HOBBY LOBBY

In *Burwell v. Hobby Lobby Stores, Inc.* (*HL*), the Supreme Court in a 5-4 decision ruled that closely held for-profit corporations could refuse to comply with the Affordable Care Act's "contraceptive mandate" to which the corporations had objected on religious grounds.

In an opinion by Justice Alito (author of the *Citizens United* decision), the Majority upheld the corporations' position, but did not deal directly with the First Amendment. Instead, it based its ruling solely on the Religious Freedom Restoration Act (RFRA) which was enacted in 1993 to remedy what Congress perceived to be erroneous Supreme Court interpretations of the Free Exercise Clause of the First Amendment. Consequently, RFRA is inextricably bound up with the First Amendment and, of necessity, the *HB* decision deals not only with the particular provisions of RFRA, but also with the Free Exercise Clause as impacted by those provisions.

As with *CU*, the discussion here will focus on those parts of the *HL* decision that address the "personhood" of corporations and will not delve into the vast, intricate, and inconsistent body of law interpreting the Fee Exercise Clause except when it might help to provide context and meaning to the corporate personhood issue.

I. Historical Background of the Hobby Lobby *(HL*) Decision

Conflict between Generally Applicable Laws and the Free Exercise Clause

In 1791, the First Amendment was adopted, the initial clause of which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

In 1871, the Dictionary Act became law and it includes "corporation" in its definition of "person". Courts are supposed to apply the definitions contained in the Act "unless the context indicates otherwise."

In 1963, in *Sherbert v. Verner*, a case involving a Seventh Day Adventist who refused to work on Saturday. When she was fired and then denied unemployment benefits, she sued and the Warren Court decided that the First Amendment proscribed not only laws that "prohibited" the free exercise of religion, but also laws that "burdened" religious exercise. The Court held that by imposing a substantial burden on Sherbert's ability to freely exercise her faith, without having a compelling state interest in doing so, South Carolina had violated her First Amendment rights.

In 1972, in *Wisconsin v. Yoder,* the Burger Court, citing *Sherbert* as controlling precedent, applied the substantial burden / compelling state interest standard and found that Amish parents, in the free exercise of their religion, could refuse to send their children to school beyond the eighth grade.

In 1990, in *Employment Division v. Smith*, the Court, held that Oregon's refusal to grant unemployment benefits to plaintiffs, drug rehab workers who had been fired due to their use of drugs, should not be evaluated under the substantial burden / compelling state interest standard. The Court, in an opinion by Justice Scalia, ruled instead that:

> "Adopting 'compelling interest' would be courting anarchy. . . . The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind - - ranging from compulsory military service, to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this."

In 1993, the Religious Freedom Restoration Act (RFRA) was enacted specifically to reestablish the status quo that existed before the *Smith* decision, but it also altered the *Sherbert* standard by requiring the Government to show that the burden being imposed on religious free exercise is the "least restrictive means" of furthering the Government's interest. Drafted in the wake of a tremendous public outcry against *Smith* and receiving overwhelming support from organized religion and nearly unanimous bipartisan approval (the vote was 100-0 in the House and 97-3 in the Senate), RFRA was quickly signed into law by President Clinton.

In 1997, in *Boerne v. Flores*, the Supreme Court concluded RFRA exceeded the power of Congress to regulate state conduct under the Fourteenth Amendment and, therefore, held the law was unconstitutional as applied to the states.

In 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA) was enacted to dilute the effect of *Boerne*. RLUIPA, unlike RFRA, makes no reference to the Free Exercise Clause and defines the term "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

In 2010, the Affordable Care Act (ACA) (a/k/a "Obama Care") became law. Guidelines promulgated by the Department of Health and Human Services (HHS) implementing the ACA required employers to provide coverage for, among other things, FDA-approved contraceptive methods including methods that prevent an already fertilized egg from developing further by preventing it from attaching to the uterus. (One of the contested drugs was the so-called "Morning-After Pill".)

II. The *Hobby Lobby* Case

A. Factual Background of *HL*

This discussion includes the companion case of *Conestoga Wood Specialties Corp. v. Burwell (CWS)*, which was decided together with *HL.*

Hobby Lobby

Hobby Lobby (HL), organized as a for-profit corporation, was owned and controlled solely by David and Barbara Green and their three children (i.e., it was "closely held"). In 2014, the corporation operated 500 stores and employed 13,000 people. The Greens were Christians who closed their stores on Sunday, supported Christian ministries, proselytized for Christianity through newspaper ads, and didn't sell alcohol or products that promoted the use of alcohol. The Greens believed that life begins at conception and that it would violate their religion to facilitate access to drugs or devices that operate after conception. As a result, these types of contraceptive drugs and devices, although mandated by ACA, were excluded by the Greens from HL's employee health plan.

Conestoga Wood Specialties

Norman and Elizabeth Hahn and their three sons owned and controlled CWS, a for-profit corporation that employed over 950 people. The Hahns were members of the Mennonite Church, which opposes abortion and teaches that "the fetus in its earliest stages . . . shares humanity with those who conceived it." The Hahns went slightly further and believed that human life begins at conception. Accordingly, they excluded from the CWS's employee health plan coverage of drugs or devices that would operate against the fertilized egg, since in their view this would terminate human life and be a sin against God.

B. Procedural Background of *HL* and *CWS*

HL

In 2012, the Greens and HL sued HHS under RFRA and the Free Exercise Clause to challenge the contraceptive mandate. When the District Court concluded that HL was not a "person" entitled to protection under either the Free Exercise Clause or RFRA and denied the plaintiffs' request for a preliminary injunction, they appealed. The Court of Appeals in Denver reversed and held that HL was a "person" under RFRA.

CWS

In 2013, the Hahns and CWS also sued HHS under RFRA and the Free Exercise Clause to challenge the contraceptive mandate. The District Court, as in *CWS,* concluded that a for-profit corporation was not a person entitled to protection under either the Free Exercise Clause or RFRA and denied the plaintiffs' request for a preliminary injunction. When the plaintiffs appealed, the Appeals Court in Philadelphia affirmed the ruling against them.

C. The Supreme Court's Decision in *HL / CWS*

In 2014, in a 5-4 decision, the Court, relying heavily on the Dictionary Act of 1871 which includes "corporation" in its definition of "person", unless the "context indicates otherwise." ruled that HL and CWS, closely held for-profit corporations, were "persons"

entitled to the protections afforded by RFRA and RLUIPA. Finding that the contraceptive mandate would burden the corporations' exercise of religion, the Court went on to apply the two-pronged test required by RFRA to determine whether that burden was justified. On the first prong, it assumed without deciding that the contraceptive mandate furthered a compelling state interest; on the second, it found the Government had failed to demonstrate that forcing compliance was "the least restrictive means" of furthering that interest and, accordingly, it ruled HL and CWS were exempted from the ACA's contraceptive mandate.

D. Analysis of the *HL / CWS* Decision

Is a Corporation a Person?

The Majority and Dissent considered pretty much the same factors in coming to diametrically opposite conclusions on whether a secular for-profit corporation is a "person" under RFRA.

Majority

RFRA

The Majority expressly relied on the text of RFRA as amended by RLUIPA in finding HL and CWS were persons. Basing their decision solely on those statutes allowed them to avoid answering the Constitutional question of whether such corporations were persons under the Free Exercise Clause.

By limiting itself to statutory interpretation, the Court was able to make a fairly straightforward decision on the question of "personhood". First, it quoted the language of RFRA as prohibiting the "Government from substantially burdening a *person's* exercise of religion . . ." After noting that RFRA contains no definition of "person", the Court concluded, "We must consult [the Dictionary Act] in determining the meaning of any act of Congress, unless the context indicates otherwise." The Dictionary Act, in turn, states that "person" includes "corporations . . . as well as individuals" and, since the Majority found nothing in RFRA "indicates" a different definition, they held that the plaintiff corporations are "persons" entitled to invoke RFRA's protections.

In reaching its conclusion on the "context" of RFRA, the Majority, relied almost exclusively on the text of the statute. "We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition. . . "

The Majority also relied on RLUIPA, noting that RFRA, as originally drafted, defined exercise of religion as "exercise of religion under the First Amendment", but RLUIPA amended that definition to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" and to exclude the reference to the First Amendment. The Majority concluded that the change in definition effected a "complete separation from First Amendment case law."

As additional support for their ruling, the Majority pointed out that HHS had already admitted a non-profit corporation can be a person under RFRA and asserted defendant's admission destroyed "any argument that that the term 'person' as used in RFRA does not reached the closely held corporations involved in these cases."

Basis of Corporate Religious Rights

Although the Majority didn't fully articulate it, their decision reflected the viewpoint that a court should look straight through the corporate form to the corporate shareholders and should consider their religious rights as individuals to be decisive. In this connection, the Majority repeatedly emphasized the shareholders' religious beliefs:

> "Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church… The Hahns believe that they are required to run their business in accordance with their religious beliefs and moral principles." [The Hahns believe that CWS should be run] "in a manner that reflects [their] Christian heritage."
>
> David and Barbara Green are Christians . . . The Greens are committed "to honoring the Lord in all they do by operating [CWS] in a manner consistent with Biblical principles." Each family member has signed a pledge to run the business in accordance with family's religious beliefs . . ."
>
> "These companies are closely held corporations each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs."
>
> "The Greens and the Hahns believe that life begins at conception."

The Majority then conjoined the free exercise rights of the shareholders with those of their corporation, since "Corporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all." This view, as discussed in the Colloquy introduction, embraces the Aggregate Theory of corporate personhood

Dissent

In arguing that CU and CWS, as secular for-profit corporations, cannot have the religious rights of individual human beings, the Dissent pointed to the inability of such corporations to "exercise" religion. This argument was intended to undermine the Majority's position in two ways:

a) Countering the Majority's reliance on the Dictionary Act's definition of a corporation by arguing that the context of the RFRA "indicated otherwise".
b) Citing the operative language of RFRA which prohibits the substantial burdening of a "person's" exercise of religion."

Disagreeing with what they saw as the Majority's narrow conception of "context", the Dissent looked for guidance not only to the text but also to pre-*Smith* decisions and the legislative history of RFRA. Since RFRA speaks of "a person's exercise of religion", and none of the cases before *Smith* supported the notion that a for-profit corporation is a "person" with free exercise rights, this aspect of "context", the Dissent found, "indicates otherwise". As an additional aspect of "context", they pointed to the legislative history as clearly showing RFRA was intended "Only to overturn the Supreme Court's decision on

Smith . . . not to unsettle other areas of the law" and not to "create new rights for any potential litigant."

As for RLUIPA, the Dissent concluded the law was intended only to enlarge the kinds of practices protected by RFRA and clarify that courts should not question the centrality of a particular religious exercise. Accordingly, RLUIPA was not meant to expand the class of entities qualified to mount religious accommodation claims or to make pre-*Smith* decisions irrelevant. So in the Dissent's view, the Majority's conclusion that RLUIPA's amending the "exercise of religion" definition effected a "complete separation from First Amendment case law" was just plain wrong.

The Dissent also disagreed with the Majority's conclusion that by conceding some closely held corporations can be "persons" under RFRA, the Government must also concede that closely held for-profit corporations such as HL and CWS were also persons. The Majority's conclusion was baseless, the Dissent argued, since the Government had agreed only that "churches", "religious institutions" and "religious non-profits" could be considered "persons", not that for-profit corporations could be.

It's noteworthy that Justice Ginsburg was joined only by Justice Sotomayor in her opinion that for-profit corporations were not "persons" under RFRA. Justices Breyer and Kagan expressed their agreement with only that part of Justice Ginsburg's dissent that found plaintiffs had failed to demonstrate the contraceptive mandate was not the "least restrictive means" of furthering the Government's interest.

My Comment

Dictionary Act

Since the Dictionary Act became law in 1871, the Supreme Court's guidance as to when the Act should be relied on has varied greatly, with one opinion stating that it should always be followed, except when doing so would require a court to "force a square peg in a round hole", while another declared it should be followed "only when it is necessary to carry out the obvious intent of the statute." So it's not surprising that when courts look to the Dictionary Act for interpretive guidance, they produce inconsistent results. For example, in the years immediately preceding the Supreme Court's decision in *HL*, the issue of whether a for-profit corporation was a RFRA person was considered by five US Courts of Appeal with three of them ruling against personhood and two ruling in favor. Four of the Courts consulted the Dictionary Act in reaching their decisions. One Court didn't bother.

The Majority's conclusion that "nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition" indicates that, unlike the Dissent, they looked to no source of information other than the statute's text. This narrow approach is the essential element of "textualism", a formalist theory which makes the ordinary meaning of a statute's text the sole criterion for interpreting the statute and gives no consideration to non-textual sources, such as the intention of the legislators who passed the law, the problem it was intended to remedy, or significant questions regarding the justice or fairness of the law. In recent years, textualism has been the dominant mode of

statutory interpretation employed by the Supreme Court's conservative majority and its decisive influence in the *HL* Majority's interpretation of RFRA and RLUIPA is obvious.

Seeing a Corporation as Merely an Aggregate of Shareholders

Before the case reached the Supreme Court, the Third Circuit had ruled that CWS could not be a RFRA "person" because:

> General business corporations do not, separate and apart from the actions or belief systems of their owners or from the intentions and directions of employees, exercise religion. They do not pray, worship, observe sacraments, or take other religiously motivated actions separate and apart from the intention and direction of their individual actors" and, therefore, couldn't "exercise religion".

The *HL* Majority dismissively rejected this conception of a corporation as distinct from the individuals who own and run it: Corporations "separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all." It is a truism, of course, that a corporation, "an artificial being", must act through human agents. But it does not necessarily follow that a corporation possesses all the "free exercise rights" possessed by its shareholders. Nevertheless, the Majority clearly considered a corporation's Constitutional rights to be coextensive with those of the individuals who own it. (But, presumably not coextensive with the rights of its non-owner employees, officers, or directors). Although this view furnished one of reasons the *CU* Court granted political free speech rights to corporations, the *HL* Majority never cited the *CU* decision, despite the fact that the same five Justices (Alito, Kennedy, Roberts, Scalia, and Thomas) constituted the majority in both cases.

Can a For-Profit Corporation Engage in the "Exercise of Religion?"

Although it is easy to understand how certain non-profit religious corporations, such as a church, religious school, or religious charity can engage in the "exercise of religion", it's more difficult to envision a secular for-profit corporation doing so.

Majority

Pre-Smith Case Law

As noted above, the Majority addressed this problem chiefly by deciding that pre-*Smith* cases, which had not extended free exercise rights to for-profit corporations, immediately became irrelevant with the enactment of RFRA and RLUIPA. But the non-applicability of pre-*Smith* decisions did not explain how a legal construct like a corporation could engage in the practice of religion.

Non-Profit / For-Profit Distinction

The Majority found that the corporate form could not be an obstacle to protection under RFRA because non-profit entities organized as corporations enjoy such protection. The fact that a corporation goal is to make money, the Majority ruled, can't be the basis for singling out for-profit corporation for lesser protection than that afforded to non-profits:

> While it is certainly true that a central objective of for profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit

> corporations, with ownership approval, support a wide variety of charitable causes, and it is not uncommon for corporations to further humanitarian and other altruistic objectives.

The Majority referred to situations where a for-profit corporation might take pollution control and energy conservation measures that are costly and beyond what the law mandates or provide benefits or working conditions that are better than what is required. The Majority then went on to assert "If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well."

Dissent.

Pre-Smith Case Law

Dissent argued a totally opposite view of the applicability of pre-*Smith* decisions and found those cases persuasive in their refusal to recognize a for-profit corporation's right to free exercise, since "the exercise of religion is characteristic of natural persons, not artificial legal entities."

Non-Profit / For-Profit Distinction

In addition, the Dissent argued, drawing distinctions between non-profit religious corporations and for-profit secular corporations, makes sense considering the differences in corporate constituencies and purposes. In this connection, all the corporations that had previously been found capable of exercising religion under RFRA had been non-profit religious entities, never for-profit corporations: "Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. . . The distinction between a community made up of believers and one embracing persons of diverse beliefs . . . constantly escapes the Court's attention." "Religious corporations exist to serve a community of believers. For-profit corporations do not fit that bill."

My Comment

The Majority assiduously avoided the term "secular" in referring to HL and CWS, although the primary purpose of these corporations was not to advance religion, but to make money. In contrast, where previously courts had always considered it critical to draw a distinction between religious entities and secular entities, the *HL* Majority chose to view these entities, not as religious or secular, but as "non-profits" or "for profits" and, since both varieties were corporations, there was no basis for treating them differently. Dismissing the case law focusing on the secular / religious divide, the Majority, noted "that modern corporate law does not require corporations to pursue profit at the expense of everything else" and (without citing any data) went on to say "and many do not do so." They then invoked this development in corporate law to support the argument that since for-profit corporations can engage in charitable work and set altruistic goals, they should be treated no differently from religious non-profits, whose only purpose is to advance religious and charitable activities.

But the types of non-profitable activities that for-profit corporations may be permitted by statutory law to engage in and what they will be allowed to do by state courts are two different things and the difference reveals the Majority's view of contemporary business law as it pertains to the primacy of corporate profit-making to be out of touch with reality. The great majority of U.S. corporations continue to be guided by the principal of maximizing shareholder value that was established one hundred years ago in *Dodge v. Ford Motor Co*. (Michigan 1919)

> A business corporation is organized and carried on primarily for the profit of the stockholders. . . . The discretion of directors . . . does not extend . . . to the non-distribution of profits among stockholders in order to devote them to other purposes.

That the preeminent responsibility of for-profit corporations is to maximize shareholder value remains the dominant view in corporate law. As stated in *eBay Domestic Holdings, Inc. v. Newmark,* (Del. 2010):

> Having chosen a for-profit corporate form, the 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. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.

Since 64% of the Fortune 500 companies are currently incorporated in Delaware, as are more than half of all companies listed on the New York Stock Exchange, NASDAQ, and other major stock exchanges, Delaware's opinion of the obligations of for-profit corporations is not only binding in that state, but also highly influential judicial authority in the rest of the United States. Leo Strine, who served as Chief Justice of the Delaware Supreme Court from 2014 to 2019 and had a thoroughgoing understanding of contemporary corporate law, found the *HL* Majority, by "conflating the family which controlled Hobby Lobby with the corporation" had made a fundamental error that was likely to engender ongoing uncertainty: "there's a whole deep corporate law problem with figuring out whether a corporation has religion."

Further, while both CWS and HL were owned and run by people whose religious values were important to them and they contributed money to religious causes, the primary purpose of CWS and HL was still to make money. Even though the shareholders of these corporations wanted their businesses, as the Hahns said "to reflect their Christian heritage", they nevertheless intended for them to "to make a reasonable profit." That critical distinction between a religious non-profit and a secular for-profit had been recognized in all the preceding court cases, until it was blithely discarded by the *HL* Majority.

Finally, it is supremely ironic that the Court alluded to corporations which provided their workers with benefits not required by law as support for its decision favoring corporations that took away from their workers benefits that were required by law.

Can the Rationale of HL Be Confined to Small Closely Held Corporations?

In his concurring opinion, Justice Kennedy wrote that the Court's holding was a narrow one, deciding only that, "The contraceptive mandate as applied to closely held corporations violates RFRA." However, the Majority's sanguine assumption that a distinction can be maintained between closely held for-profit corporations and other for-profit corporations remained open to question.

Majority

Although the Majority appeared to have limited their decision on the applicability of RFRA to closely held corporations, they did not provide a definition of such a corporation. Nevertheless, what they had in mind can be inferred from their repeated references to the small size of HL and CWS and the fact that in each instance they were owned and run by a few family members: "The companies in the cases before us [are] each owned and controlled by members of a single family."

In the event disputes were to arise among the owners of a for-profit closely held corporation, the Majority expressed confidence that state corporate law was perfectly capable of resolving any conflicts.

In addition, the Majority minimized the possibility that the logic of their decision might extend beyond closely held to publicly traded corporations: "These cases, however, do not involve publically traded corporations, and it seems unlikely that the . . . corporate giants will often assert RFRA claims. [The Government] has not pointed to any example of publicly traded corporations asserting RFRA rights . . ."

Dissent

Finding the Majority's efforts to limit the reach of their decision unpersuasive, the Dissent asserted: "Although the Court attempts to confine its language to closely held corporations, its logic extends to corporations of any size, public or private . . . " In addition, with respect to closely held corporations, they observed "'Closely held' is not synonymous with 'small'", pointing out that HL had thousands of employees and hundreds of stores and that Cargill and Mars are huge corporations despite being closely held.

The Dissent also doubted a court's ability to resolve "a religion-based intracorporate controversy", even in a state that has a mechanism for handling such an issue, given the Majority's instruction that "courts have no business addressing [whether an asserted religious belief] is substantial."

My Comment

Closely Held

As previously noted, the Majority did not define the term "closely held" and guidance from other source is vague or ambiguous. Most definitions of "closely held" include such terms as a "small group" or "handful" but do not specify an upper limit to the number of

shareholders such a corporation may have. However, the IRS is more specific, defining a closely held corporation as one that has more than 50% of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals. Accordingly, under the IRS definition, it is possible that 49% of the shares of a closely held corporation could be owned by a large number of unrelated individuals.

Although HL is not a giant corporation, it is large and growing. It increased in size from 500 stores and 13,000 employees in 2014 to 900 stores and 43,000 employees in 2019. And, as pointed out by the Dissent, closely held for-profit corporations can be huge. By revenue Cargill, Inc. ($113 billion) and Koch Industries, Inc. ($115 billion) are larger than many publicly held entities; larger, for example, than Bank of America, Microsoft, Home Depot, Boeing, Wells Fargo and many others. Cargill employs 166,000 people and Koch 120,000.

Publicly Traded

Responding to the argument that extending religious rights to closely held for-profit corporations would also logically encompass publicly traded for-profit corporations, the Majority stated: "It seems unlikely that the . . . corporate giants will often assert RFRA claims. [The Government] has not pointed to any example of publicly traded corporations asserting RFRA rights . . ."

This response is unconvincing. Prior to the *HL* decision, it was not thought possible for a for-profit corporation of any stripe to be afforded free exercise rights under RFRA, so it's hardly surprising that the Government was not able to cite examples of publicly traded for-profit corporations invoking RFRA's protections. Further, the Majority's prediction that it's "unlikely" huge public corporations "will <u>often</u> assert RFRA claims" (emphasis added) doesn't foreclose their ability to do so and is anything but reassuring.

<u>Will Secular For-Profit Businesses Invoke RFRA to Opt Out of Generally Applicable Laws</u>

<u>My Comment</u>

Although, strictly speaking, it's beyond the scope of the "corporate personhood" discussion, the possibility that secular businesses will use the religious grounds and the *HL* decision to "exempt" themselves from laws they don't like was one of the reasons the case was highly controversial and so will be briefly explored here.

The Dictionary Act includes not only corporations in its definition of "person", but also "companies, associations, firms, partnerships, societies, joint stock companies, as well as individuals." As discussed above, the *HL* Majority ruled that secular for-profit corporations had to be treated as "persons" under RFRA and the rationale of that decision logically extends "free exercise" protection to all the other business entities listed in the Dictionary Act.

In finding that pre-*Smith* case law did not apply under RFRA, however, the Majority made irrelevant a large body of judicial opinion that had decided which Free Exercise claims by businesses were valid and which were not. For example, the Supreme Court and lower courts had ruled that religious belief, no matter how sincerely held, could not exempt the believer from: paying the minimum wage; paying women the same as men for equal work; paying Social Security taxes; serving Black people in a restaurant; laws barring discrimination against homosexuals; laws regulating child labor; laws barring polygamy; and many other religiously motivated behaviors that violated laws of general application.

With the slate wiped clean of the most germane legal precedents, the Dissent expressed concern that for-profit businesses, citing RFRA and the *HL* decision, would seek to opt out of laws of general application, especially anti-discrimination laws. The Majority dismissed those concerns in two ways: a) predicting that public traded corporations would be "unlikely" to invoke RFRA; and b) expressing confidence in the ability of the courts to distinguish between sincere religious claims and the bogus variety.

To date, the *HL* decision appears to have had a less than anticipated impact on lawsuits seeking to exempt businesses from laws of general application. But in cases involving small businesses whose owners' religiously motivated conduct has run afoul of anti-discrimination laws, it has had some influence.

But in a recent highly controversial case involving a claim of religion-based exemption from an antidiscrimination law, the *HL* decision was not cited at all. *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (*MC*), involved a closely held for-profit corporation that refused to bake a cake celebrating the marriage of a gay couple. To do so, the baker claimed, would violate his religious beliefs concerning homosexuality. The Commission ruled that the bakery had violated Colorado anti-discrimination law by refusing to bake the couple's wedding cake. Since, under the Supreme Court's decision in *Boerne v. Flores,* RFRA does not apply to the states and the *HL* ruling dealt only with RFRA, *HL* was not a relevant precedent. So, with RFRA and *HL* inapplicable, the Court dealt only with the fairness of the proceedings before the Civil Rights Commission, which it found were fatally compromised by the Commissioners' "hostility" to religion. By granting judgment to the bakery on that procedural basis, the Court avoided a Free Exercise Clause decision that would have had to rely on pre-*Smith* case law and, for that reason, be less likely to favor the bakery than a decision under RFRA

Although the Court avoided a decision based on the Constitution, it did address in passing two competing constitutional interests: the baker, as the owner of a business serving the public, "might have his right to the free exercise of his religion limited by generally applicable laws", while, on the other hand, the baker possessed free speech rights, "Religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."

The interplay between the First Amendment's Free Exercise Clause and its Free Speech Clause, which generally has resulted in decisions favorable to religious claimants, will be explored in Session Three's discussion of corporations and the Bill of Rights.