



THE CORPORATE PARADOX OF *CITIZENS UNITED* AND *HOBBY LOBBY*

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INTRODUCTION

Two decisions by the United States Supreme Court over the last several years seemed to advance the idea that corporations have some of the attributes of human beings. In *Citizens United v. Federal Election Commission*,¹ the Court ruled that corporations enjoy the same constitutional rights to freedom of speech as do individual people. This means that *incorporated* businesses may contribute unlimited amounts of money to political organizations in order to

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¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

promote certain points of view. A few years later, in *Burwell v. Hobby Lobby Stores, Inc.*,² the Court held that the Religious Freedom Restoration Act exempted some closely held corporations from a requirement of the Affordable Care Act that contradicted the religious beliefs of the shareholders of those corporations. Plainly, these two decisions share at least one common theme: they recognize rights in for-profit corporations that have traditionally been thought of as belonging only to individuals, political entities, or religious organizations. As such, many commentators have viewed *Citizens United* and *Hobby Lobby* as evidence of the Supreme Court's increasing willingness to cede power to corporations at the expense of the rights of individuals and other stakeholders.³

Despite this apparent recognition that corporations can behave like human beings and have some of the same rights commensurate with that status, the two decisions in fact offer very different, and indeed irreconcilable, visions of the American corporation. *Citizens United* embodies the view that corporations are run by boards of directors and managers whose pursuit of profit trumps the non-monetary values of other stakeholders, including society, employees, the environment, and the shareholders themselves. In protecting the right of corporate managers to make political donations that do not necessarily reflect the opinions of shareholders, *Citizens United* affirmed both the primacy of management over shareholders and the profit motive as central aspects of corporate governance and behavior. In contrast, *Hobby Lobby* does much the opposite. *Hobby Lobby* makes plain that corporations can pursue ends in conflict with the goal of monetary profit.⁴ Further, the decision seems to place the

² *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

³ See, e.g., Binyamin Appelbaum, *What the Hobby Lobby Ruling Means for America*, N.Y. TIMES MAGAZINE (July 22, 2014).

⁴ Even before *Hobby Lobby*, this was no longer regarded as a fringe view. The most notable recent rejection of the primacy of profits and shareholder value is Lynn Stout's

personal beliefs and interests of the shareholders above those of any other stakeholders. Indeed, these two aspects of the decision appear to be antithetical to the management-primacy and monetary-profit based vision of *Citizens United*.⁵

The opinions' interpretations of several important characteristics of corporations and how corporations behave help illustrate the seeming irreconcilability of the two decisions' visions. First, while both decisions address the rights of people associated with corporations, they offer different conceptions of who acts when a corporation exercises a right and who suffers when a government regulation limits corporate behavior. Second, the two decisions vastly differ in the weight they place on the primacy of the profit-motive in for-profit corporations. *Citizens United* seems to adhere to the age-old premise that a corporation must be run with the monetary interests of the shareholders as its top priority, even if this is at the expense of other shareholder values or goals. *Hobby Lobby* begins with the premise that the shareholders of a for-profit corporation might prefer other values over monetary profits and

2012 book, "The Myth of Shareholder Value." See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* (2012).

⁵ Brett McDonnell makes a strong case for viewing *Hobby Lobby* as a decision that affirms liberal values. Brett McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777 (2015). McDonnell emphasizes the way that the majority acknowledges the "liberal" idea that corporations may pursue goals other than profit. In a similar vein, Chief Justice Leo Strine of the Delaware Supreme Court and a co-author argue that *Citizens United* was not, in fact, an affirmation of conservative values although it has been embraced as such by many right-wing commentators. See Leo E. Strine and Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015). Both articles sensibly warn the reader that the labels "liberal" and "conservative" are fluid and can lead to misunderstanding. This article will attempt to avoid such confusion by shunning the terms altogether.

concludes that those values may even trump legal requirements.⁶ Third, although *Citizens United* largely addressed an issue that affects publicly held corporations and *Hobby Lobby* purports to confine itself to closely held corporations, *Hobby Lobby* appears to leave itself open to application to any business formed as a corporation.⁷ Ultimately, in these two cases, the Court produced two contrasting visions of the nature of corporations to protect the very different rights of the differently situated plaintiff-stakeholders. Its defense of the free speech rights of corporations in *Citizens United* required it to marginalize the interests of shareholders;⁸ its defense of the religious rights of shareholders in *Hobby Lobby* required it to discount the very nature of the corporation the court explicated in its earlier decision in *Citizens*.

I. THE RELATIONSHIP BETWEEN DECISION MAKERS AND SHAREHOLDERS IN CORPORATIONS

A. CITIZENS UNITED

The lawsuit in *Citizens United* rested on the claim of the corporate plaintiffs that the McCain-Feingold campaign finance law infringed upon their freedom of speech protected by the First Amendment.⁹ Although the case addressed a rather narrow instance of corporate

⁶ An essential element of the *Hobby Lobby* decision was the fact that the values that conflicted with the pursuit of profit originated in religious belief; otherwise, the shareholders' objection to enforcement of the ACA would not have received the enhanced protections of RFRA.

⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 (2014) (Ginsburg, J. dissenting) (footnote omitted) ("Although the Court attempts to cabin its language to closely held corporation, its logic extends to corporations of any size, public or private.").

⁸ Reza Dibadj, *Expressive Rights for Shareholders after Citizens United?*, 46 U.S.F. L. REV. 459, 470 (2011).

⁹ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

political speech,¹⁰ the majority opinion expanded its reach to allow all corporations (and other entities such as labor unions) to spend unlimited amounts of treasury funds on political advocacy.¹¹ The ruling increased the options available to corporations for financing political speech and influencing the outcomes of future elections.

In the context of a for-profit corporation, the decision to allocate money in this way belongs strictly in the hands of management and is not all that different from any other kind of everyday business decision.¹² The company's decision-makers, overseen by the board of directors, might decide to donate money to a Political Action Committee (super PAC) that advocates for candidates or causes that may potentially benefit the company's bottom line. Although such spending may help influence laws and regulations that affect the company and increase the profits of the corporation, the allocation of corporate funds for this purpose may nonetheless be objectionable to many of the shareholders. For example, a donation by a mining company to a super PAC that supports an anti-environmentalist Senator may help increase the company's profits, but it may also contradict the beliefs and desires of numerous shareholders, as well as contribute to the decline in the quality of the air that they breathe. As long as such a spending decision is made in good faith, however,

¹⁰ The corporate plaintiff in *Citizens United* had funded production of a movie critical of Hillary Clinton in the run-up to the 2008 presidential election. The Federal Election Commission determined that such spending violated McCain-Feingold because it focused on a candidate in the period immediately before a Federal election. *Id.* at 319-22.

¹¹ *Id.* at 342.

¹² In the wake of *Citizens United*, some scholars proposed passing laws that require corporations to put the decision to spend money on political expression to a shareholder vote. See, e.g., Lucian A. Bebchuk and Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010). In the absence of such laws, a corporation might have its own rules that would allow shareholders to have a role in decisions regarding political spending. Alternatively, shareholders might pass their own resolutions on the question.

the laws of corporate governance and fiduciary duty would not allow the shareholders to contest it successfully.¹³

The majority opinion in *Citizens United* acknowledges this disjunction but dismisses it as of little consequence to the interests of the shareholders, who have, after all, purchased shares in a corporation presumably with the understanding that they are subjecting themselves to the management-favoring rules that govern most corporations.¹⁴ Justice Kennedy in *Citizens United* wrote: “There is, furthermore, little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”¹⁵ According to *Citizens United*, therefore, if shareholders do not agree with the opinions expressed by the corporation in which they own shares, they can pursue a remedy through a proxy battle, shareholder resolution, or through the election of new directors.¹⁶ This is, of course, notoriously difficult, time-consuming, and expensive.¹⁷ The

¹³ See David Rosenberg, *Goodwill and the Excesses of Corporate Political Spending*, 11 HASTINGS BUS. L.J. 29 (2015). For a thorough discussion applying the law of fiduciary duty to corporate political spending, see Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. COLO. L. REV. 477 (2015).

¹⁴ See *Citizens United*, 558 U.S. at 361.

¹⁵ *Id.* (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)). It seems to me that the best bet for overturning *Citizens United* would be to bring a case that gives the justices the opportunity to revisit the veracity of Kennedy’s statement regarding “corporate democracy.” Further, Kennedy’s quotation of the term “corporate democracy” from *Bellotti* appears to be loaded with unintended double meanings. Corporate elections are nothing like those associated with the democratic process: there is little transparency of information and, appropriately, no system of “one citizen, one vote.” Yet Kennedy seems to be trying to conjure up a vision of shareholders gathering for a kind of New England town-hall meeting to decide how to spend money in the corporate arena. Finally, given the decision’s devastating effect on real democracy, he might have looked for a different term in the context of corporations wielding their disproportionate power to influence the outcome of political elections.

¹⁶ *Citizens United*, 558 U.S. at 361.

¹⁷ Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 540 (2010).

opinion in *Citizens United*, then, plainly rests on protecting the constitutional rights of corporate decision makers, even if this results in the promotion of opinions that stand in contradiction to the values and beliefs of some of the corporation's shareholders who are without much power to do anything about it. Since management's decision to engage in corporate political spending is almost always designed to increase profits,¹⁸ *Citizens United*, unlike the Court's decision in *Hobby Lobby*, has the effect of enabling the pursuit of that profit-maximizing goal over other interests, namely the desire of shareholders not to be associated with the propagation of opinions with which they disagree.

B. *HOBBY LOBBY*

The Affordable Care Act (ACA) requires certain employers to provide their employees with health care insurance that covers contraceptive products for women.¹⁹ This provision doubtless burdens all affected corporations to some degree with added costs and bureaucracy. These ill effects might be measured and felt by both the corporation in its bottom line and by the shareholders—diminished profits mean diminished shareholder value. But the plaintiffs' objection in *Hobby Lobby* was more personal: they believed that the corporation's compliance with the law would impinge upon their religious beliefs in violation of the Religious Freedom Restoration Act (RFRA).²⁰ The RFRA allows exemptions to enforcement of laws that burden religious freedom unless the

¹⁸ Any other goal of corporate political spending would appear highly suspicious. Without a clear profit motive, it could easily be seen as an act of self-interest by management (possibly seeking personal political favors). Further, since the subject is itself so controversial, it cannot fit neatly into the category of goodwill that justifies much real corporate philanthropy. See Rosenberg, *supra* 13, at 33-34.

¹⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762 (2014).

²⁰ *Id.* at 2765.

government can show that the law furthers a compelling state interest and is the least restrictive means of accomplishing that goal.²¹ In order to compare the nature of the right at issue in *Hobby Lobby* with the right in *Citizens United*, we must establish precisely whose religious beliefs are burdened by the ACA's contraception mandate.

In *Hobby Lobby*, Justice Alito wrote, "protecting the free-exercise rights of corporations like [those of the plaintiffs] protects the religious liberty of the humans who own and control those companies."²² As in *Citizens United*, this statement recognizes that the actor in a corporation is the company itself and not its directors, managers, employees or shareholders.²³ Indeed, Alito deliberately distinguishes between the corporation and the *humans* whose religious rights are at stake in the case. But the statement opens the door for the Court to recognize that regulation of a corporation implicates the rights of other stakeholders. At the outset, this seems to make sense: religion is not typically practiced by corporations through the decisions of boards of directors but rather by individual human beings who have made the personal choice²⁴ to devote

²¹ The passage of the original Federal RFRA has a long and complicated history. It was Congress's response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) which changed the standard under which courts evaluated allegations of governmental burdens on the free exercise of religion. In the wake of that decision, courts would no longer require such burdens to be justified by a "compelling state interest." Rather, *Smith* allowed burdens on religion so long as the law in question was facially neutral as to religion and not designed to discriminate against the faithful. *Smith*, 494 U.S. at 879, 890. RFRA has restored the standard that existed pre-*Smith* but was limited to *Federal* laws (of which the ACA is one) by a later Supreme Court decision. *City of Boerne v. P.F. Flores*, 521 U.S. 507 (1997).

²² *Hobby Lobby*, 134 S. Ct. at 2768. Alito's language is clearly meant to distinguish between the corporation itself and, as he emphasizes, the "humans" associated with the corporation. His use of the word "humans" rather than "persons" (which can include legal entities like corporations) is deliberate.

²³ Alito's phrasing clearly implies that the corporation is the acting entity when it provides contraceptive coverage in compliance with ACA. *See id.*

²⁴ Some might argue that it is not even a *choice*.

themselves to a certain way of life. For a law to burden religious practice, surely it must do so in the context of the lives of actual persons who adhere to a religious tradition. Nonetheless, as the Court persuasively lays out, the artificiality of the corporate entity should not preclude it from having religious rights.²⁵ The Supreme Court has long recognized the religious rights of non-profit corporations, for example.²⁶ Further, the ACA itself contains an exception that recognizes the religious rights of such non-profit corporations and allows them to opt out of the contraceptive mandate.²⁷ That religious non-profits have these rights seems to go without saying because these corporations are organized specifically for a religious purpose.

II. THE RELIGIOUS RIGHTS OF FOR-PROFIT CORPORATIONS

It is surprising that many of the reactions to *Hobby Lobby* have focused on its affirmation that for-profit corporations can have a religious purpose.²⁸ After all, almost every state allows incorporators to state *any* business purpose as long as that purpose is lawful.²⁹ This can certainly include the practice of religion. The statement of purpose of the plaintiff's business in *Hobby Lobby* commits the company to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."³⁰ The

²⁵ *Hobby Lobby*, 134 S. Ct. at 2771.

²⁶ *Id.* at 2755.

²⁷ *Id.* at 2782.

²⁸ See, e.g., Editorial, *Hobby Lobby Ruling Stops Over the Line*, DALLAS MORNING NEWS (June 30, 2014), <https://www.dallasnews.com/opinion/editorials/2014/06/30/editorial-hobby-lobby-ruling-steps-over-the-line>.

²⁹ *Hobby Lobby*, 134 S. Ct. at 2772.

³⁰ *Id.* at 2766. The text of the majority opinion actually states that the statement of purpose "commits the Greens." The Court is therefore making a crucial leap without really justifying it here. By stating that the corporation's statement of purpose imposes an obligation on the Greens (rather than on the corporation), the Court conflates the

“Vision and Values Statement” of the business of another plaintiff in the case says that the company endeavors to “ensur[e] a reasonable profit in [a] manner that reflects [the family’s] Christian heritage.”³¹ A law requiring either of these businesses to remain open on Sunday, for example, would plainly place a burden on the corporation’s religious freedom because it would compel the corporation to deviate from the religious values embodied in its purpose. This burden can exist without reference to the religious practice of any actual human beings: the corporation itself has religious rights.³² But who else would such a law burden?

III. WHOSE RIGHTS ARE BURDENED BY CAMPAIGN FINANCE LAW AND THE AFFORDABLE CARE ACT?

Having established that for-profit corporations can have religious rights, the *Hobby Lobby* majority must next establish precisely whose rights under RFRA are burdened by the contraceptive mandate of the ACA. Corporate law is generally careful to distinguish between the corporation, the board of directors, employees, other agents, shareholders, and other stakeholders when assigning liability for wrongs and when determining whose rights are violated by government actions.³³ In discussing whose rights are at stake in *Hobby Lobby*, however, the language of the opinion is all

corporation with its shareholders without explanation. As will be discussed below, a key issue is whether it is the company’s religious freedom or the Greens’ that is burdened by the ACA’s contraceptive mandate.

³¹ *Id.* at 2764.

³² Amy Sepinwall provides a good example of how a corporation can have religious rights even if none of the stakeholders (shareholders, officers, employees) adhere to the religion in question. Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby’s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173, 185 (2015).

³³ RICHARD D. FREER & DOUGLAS K. MOLL, *PRINCIPLES OF BUSINESS ORGANIZATIONS* 139-42 (2013).

over the place and the majority seems unable to distinguish between the corporation, its officers and managers, its employees, and the shareholders themselves. Of course, there is overlap among these groups in a closely held corporation. But one of the purposes of corporate law is to allow people to organize businesses in certain ways so that their rights and liabilities vary depending on the role in which they are functioning when committing a certain act.

The language of RFRA protects a “person’s” exercise of religion³⁴ and the majority opinion contains a sensible and persuasive discussion that concludes that “persons” must include corporations and other artificial business entities.³⁵ But the ensuing discussion utterly conflates corporations with the people who control them and own their shares. At the outset, the majority seems to focus on the corporation as the burdened party. In describing one aspect that imbues the companies with a religious identity, the majority writes, “The *businesses* refuse to engage in profitable transactions that facilitate or promote alcohol use.”³⁶ This statement suggests that the corporation is the “person” whose religion is at issue and whose religion might be burdened by the ACA’s requirements. This is consistent with most conventional conceptions of corporate behavior, such as the law of limited liability and of agency, and with the vision of the corporation that the Court itself recognized in *Citizens United*.

Later, the majority introduces the key phrase that “protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”³⁷ The Court is indicating that the shareholders’ religious liberty is implicated only as a result of actions

³⁴ 42 U.S.C. § 2000bb-1(a).

³⁵ *Hobby Lobby*, 134 S. Ct. at 2768-69.

³⁶ *Id.* at 2766 (emphasis added).

³⁷ *Id.* at 2768.

that a corporation is forced to take in order to comply with a law. The Court is acknowledging that the shareholders are not literally the persons providing the objectionable contraceptive coverage;³⁸ yet the shareholders' religious liberty is nonetheless burdened through their status as owners and controllers of the business.

Much of the rest of the opinion seems to say that it is the shareholders themselves who act when the corporation complies with a law imposed on it. Indeed, the majority focuses on the religious beliefs of the shareholders themselves while giving a nod to the religious nature of the corporation. For example, at the outset of its discussion of the way the ACA burdens religion, the majority states that "the Hahns and Greens have a sincere religious belief that life begins at conception"³⁹ In discussing the burden that the ACA places on actual human beings, the majority writes: "By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs. If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe."⁴⁰ Note that here the opinion uses the actual names of the shareholders themselves in order to emphasize the humanness (as opposed to personhood⁴¹) of the

³⁸ Of course a strong argument can be made that, even in a sole proprietorship that offers healthcare coverage under the ACA, the employer is not *providing* the offending contraceptives. The Supreme Court recently decided not to rule in a case in which the appellant argues that an employer's religious freedom is burdened if they simply take action to opt-out of the ACA requirement by submitting a form that asserts a religious objection and that requests an opt-out. *Zubik v. Burwell*, 578 U.S. __ (2016).

³⁹ *Hobby Lobby*, 134 S. Ct. at 2775. It would not necessarily make sense to say, "The corporation has a sincere religious belief," although we accept that a corporation might have political opinions in the way that the *Citizens United* majority recognized.

⁴⁰ *Id.* at 2775.

⁴¹ Because corporations are "persons" under the RFRA. *Id.* at 2768.

victims of the ACA's requirements. Later, the majority modulates again:

We doubt that the Congress that enacted RFRA – or for that matter, ACA – would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing health plans.⁴²

The majority first stated that RFRA must protect the religious freedom of the corporation in order to protect the religious freedom of the shareholders.⁴³ It then abandons the distinction between the corporation and its human shareholders before finally settling on a term that, prior to *Hobby Lobby*, had more sentimental than legal significance: “family-run businesses.”⁴⁴ It therefore remains unclear who would be violating their beliefs if the corporation complies with the ACA's contraceptive requirement: the business, the individual human beings who own shares in the business or some undefined entity in-between.

The Court arrives easily at the conclusion that the ACA regulation burdens the religious mission of the plaintiff corporations. The majority asserts that this burdens the religious liberty of the shareholders of the closely held corporation as well.⁴⁵ But it then goes on to conflate the corporation and the shareholders themselves

⁴² *Id.* at 2777.

⁴³ *Id.* at 2768.

⁴⁴ This term could apply to a lot of companies: a partnership between father and son running a small bakery; Koch Industries; the Saudi oil operations. The closest that the majority comes to defining the kind of corporation that it is referring to is, “The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family.” *Hobby Lobby*, 134 S. Ct. at 2774.

⁴⁵ *Id.* at 2777.

without adequately distinguishing between two entities whose separateness is the very basis for much of the law that governs them.⁴⁶ Having made a persuasive case that even for-profit corporations like Hobby Lobby have religious rights under RFRA, the majority is less convincing in showing how the ACA requirements burden the religious rights of the individual human beings who own all of the shares in that particular corporation.

IV. PUBLICLY HELD VERSUS CLOSELY HELD CORPORATIONS

In attempting to distinguish between *Hobby Lobby* and *Citizens United*, the most obvious difference is that *Citizens United* applies to publicly held corporations and other groups such as unions, while *Hobby Lobby* is confined to closely held corporations in which all of the shares are owned by members of the same family who appear to profess the same religious beliefs. This distinction is obviously relevant to the question of how the two cases arrived at such different outcomes regarding the shareholder's right to be protected from being associated with activities that violate their consciences.⁴⁷

The law of corporate governance does not emphasize the existential difference between closely held and publicly held corporations, and the *Hobby Lobby* majority is not very helpful on the

⁴⁶ Amy Sepinwall has phrased the question in the following way (while admitting that we do not have an answer yet): "when do the corporation's controlling members have reason to feel complicit in its acts?" Sepinwall, *supra* note 32, at 203.

⁴⁷ One obvious response to this question is that the objectionable action in *Hobby Lobby* is being compelled by the government against whom shareholders have rights under RFRA. In the case of an objectionable political donation by a large publicly traded corporation, the participation in that speech is being compelled by the corporate decision makers themselves, not the government. A response that paraphrases key language from *Hobby Lobby* might be persuasive here: limiting the free speech rights of corporations protects the expressive rights of the "humans who own and control them."

subject.⁴⁸ In both entities, decisions are made by management who are overseen by a board of directors that is elected by the shareholders. So, when Hobby Lobby pays its employees, commits a tort, or complies with a federal law, it is not the act of the shareholders any more than when the widely held Coca-Cola Company performs the same actions. This is a fundamental tenet of law that distinguishes the corporate form from so many of the other options that people have to choose from when organizing a business.⁴⁹ Let us return for a moment to the phrase that much of the *Hobby Lobby* opinion hinges on: “protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”⁵⁰ The majority does not tell us why this phrase should apply to a “family-run business” and not to a publicly traded corporation.

V. HOBBY LOBBY’S REJECTION OF CITIZENS UNITED

Perhaps the distinction between the two approaches in the cases arises from the Court’s differing interpretations of the purpose of a corporation. *Citizens United* is built around the idea that the shareholders of a corporation share the same primary interest: maximizing profit. The case grants the decision makers of the corporation a right to pursue profit through political spending even if this results in shareholders being associated with speech with which they disagree. It stands to reason, then, that *Citizens United* has

⁴⁸ See Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Zoe Robinson, Chad Flanders & Micah Schwartzman, eds., forthcoming 2015). Brett McDonnell puts it nicely: “The idea of a closely held corporation is somewhat nebulous.” McDonnell, *supra* note 5, at 31.

⁴⁹ Lyman P.Q. Johnson & David K. Millon, *Corporate Law After Hobby Lobby*, 70 *BUS. LAW.* 8 (2015).

⁵⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

the effect of giving weight to what shareholders should, in the Court's view, have in common: the desire for higher profits. *Hobby Lobby* challenges that notion by acknowledging that for-profit corporations themselves can have other priorities—among them, adhering to certain religious beliefs.

The majority in *Hobby Lobby* is explicitly aware that its holding could not possibly make sense if it extended to a publicly held corporation: “the idea that unrelated shareholders— including institutional investors with their own set of stakeholders— would agree to run a corporation under the same religious beliefs seems improbable.”⁵¹ Here again, the majority is emphasizing the substantial role that shareholders (rather than the managers and directors) play in the decision-making of the corporations in *Hobby Lobby*. The majority also acknowledges that “the owners of a company [like Hobby Lobby] might well have a dispute relating to religion.”⁵² The majority provides an example that is easy to work with: “some [shareholders] might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons.”⁵³ The majority asserts, however, that if this should happen, it should be resolved through the usual procedures of corporate governance—presumably by allowing the shareholders to vote on proposals or to elect directors who will make decisions that are in line with how the shareholders want the company to balance its religious mission with the realities of running a business.⁵⁴ In the hypothetical religious dispute scenario that the opinion provides, the board of directors will make the call

⁵¹ *Id.* at 2774.

⁵² *Id.*

⁵³ *Id.* at 2775.

⁵⁴ *See id.* at 2776 (“State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure.”).

on behalf of the corporation, and the shareholders will have to accept that decision whether or not it falls in line with their own beliefs. The directors can only be held accountable after the act is performed, and even then, only if the majority disagrees with the directors' decision.⁵⁵ This has begun to sound a lot like the kind of dispute that *Citizens United* might give rise to: the corporation acts on behalf of shareholders and are only accountable through the corporation's own governance process, leaving the minority shareholders without any recourse other than selling their shares.

VI. HOW SHOULD STAKEHOLDERS IN A CORPORATION RESPOND TO LAWS THEY OPPOSE?

A central aspect of the controversy over the decision in *Citizens United* is the role it allows corporations to play in crafting the very laws that govern them. For those who believe in the primacy of profit, it has long been an accepted axiom that corporations may pursue that end as long as they do so within the confines of *existing* law.⁵⁶ After *Citizens United*, they may even have an influential role in *shaping* those laws by making unlimited political donations. This serves the interests of those shareholders who prioritize profit over other ends. The logic goes that, in a capitalist economy governed by democratic institutions, the people can place limits on the way corporations pursue profit by passing laws (such as environmental regulations) through the ballot box in order to counterbalance the

⁵⁵ It might play out something like this: Mom and Dad believe that the family store should stay open on the Sabbath; the slightly more pious and less profit-driven Junior believes that the family religion demands that the store remain closed; Mom and Dad elect themselves as directors and vote to stay open.

⁵⁶ See Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAGAZINE (Sept. 13, 1970) at 33. For a discussion of the implications to fiduciary duties when directors approve actions that break the law, see David Rosenberg, *Delaware's Expanding Duty of Loyalty and Illegal Conduct: A Step Towards Corporate Social Responsibility*, 52 SANTA CLARA L. REV. 81 (2012).

profit-primacy influence.⁵⁷ *Citizens United*, however, distorts this system by allowing corporations to have disproportionate influence on the passage of the very laws that might limit the damage that they inflict on the interests of other stakeholders. In a corporate world in which profit always comes first, the obvious remedy is for shareholders to exert their own influence on the political process by using the gains on their investments to promote opinions that contradict those of the corporation itself.

Citizens United empowers corporations to influence the legislation that governs them. If a robust environmental law impairs the conduct of business of a mining company, that company can devote resources to changing that law. A difference between such an environmental regulation and the contraceptive mandate of the ACA is that the latter implicates a right that receives special protection through RFRA and the Constitution.

The decision in *Hobby Lobby* presents a different outcome regarding shareholder opposition to regulations that compel corporations to engage in certain behavior.⁵⁸ The regulation at issue in *Hobby Lobby* had little effect on a corporation's bottom line: the shareholders opposed it because they believed it contradicted their personal religious beliefs. Under *Citizens United's* vision, the corporations in *Hobby Lobby* could either make donations to support repeal of the ACA, or the shareholders could use the dividends they receive to make similar donations. Rather than provide corporations or shareholders unrestricted means for participating in the political process as the Court did in *Citizens, Hobby Lobby* (via the RFRA) allows the religious values of the shareholders to influence for-profit

⁵⁷ Judd F. Sneirson, *Shareholder Primacy and Corporate Compliance*, 26 FORDHAM ENVTL. L. REV. 450, 455 (2015).

⁵⁸ This stands in contrast to *Citizens United* in which corporations were contesting a law that restricted their behavior.

corporate behavior and to avoid compliance with otherwise valid laws.

The holding in *Citizens United* protects shareholder interests as they relate to the company's pursuit of profit through political spending. Indeed, that decision implicates the speech of shareholders⁵⁹ who may disagree with the opinions expressed by the corporation via donations to super PACs and other political organizations. As stated above, it offers only the potentially ineffective avenues of corporate democracy as a protection for shareholders who do not want their money spent on the promotion of opinions with which they disagree. *Hobby Lobby* puts the values of the shareholders first and allows the corporations that they control to ignore the legal requirements of a validly enacted regulation because it might offend the religious sensibilities of the shareholders.

VII. THE EXERCISE OF RELIGION V. FREEDOM OF EXPRESSION IN CORPORATIONS

It is important to emphasize, of course, that the rights protected by *Citizens United* and *Hobby Lobby* arise from different pieces of federal law. At stake in the earlier case was the McCain-Feingold Act, which plaintiffs claimed threatened a corporation's right to freedom of speech under the First Amendment. While the right to the free exercise of religion is also protected in the First Amendment, the plaintiffs in *Hobby Lobby* complained that the ACA's rule additionally

⁵⁹ One of the first debates that arose in the wake of the *Citizens United* decision was over whether it actually implicated the First Amendment rights of shareholders who were now occasionally forced to pay (directly or indirectly, take your pick) for the expression of opinions with which they disagree. Since the corporation (and not the government) is the entity controlling the content of the speech at issue, it does not appear to become a question of constitutional law. Nonetheless, *Citizens United* plainly implicates the speech of shareholders in a way that is similar to the burdens placed on religion by the Affordable Care Act.

violated their rights under RFRA – a piece of federal legislation that was intended to strengthen the free exercise of religion after the Supreme Court had weakened its own interpretation of the meaning of that right as it was enshrined in the Constitution.⁶⁰ Under *Hobby Lobby's* ruling, the statutory rights granted by RFRA allow corporations and their shareholders to be exempted from many rules that they view as burdensome to their religious beliefs.⁶¹ *Hobby Lobby's* emphasis is on the religious rights of the human beings associated with a corporation through their ownership of shares.⁶² In certain circumstances, if the government passes a law that is neutral towards religion but nonetheless burdens the religious belief of these people, corporations are exempt from that regulation in order to protect the religious rights of the shareholders.⁶³ *Citizens United* would nullify any rule that infringes on the free speech of corporations. This difference in emphasis arises partly from the fact that all of the *Hobby Lobby* plaintiffs are closely held corporations. But this cannot explain why the Supreme Court is willing to protect the religious rights of the corporation *and* its shareholders in *Hobby Lobby* but is willing to protect the First Amendment free speech rights of the corporation while giving little weight to the views of the minority shareholders in *Citizens United*.

⁶⁰ *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

⁶¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

⁶² It entirely ignores other stakeholders in a corporation, particularly employees who might benefit from the enforcement of precisely the kinds of laws that the decision allows corporations to flout in the name of the freedom of religion of their shareholders.

⁶³ RFRA allows exemptions from such laws unless the government can demonstrate that (1) The law is in furtherance of a compelling government interest, and (2) it is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). The majority in *Hobby Lobby* held that ACA's contraceptive requirement was not the least restrictive means of furthering a compelling government interest because even the law itself presents an alternative for nonprofit corporations that object to complying on religious grounds. *Hobby Lobby*, 134 S. Ct. at 2759.

Perhaps this can be explained by the fact that the Court has a clearer vision of what it means for a corporation to engage in speech than what it means for a corporation to practice religion. Corporate speech includes, among other things, a decision by the board of directors to make a contribution from the company treasury to a super PAC that supports a certain point of view.⁶⁴ This can happen without reference to the views of any human being—whether a director, manager or shareholder. It might well be that no single stakeholder of the corporation actually agrees with the words that are ultimately expressed by the donation. The speech takes place through the transfer of money from one place to another.

On the other hand, the Court has a harder time conjuring up a vision of religious exercise that does not involve reference to an individual faithful person. Compliance with ACA's contraceptive mandate requires the payment of funds by the corporation—not by the individual family members who are shareholders—to an insurance company that has contracted with health care providers who will dispense certain forms of birth control. Further, non-compliance will result in a hefty fine against the corporation—again, not against the individual family members who are shareholders. Like the donation of money to a super PAC, complying with the ACA appears to be a highly impersonal act. So, to imbue it with religious significance, perhaps the Court must find some human being whose religious sensibilities the ACA requirement offends. Taking a leap as far as possible from the director-centric view of corporate governance displayed in *Citizens United*, the *Hobby Lobby* majority insists that a corporation cannot do anything at all “separate and apart from the human beings who own, run and are employed by

⁶⁴ Of course, a strong argument can be made that this is far from what the writers of the First Amendment envisioned as freedom of speech. Nonetheless, it is settled law.

them.”⁶⁵ It would be close to meaningless for the Court to say, “The corporation has a sincere religious belief that life begins at conception.” But it makes sense to assert that a small group of shareholders have this belief.⁶⁶ Of course, the opinion later focuses almost exclusively on the burden the ACA places on the people who own a corporation and entirely ignores the rights of those employed by them, whose access to complete health care is implicated by their decision. In order to amplify the ACA’s harm to religious sensibilities, the Court deconstructs its own vision of corporate governance and holds that the act of compliance with a federal law by the corporation is in fact an act of the shareholders.⁶⁷

CONCLUSION

The decision by the Supreme Court in *Citizens United* affirmed a corporation’s constitutional right to free speech in a way that, at the very least, causes shareholders to be associated with the expression of ideas that they abhor. The opinion can seem internally consistent based on its assumption that all stockholders share the common values of maximizing the monetary gains in their investment. Further, the opinion assumes the centrality of directors and management at the expense of shareholders in the governance of the company in which they own shares. Describing the workings of

⁶⁵ See *Hobby Lobby*, 134 S. Ct. at 2768 (internal quotations omitted).

⁶⁶ See *id.* at 2775. On the other hand, it seems more credible to say, “Big Oil Co. believes that drilling in the Arctic National Wildlife Refuge poses no environmental threat,” because this bears on an action that a corporation itself can take responsibility for. In order to arrive at that belief, Big Oil Co. would likely have consulted with its own experts and lawyers to make that determination. If their conclusion turns out to be false, the corporation itself would pay the price.

⁶⁷ It is quite possible that future developments in the *Zubik* case will help to clarify the issue of what kind of action by an employee, director or shareholder of a corporation would be sufficient to trigger the protections of RFRA. *Zubik v. Burwell*, 578 U.S. ___ (2016).

corporations in this way suited the decision's main holding: that corporations may make unlimited contributions to political organizations as a manifestation of their right to freedom of expression.

The Court's subsequent decision in *Hobby Lobby* relies on a very different conception of businesses organized as corporations in order to find a way to protect the religious rights of shareholders. It recognizes that the goal of a corporation might include values other than the maximization of wealth. Further, it prioritizes the effects that government regulations might have on shareholders even though such rules address only the conduct of the corporation itself. Although the holding acknowledges that corporations have religious rights, it insists on finding actual human beings – and not mere legal “persons” – whose religious sensibilities are harmed by the law in question. By allowing a corporation to avoid compliance with neutral laws in order to protect the religious rights of shareholders, the majority reconstructs a corporate world that is unrecognizable from the one it describes in its earlier decision in *Citizens United*.