refer to the different question of who is ultimately in control of the corporation. BAINBRIDGE, *supra*, at 53, 57.

⁴⁷ LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012) (arguing that corporate law does not mandate shareholder primacy or the shareholder wealth maximization norm); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (arguing that corporate managers “have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interest”).

⁴⁸ Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008).

⁴⁹ David Millon, *Team Production Theory: A Critical Appreciation*, in *Micro-Symposium on Competing Theories of Corporate Governance*, 62 UCLA L. REV. DISCOURSE 66, 79–80 (2014).

⁵⁰ DEL. CODE ANN. Tit. 8, § 101(b) (West 2014); *see also* 1A WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 102 (2014).

⁵¹ E.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280, 1287 (Del. 1989); *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff’d sub nom. Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939). *Compare* Rev. Model Bus. Corp. Act § 8.30(a) (2010) (stating each member of the board shall act “in a manner the director reasonably believes to be in the best interests of the corporation”).

⁵² 170 N.W. 668, 684 (Mich. 1919).

⁵³ E.g., *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

case *eBay Domestic Holdings, Inc. v. Newmark*;⁵⁴ the business judgment rule insulating directors from liability for their decisions provided they meet certain basic conditions;⁵⁵ and constituency statutes, corporate charitable donation statutes and cases, and the recent development in many states of social enterprise business forms such as the benefit corporation.⁵⁶ Scholars across the spectrum of the debate use and contest the meaning of these points of law in order to support their interpretations of whether corporate law mandates shareholder wealth maximization as the default rule of governance.

The issue of corporate purpose arose in *Hobby Lobby* in response to the government's argument that RFRA does not include for-profit corporations within its reach. Attempting to draw a bright line between for-profit business corporations and religious nonprofit corporations, the government asserted that the former are run "to make a profit," whereas the latter are run to "perpetuate a religious values-based mission."⁵⁷ While a history of religious exemptions existed for churches and nonprofit religious organizations, business corporations were not part of this history because when they enter "the commercial, profit-making world," they are understood to "submit themselves to legislation."⁵⁸ Business corporations have "never been regarded under the Religion Clauses, or in our societal and legal traditions, as institutions with their own freestanding religious identity."⁵⁹ The government thus painted a picture of business corporations as operating in a secular sphere with an objective to make a profit for shareholders that precludes an ability to exercise religion or perpetuate religious values. Faced with this argument, the Court had to determine whether "for-profit" status prevents business corporations from exercising religion within the meaning of RFRA.

To answer this question, the Court looked to state corporate law and concluded that the government's argument "flies in the face of modern corporate law."⁶⁰ The Court referenced common points from the corporate purpose debate, such as state

⁵⁴ 16 A.3d 1 (Del. Ch. 2010); see also *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) ("[T]he duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment.").

⁵⁵ E.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968); Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 444–45 (1993).

⁵⁶ E.g., 15 Pa. C.S.A. § 1715 (2014) (providing that in considering the best interests of the corporation the board of directors may consider nonshareholder interests); DEL. CODE ANN. Tit. 8, § 122(9) (West 2014) (articulating corporations' power to engage in charitable giving); A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) (case law on charitable giving); DEL. CODE ANN. Tit. 8, §§ 361–368 (benefit corporation legislation).

⁵⁷ Brief for Petitioners, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13–354), 2014 WL 173486 at *19 (internal quotation marks and citations omitted).

⁵⁸ Reply Brief for Petitioners, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13–354), 2014 WL 985095 at *6–7 (internal quotation marks and citations omitted).

⁵⁹ *Id.* at *8.

⁶⁰ *Hobby Lobby*, 134 S. Ct. at 2770.

statutory law that allows corporations to “act for any lawful purpose or business” and corporate support for charitable causes and other social values. It explained:

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 or other altruistic objectives. Many examples come readily to mind. 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.⁶¹

Although the Court’s conclusion is clear that “for-profit” status does not preclude RFRA protection, its language was ambiguous as to whether it understood corporate law to require shareholder wealth maximization as a default rule or not. The above language stressed that corporations can and do pursue a variety of purposes besides maximizing profits. However, the inclusion of the phrases “with ownership approval” and “[s]o long as its owners agree,” also makes plausible an interpretation that the Court understood state corporate law to mandate shareholder wealth maximization as a default rule of governance, which can be altered by shareholder approval. Evidencing this ambiguity, scholars from both ends of the spectrum have claimed that *Hobby Lobby* endorses their position in the corporate purpose debate.⁶²

Aside from academic debates, why does the Court’s ambiguity about corporate purpose matter? As a matter of precedent, because corporate purpose is within the

⁶¹ *Id.* at 2771.

⁶² Compare Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAWYER 1, 22–23 (2015) (claiming that *Hobby Lobby* “renounced the widely (though not universally) held view that maximization of profits is legally mandated as the sole corporate purpose”), and Brett McDonnell, *The Liberal Case for Hobby Lobby*, at 6 & n.18, available at <http://ssrn.com/abstract=2513380> (arguing that *Hobby Lobby* endorsed an interpretation of corporate law that allows for the pursuit of a wide variety of ends without explicit shareholder approval), with Stephen M. Bainbridge, *Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co.*?, PROFESSORBAINBRIDGE (July 3, 2014), <http://www.professorbainbridge.com/professorbainbridge.com/2014/07/does-hobby-lobby-sound-a-death-knell-for-dodge-v-ford-motor-co.html> (arguing that *Hobby Lobby* stands for the principle that shareholders of a closely held corporation can alter default rules of corporate law such as corporate purpose, but that the case should not be understood as changing the default rule), and Alan Meese, *Hobby Lobby and Corporate Social Responsibility: A View from the Right*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/hobby-lobby-and-corporate-social-responsibility-a-view-from-the-right.html> (arguing that *Hobby Lobby* is consistent with shareholder primacy).

purview of state corporate law, the U.S. Supreme Court's views on this topic would not be binding in a corporate law dispute. Nonetheless, the Court's opinion could serve as persuasive authority for judges inclined to follow it, and the opinion's lack of clarity could lead to further conflict or murkiness in this area of law. It is possible that the Court's ambiguity could be understood as legitimating or endorsing the pursuit of noneconomic goals by business corporations and could in some way lead to increased activity in this vein.⁶³

Moreover, the Court's ambiguity on corporate purpose matters because it makes it difficult to operationalize the *Hobby Lobby* ruling, and it cedes to other government actors important decision-making about the scope of religious liberty. After the Court handed down its decision, the Department of Health and Human Services began a rule-making process for defining eligible organizations for religious accommodation consistent with *Hobby Lobby* and identifying "whether other steps might be appropriate to implement this policy."⁶⁴ The next section discusses eligible organizations, but here we can observe that the Court's opinion does not provide guidance on whether formal shareholder action is required to approve the pursuit of noneconomic goals, or the specific requirements or mechanics for that shareholder approval and whether it could vary by state. The three corporations in *Hobby Lobby* had various informal corporate documents such as statements of purpose and individual written pledges, but did not have formal written shareholder agreements, or provisions in the articles of incorporation or bylaws concerning religious purpose. In each of these corporations, the shareholders were all members of a single family and unanimous in their religious beliefs, and so concerns of a minority or dissenting shareholder were not pressed, but the Court's inattention to these corporate law matters could leave an uncomfortable fit between federal statutory corporate religious liberty and each state's corporate law.

C. The "Closely Held" Corporation

The term "closely held" pervades the *Hobby Lobby* opinion from beginning to end. The first line of the opinion frames the issue as to the "three closely held corporations" involved, and the opinion concludes simply at the end: "The contraceptive mandate, as applied to closely held corporations, violates RFRA."⁶⁵ In addition to extensively using the "closely held" terminology, the opinion repeatedly refers to the shareholders as "owners" and "small-business owners,"⁶⁶ and emphasizes their connection as

⁶³ See, e.g., McDonnell, *supra* note 62; Johnson & Millon, *supra* note 62.

⁶⁴ Press Release, HHS, Administration Takes Steps to Ensure Women's Continued Access to Contraception Coverage, While Respecting Religious-Based Objections (Aug. 22, 2014), available at <http://www.hhs.gov/news/press/2014pres/08/20140822a.html>.

⁶⁵ *Hobby Lobby*, 134 S. Ct. at 2785.

⁶⁶ *Id.* at 2759, 2767.

family members.⁶⁷ Further, in response to the government's argument that Congress did not intend RFRA to include for-profit corporations because it is difficult to ascertain their religious identity, particularly for large, publicly traded corporations, the Court noted that *Hobby Lobby* did not involve publicly traded corporations and it is "unlikely" that such "corporate giants" would "often" assert RFRA claims.⁶⁸ The Court added, "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."⁶⁹ The Court's framing and terminology, as well as its contrasting with public corporations, raise the question: Was the *Hobby Lobby* ruling limited to closely held corporations? And how is that term defined in the law?

Again, as with other issues of corporate law in *Hobby Lobby*, the Court's treatment was impoverished, and so the importance of a corporation being closely held for purposes of religious liberty is unclear. The Court never defined the term "closely held corporation" nor cited to a source defining it. There is, in fact, no singular definition of this term in corporate law. It is typically understood to refer to a corporation with a small number of shareholders whose shares are not readily transferable and who are often involved in managing the corporation.⁷⁰ Fewer than half the states have a statutorily created "closely held" business form and the requirements vary from state to state,⁷¹ for example, varying in the limit on the number of shareholders from ten to fifty.⁷² These statutory forms are not commonly used,⁷³ however, and none of the *Hobby Lobby* plaintiffs elected statutory close corporation status.⁷⁴

The "closely held" concept might also be understood by reference to what it is not. Clearly outside the boundary of what "closely held" might refer to we have the concept of a "public" corporation, which is defined by federal securities laws enacted with the aim of investor protection and market integrity. In simple terms, a company

⁶⁷ See, e.g., *id.* at 2774 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.").

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 338 (8th ed. 2000); STEPHEN M. BAINBRIDGE, CORPORATE LAW 442 (2d ed. 2009); Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 756 (2000).

⁷¹ 1A FLETCHER CYC. CORP. § 70.10 (2014).

⁷² See AZ. REV. STAT. §§ 10-1801 et seq. (2014); GA. CODE ANN. § 14-2-902 (2014); MO. REV. STAT. § 351.755 (2014).

⁷³ Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 314 (2008) ("While fifteen states eventually adopted integrated statutes, remarkably few close corporations chose to take advantage of them. Empirical studies show that only a very small percentage of corporations ever registered as statutory close corporations.").

⁷⁴ Brief for Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 546899 at *8 ("Hobby Lobby and Mardel remain closely held family businesses, organized as general corporations under Oklahoma law . . ."); Joint Appendix, *Conestoga Wood Specialties Corp. v. Sebelius* (No. 13-356), 2014 WL 5151398 at *72 (reflecting Conestoga's election in its articles of incorporation for "business-stock" rather than "business-statutory close" status).

becomes subject to federal public reporting requirements by listing securities on a national securities exchange, by making a public offering of securities, or by reaching a certain size as measured by company assets (\$10 million) and number of shareholders of record (2,000).⁷⁵ Public corporations are thus generally characterized by having a large number of shareholders and stock traded on a public exchange, which leads to what many scholars have called a separation of ownership and control—that is, passive shareholders and a separate hierarchy of managers topped by the board of directors to carry out the management of corporate affairs.⁷⁶

As there is no singular definition or uniform corporate law on closely held corporations, the notion of the closely held corporation invoked by the Court appears to turn on more colloquial usage or a general understanding that such a corporation has a small number of shareholders united in ownership and control of the business enterprise. The Court's phrasing, and its lack of attention to the role of the board of directors in managing the affairs of the corporation, suggests that it conceptually equivocated closely held corporations with small businesses or partnerships in which the owners, related in some way to each other, are engaged in running the business together.

But because the Court did not pinpoint which characteristics were required for its ruling, it is not clear that the closely held category will limit future cases, particularly as it is not a uniformly defined term in the law. And although it is reasonable for the Court to resolve the dispute before it and leave other questions for a later day, the Court's reasoning and language were more expansive than would be necessary to resolve the current case. Family ownership arguably assures an intimacy or associational dynamic among the shareholders, as might stock ownership and control being united in a small number of shareholders, but as much as these characteristics might provide a conceptual grounding for derivative religious liberty rights for the corporation, the Court did not explicitly state they are necessary for RFRA standing.⁷⁷ The Court expressed doubt that a public corporation would bring a RFRA claim,

⁷⁵ 15 U.S.C. §§ 781(a) & 780(d). The JOBS Act recently increased the size threshold of section 12(g) of the Securities Exchange Act to companies with \$10 million in assets and 2,000 shareholders of record (so long as no more than 499 of those are "non-accredited" as defined by the Securities and Exchange Commission). Jumpstart Our Business Startups Act ("JOBS Act"), Pub. L. No. 112-106, § 501, 126 Stat. 306, 325 (2012); 17 C.F.R. 230.501 (2013).

⁷⁶ Adolf Berle and Gardiner Means famously observed the separation of ownership and control as a key characteristic of the public corporation in the modern era. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). "Private" companies are those that are not subject to the public reporting requirements. As current securities laws allow for up to 2,000 shareholders of record before a company is forced to go public, private companies often have a significantly larger number of shareholders than permitted under state closely held statutes and also a separation of stock ownership and control. Thus, "private" corporation could be understood as a broader conceptual category than "closely held." For a discussion of the range of private corporations, see Elizabeth Pollman, *Team Production Theory and Private Company Boards*, 38 SEATTLE U. L. REV. 619 (2015).

⁷⁷ The Court also did not use the corporate law doctrine of veil piercing to determine when the corporate form should be disregarded, as suggested in Stephen M. Bainbridge, *Using Reverse Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235 (2013). In the corporate law context, veil piercing has been long criticized. See, e.g., Peter B. Oh, *Veil-Piercing*,

but nothing in the Court's logic imposed this limit besides the Court's indication that the shareholders would have to agree to run the corporation under the same religious beliefs. Therefore, a prudent, narrow approach might implement *Hobby Lobby* based on the Court's emphasis on the small number of shareholders associating for a religious purpose, but future jurisprudence is not so clearly limited.

*D. State Corporate Law as a Mechanism for Resolving Disputes about
a Corporation's Religious Activity or Purpose*

Finally, we turn to the last important issue of corporate law and theory in *Hobby Lobby*. As we saw in the above discussion, the Court determined that a business corporation can pursue religious objectives at the expense of profits "[s]o long as its owners agree."⁷⁸ Later in the opinion, the Court acknowledged that "the owners of a company might well have a dispute relating to religion," but disposed of this concern by noting that "[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure."⁷⁹

With this seemingly small point, we confront a large difficulty. There is no federal general common law of corporations. Instead, corporate law has been historically within the purview of the states and the Court's deference to it here respects that boundary. However, the result is that state corporate law which has been created to govern the internal business relations of a corporation—the relationship of shareholders and the board of directors—will now provide the rules which ultimately determine whether a corporation will be ascribed religious beliefs and have a claim for exemption from generally applicable federal regulation. And the Court's opinion, which did not delineate the separate roles of the shareholders and the board, provided no further elaboration on which rules of corporate law are relevant for purposes of corporate religious liberty. The Court also did not square its reasoning in recognizing RFRA standing—to protect those who "own and control" the corporations—with the mechanics and structure created by corporate law.

Under state corporate law, for example, the shareholders and the board of directors have legally distinct roles and obligations. Shareholders do not have the authority to direct the business and affairs for the corporation. The board acts for the corporation, in its capacity as a collective body, or through delegation of authority to officers and other individuals.⁸⁰ Shareholders are not involved in their capacity as

89 TEX. L. REV. 81, 84 (2010) (noting veil piercing "has been a scourge on corporate law" and "has resulted in a doctrinal mess"); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 506 (2001) (describing veil piercing as a "dysfunctional doctrine" and arguing that it should be abolished).

⁷⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

⁷⁹ *Id.* at 2775.

⁸⁰ See, e.g., 2 FLETCHER CYC. CORP. § 505 (2014) ("The board of directors controls the corporate business and authorizes the corporation's executive agents to enter into contracts and new business ventures. . . . Thus, the business and affairs of the corporation are managed by and under the direction of its board.").

shareholders except to elect directors, amend the certificate of incorporation or bylaws, and vote on fundamental transactions such as mergers.⁸¹ Shareholders do not otherwise have a role in directing a corporation's business and affairs.

The separate roles of the board and the shareholders inevitably lead to the question of whether the board has the power to determine a religious purpose for the corporation. The opinion is unclear on this point, and, as discussed above, scholars disagree about whether corporate law requires shareholder wealth maximization as a default.

If the board has discretion to pursue values besides profits, including the exercise of religion, then the board could decide to pursue religious objectives different from those of the shareholders. A corporate exercise of religion that is different from the beliefs of the shareholders does not fit with the Court's logic that the corporation's derivative right protects those who "own and control" the corporation, nor the Court's attribution of the shareholders' beliefs to the corporation.⁸² The shareholders' recourse would be to "control" the corporation—elect new directors at the next annual meeting or at a special meeting, and those new directors would again exercise their own discretion in managing the corporation. Further, if the shareholders were not unanimous in their religious beliefs, the board would have to determine how to give effect to the concerns of the minority shareholders and fulfill their fiduciary duties as directors to "the corporation and its shareholders." Corporate law does not provide a clear path to fulfilling the religious dictates (or political or social preferences) of a diverse shareholder body.

If shareholder consent is sufficient or required for determining the religious purpose of the corporation, must it be unanimous? Again, we face a question not as readily answered as the Court suggested. It might vary by state and depend on what type of action is considered sufficient to express a religious purpose for the corporation. Under state corporate law, the individuals setting up the corporation may customize the purpose, conduct of business, or rules of governance by adopting provisions in the certificate of incorporation.⁸³ A certificate of incorporation could also be amended to include a provision regarding religious purpose so long as the board adopts a resolution proposing such change and a majority of the outstanding stock entitled to vote approves.⁸⁴ Shareholders could also include a provision in the bylaws, which may be approved by either the board or a majority vote of the outstanding stock.⁸⁵ Shareholders may also enter into written agreements that could bind the

⁸¹ See HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 11, 288–89 (1996) (noting that shareholder voting "is not to provide a means for conveying the patrons' preferences to the firm's management, but rather to make it more difficult for the firm to exploit those patrons as a class. . . . [t]o give the electorate some crude protection from gross opportunism on the part of those in power").

⁸² The concept of complicity may also be weakened where the board is independent of its shareholders. For discussion of conscience and complicity in the corporate context, see NeJaime & Siegel, *supra* note 10; Amy Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions After Hobby Lobby*, 82 U. CHI. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496218.

⁸³ *E.g.*, DEL. CODE ANN. Tit. 8, § 102(b)(1), (a)(3) (West 2014).

⁸⁴ *E.g.*, *id.* § 242(b).

⁸⁵ *E.g.*, *id.* § 109.

corporation, with requirements varying by state, including a unanimity standard in some jurisdictions.⁸⁶

However, while corporate law allows for customizing governance rules, and many such methods require only a majority vote, the protection of minority shareholders is also a principle of corporate law. Where there is a controlling shareholder who acts for his or her own exclusive benefit to the detriment of minority shareholders, the controlling shareholder breaches the fiduciary duty of loyalty unless he or she can show that the act was entirely fair to minority shareholders.⁸⁷ Controlling shareholders are thereby constrained to act equitably and in the interest of all shareholders.⁸⁸

Furthermore, the *Hobby Lobby* opinion relies on the logic that the beliefs of the shareholders can be attributed to the corporation, and it is not clear that this logic would hold where shareholders are divided on a religious issue. Is it still “a person’s exercise of religion” if only the will of the majority of the shareholders is expressed and not others who have conflicting interests and values?⁸⁹ The Court’s theory of the corporation as a right holder might be in tension with the notion that state corporate law can resolve any dispute related to religion.

3. THE IMPACT OF *HOBBY LOBBY* ON CORPORATE LAW

The above discussion has engaged with the corporate law issues and theory driving the Court’s conclusion that business corporations have standing to bring religious liberty claims under RFRA. What, in turn, is the impact of *Hobby Lobby* on corporate law? This final section concludes with reflections on this question, criticisms of the *Hobby Lobby* decision, and new paths for future exploration.

Most significantly, while *Hobby Lobby* left much unexplained with regard to corporate law and theory, the case nonetheless clearly illustrates what we might now understand as a trend of adding weight to the work of corporate law. The Supreme

⁸⁶ *Id.* § 350 (votes representing the majority of outstanding shares may bind a close corporation); Rev. Model Bus. Corp. Act § 7.32 (2010) (allowing shareholders to substantially modify the default rules of corporate governance with unanimous shareholder approval).

⁸⁷ *E.g.*, 12B FLETCHER CYC. CORP. §§ 5810–5811 (2014); *see also* Moll, *supra* note 70 (discussing the shareholder oppression doctrine).

⁸⁸ *See* Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 124 (2003) (arguing that corporate law is “a device to ensure that minorities will be treated fairly”); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 305–22 (1998) (arguing the shareholder primacy norm was first used to resolve disputes among shareholders in closely held corporations and this use evolved into the modern doctrine of minority oppression).

⁸⁹ *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 232 (1994) (noting that RFRA’s “legislative history is relatively clear . . . that the bill would protect conduct that was religiously ‘motivated’”); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 66 (2013) (“[T]he key to determining whether a particular action is a religious exercise is determining whether religious belief motivates the act.”).

Court has long accorded constitutional rights to corporations,⁹⁰ but the recent decisions of *Citizens United* and *Hobby Lobby* have provided corporations more latitude than ever before to act in political and religious spheres based on a reliance on the mechanisms of corporate governance that were not designed to shape or constrain corporate activity in these domains.

The Court's earliest decisions according constitutional protections to corporations, through the nineteenth century, involved property and contract rights.⁹¹ These protections were closely related to the economic purposes for which business corporations operated: Recognizing the corporate charter as protected by the Contract Clause and the corporate property as covered within the scope of the Due Process Clause stabilized the corporation as a form of business organization suited for long-term private investment, with separate existence from the government.⁹² Early twentieth-century case law recognized corporations as subject to criminal liability and as having some, but not all, of the related protections concerning searches and trials.⁹³ With limited exception, constitutional protections for business corporations in social, political, and religious realms did not arise until the 1970s.⁹⁴ Since that time, the Court has successively expanded speech rights for corporations, culminating recently in *Citizens United*, which further freed business corporations from campaign finance restrictions on political spending. *Hobby Lobby* represents a new landmark; allowing, for the first time, business corporations to claim religious accommodation to avoid compliance with generally applicable federal regulation.

Under the weight of *Citizens United* and *Hobby Lobby*, corporate law becomes the mechanism not just for ordering business affairs but also for making decisions about corporate political spending and sorting corporations that might seek religious accommodation. *Citizens United* left the question of who speaks and how corporate participants are protected to "the procedures of corporate democracy."⁹⁵ As explained in this chapter, *Hobby Lobby* likewise leaned on state corporate law to determine the religious identity of a corporation and resolve disputes among corporate participants.

In this way, part of the broader significance of *Hobby Lobby* is that it adds weight to the work of corporate law and shines a light on what corporate law does and does not do. Corporate law governs the internal relations of the corporation with a focus

⁹⁰ Blair & Pollman, *supra* note 20 (tracing two hundred years of Supreme Court jurisprudence on corporate constitutional rights).

⁹¹ *Id.*

⁹² Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1639.

⁹³ Blair & Pollman, *supra* note 20.

⁹⁴ *Id.* Until this time, "First Amendment protections had been extended to corporations primarily in the narrow context of media corporations and claims brought by the NAACP in the civil rights era." *Id.* at 1719.

⁹⁵ *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010) (internal quotation marks and citation omitted); see also *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978). For an explanation of how "the procedures of corporate democracy" in fact offer little to no relief for dissenting shareholders, see Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009).

on the shareholders and the board of directors. Corporate law does not provide a voice for other corporate stakeholders, and it does not regulate corporations' relations with the external world. More than a century ago, states eased restrictions that regulated corporate behavior through their charters and various doctrines of corporate law.⁹⁶ Corporations instead became primarily regulated by regimes outside of corporate law.⁹⁷ For instance, state corporate law does not take into consideration or provide a voice for employees who do not share in the moral or religious commitments of the corporation's board or shareholders.⁹⁸ Employee protections are left to employment and labor law and other areas outside of corporate law. Likewise with consumers and other business participants—their concerns are dealt with by legal frameworks outside of corporate law.

In a post-*Hobby Lobby* environment in which business corporations can seek religious accommodations from generally applicable laws, we might consider anew the merits of relying on areas outside of corporate law to regulate corporations.⁹⁹ Corporate law might function well as a tool for organizing business endeavors, but it was not designed to aggregate and protect the nonbusiness interests of various participants. Further, if the choices that individuals make as investors, employees, and consumers are understood as expressing values beyond economics, we might place greater importance on sorting and facilitating decision-making about corporations.¹⁰⁰

Hobby Lobby raises still more questions. Some scholars have lauded *Hobby Lobby* as a win for progressive values because of its recognition that business corporations can pursue goals other than shareholder profits and its implication for the larger realm of corporate social responsibility.¹⁰¹ But the question of whether religion is different from other social values such as environmental sustainability or employee protections has not been fully grappled with in the corporate context.¹⁰²

⁹⁶ Lyman Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 975 (2013); Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001).

⁹⁷ Winkler, *supra* note 1, at 110–11.

⁹⁸ Nelson, *supra* note 45, at 1609–10; Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 283–85 (1998).

⁹⁹ Further, for an argument that *Citizens United* “undermines conservative corporate theory’s reliance upon the regulatory process as an adequate safeguard against corporate overreaching,” see Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course? The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 342 (2015).

¹⁰⁰ For example, the role of disclosure deserves further study. The Delaware approach to benefit corporation law allows for a religious purpose, but requires disclosure of the corporation’s public benefit purpose, religious or otherwise, in its certificate of incorporation. Whereas some states require the public disclosure of a benefit report and/or the submission of the benefit report to the secretary of state, Delaware requires only a statement to the shareholders every two years. DEL. CODE ANN. Tit. 8, § 366(b) (West 2013).

¹⁰¹ Johnson & Millon, *supra* note 62; McDonnell, *supra* note 62.

¹⁰² For a discussion in the context of religion and law, see BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

Simply put, *Hobby Lobby* is about opting out. It is not about doing more than the law requires, as is usually the case with corporate social responsibility. Whereas the pursuit of corporate social responsibility often entails questions of whether the board of directors can put nonshareholder interests ahead of those of shareholders in order to surpass legal compliance, the pursuit of religious accommodation asks the law to bend around the shareholders' will to avoid generally applicable laws.

As Elizabeth Sepper recently commented, before *Hobby Lobby*, courts had resisted businesses' claims to religious exemptions, and even religious organizations were not excused from wage-and-hour laws despite contrary religious belief.¹⁰³ Legislative exemptions for business corporations on the basis of religious liberty had been "virtually nonexistent."¹⁰⁴ For example, Title VII of the Civil Rights Act includes an exemption that allows religious employers to favor their co-adherents with respect to certain limited activities, but courts to date have narrowly interpreted it as covering churches and faith-based nonprofit corporations.¹⁰⁵ A growing number of states prohibit discrimination on the basis of sexual orientation, and to date none have exempted business corporations from compliance.¹⁰⁶ *Hobby Lobby* takes the unprecedented step of exempting business corporations from an employee-protective law in the name of the religious liberty of shareholders. We must more deeply question whether allowing corporations to avoid laws based on the religious objections of shareholders should be put in the same conceptual category as allowing corporations to meet legal requirements and take additional actions at the expense of profits.

We might also question whether there is a limit to the socially acceptable bounds of allowing business corporations to opt out of federal regulation. In the securities law context, scholars have begun to examine the concept of "publicness"—when a private enterprise should be forced to take on public status—in theorizing the public-private divide.¹⁰⁷ Likewise here we might consider whether corporations with a significant impact on society should be forced to comply with generally applicable regulation, regardless of whether their motives are driven by profit or other objectives. As Justice Ginsburg noted in her dissent, "[c]losely held" is not synonymous with "small."¹⁰⁸

¹⁰³ Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 25 (2014).

¹⁰⁴ *Id.* at 26.

¹⁰⁵ See 42 U.S.C. 2000e-1(a) (2006) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 13–14 (2013). Cf. Rienzi, *supra* note 89, at 92 (acknowledging that business corporations have not received the Title VII exemption to date but arguing that no categorical rule prevents this result).

¹⁰⁶ Sepper, *supra* note 103, at 26.

¹⁰⁷ Donald C. Langevoort & Robert B. Thompson, "Publicness" in *Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337 (2013); Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137 (2011); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012 (2013).

¹⁰⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797, n.19 (2014) (Ginsburg, J., dissenting).

Hobby Lobby itself has over 13,000 employees, 600 stores nationwide, and \$3 billion in annual revenue. Many other large privately owned companies exist, including the veritable giants of Cargill (\$134.9 billion in revenue and 143,000 employees) and Koch Industries (\$115 billion in revenue and 100,000 employees).¹⁰⁹ RFRA provides federal statutory protection of religious liberty that goes beyond what is protected by the Free Exercise Clause.¹¹⁰ Such protection is within the scope of congressional authority and is subject to change and clarification.

4. CONCLUSION

In ruling that closely held business corporations can seek religious liberty protections under RFRA, the *Hobby Lobby* Court relied on state corporate law to provide a framework for corporations to pursue a religious purpose or identity. Close attention to the Court's own treatment of corporate law issues reveals, however, several complexities that the Court left unexplained or ambiguous. The result is a landmark decision that allows corporations to avoid generally applicable laws based on the religious objections of shareholders and provides only a murky explanation of the corporate law mechanics for establishing and limiting this liberty.

This chapter has aimed to advance the important project of understanding *Hobby Lobby* and corporate religious liberty in the context of corporate law and theory. Further, this chapter has argued that, like *Citizens United* before it, *Hobby Lobby* adds weight to the work of corporate law in ordering the rights of organizations and their political and religious roles, meriting future examination.

¹⁰⁹ FORBES, <http://www.forbes.com/companies/cargill/>; <http://www.forbes.com/companies/koch-industries/> (last visited Feb. 22, 2015).

¹¹⁰ See *supra* note 15.