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# Corporate Law After *Hobby Lobby*

By Lyman Johnson\* and David Millon\*\*

*We evaluate the U.S. Supreme Court's controversial decision in the Hobby Lobby case from the perspective of state corporate law. We argue that the Court is correct in holding that corporate law does not mandate that business corporations limit themselves to pursuit of profit. Rather, state law allows incorporation for any lawful purpose. We elaborate on this important point and also explain what it means for a corporation to "exercise religion." In addition, we address the larger implications of the Court's analysis for an accurate understanding both of state law's essentially agnostic stance on the question of corporate purpose and also of the broad scope of managerial discretion.*

## I. INTRODUCTION

In a landmark June 30, 2014 ruling on religious liberty,<sup>1</sup> the United States Supreme Court spoke in unprecedented fashion to a foundational issue in corporate law, the question of corporate purpose.<sup>2</sup> To resolve a clash between two important federal statutes—the Patient Protection and Affordable Care Act (“ACA”)<sup>3</sup> and the Religious Freedom Restoration Act (“RFRA”)<sup>4</sup>—the Court entered the very heart of state corporate law and addressed a debate that has raged for decades.<sup>5</sup> Rejecting the federal government’s position that “for-profit” business corporations cannot “exercise religion” because their sole purpose is to make money,<sup>6</sup> the Court in *Burwell v. Hobby Lobby Stores, Inc.* construed state corporate law as permitting a broad array of non-monetary objectives.<sup>7</sup> Thus, the Court reasoned, business corporations are “persons” under RFRA that can

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1. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *aff'g* 723 F.3d 1114 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014), *rev'g* 724 F.3d 377 (3d Cir. 2013). The two cases were consolidated after the grant of certiorari. 134 S. Ct. 678 (2013).

2. See *Hobby Lobby*, 134 S. Ct. at 2766–76; see *infra* Part III.B.

3. Pub. L. No. 114-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, and 42 U.S.C.).

4. See 42 U.S.C. §§ 2000bb to -4 (2012).

5. See *infra* Part III.

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

7. *Id.*

“exercise religion” under that Act,<sup>8</sup> and it held that the ACA’s contraceptive mandate substantially burdened sincerely held religious beliefs.<sup>9</sup>

The *Hobby Lobby* decision has generated enormous controversy in both legal and political circles,<sup>10</sup> and Justice Ginsburg authored a fierce and lengthy dissent.<sup>11</sup> Undoubtedly, in the months ahead, much scholarly attention will be devoted to the intricacies of the Court’s RFRA analysis and what it reveals as to the Justices’ current thinking about religious liberty inside as well as outside the business setting.<sup>12</sup> This is an important subject, as is the policy issue of ensuring women’s access to contraceptive care under the ACA and to healthcare generally.<sup>13</sup>

In this article we assess the implications of the *Hobby Lobby* decision from a corporate law perspective. The Supreme Court very rarely takes up corporate law issues of any kind and it has never spoken to the subject of corporate purpose. Without the Court’s threshold holding that, as a matter of state corporate law, business corporations can exercise religion because they need not solely pursue profits,<sup>14</sup> the RFRA claim in *Hobby Lobby* would have failed, and the ACA’s contraceptive mandate would not have been struck down. With that expansive holding in *Hobby Lobby*, however, the consequences now radiate far beyond the context of religious liberty, healthcare, and women’s rights. Quite simply, by tackling for the first time the contentious issue of corporate purpose, the Supreme Court relaunched a stalled conversation and the *Hobby Lobby* decision will reverberate across corporate America. It will reshape fundamentally how business people, lawyers, legal and business scholars (particularly, corporate law professors),<sup>15</sup> as well as ordinary citizens, think about the permitted objectives of business corporations in a free society, objectives that extend far beyond

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8. *Id.* at 2768–76.

9. *Id.* at 2774–79. From that conclusion, the Court went on to examine whether, in order to comply with RFRA, the contraceptive mandate was the “least restrictive means” of furthering what the Court assumed to be a “compelling governmental interest.” *id.* at 2779, and concluded it was not. *Id.* at 2780–84. We do not address these issues in this article.

10. See, e.g., Adam Liptak, *Court Limits Birth Control Rule*, N.Y. TIMES, July 1, 2014, at A1.

11. *Hobby Lobby*, 134 U.S. at 2787–2806 (Ginsburg, J., dissenting).

12. In its October 2014 term, the Supreme Court took up another religious liberty case, *Holt v. Hobbs*, 509 F. App’x 561 (8th Cir. 2014), *cert. granted*, 134 S. Ct. 1512 (Mar. 3, 2014) (No. 13-6927). The case involves a RFRA challenge to the Arkansas no-beards in prison policy by a Salafi Muslim. *Id.*

13. Democratic members of the House and Senate quickly introduced new legislation to counter *Hobby Lobby*, the Protect Women’s Health from Corporate Interference Act of 2014. Ilyse Wolens Schuman, *Democratic Lawmakers Introduce Measure to Counter Hobby Lobby*, LITTLER (July 10, 2014), <http://goo.gl/saZUni>. With a Republican-controlled House, this bill likely has little hope of success. In late August 2014, the Department of Health and Human Services issued proposed rules aimed at permitting only a narrow group of business corporations to refuse on religious grounds to provide certain contraceptive coverage to employees. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (proposed Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510 & 2590, 45 C.F.R. pt. 147). The period for comments closed on October 21, 2014, but as of the date of this article, no further agency action has been taken.

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

15. For example, a 2011 Brookings Institute study noted that the top twenty law schools and top twenty business schools in the United States routinely teach that maximizing shareholder wealth is (and should be) the primary purpose of the corporation. DARRELL M. WEST, BROOKINGS INST., THE

those that are religiously motivated and into the larger realm of corporate social responsibility of all kinds. This article explains why.

Part II identifies the two key corporate law issues at stake in *Hobby Lobby*: is a business corporation a “person” under RFRA and can it “exercise religion”? This Part describes the parties and the salient features of the three companies involved in the litigation, and it explains how religious convictions in the corporate setting created a conflict between the ACA and RFRA. Part III traces the heated, decades-long debates over corporate personhood and corporate purpose, debates the Supreme Court, at last, had to weigh in on to resolve the contraceptive mandate issue. Part IV critically analyzes the scope and rationales of the Court’s views on these corporate law subjects. Part V discusses the larger significance of *Hobby Lobby* for corporate law and corporate theory, and identifies where lingering uncertainty remains on the personhood and purpose issues. Part VI is a brief conclusion.

## II. THE CORPORATE LAW ISSUES IN *HOBBY LOBBY*

The consolidated *Hobby Lobby* cases presented two corporate law issues. First, is a business corporation a “person” under RFRA? Second, can such a corporation “exercise religion” under RFRA? In this Part, we describe how these questions emerged and why they were so important. We note before doing so, however, that both questions are federal law questions because RFRA, like the ACA, is a federal statute. But resolution of the second issue—i.e., whether a corporation can exercise religion—depends entirely on the permissible purposes of corporate endeavor under state corporate law. The Court acknowledged this.<sup>16</sup> And it is the Court’s views on corporate law that make its ruling so momentous.

### A. RFRA

RFRA was enacted in 1993,<sup>17</sup> in response to the 1990 Supreme Court decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>18</sup> The *Smith* Court held that, under the First Amendment, “neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.”<sup>19</sup> *Smith* thereby dramatically altered how the Court analyzed the Free Exercise Clause of the First Amendment.<sup>20</sup>

RFRA sought, statutorily, to counter *Smith* by providing that “[g]overnment shall not substantially burden a *person’s exercise of religion* even if the burden results from a rule of general applicability.”<sup>21</sup> If the government does substantially

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PURPOSE OF THE CORPORATION IN BUSINESS AND LAW SCHOOL CURRICULA 17–18 (2011), available at <http://goo.gl/GrxZlj>.

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

17. See *supra* note 4.

18. 494 U.S. 872 (1990). For a discussion of pre-*Smith* case law, see McDonnell, *infra* note 117.

19. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

20. See *Hobby Lobby*, 134 S. Ct. at 2760.

21. See 42 U.S.C. § 2000bb-1(a) (2012) (emphasis added).

burden a person's exercise of religion, under RFRA, that person is entitled to an exemption unless the government "demonstrates 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."<sup>22</sup>

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000,<sup>23</sup> which, among other things, broadened the definition of the phrase "exercise of religion" in RFRA to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>24</sup> Given the text of RFRA and the 2000 amendment, it is plain to see the importance of the terms "person" and "exercise of religion" in determining the reach of that Act's protection against governmental encroachments on religious liberty.

## B. ACA AND THE HHS CONTRACEPTIVE MANDATE

Congress enacted the ACA—sometimes referred to as "Obamacare"—in 2010.<sup>25</sup> It requires employers with fifty or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage."<sup>26</sup> As noted by the Court, the ACA authorized the Health Resources and Services Administration ("HRSA"), a component of the United States Department of Health and Human Services ("HHS"), to establish exemptions from the ACA for "religious employers" such as churches.<sup>27</sup> HHS, again acting under ACA auspices, also provided a somewhat similar (but not identical) "accommodation" to religious *nonprofit* organizations, such as religiously affiliated schools and hospitals.<sup>28</sup>

For all employers covered by the ACA, HRSA, pursuant to ACA authorization, promulgated mandatory rules pertaining to the provision of contraception coverage as an employee benefit.<sup>29</sup> Under these rules, all nonexempt employers were required to offer specified contraception coverage to their female employees.<sup>30</sup> Four of the mandated methods of contraception may, the Court in *Hobby Lobby* noted, "have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus."<sup>31</sup> Requiring access to these four methods of contraception triggered the *Hobby Lobby* litigation.

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22. See *id.* § 2000bb-1(b).

23. *Id.*

24. See *id.* § 2000cc-5(7)(A).

25. See *supra* note 3.

26. 26 U.S.C. § 5000A(f)(2) (2012); *id.* § 4980H(a), (c)(2).

27. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2763 (2014); 45 C.F.R. § 147.131(a) (2014).

28. See *Hobby Lobby*, 134 S. Ct. at 2763; 45 C.F.R. § 147.131(b) (2014). This "accommodation" has itself spawned substantial litigation. See, e.g., *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (pending appellate review, Secretary of HHS enjoined from enforcing ACA if applicant Christian College states that it is a nonprofit organization holding itself out as religious and has religious objections to providing coverage for contraceptive services); see Robert Pear, *A Two-Page Form Spurs an Ideological Showdown*, N.Y. TIMES, July 13, 2014, at 16.

29. *Hobby Lobby*, 134 S. Ct. at 2762.

30. *Id.*

31. *Id.*

### C. THE THREE CORPORATIONS OBJECT

The *Hobby Lobby* decision was the culmination of litigation initiated by three business corporations and their shareholders against HHS.<sup>32</sup> In brief, they all objected to the four contraceptive methods noted, although they had no objection to offering employee coverage for the sixteen other mandated methods of birth control.<sup>33</sup> The basis for the objection in all cases was a deeply held religious conviction that these four methods were life-ending abortifacients.<sup>34</sup> The sincerity of these beliefs was never questioned by the government or any court.<sup>35</sup>

Due to the objection, the corporations sought an exemption from the HHS mandate with respect to the four government-mandated contraceptive methods. The legal ground for seeking an exemption was RFRA. In each of the cases below,<sup>36</sup> the corporations themselves and their shareholders asserted that they were “persons” under RFRA and that the HHS contraception mandate substantially and impermissibly burdened their “exercise of religion.”

#### 1. Hobby Lobby Stores, Inc.

This company was organized in the late 1960s as an Oklahoma business corporation by David and Barbara Green, husband and wife, devout evangelical Christians. All of the voting stock is held by various family trusts, not directly by the Greens themselves.<sup>37</sup> The Greens and their adult children serve as trustees of the trusts and all were required to sign a statement of faith—called a Trust Commitment—before becoming trustees.<sup>38</sup> The express language of the trust instrument itself also affirms the Christian faith.<sup>39</sup> Thus, the controlling shareholders (the trusts), as well as the trustees who control the shareholder-trusts, each memorialized a commitment to the Christian faith. David Green and three of the Greens’ children serve as the four directors of Hobby Lobby. They also serve as the company’s senior executive officers.<sup>40</sup>

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32. Both the Court and Justice Ginsburg in her dissent repeatedly refer to the corporations involved in this case as “for-profit” corporations. The Oklahoma corporation statute relevant to the case, unlike the Pennsylvania statute, does not use this term to describe business corporations organized thereunder. Nor does the Delaware statute or the Model Business Corporation Act. Because the term may be taken incorrectly to imply that business corporations must pursue profit at the expense of competing considerations, except where we specifically discuss Conestoga Wood Specialties Corporation and the Pennsylvania statute, we instead refer to corporations like Hobby Lobby as “business corporations.”

33. *Hobby Lobby*, 134 S. Ct. at 2764–66.

34. *Id.*

35. *Id.* at 2779.

36. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *rev’d*, 723 F.3d 1114 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013), *aff’d*, 724 F.3d 377 (3d Cir. 2013).

37. 870 F. Supp. 2d at 1284 n.6.

38. 723 F.3d at 1122.

39. *Id.*

40. *Hobby Lobby*, 134 S. Ct. at 2765. It appears that Mrs. Green was not a director, even though she was a trustee of the trusts that owned the stock. Thus, there is not complete identity between the directors and the shareholders. Any reading of *Hobby Lobby* therefore that contends the case should

Hobby Lobby has more than 13,000 employees and operates over 500 arts and crafts stores.<sup>41</sup> Thus, although it is a family-controlled, closely held corporation, it is, financially and otherwise, a substantial company. *Forbes* magazine, for example, reports that it had 2013 revenues exceeding \$3 billion.<sup>42</sup> An affiliate, Mardel, Inc., also an Oklahoma business corporation, was started by one of the Green's sons. It operates thirty-five Christian bookstores and employs approximately 400 people.<sup>43</sup> Like Hobby Lobby, it objected to the contraception mandate.

Hobby Lobby has a written statement of corporate purpose.<sup>44</sup> This statement evinces a clear Christian emphasis along with a notable multi-stakeholder thrust. It expresses a commitment to “[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles,” while offering customers exceptional value and service, serving employees and their families while sharing blessings with them, investing in the community, and providing a return on the owners’ investment.<sup>45</sup> This corporate statement is separate from that of the trusts that own the stock in Hobby Lobby.

Conspicuously, in the statement of corporate purpose, a return for shareholders appears last and only is one of several purposes identified by Hobby Lobby, and nothing whatsoever is said in that statement about “maximizing” the return to investors. Moreover, if the company is sold, only 10 percent of the sales proceeds are to go to the stockholder-trusts, while 90 percent will be paid to charity.<sup>46</sup> About one-third of the corporation’s annual profits already are contributed to charity, and the company pays its employees no less than \$14 per hour, almost twice the minimum wage.<sup>47</sup> Both Hobby Lobby and Mardel, moreover, are closed on Sundays due to religious beliefs, an action Mr. Green calculated costs several million dollars a year in lost profits for the business.<sup>48</sup> The companies neither seek to maximize profits nor do they actually do so.

## 2. Conestoga Wood Specialties Corporation

The third corporate litigant was Conestoga Wood Specialties Corporation. Norman and Elizabeth Hahn organized this company as a Pennsylvania for-profit

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be limited to companies where shareholders are coextensive with the directors would be a flawed interpretation of the decision.

41. *Id.* These figures stem from the litigation record. See 817 F. Supp. 2d at 1284. According to *Forbes*, however, as of the end of 2013, Hobby Lobby employed over 23,000 people. See *America's Largest Private Companies 2013*, *FORBES* (Dec. 18, 2013), <http://www.forbes.com/largest-private-companies>.

42. See *supra* note 41.

43. 817 F. Supp. 2d at 1284.

44. See *Statement of Purpose*, HOBBY LOBBY, [http://www.hobbylobby.com/our\\_company/purpose.cfm](http://www.hobbylobby.com/our_company/purpose.cfm) (last visited Oct. 10, 2014).

45. *Id.*

46. Brian Solomon, *David Green: The Biblical Billionaire Backing the Evangelical Movement*, *FORBES* (Sept. 18, 2012, 7:51 AM), <http://goo.gl/>

47. Janet Adamy, *Are Firms Entitled to Religious Protections?*, *WALL ST. J.* (Mar. 21, 2014, 10:33 PM), <http://goo.gl/VcLScW>.

48. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014).

business corporation in the early 1960s.<sup>49</sup> The Hahns, members of a Mennonite denomination of Christians, own all of the company's voting stock, and they serve as members of its board of directors.<sup>50</sup> One of their sons serves as the President and CEO.<sup>51</sup>

Conestoga's board of directors adopted a Statement on the Sanctity of Life expressing the view that "human life begins at conception."<sup>52</sup> The company's mission, moreover, is articulated in a Vision and Values Statement affirming that the corporation will act to ensure a "reasonable profit" as gained in a "manner that reflects [a] Christian heritage."<sup>53</sup> As with the Hobby Lobby and Mardel corporations, the founders and directors of Conestoga Wood operate the company in accordance with sincerely held "religious beliefs and moral principles."<sup>54</sup> The pursuit of profits, moreover, is stated not to be the sole purpose of Conestoga, and the company does not seek to maximize profits.

Given the three companies' rejection of profit maximization as a corporate objective,<sup>55</sup> in their resistance to the contraception mandate a central question was whether a business corporation could even invoke the protection of RFRA by claiming to be a "person" that seeks to "exercise religion." The federal government argued that so-called "for-profit" corporations neither are "persons" under RFRA, nor, given that they exist for the purpose of making money, could such companies "exercise religion."<sup>56</sup> The issue was thus squarely joined on these questions, and, as Part III explains by way of background, this brought to the Supreme Court a longstanding and unendingly controversial issue of signal importance for corporate law: must business corporations act solely to maximize profits, or may they pursue other non-pecuniary objectives?

### III. STATE LAW ON CORPORATE PERSONHOOD AND PURPOSE

Corporate personhood and corporate purpose are related concepts. The idea of a corporation as a "person" expresses that the corporation possesses a separate legal identity, distinct from the persons associated with it. Corporate purpose

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49. *Id.* at 2764.

50. *Id.*

51. *Id.*

52. *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 382 n.5 (3d Cir. 2013).

53. *Hobby Lobby*, 134 S. Ct. at 2766.

54. *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013).

55. Numerous amicus briefs were filed on behalf of these companies arguing that corporate law permits the pursuit of non-monetary objectives and that many businesses do so. *See, e.g.*, Brief of Pacific Legal Foundation at 10–26, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2012) (No. 13-354); Brief of National Religious Broadcasters at 11–16, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2012) (No. 13-354); Brief of National Jewish Commission on Law and Public Affairs at 1–17, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2012) (No. 13-354).

56. *Hobby Lobby*, 134 S. Ct. at 2767–72. Numerous amicus briefs supported the government in this regard and argued against RFRA as a shield from the contraception mandate for business corporations. *See, e.g.*, Brief of Constitutional Accountability Center, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2012) (No. 13-354); Brief of Jewish Social Policy Action Network, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2012) (No. 13-354); Brief of Brennan Center for Justice at New York University, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2012) (No. 13-354).



reflects the particular objective(s) sought to be achieved by cooperative human endeavor through the corporate form. Central to the *Hobby Lobby* case was whether business corporations are “persons” under RFRA, a federal statute, and if so, whether they have the power to “exercise” religion. As described in this Part, corporate personhood is well established, as is the broad power of corporations to pursue a range of corporate purposes besides profit maximization.

#### A. CORPORATE PERSONHOOD

It is beyond dispute that corporations—business corporations as well as non-profit corporations—are persons in the eyes of the law. This means that they enjoy a legal status separate and distinct from the human beings who are associated with them. So, for example, corporations own property, enter into contracts, and commit torts. They can sue and be sued in their own right. They are subject to penalties if they violate applicable criminal laws. They must comply with a vast array of federal and state regulations. Unless tax-exempt status has been conferred upon them, they are subject to income tax liability on the net income generated by their commercial activities. Corporations also possess rights conferred upon them by state and federal statutes and enjoy certain state and federal constitutional protections. In other words, the rights and obligations of corporations are not simply those of their shareholders, officers, directors, employees, or other humans who participate in or are affected by the corporation’s activities.

Much ink has been spilled over the metaphysical question of the nature of corporate personality.<sup>57</sup> Are corporations entities in their own right or merely aggregations of human beings who are associated with each other in a joint endeavor? If they are entities, are they “natural” rather than merely “artificial”? We need not concern ourselves with these theoretical debates, noting only that corporate law unambiguously treats corporations as possessing distinct legal identities separate from the human beings who have chosen to act jointly through the device of incorporation.

As creatures of positive law, corporate persons exist to pursue the purposes chosen by their human founders. State law specifies the purposes for which corporations may be organized. Importantly, it does little to limit the organizers’ choices. Delaware’s business corporation statute is typical in providing that “[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.”<sup>58</sup> As probed in greater depth in Part IV, the Pennsylvania and Oklahoma statutes governing the corporations involved in the *Hobby Lobby* case are to the same effect, despite differences in language.<sup>59</sup>

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57. See, e.g., David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201.

58. DEL. CODE ANN. tit. 8, § 101(b) (2011).

59. 15 PA. CONS. STAT. ANN. § 1301 (West, Westlaw through 2014 Reg. Sess. Acts 1 to 131) (“Corporations may be incorporated under this subpart for any lawful purpose or purposes.”); OKLA. STAT.

Having conferred extremely broad freedom of choice on the corporation's organizers, state corporate law then specifies the powers that corporate persons may lawfully exercise in furtherance of their purposes. Some statutes define corporate powers in general terms. For example, the Pennsylvania statute involved in *Hobby Lobby* as well as the Model Business Corporation Act provide that corporate persons possess the same powers or capacity as natural persons.<sup>60</sup> These are default provisions that could be subject to carve-outs or qualifications where state legislatures think it appropriate to do so. Other corporate statutes take a different approach, providing a list of the corporation's powers. Delaware's statute takes this form.<sup>61</sup>

As persons that exist only by virtue of law, corporations obviously lack the ability to pursue their purposes and exercise their lawfully delegated powers without the assistance of human beings. The corporate person can do nothing unless human beings act on its behalf. In this sense, corporate persons are artificial (or "fictitious") in comparison with human ("natural") persons. Corporate law therefore provides a governance framework that specifies who can act lawfully on behalf of the corporation. The board of directors is the primary locus of governance authority. The board acts for the corporation, sometimes in its own capacity and more often through delegation of authority to other humans, namely the corporation's senior officers and those to whom they in turn have delegated authority.

As a practical matter, statutory specifications of corporate power define the scope of the powers of those natural persons who possess the lawful authority to act on the corporation's behalf. To say, for example, that a corporation has the power to file a lawsuit in its own right or to acquire property is to say in effect that the board of directors possesses the authority to exercise these rights on the corporation's behalf. Similarly, if those with the requisite authority deem philanthropy to be among a corporation's purposes, it is up to the board of directors to exercise the corporation's statutory power<sup>62</sup> to make charitable donations.

In addition to the specification of the corporation's powers, positive law also confers rights and legal protections on corporate persons. Thus, for example, the Supreme Court has held that corporations enjoy many—but not all—of the constitutional rights enjoyed by human beings. State and federal statutes also provide privileges for corporate persons such as, for example, eligibility for government contract work and entitlement to income tax credits and deductions. These constitutional and statutory provisions often confer rights to act, such as the right to spend corporate funds on political campaigns.<sup>63</sup> As is the case with

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ANN. tit. 18, §§ 1002, 1005 (West, Westlaw current with chapters of the 2d Reg. Sess. of the 54th Leg.) ("[E]very corporation, whether profit or not for profit" may "be incorporated or organized . . . to conduct or promote any lawful business or purposes.").

60. 15 PA. CONS. STAT. ANN. § 1501 (West, Westlaw through 2014 Reg. Sess. Acts 1 to 131); MODEL BUS. CORP. ACT § 3.02 (2014).

61. DEL. CODE ANN. tit. 8, § 122 (2011).

62. See, e.g., *id.*

63. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

corporate powers, those human actors whom the law authorizes to act on the corporation's behalf exercise corporate rights.

## B. CORPORATE PURPOSE

The question in the *Hobby Lobby* cases of whether RFRA applies to business corporations depends primarily on whether they are able to “exercise religion.” The fact that a fictitious legal entity cannot pray or attend a synagogue is irrelevant to this question. If the corporation is empowered by state law to exercise religion, then it does so through its legally authorized representatives, just as it does when it exercises any other lawful power.

The issue therefore is whether state corporate law authorizes business corporations to exercise religion. As noted above, this is important because in *Hobby Lobby* the government argued that business corporations lack the lawful authority to do anything other than pursue financial gain. The argument resonates with the claims of conservative corporate law academics who assert that corporate law mandates profit maximization. According to this view, the financial interests of shareholders take precedence over all competing considerations. However, if state corporate law does not authorize the exercise of religion, religious observance or activities would be proscribed even if they do not compromise shareholder financial interests or actually promote them. Thus, as background to the *Hobby Lobby* Court's treatment of this issue, here we briefly describe state corporate law bearing on corporate purpose.

State corporate law does not require corporations to prioritize profits over competing considerations. This fact has ramifications that extend far beyond the particular activities—religious observance—at issue in the *Hobby Lobby* cases. All business corporations (and non-profits too, for that matter) must generate profit in order to survive. That is simply a fact of life. But corporate law confers on them broad discretion to determine the extent to which they choose to temper the pursuit of profit by regard for other values.

Delaware corporate law, the most influential body of law for United States publicly held corporations, does not mandate shareholder wealth maximization. The statute says no such thing. There is virtually no judge-made precedent to that effect. One recent trial court opinion does speak of shareholder wealth maximization as a statutory mandate, but the analysis is not persuasive and is not likely to be influential.<sup>64</sup> In deciding eBay's suit against craigslist, Chancellor Chandler states that, “[h]aving chosen a for-profit corporate 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.”<sup>65</sup> Chancellor Chandler then goes on to make a far stronger statement. Corporate policies that seek “*not* to maximize

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64. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). For a thorough critique of this decision, see Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 439–44 (2013).

65. *eBay Domestic Holdings, Inc.*, 16 A.3d at 34.

the economic value of a for-profit Delaware corporation for the benefit of its stockholders” are invalid.<sup>66</sup> In other words, not only is corporate management legally required to pursue profit, it must also seek to maximize the shareholders’ financial interests. The Court cites no statutory provision or case law in support of these sweeping assertions. The Delaware corporation statute includes no such mandate and does not even refer to corporations organized under it as “for-profit” entities, the phrase used by Chancellor Chandler. To the contrary, as noted in Subpart A above, the statute states expressly that “[a] corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes.”<sup>67</sup> No other Delaware Chancery or Supreme Court decision has squarely endorsed shareholder wealth maximization in the stark terms used by the court in this case.<sup>68</sup>

Further, the court’s endorsement of shareholder wealth maximization in the *craigslist* case may have very limited relevance. The facts of the case were eccentric given the defensive measures adopted by the board of directors in that case; read narrowly, the opinion insists on the shareholder wealth maximization idea in a highly unusual case involving a closely held corporation whose founders had explicitly chosen to eschew profit in order to pursue a social mission. Thus the opinion might be read simply to condemn corporate policies that are entirely and expressly contrary to shareholder financial interests, although even then the decision lacks legal support. Such circumstances are rare to say the least; business corporations pursuing social missions at the expense of shareholder value are far more likely to sacrifice some amount of profit without rejecting that objective entirely and are likely also to justify such policies with reference to long-run shareholder financial interests, even if the claim is vague and not susceptible to proof. Under the business judgment rule, policies of this kind would not be condemned even if shareholder wealth maximization were the law.<sup>69</sup>

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66. *Id.*

67. See, e.g., DEL. CODE ANN. tit. 8, § 101(b) (2011).

68. One trial court opinion states in passing that “[i]t is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders.” *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986). However, that case involved the contractual rights of bondholders and as such did not speak directly to the question of shareholder rights vis-à-vis competing considerations. Furthermore, the reference to “long-run interests” confers broad discretion on management to pursue policies that shareholders preferring short-term share price maximization might find objectionable.

In a forthcoming article, Chief Justice Leo Strine and Professor Nicholas Walker argue that advancing shareholder wealth is consistent with what they call “conservative corporate theory.” Leo E. Strine, Jr. & Nicholas Walker, *Conservative Collision Course? The Tension Between Conservative Corporate Law Theory and Citizens United* (Harvard L. Sch. John M. Olin Discussion Paper No. 788, 2014), available at <http://goo.gl/cstZzu>. They cite a number of theorists but, outside the unusual sale of control context, they cite no legal authority squarely holding that shareholder wealth (or corporate profits) must be maximized. We submit that there is none. They also sometimes state that shareholder wealth is to be “maximized” and sometimes only that it is to be “advanced.” *Id.* at 19 n.34. And they acknowledge that in a majority of states the law does not mandate shareholder wealth as the sole corporate end. *Id.* Finally, and most critical for our purposes, they agree that the Supreme Court in *Hobby Lobby* explicitly held “that profit is not the sole end of corporate governance.” *Id.* at 13 n.13.

69. Elsewhere in the *craigslist* opinion, Chancellor Chandler writes,

It should be noted further that even a narrow reading of the court's endorsement of shareholder wealth maximization is quite problematic. eBay, the plaintiff minority shareholder, invested in craigslist with full knowledge that profit maximization was not that corporation's objective. This was not, in other words, a case in which those in control of a profit-seeking corporation chose to change direction to the prejudice of existing minority shareholders. One might argue that eBay implicitly assented to craigslist's disavowal of shareholder wealth maximization when it invested with knowledge of the founders' social mission.

The typical citation for the shareholder wealth maximization claim is not a Delaware case. It is *Dodge v. Ford Motor Co.*, decided by the Michigan Supreme Court nearly 100 years ago.<sup>70</sup> That decision, without citing precedent, states that "[a] business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself . . ." <sup>71</sup> Despite the frequency with which the case is cited by commentators, by its terms, it does not mandate wealth maximization and no Delaware court has cited it as authority for a legal duty to maximize shareholder wealth.<sup>72</sup> The general statement quoted here also is not necessary to the decision of the case, which appears to be a case involving oppression of minority shareholders in a closely held corporation. The controlling shareholder—Henry Ford—adopted a policy for Ford Motor Company to forgo a large amount of profits and their distribution in favor of retaining employees and advancing conflicting social objectives, to the detriment of the Dodge brothers' arguably legitimate expectations. The shareholder wealth maximization idea did not need to be invoked to protect minority shareholders in that case or in similar cases.

Further, even viewed as a minority shareholder oppression case, the *Dodge v. Ford* decision may simply be wrong. There is no plausible claim that Henry Ford was using his control of the corporation to treat the Dodge brothers unfairly. Even after adoption of Ford's new policies, the Dodge brothers were to continue to receive annual dividends of \$120,000 on an initial investment of \$200,000, an astonishingly rich annual return of 60 percent. And, although the corporation was earning profits far in excess of the planned distributions and might have earned even more in the short term, the corporation's management had chosen to reinvest a large share of those profits in new capital assets. This sounds on the

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When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value.

*eBay Domestic Holdings, Inc.*, 16 A.3d at 33.

70. 170 N.W. 668 (Mich. 1919).

71. *Id.* at 684.

72. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 27 (2012).

face of it like just the kind of decision that the business judgment rule ought to have protected.

Delaware's lack of commitment to shareholder wealth maximization is also evident in various doctrines that insulate management from accountability to the corporation's shareholders. As a practical matter, the demand requirement in derivative litigation, the business judgment rule, and the statutory provision for exculpation from monetary liability for breach of the duty of care<sup>73</sup> insulate management from liability to shareholders except in cases involving severe conflict of interest or bad faith. Directors' fiduciary duties are owed not to the shareholders alone but rather to "the corporation and its shareholders."<sup>74</sup> Vague as this formulation might be, it does express the notion that management acts not only on behalf of the shareholders but also on behalf of the corporate entity as a whole; part of its job is to make choices in cases where corporate and shareholder interests diverge. As currently structured, except for atypical cases of coordinated institutional shareholder activism, the voting rights regime does not seriously threaten incumbent management of public companies because of collective action costs and rational apathy that discourage shareholder insurgency. Nor does the prospect of a hostile takeover create a strong incentive to maximize share value; Delaware common law accords target company boards of directors broad discretion to adopt potent defensive measures.<sup>75</sup> The *Revlon* duty<sup>76</sup> to maximize current share value arises only in a narrow range of circumstances—certain sales of the company—that corporate boards are free to avoid if they so wish, and in contemporary practice the case is of limited significance for directors.<sup>77</sup>

In our view, then, Delaware law is agnostic on the question of corporate purpose. Although dictum in *Revlon* mentions "benefits accruing to stockholders" neither that case nor any other Supreme Court authority mandates shareholder wealth *maximization* outside the *Revlon* setting. Nor does it endorse a stakeholder-focused alternative, for example, by requiring that management somehow balance the competing interests of all the corporation's various constituencies. To the contrary, we see Delaware as providing expressly for broad freedom of choice as to corporate purpose. Those who form a corporation are free to specify particular purposes in the organizational documents, subject only to the requirement that those purposes be "lawful,"<sup>78</sup> or they can leave the matter open-ended, stating simply that "the purpose of the corporation is to engage in any lawful act or activity."<sup>79</sup> In the latter case, it will be up to the board of

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73. See, e.g., DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

74. See, e.g., *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939).

75. See, e.g., *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

76. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). The court in *Revlon* did state, in dicta, that a "board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders." *Id.* at 182. But the court said nothing about "maximizing" shareholder wealth.

77. Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167 (2014).

78. DEL. CODE ANN. tit. 8, §§ 102(b), 102(a)(3) (2011).

79. *Id.* § 102(a)(3).

directors, exercising its statutory responsibility to direct the corporation's "business and affairs,"<sup>80</sup> to determine questions of corporate purpose.<sup>81</sup>

Beyond Delaware, the open-ended nature of corporate purpose is even more clear. A majority of states have enacted various versions of a "constituency statute."<sup>82</sup> These statutes empower—but do not require—corporate management to consider nonshareholder as well as shareholder interests in directing the corporation's business. Either expressly or by clear implication, they reject the shareholder wealth maximization conception of management responsibility, conferring broad discretion to sacrifice profits for alternative objectives.

Despite the absence of persuasive legal authority, corporate law scholars frequently claim not only that the law requires shareholder wealth maximization but also that corporate law designates management as the agents of the corporation's shareholders. According to this view, the inevitable costs that arise whenever a principal must rely on an agent—the likelihood of shirking and the need to monitor the agent's performance—are termed "agency costs" and are a potentially significant drag on shareholder wealth. Like the maximization claim, the agency characterization also lacks legal foundation. In legal discourse, it is traceable to the work of Daniel Fischel and Frank Easterbrook working at the University of Chicago during the later part of the 1970s.<sup>83</sup> Drawing on an article by financial economists Michael Jensen and William Meckling,<sup>84</sup> first Professor Fischel and then Professor Fischel writing with Professor (later Judge) Easterbrook argued that the job of corporate management, as agent of the shareholders, is to maximize the value of their investments in the corporation.<sup>85</sup> Although Jensen and Meckling used the agency idea in a non-legal sense and offered no legal basis for the agency characterization, Fischel and Easterbrook seized upon the agency cost idea and proceeded to analyze virtually all of corporate law from that perspective.<sup>86</sup> Since then, the shareholder wealth maximization assumption and the fixation on agency costs have taken root and flourished within the corporate law academy—despite some notable dissenters<sup>87</sup>—and has been described as "the dominant framework of analysis for corporate law

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80. *Id.* § 141(a).

81. The only limits on this power are the fiduciary obligations of care and loyalty and the doctrine of waste. The question of "waste" would be determined by evaluating director conduct against the expressed corporate purpose.

82. See Kathleen Hale, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 *ARIZ. L. REV.* 823, 833 (2003) (noting that Pennsylvania became the first state to pass a constituency statute in 1983). See generally 1 JAMES COX & THOMAS HAZEN, *TREATISE OF THE LAW OF CORPORATIONS* § 4.10, at 245 (2010).

83. For discussion of the origins of the agency theory in corporate law discourse and a critical perspective, see David Millon, *Radical Shareholder Primacy*, 10 *U. ST. THOMAS L.J.* 1013 (2013).

84. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976).

85. FRANK EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15–22 (1991).

86. See Millon, *supra* note 83, at 1025–34 (discussing the origins of Easterbrook and Fischel's agency theory of management's relationship to shareholders).

87. See, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *V.A. L. REV.* 247 (1999); Einer R. Elhauge, *Sacrificing Profits in the Public Interest*, 80 *N.Y.U. L. REV.* 733, 738 (2005); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate*

and corporate governance today.”<sup>88</sup> Similarly, business leaders, business school academics, and the business press typically take for granted the legitimacy of shareholder wealth maximization and the idea of management as the shareholders’ agent, despite the absence of legal authority. In the face of these widely held though incorrect assumptions, the Supreme Court in *Hobby Lobby* was called upon to address the question of corporate purpose under state law. We turn now to its analysis.

#### IV. THE *HOBBY LOBBY* OPINION

To resolve the RFRA claims, the Court necessarily had to address both the corporate personhood and corporate purpose issues. The federal government, through HHS, the Court observed, saw these questions in quite simple terms: “the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations . . . apply only to the companies and not to the owners as individuals.”<sup>89</sup> In effect, HHS argued, to preserve religious liberty a business individual must forgo operating through the corporate form. Such a person would thus face a Hobson’s choice: he or she might conduct business as a sole proprietor (or general partnership) and retain religious liberty, or elect to conduct business through the corporate form and relinquish that liberty.<sup>90</sup> Preservation of religious liberty in the business setting therefore requires, under the HHS view, that merchants exercise what the Court called a “difficult choice.”<sup>91</sup> The Court swiftly concluded that Congress did nothing of the kind in RFRA, an act designed to provide “broad protection for religious liberty.”<sup>92</sup>

##### A. THE CORPORATION AS PERSON

In light of the established legal framework recognizing corporations as “persons” under state law,<sup>93</sup> in *Hobby Lobby* the initial issue as to whether corporations fell within the protective mantle of RFRA was a straightforward question of statutory construction. The Court was called upon to decide whether that statute’s reference to “persons” embraces corporate persons as well as human ones, just as state corporate law routinely does.

The Court began by stating that while Congress in RFRA employed a familiar legal fiction in defining corporations as “persons,” the purpose of doing so was to provide protection for human beings.<sup>94</sup> This is so, the Court said, because a

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*Law*, 68 TEX. L. REV. 865 (1990); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 233 (1990); STOUT, *supra* note 72.

88. Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1326 (2013).

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

90. *Id.*

91. *Id.*

92. *Id.*

93. See *supra* Part III.A.

94. *Hobby Lobby*, 134 S. Ct. at 2767.



corporation is “simply a form of organization used by human beings to achieve desired ends.”<sup>95</sup> Consequently, when rights are extended to corporations, “the purpose is to protect the rights of these people.”<sup>96</sup> Importantly, the Court stated that the rights of “these people” were those of the humans who “own and control those companies.”<sup>97</sup>

The Court did not explain the basis for its equation of corporate rights with those of humans. Because of the potential for confusion, we believe this point warrants further explanation. The key idea is that the “rights” of “these people” to exercise religion that are protected by the statute are those rights to act that they possess in their *corporate* capacity. It is in the particular role of being “associated with a corporation,”<sup>98</sup> including as “shareholders, officers, and employees,”<sup>99</sup> that humans in the corporate context are protected by statutes conferring rights on corporations. Roles performed outside the corporate context give rise to no such protections any more than, by analogy, the same person playing baseball with eight others is engaged in the same activity—or has the same role, responsibilities, and objectives—as when playing soccer with eight others. Roles, organizational structure, and the decisionmaking process are all quite different for humans interacting in the corporate setting than outside it. But the human desire to express religious convictions in the corporate milieu may be no less fervent, as Justice Kennedy’s concurrence underscored: plaintiffs “deem it necessary to exercise their religious beliefs within the context of their own closely-held for-profit corporation.”<sup>100</sup> Analytically, in order to preserve the separateness of the corporation as a legal person distinct in a meaningful way from the humans associated with it, while still acknowledging their desires for religious expression, the Court emphasized here, and throughout the opinion, the *corporate* capacity and *corporate* positions and roles played by these humans. The Court thus upheld the institutional heft of the corporation as a distinct legal person under

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95. *Id.* at 2768.

96. *Id.*

97. *Id.* Here and elsewhere in the majority opinion and in the principal dissent, shareholders are referred to as the corporation’s “owners” even though there is no legal basis for this oft-used reference. Shareholders own the corporation’s stock but not the corporation itself. The corporation holds title to and owns its own assets. The distinction can be important because ownership of the corporation could imply stronger control and financial rights than corporate law actually provides.

98. *Id.*

99. *Id.* Of course, in U.S. corporate governance, employees as such have no role; their rights and obligations stem from contract and employment law. See Mark Roe, *Delaware’s Politics*, 118 HARV. L. REV. 2491, 2500 (2005) (in corporate law, “[m]anagers and shareholders get to play; no one else does”).

100. *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). We note that Justice Kennedy’s statement is at odds with Chief Justice Strine’s much narrower, and we believe incorrect, view that business people do not express moral values by investing in business corporations. Strine & Walker, *supra* note 68, at 21. Justice Ginsburg, in her dissent, invoked a strong version of distinctive corporate personhood, arguing that by incorporating a business, “an individual separates herself from the entity.” *Id.* at 2797 (Ginsburg, J., dissenting). Only Justice Sotomayor joined the corporate law portion of Justice Ginsburg’s dissent. Justices Breyer and Kagan joined all other parts of her dissent, however. *Id.* at 2806 (Breyer & Kagan, JJ., dissenting). Thus, the overall vote on the corporate law aspect of the case was 5-2.

RFRA, and did not simply disregard it by making it indistinguishable from its human participants.

This critical theoretical point could have been made far stronger and more readily comprehensible in either of two ways. First, the Court easily could have referred to the very corporate laws under which Hobby Lobby, Mardel, and Conestoga were incorporated, those of Oklahoma and Pennsylvania. Pennsylvania's statute, under which Conestoga was incorporated, provides a useful illustration. By statute, Pennsylvania corporations expressly are stated to have the same "legal capacity" as natural persons.<sup>101</sup> This is similar to section 3.02 of the Model Business Corporation Act, which confers on corporations "the same powers as an individual."<sup>102</sup> Under Pennsylvania law, therefore, business corporations have both a distinct legal identity separate from the individuals involved in it and the legal capacity to do whatever natural persons can do. Because it is not disputed that individuals are free to exercise religion, in having the same "legal capacity" as individuals, corporations also have the legal capacity to exercise religion.

Having defined corporate power in these terms, the Pennsylvania statute,<sup>103</sup> again like the Model Business Corporation Act,<sup>104</sup> then provides that all such powers are to be "exercised by" the board of directors. Since only human beings can serve as directors of a corporation, when those humans act in their director capacity, they are acting in their *corporate* role, "exercising" *corporate* powers; they are not acting on their own behalf. As those humans exercise corporate functions, they can, of course, also "exercise" all of the myriad actions of religious people in other settings—including praying, worshiping, and observing sacraments<sup>105</sup>—but, in doing so, they act in their representative "corporate" role and "corporate" capacity, as always is the case when a corporation's board of directors acts within its lawful capacity. Thus, humans, alone or communally, can simultaneously "exercise" religion while "exercising" corporate functions. Here,<sup>106</sup> the very language ("exercise") of religious liberty corresponds exactly with what humans do in directing corporate affairs.

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101. 15 PA. CONS. STAT. ANN. § 1501 (West, Westlaw through 2014 Reg. Sess. Acts 1 to 131).

102. MODEL BUS. CORP. ACT § 3.02 (2014).

103. 15 PA. CONS. STAT. ANN. § 1721 (West, Westlaw through 2014 Reg. Sess. Acts 1 to 131).

104. MODEL BUS. CORP. ACT § 8.01(a) (2014).

105. The Third Circuit in the *Conestoga* case had said that corporations "do not pray, worship, observe sacraments." *Conestoga Wood Specialties Corp. v. Burwell*, 724 F.3d 377, 385 (3d Cir. 2013). The Supreme Court, after quoting that language, said it was "quite beside the point." *Hobby Lobby*, 134 S. Ct. at 2768. This is so because, apart from humans acting in corporate capacity, and therefore acting on behalf of the corporation, corporations can do nothing. *Id.* Our point, however, is that the board of directors as a collective body can, of course, like any group of persons, pray together, engage in worship, and observe sacraments together.

106. The "exercise of religion" phrasing is used both in RFRA and in the First Amendment to the U.S. Constitution. The Hobby Lobby family—the Greens—made just this point about directing corporate affairs, in arguing that they "cannot in good conscience direct their corporations to provide insurance coverage for the four drugs and devices at issue because doing so would 'facilitat[e] harms against human beings.'" Brief for Respondent at 31, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (citing Pet. App. 14a.).

Appreciating this crucial point about corporate role serves not only to preserve the distinctive legal personhood and institutional significance of the corporation as a modern actor, it also helps to differentiate as legally and conceptually meaningful the myriad actions taken by humans in different settings, whether business or otherwise. The same humans who serve as directors of a corporation also serve in other multifarious social roles—parent, spouse, colleague, and so on—and when they do so, they are not acting in corporate capacity. The identical point, of course, can be made as to other actions taken in corporate capacity, such as those of shareholders or officers.<sup>107</sup> We need a legal vocabulary to make these important distinctions of setting and role in a society with so many collective actors, of which business corporations are only one type.

Second, the Court in *Hobby Lobby* could have taken a different approach, and more pointedly and formally emphasized that the RFRA right to “exercise religion” was the right of the corporate person itself, not those of the human directors and officers who control it—by acting on its behalf—or of the shareholders who own its stock or of the employees who work for it or of any other human associated with the corporation in some way. To be sure, legal protections conferred on corporations will typically benefit some natural persons in some way, but the existence of the corporate right has nothing to do with the existence or not of the rights of those humans who have chosen to pursue joint purposes by organizing a corporation. More particularly, the religious liberties of those individuals involved in these corporations are already the subject of undoubted legal protection outside the corporation. If the corporation itself enjoys religious liberty, its rights exist separately and in addition to those protections, and would exist even if some—or even all—of its shareholders or directors were atheists and derived no benefit from the corporation’s exercise of its own right.

This distinction is not simply a matter of semantics or formalism. The question could be important if one were to read the Court’s opinion as stating that the scope of a corporation’s legal right is dependent on the extent to which that right actually protects the interests and values of humans associated with the corporation. In *Hobby Lobby*, for example, applying RFRA protects the religious liberty of the family members who formed and control the corporations, but it is quite possible that it has no such effect on many of these companies’ employees, at least some of whom may not share their religious commitments. For such employees, there would be no benefit and only the cost of denial of access to certain health care benefits. If the scope of the RFRA depends on its purpose and that purpose is to protect the religious liberty of all persons associated with a corporation, application of the statute in this case would not have been appropriate. Limiting, as the Court did, the inquiry to whether application protects only the religious liberty of the corporations’ “owners and controllers” merely invites the question why their interests alone—ignoring those of the thousands of other humans associated with these corporations—should provide the relevant criterion.

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107. See, e.g., MODEL BUS. CORP. ACT § 7.28 (2014) (shareholders elect directors); *id.* § 8.41 (officers perform the functions prescribed by the board of directors).

Perhaps the Court at times seemingly equates the statutory rights of the corporations involved in the *Hobby Lobby* case with those of their “owners and controllers” because, as we noted above, the directors exercise control over the corporation and thus advance its chosen purposes. In exercising corporate control, directors may be motivated by religious commitment. Or perhaps the Court emphasizes shareholders because they first formed these entities in order to pursue religious as well as commercial objectives. Application of the statute certainly protects the interests of both overlapping groups of people, shareholders and directors. While that observation is true, it is beside the point if, as in *Hobby Lobby*, the distinctive rights of the corporations themselves are at stake. When humans choose to associate with each other by forming a corporation, they create a legal entity whose rights and duties are separate and distinct from their own. When directors or the corporation’s agents act on its behalf, they act in their *corporate* capacity and not as individuals. The existence or not of these corporations’ statutory rights has nothing to do with whether particular humans are benefited.

The idea of the corporation as a distinct rights-bearing entity—with rights that exist independently of those humans who are associated with it—might seem puzzling when the rights involve political speech or religious exercise, but it should not be. It is not any stranger than imagining a corporate person owning legal title to a building, filing a lawsuit in its name, or making a charitable donation. In each of these cases, if state law empowers the corporation to act, the corporation does so through the actions of its lawfully designated human representatives as carried out in accordance with the statutory governance structure. The key question therefore is whether the corporation possesses the power to act. This, of course, is a question for state corporate law, which long ago accorded broad powers to business corporations to do more than simply seek to maximize profits, as we explained in Part III.B.

Despite the potentially confusing emphasis on the rights of the humans who direct the corporations’ affairs and own its stock, the Court’s analysis sufficiently accomplishes its chosen goal of recognizing corporate separateness as furthering the true aim of granting protection to natural persons, even if its treatment of this slippery but crucial notion could have been significantly strengthened in the ways we indicate. And, although 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 thereby is a rights-bearing person, there is little doubt that, as an alternative, it could have quite easily reached that conclusion without relying on that idea.

The Court ended its brief “person” analysis by noting that the federal Dictionary Act, which governed in the absence of RFRA’s own definition, clearly included “corporation” within the meaning of that word.<sup>108</sup> Given as well that *non-profit* corporations clearly have RFRA and free exercise rights,<sup>109</sup> a point the

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108. *Hobby Lobby*, 134 S. Ct. at 2768.

109. *Id.*

government did not strenuously dispute, the Court saw no conceivable basis for including natural persons and non-profit corporations within the term “person” while excluding business corporations.<sup>110</sup> Overall, although it left much unexplained, the Court had little trouble concluding that business corporations were “persons” under RFRA. This of course was consistent with the long-held understanding of state corporate law.

## B. CORPORATE RELIGIOUS EXERCISE

The chief argument made by HHS against the three companies was that they cannot “exercise religion” under RFRA. The nub of the argument, and one agreed with by several lower court judges,<sup>111</sup> was that RFRA does not protect business (“for-profit”) corporations “because the purpose of such corporations is simply to make money.”<sup>112</sup> According to this view, business corporations lack the power to exercise religion, not simply because religion can interfere with profit seeking but because religious exercise is unauthorized by state law without regard to whether it results in lower profits. That position, of course, does not merely preclude the exercise of religion; it precludes the pursuit of any and all other non-pecuniary goals as well.

The Court dispatched this argument in a few short paragraphs, addressing for the first time an issue that has sharply divided scholars for decades.<sup>113</sup> The Court began by stating correctly that the government’s contention “flies in the face of modern corporate law.”<sup>114</sup> Acknowledging that although “a” central objective of business corporations is to “make” money,<sup>115</sup> the Court did not regard that as the only legally permissible goal. Instead, the Court noted that “modern corporate law does not require business corporations to pursue profit at the expense of everything else, and many do not do so.”<sup>116</sup> The Court observed that many business corporations support charitable causes and pursue humanitarian and altruistic objectives.<sup>117</sup> Notably, the Court did not say that corporations may advance those objectives only as a means to maximize profits; nor did the Court say that doing so was in some way consistent with the overarching aim of making

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110. *Id.* at 2769.

111. *Id.* at 2770 n.23 (citing cases).

112. *Id.* at 2771.

113. *See supra* Part III.B.

114. *Hobby Lobby*, 134 S. Ct. at 2770. The Court cited as authority two corporate law treatises that, in turn, simply cited state general incorporation laws. *Id.* at 2771.

115. *Id.*

116. *Id.* The Court here is disagreeing with the view set forth in a forthcoming article by Chief Justice Leo Strine that people do not invest in corporations to express moral values. Strine & Walker, *supra* note 68, at 21. That goal was at the heart of the three companies’ purposes in the *Hobby Lobby* cases.

117. *Id.* As Professor Brett McDonnell points out in his article on the *Hobby Lobby* decision, it is the board of directors that decides whether to make charitable contributions, just as the board decides most matters pertaining to a corporation’s business and affairs. Brett McDonnell, *The Liberal Case for Hobby Lobby* (Minnesota Legal Studies Research Paper No. 1439, 2014), available at <http://goo.gl/Idyn82>. This is important as a reminder that the key decision-making body for a corporation’s “exercise of religion” is the board, not the shareholders.

profits.<sup>118</sup> The language was far stronger. When the pursuit of profits comes “at the expense of everything else,”<sup>119</sup> the corporation may forgo profits. If, then, business corporations can lawfully pursue such worthy non-monetary objectives as those cited, the Court reasoned, there is no reason they do not have the legal power to further religious objectives as well.<sup>120</sup> Here too, the Court did not attempt to rationalize the religious aspect of the three companies as somehow consistent with profit maximization because the record clearly indicated that it was not.<sup>121</sup>

In addition, the Court recognized that many business corporations are not organized “in order to maximize profit.”<sup>122</sup> Many companies regard that form of organization as beneficial for other reasons, the Court pointed out, such as the freedom to lobby or campaign for political candidates.<sup>123</sup> Here, the Court is clearly rejecting as overly simplistic the supposed stark and binary nature of corporations, to the effect that one type, non-profits, cannot and do not distribute any profits they may generate, while the other type, so-called “for-profits,” must and do singularly seek to maximize profits for the benefit of their shareholders. Instead, the Court recognized that companies fall along a spectrum,<sup>124</sup> with some maximizing profits, others coupling the pursuit of profits with other non-monetary objectives, and yet others (non-profits) not distributing profits to owners/members at all.<sup>125</sup>

As to the source of its views on corporate purpose, the Court, as it has done before in describing the attributes of corporateness,<sup>126</sup> turned to state law.<sup>127</sup> The Court cited to the same provisions in Oklahoma’s and Pennsylvania’s general incorporation laws as the treatises it had earlier cited do more generally.<sup>128</sup> Here again, however, the Court’s treatment of this critical issue was extremely sparse, and there was stronger authority available than it recognized. For example, section 102 of the Pennsylvania corporate statute pointedly states that “a” (not “the”) purpose of a for-profit corporation can be to “pursue” (not “maximize”) profits and that profit may be an “incidental” (not the “sole” or even “primary”)

118. We thus disagree with Professor J. Robert Brown’s interpretation of this point. See J. Robert Brown Jr., *Corporate Governance, Profit Maximization and Hobby Lobby (Part 1)*, RACETOTHEBOTTOM.ORG (July 10, 2014, 6:00 AM), <http://goo.gl/HO1Lal>; J. Robert Brown Jr., *Corporate Governance, Profit Maximization and Hobby Lobby (Part 2)*, RACETOTHEBOTTOM.ORG (July 11, 2014, 6:00 AM), <http://goo.gl/KjG7hp>.

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

120. *Id.*

121. See *supra* note 48.

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

123. *Id.*

124. For a description of this “spectrum” or continuum idea, see Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corporations*, 25 REGENT L. REV. 269, 280 (2013).

125. *Hobby Lobby*, 124 S. Ct. at 2771.

126. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) (“[T]he corporation . . . owes its existence and attributes to state law.”); *Burks v. Lasker*, 441 U.S. 471, 478 (1979).

127. The Court stated: “[T]he objectives that may properly be pursued by the companies in these cases are governed by the laws of the states in which they are incorporated.” *Hobby Lobby*, 124 S. Ct. at 2771.

128. *Id.*; see *supra* note 114.

purpose of a “for-profit” corporation.<sup>129</sup> Pennsylvania thus explicitly authorizes business corporations to have mixed purposes, only one of which need be to “pursue” profit, and even that may be an “incidental” purpose.<sup>130</sup>

However frustratingly terse, the upshot of the Court’s assessment of state corporate law is to free the three companies—and others—from some imagined state law mandate to maximize profits at the expense of other activities or values. Being legally free to do more than simply pursue profits, the Court concluded that they necessarily were legally free to “exercise religion.” Consequently, the Court held, business companies could invoke RFRA’s protection of their right to exercise religion against the contraceptive mandate of the ACA.<sup>131</sup> But in reaching that conclusion, grounded as it is on the Court’s understanding of state corporate law, the opinion extends far beyond the religious context of the *Hobby Lobby* case itself. The Court’s view of corporate law’s permissive ambit means that such avowed goals as social justice, environmental concerns, and employee welfare, as well as various charitable, humanitarian, and other socially responsible pursuits, emerge as legally possible for business corporations; and these are valid ends in themselves, not merely means toward the goal of profits. The Court thus effectively addressed a core trait of the business corporation’s legal ontology, not just by saying what it is—a “person”—but also by expansively interpreting what it can *do*—i.e., pursue a host of objectives besides just making money.

This portion of the *Hobby Lobby* opinion is a landmark in corporate law. Never before had the highest court in the land spoken to an issue that goes to the very foundation of corporate law, namely, corporate purpose. Understandably, thoughtful people have differing views on the normative question of what purpose(s) a business corporation *should* pursue.<sup>132</sup> But the longstanding debate about corporate purpose goes even to the descriptive question of what the law really is on this point.<sup>133</sup> Sparse, highly ambiguous authority on this baseline issue has served only to fuel—and prolong—the disagreement.<sup>134</sup> Critically, moreover, unless corporations are legally free to pursue non-pecuniary objectives as ends in themselves, any talk of “corporate social responsibility” is of no moment because various supposedly laudable pursuits could not be advanced anyway. They would be *ultra vires*. Only with legal freedom is corporate social responsibility even possible, just as such freedom was essential to the conclusion in *Hobby Lobby* that business corporations can exercise religion.

The majority opinion in *Hobby Lobby* thus took a decidedly pluralistic view of corporate purpose<sup>135</sup> and renounced the widely (though not universally) held

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129. 15 PA. CONS. STAT. ANN. § 102 (West, Westlaw through 2014 Reg. Sess. Acts 1 to 131).

130. *Id.*

131. *Hobby Lobby*, 134 S. Ct. at 2751, 2785. For thoughts about how courts should determine whether corporations are exercising religion, see McDonnell, *supra* note 117.

132. See *supra* Part III.B.

133. See *supra* Part III.B.

134. See *supra* Part III.B.

135. See Johnson, *supra* note 124, at 279–81 (describing corporate pluralism).

view that maximization of profits is legally mandated as the sole corporate purpose.<sup>136</sup> Business corporations are not required to maximize profits and they violate no state law mandate when, as is frequently the case, they engage in activities that sacrifice profits for other values. Those activities can include “exercising religion,” as well as voluntarily going beyond the law’s requirements to promote environmental sustainability or the well-being of employees, even where that means reduced profits. So, when the organizers of Hobby Lobby and the other corporations involved in this case chose to temper their commercial ambitions with religious commitments at the time of incorporation, they acted lawfully under state law.

This conclusion was, of course, crucial to the Court’s ruling in *Hobby Lobby* that corporations can exercise religion under RFRA, a federal law. But this view of corporate purpose was rooted in the Court’s larger understanding of state corporate law, and thus the opinion has potentially far-reaching consequences for corporate law and corporate activity that extend beyond the issue of religious liberty. In Part V, we address these possible consequences while also taking up some lingering uncertainties as to the full reach of the *Hobby Lobby* decision for corporate law.

## V. THE CORPORATE LAW AFTERMATH OF *HOBBY LOBBY*

Justice Ginsburg began her dissent in *Hobby Lobby* by characterizing the majority’s decision as one “of startling breadth.”<sup>137</sup> Justice Kennedy’s brief concurrence disputed that description, stating the “opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent.”<sup>138</sup> In this Part, we explore the reach of the majority opinion, but do so specifically with respect to its implications for corporate law. We take up several dimensions of this issue, emphasizing areas where the decision made a genuine breakthrough but also where some questions remain and where disagreement already is emerging.<sup>139</sup>

### A. *HOBBY LOBBY*’S IMPACT ON STATE CORPORATE LAW

In addressing the application of RFRA to a business corporation, *Hobby Lobby* addressed an issue of federal law. But to do so it necessarily addressed a state law

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136. See, e.g., *supra* note 15.

137. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

138. *Id.* at 2785 (Kennedy, J., concurring).

139. See, e.g., Haskell Murray, *Lyman Johnson—Hobby Lobby, a Landmark Corporate Law Decision*, BUS. L. PROF. BLOG (July 2, 2014), <http://goo.gl/7BAmgz> (offering Professor Johnson’s interpretation of the Court’s *Hobby Lobby* ruling); Stephen Bainbridge, *Does Hobby Lobby Sound a Death Knell for Dodge v. Ford Motor Co.?*, PROFESSORBAINBRIDGE.COM (July 3, 2014, 2:35 PM), <http://goo.gl/g7e34g> (offering Professor Bainbridge’s response to Professor Johnson’s interpretation of *Hobby Lobby*); Alan Meese, *Hobby Lobby and Corporate Social Responsibility*, BISHOP MADISON (July 5, 2014, 12:58 AM), <http://goo.gl/hTFwsU> (discussing the academic commentary in response to *Hobby Lobby*); J. Robert Brown Jr., *Corporate Governance, Profit Maximization and Hobby Lobby (Part 2)*, THERACE-TOTHEBOTTOM.ORG (July 11, 2014, 6:00 AM), <http://goo.gl/KjG7hp> (discussing the Court’s analysis in *Hobby Lobby* and arguing that the decision does not provide any “meaningful guidance” on corporate purpose).



question, the issue of corporate purpose, as the Court itself noted.<sup>140</sup> There is, of course, neither a federal general incorporation statute nor a federal common law of corporations. Instead, outside the area of constitutional rights,<sup>141</sup> the Supreme Court routinely looks to state law as the source of rules specifying corporate attributes,<sup>142</sup> just as it did in *Hobby Lobby*. In doing so, it seeks to ascertain that law solely from state law sources, here, Oklahoma and Pennsylvania statutory and decisional law and also general principles of corporate law common to all state statutes. In *Hobby Lobby*, the Supreme Court did not describe state law as unsettled or uncertain on the issue of corporate purpose; instead, it had no difficulty concluding that state corporate law simply does not require profit maximization.<sup>143</sup> In doing so, the Court cited not only Oklahoma and Pennsylvania statutes containing language similar to that in every corporate statute, it cited two corporate law treatises that referred more generally to those types of statutes.<sup>144</sup> The Court's reasoning on the issue would thus seem to extend to all corporations in all states.

But the Court's views on corporate purpose would not be binding in the context of a state law dispute on the issue of permitted (or mandated) corporate purpose, if the state's highest court had decided otherwise or the state legislature had amended the corporate statute.<sup>145</sup> Thus, if a reprise of the *eBay* litigation<sup>146</sup> should appear, where the corporate purpose issue was quite briefly and inadequately addressed,<sup>147</sup> the Delaware Court of Chancery would presumably treat the *Hobby Lobby* opinion as highly persuasive, but the Delaware Supreme Court would not be bound to follow *Hobby Lobby's* reading of the breadth of corporate purpose.

At the same time, given that the Chancery Court in *eBay*,<sup>148</sup> like the Michigan Supreme Court in its 1919 decision of *Dodge v. Ford Motor Co.*,<sup>149</sup> cited no legal authority for its views on corporate purpose,<sup>150</sup> an opinion of the United States

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140. *Hobby Lobby*, 134 S. Ct. at 2775 (majority opinion).

141. See, e.g., *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (corporations have First Amendment free speech rights).

142. See *supra* notes 126–27 and accompanying text.

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

144. *Id.*

145. See *Johnson v. Frankell*, 520 U.S. 911, 916 (1997) (noting that “the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts”). We note, however, that besides the support of the State of Oklahoma, the Attorneys General of twenty other states supported *Hobby Lobby* and took a broad view of corporate purpose in their amicus brief. Brief for States of Michigan, Ohio and 18 Other States as Amici Curiae Supporting Respondents at 17–25, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356). Among the two co-authors of that brief was the Attorney General of Michigan. That brief rather conspicuously did not cite the Michigan Supreme Court decision of *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919), one of the rare opinions addressing corporate purpose, however briefly. See *supra* Part III.B (discussing *Dodge* and its impact on corporate purpose).

146. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

147. See *supra* Part III.B.

148. *eBay Domestic Holdings, Inc.*, 16 A.3d at 35.

149. 170 N.W. at 684 (distinguishing the case presented from cases cited by counsel); see also Brief for States of Michigan, Ohio and 18 Other States as Amici Curiae Supporting Respondents, *supra* note 145, at 3 (arguing that corporations do not need to maximize profits).

150. See *Johnson*, *supra* note 124, at 274–75.

Supreme Court, speaking with the force noted in Part IV above, will be impossible to ignore—and exceedingly difficult to disagree with.<sup>151</sup> This is especially the case given that in order to reach the conclusion that business corporations can “exercise religion” under RFRA, the Court necessarily had to first rule that state corporate law permitted corporations to pursue that objective because it eschews categorical profit maximization. A state supreme court might disagree with that ruling, but a ruling of the United States Supreme Court it is, and given the paucity of counter authority, it carries highly persuasive, if not authoritative, weight unless and until displaced by a state’s highest court or legislative action. Moreover, state law silence in the face of *Hobby Lobby*, or failure of a state to disagree with it, means the opinion will retain its persuasive force. And in the highly unlikely event a state were to somehow act to mandate profit maximization, companies could easily reincorporate elsewhere, perhaps in Oklahoma or Pennsylvania, to the fiscal disadvantage of the former state of incorporation. In the competitive corporate chartering world, of course, states do not typically act to drive businesses away.

Finally, the *Hobby Lobby* opinion serves to vindicate and validate the common business practice of choosing not to maximize profits. As the Court remarked, “it is not at all uncommon for . . . corporations to further humanitarian and other objectives.”<sup>152</sup> This judicial endorsement likely will further legitimate corporate goals other than profit maximization. Much of what is done in the corporate arena today is not the product of mandatory legal rules, but a confluence of business lore, ingrained practices, market forces, professional education, and other non-legal influences, as noted in Part III. These factors are fluid, and the *Hobby Lobby* opinion both reflects and can facilitate the ongoing shift in the norms of corporate purpose to align with broad societal expectations of corporate behavior. Movement away from pure profit seeking, moreover, is by no means limited to advancing religious objectives but can include an array of goals thought by corporate decision makers to be “socially responsible” for purely secular reasons. Voluntary action in this regard can be an efficient, positive, and non-statist influence on corporate conduct, but it depends on first appreciating a corporation’s broad legal freedom to so act, which the *Hobby Lobby* opinion legitimates.

## B. CLOSELY HELD ONLY OR ALL CORPORATIONS?

All three corporations in *Hobby Lobby* were closely held, family-controlled companies. Is the Court’s ruling limited to those types of corporations, or does it apply to all corporations, including those that are publicly held? If the

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151. In a forthcoming article co-authored by Chief Justice Leo Strine, for example, the authors agree that *Hobby Lobby* explicitly holds that “profit is *not* the sole end of corporate governance.” Strine & Walker, *supra* note 68, at 13 n.13. Delaware has taken notice of *Hobby Lobby*.

152. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014). The Court, in speaking of pursuing profit at the expense of everything else, noted too that “many [corporations] do not do so.” *Id.*

former, what exactly is a “closely held” corporation? To be sure, Justice Alito emphasized the closely held nature of the companies throughout the opinion, and he stated expressly that the case did “not involve publicly traded corporations” and “we have no occasion in these cases to consider RFRA’s applicability to such companies.”<sup>153</sup>

Still, nothing in the majority’s reasoning limits the type of companies to which it applies. Justice Alito himself said only that it was “unlikely” that public companies would assert RFRA claims, due to “numerous practical restraints.”<sup>154</sup> The involvement of institutional investors in public corporations made it “improbable” that religious beliefs would be drawn on to run such a company, Alito observed.<sup>155</sup> Moreover, it is important to distinguish the federal RFRA “exercise of religion” aspect of the case—where, practically speaking, public companies likely will not so act—from the state law issue of freedom to do so because state law does not mandate profit maximization. State law legally permits all corporations to exercise religion, but whether a particular corporation does so is up to its organizers and its board of directors. That key point pertains to all corporations.

The corporate treatises and corporate statutes cited by Justice Alito on freedom to act in a non-profit-maximizing manner are not limited in application to closely held corporations.<sup>156</sup> This is necessarily the case because there is, in state corporate law, no basis for contending that the general incorporation statute—and judicial interpretations of it—do not apply categorically to all companies, except where the statute itself provides otherwise.<sup>157</sup> There is thus no principled basis for construing the Court’s views on profit maximization as limited to closely held corporations as a matter of law. In ruling that a closely held corporation need not maximize profits, the Court looked to state law sources equally applicable to public companies.

### C. SHAREHOLDER UNANIMITY?

On the facts of the *Hobby Lobby* case, all of the stockholders, directors, and officers of the three corporations supported the religious thrust of the business operations.<sup>158</sup> One commentator quickly seized on two brief phrases in the majority opinion to suggest that such internal unanimity might be essential to the Court’s endorsement of a corporation’s non-profit-maximizing purpose.<sup>159</sup> We disagree.

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153. *Id.* at 2774.

154. *Id.*

155. *Id.*

156. *Id.* at 2771, 2775.

157. *See, e.g.*, MODEL BUS. CORP. ACT § 8.01 (2014) (referring to § 7.32).

158. *See supra* notes 37–54 and accompanying text.

159. Meese, *supra* note 139. Professor Bainbridge’s first *Hobby Lobby* blog post on this point is more equivocal. Bainbridge, *supra* note 139. He cites authority that discusses the prerogatives of the holders of a “majority” of stock, and then mentions only “a consensus.” *Id.*

The Court stated that business corporations, “with ownership approval, support a wide variety of charitable causes.”<sup>160</sup> And the Court also said, “[s]o long as its owners agree,” a corporation may deviate from profit maximization.<sup>161</sup> One might be tempted to construe the words “with ownership approval” and “so long as owners agree” as implying that *all* must so agree.<sup>162</sup> But that simply is not what those passages say or mean. Nowhere does the Court use the words “all” or “unanimous” or anything like them. Justice Alito, in this portion of the opinion, is not addressing the nuances of the voting rules for shareholders under state corporate law, which, in any event, are governed by stronger or weaker versions of a majoritarian principle, not rules of unanimity.<sup>163</sup> He is simply saying that, by whatever process the requisite level of “ownership approval” is obtained, corporations ultimately take actions consistent with how the “owners agree.”

Moreover, in responding to Justice Ginsburg’s dissent, Justice Alito explicitly takes up the question of “disputes among the owners of corporations.”<sup>164</sup> He acknowledges that “the owners of a company might well have a dispute relating to religion.”<sup>165</sup> If so, then necessarily all shareholders do not agree on business policy and unanimity is lacking. But that does not mean that, lacking unanimous agreement, the business must seek to maximize profits. It means precisely what Justice Alito then notes: “State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. . . . Courts will turn to that structure and the underlying state law in resolving disputes.”<sup>166</sup> And as noted,<sup>167</sup> the default voting rule in corporate governance is a lower threshold than unanimity. The treatise to which Alito cites at this point in his opinion refers, quite conventionally, to “simple majority vote.”<sup>168</sup>

Further, on questions of business policy, including strategic and operational decisions that sacrifice profits for other considerations, shareholders ordinarily

160. *Hobby Lobby*, 134 S. Ct. at 2771. As noted at *supra* note 97, we think reference to shareholders as “owners” of the corporation is legally incorrect and potentially misleading and, in any event, unnecessary.

161. *Id.*

162. Meese, *supra* note 139, at 3. Professor Meese cites to an earlier article he co-authored in which the unanimity position was advocated. Alan J. Meese & Nathan B. Oman, *Corporate Law and the Theory of the Firm: Why For-Profit Corporations Are RFRAs*, 127 HARV. L. REV. FORUM 273, 284–85 (2014). The cited article preceded the Supreme Court’s opinion in *Hobby Lobby*. In a later, post-*Hobby Lobby* blog post, replying to a post by Lyman Johnson, A “Missing Person”—the “Corporation,” CONGLOMERATE (July 17, 2014), <http://goo.gl/J8CCXn>, Professor Meese clarified that unanimity by shareholders was sufficient but not necessary. Alan Meese, *Hobby Lobby, Shareholder Priority and Profit Maximization*, CONGLOMERATE (July 17, 2014), <http://goo.gl/D9fySk>.

163. See, e.g., MODEL BUS. CORP. ACT § 7.25(c) (2014).

164. *Hobby Lobby*, 134 S. Ct. at 2774.

165. *Id.* at 2775. He cites as an example some stockholders wishing to remain open on the Sabbath to make more money while other stockholders might want to close for religious reasons. *Id.*

166. *Id.*

167. See *supra* note 162.

168. COX & HAZEN, *supra* note 82, § 14.11.

have no voting rights at all. It is for the board of directors to decide such questions,<sup>169</sup> and even in the boardroom unanimity is not required. If the shareholders disagree with a board-level decision, their primary recourse will be the annual election of directors, where collective action costs and rational apathy severely limit the efficacy of voting rights in public companies. While it is true that in closely held corporations controlling shareholders exercise broad decision-making influence, as a legal matter they act in their capacity as directors, not as shareholders, and here too unanimity is not required absent an unusual charter or bylaw provision.

In short, by acting appropriately through the legally mandated corporate governance structure, shareholders and directors can chart business policy. One aspect of this is deciding how, if at all, religious or other philosophical or social policy beliefs will play a role in shaping that strategy. As the key decision-makers address that question, the usual default governance and majoritarian voting rules will apply, not a highly unusual unanimity rule that would obtain only if specifically agreed *ex ante*. The decision to engage in—or refrain from—non-maximizing of profits behavior of all sorts will thus be decided in the customary way under standard corporate law rules.

#### D. A PROFIT-MAXIMIZATION DEFAULT RULE?

As we traced in Part III, there is a long and ongoing controversy about corporate purpose in the United States. Corporate law itself offers scant authority and is best characterized, we believe, as agnostic and broadly permissive on corporate purpose. Thus, although it is likely safe to describe profit-maximizing behavior as a “norm” or “common practice” in the corporate realm—and setting aside the somewhat unusual *Revlon* setting in Delaware<sup>170</sup>—it is not correct to describe it as a binding legal “rule.” The norm, moreover, is likely far stronger in the public corporation setting than in the close corporation context. The profit maximization norm, whatever the prescriptive case for it, is, descriptively, a product of deep-seated business lore and practices, market pressures, and professional education, not law. Those who contend otherwise have little to support their position on such a first-order issue.

While rejecting the notion of a mandatory profit-maximization rule, the *Hobby Lobby* case also implicitly holds that there is no default rule to that effect either. Tellingly, the Court spoke to the question of corporate purpose without reliance on or reference to any modification of or “contracting around” some supposed background maximization rule. The Hobby Lobby Stores company had a statement of corporate purpose,<sup>171</sup> and Conestoga Wood Specialties had a Vision and Values Statement,<sup>172</sup> but neither company addressed these issues in their articles of incorporation. Also, the authority to which the Court in *Hobby Lobby* cited on

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169. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2011).

170. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

171. See *supra* note 44.

172. See *supra* note 52 and accompanying text.

the corporate purpose question<sup>173</sup>—scant, as noted<sup>174</sup>—were references to generally applicable provisions of state corporation statutes, not to contractually agreed departures from those provisions.

For several additional reasons we believe the *Hobby Lobby* decision will have a positive influence on discussions about corporate purpose, and the question of the presence or absence of a default rule on that subject under current corporate law. First, as observed already, the Court's opinion validates both the business and legal legitimacy of a non-profit-maximizing approach to business, in the religious context but also beyond it. This could actually encourage express provisions to this effect. Such an authoritative sanctioning of a non-pecuniary objective in the corporate sector can itself play a role in softening the strong corporate norm of profit maximization, if not altogether shifting it. Second, given the high visibility of *Hobby Lobby*, business participants and their counsel likely will, if this is deemed important, attend more deliberately to the issue of corporate objective(s) in the corporation's organizational and governing instruments and in the disclosures made to prospective investors about corporate objectives. If so, the default rule (whatever it is) becomes irrelevant anyway.

Third, for those who think there currently is a default rule on profit maximization in corporate law, the *Hobby Lobby* decision may prompt new thinking as to whether there should be a single default rule for all corporations. Given that surveys continue to reveal the important role of religious (and other non-commercial) beliefs in American life,<sup>175</sup> and given the far more extensive participation of shareholders in all aspects of a close corporation than in the affairs of a public corporation, perhaps it is sensible to presume a greater harmony between personal belief and business goals in close corporations than in the public corporation, where a sharper focus on return on investment may be more prevalent. The dramatic rise in adoption of benefit corporation statutes,<sup>176</sup> adverted to in the Court's opinion,<sup>177</sup> shows the law's responsiveness to a perceived desire to combine the pursuit of profits with other social goals in business. The *Hobby Lobby* case highlights this not uncommon congruence of personal conviction and business practice in the close corporation. Unless state law is to require participants in close corporations to use a benefit corporation to pursue non-commercial purposes along with profits, the wisdom of a default rule of profit maximization in the general corporation statute should be rethought for close corporations.

Both as a behavioral and theoretical matter, one has to wonder whether, if natural persons are not generally presumed in our legal system to be single-minded money maximizers in all facets of their daily lives, why in corporate law they

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

174. See *supra* Part IV.

175. See, e.g., PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY (2008), available at [www.religions-pewforum.org/reports](http://www.religions-pewforum.org/reports) (describing religious affiliation and beliefs in the United States).

176. More than one-half of all states now authorize the formation of benefit corporations. See *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Oct. 10, 2014).

177. *Hobby Lobby*, 134 S. Ct. at 2771 n.25.

should be presumed to be such in their role as investors, at least in the closely held business setting if not in holding public company stock. In sweeping so categorically across investors in corporations of all sorts, adherents of the mandatory or default profit-maximizing camp make a simplifying assumption about human behavior that lacks nuance, and that may itself hobble efforts to achieve better balance among monetary and non-monetary goals within the corporate world, just as the humans associated with those corporations strive for balance throughout their lives. At the same time, we recognize that some, perhaps many, persons with strong religious convictions may well choose to maximize financial well-being in and outside the corporate setting. They are legally free to do so.

Finally, all three corporations involved in *Hobby Lobby* sought to advance a corporate purpose that went beyond making profits. Although the shareholders involved in those companies agreed on this objective, under standard corporate governance rules it is the board of directors that charts a firm's strategic direction. And the board is free to advance the corporation's mixed objectives over the objections of shareholders and at the expense of strict shareholder primacy. Thus, *Hobby Lobby* illustrates that the business corporation is a legal person possessing an *identity* distinct from the humans involved in it, and that it can have an institutional *purpose* distinct from that of its shareholders. In this way, the centrality of the corporate entity is restored to corporate law, rather than adhering to a conception of the corporation as identical to the body of shareholders both as to legal personhood and corporate goals.

Once the interests of the corporation itself, not simply the welfare of its shareholders, is made the focal point of legal and business analysis, the issue of both its rights and its "responsibilities" can be more squarely addressed. Corporate responsibilities can be mandated by laws requiring specified corporate behavior, as in the ACA itself. Corporate responsibility also can be addressed, however, by voluntary actions that exceed legal mandates, whether motivated by religion or by other philosophical, ethical, or social policy convictions. Shareholders can contribute to this and can derive benefit from it, but neither they nor other constituencies are the responsible "corporate" actor, in the eyes of the law or in society at large.

The Court in *Hobby Lobby*, however incomplete and thin its analysis, upheld a strong version of corporate personhood distinct from that of its associated constituencies and a strong version of corporate freedom to pursue mixed objectives, not just corporate profits or shareholder financial welfare. In doing so, the Court certainly did not discuss or engage modern corporate theory, but neither did it do as the "nexus of contracts" version of that theory does and essentially disregard the corporation altogether as the focal point of analysis.<sup>178</sup> By taking corporate personhood seriously, the Court endorsed the business corporation as a flexible legal arrangement possessing an inherent freedom to pursue a range of institutional goals, including but not limited to profit maximization. The robust corporate actor that emerges from *Hobby Lobby* is thus more complex than the narrow

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178. For a description of the modern "nexus of contracts" theory of the corporation, see Millon, *supra* note 84, at 1033–34.

profit-maximizing, shareholder-centric version of modern theory, but for that very reason it is fully amenable to debates about what its behavior should be. With express recognition of the freedom to do more than simply seek to maximize profits may come a growing social demand that business corporations act to advance other goals. Corporate theory will then have to adjust accordingly.

## VI. CONCLUSION

The *Hobby Lobby* decision has drawn sharp criticism from advocates of women's reproductive freedom. Others have expressed concern over the possible future repercussions of a religion-based "exemption" from federal statutes and regulations. Without expressing our views on the merits of these concerns, we argue in this article that critics have overlooked the very important—and in our view very positive—implications of *Hobby Lobby* for corporate law.

The Supreme Court was correct to conclude that Hobby Lobby and the other corporations are "persons" capable of "exercising religion" for purposes of the RFRA. The notion that corporations are persons existing in the eyes of the law, separately from those human persons associated with each other in pursuit of a common enterprise, is well settled as a matter of state corporate law. More controversial is the idea that business corporations—the Court refers to them as "for-profits"—are legally free to "exercise religion" and are capable of doing so. There is no legal basis for the argument that business corporations may do nothing more than seek to maximize profits. No statute says that and judicial precedent to that effect is almost non-existent; the few cases that might be cited provide exceedingly weak support for the supposed profit-maximization requirement. To the contrary, the statutes relevant to this case—like all other state business corporation statutes—specifically provide that business corporations may be organized "for any lawful purpose."

As for the question whether a business corporation is capable of "exercising religion," this presents no conceptual or practical difficulties. A corporation can act in this area just as it does when it executes a contract, files a lawsuit, or commits a crime or tort. That is, it acts through legally authorized human beings. That means, of course, the corporation's board of directors and the officers to whom the board has delegated authority.

The importance of the *Hobby Lobby* case extends far beyond the specific question of religious freedom. Here the United States Supreme Court speaks clearly to the fundamental issue of corporate purpose and states correctly that corporate law authorizes non-profit-maximizing behavior. Business corporations are free to engage in a wide range of activities that sacrifice profits for other values. They can, for example, devote resources to environmental sustainability or to worker well-being even if that means a reduction in net income. And they can do so even without insisting that the results will enhance the company's long-run profitability. This, of course, is precisely the legal position advocated by supporters of corporate social responsibility. We hope that *Hobby Lobby's* critics will appreciate the importance of this aspect of the Court's holding.



