I. Two U.S. Supreme Court decisions have extended constitutionally protected rights that were traditionally viewed as personal rights to corporate entities. These two cases have implications for legislative bill drafters.

**Citizens United v. Federal Election Commission**, 558 U.S. 310 (2010): The U.S. Supreme Court in *Citizens United* said that political spending is a form of protected speech under the First Amendment, and corporations have free speech rights. While corporations may not give money directly to campaigns, they may seek to persuade the voting public through other means, including ads.

**Burwell v. Hobby Lobby Stores, Inc.,** __ U.S. __ , 134 S. Ct 2751 (2014): The U.S. Supreme Court held that closely-held corporations are "persons" under the Religious Freedom Restoration Act and that protecting the free exercise right of the closely-held corporation protects the religious rights of the people who formed the corporation.

As a legislative drafter who uses the term "person" all the time in drafting legislation, what I want to focus on from the *Hobby Lobby* case is how the Court interpreted the word "person" in the Religious Freedom Restoration Act and the phrase "unless the context otherwise requires" relating to the word "person".

- The plaintiffs based their challenge to the contraceptive mandate under another federal law, the federal "Religious Freedom Restoration Act of 1993" (RFRA). Under RFRA, Congress prohibits the federal government from **substantially burdening a person's exercise of religion** unless the action is the **least restrictive means** of furthering a **compelling government interest**.

- (RFRA) does not define the term "person". The Court applied the federal "Dictionary Act", 1 U.S.C. §1, which defines "person" to include "corporations".

- "Under the Dictionary Act, 'the wor[d] 'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals'. Ibid.; see FCC v. AT&T, Inc., 562 U.S. ____, ____, (2011) (slip op., at 6) ("We have no doubt that 'person' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear"). Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act
provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

• Because the Court looked to the Dictionary Act's default definition of "person" which includes corporations and which is applicable to federal laws, the Court concluded that closely held for-profit corporations fall under the definition of “person” under RFRA and held that "a federal regulation's restriction on the activities of a for-profit closely-held corporation must comply with RFRA”.

• The "purpose of extending rights to corporations is to protect the rights of the people associated with the corporations, including shareholders, officers, and employees". The court found that corporations can exercise religious beliefs that are protected under RFRA.

• The court made a distinction between closely-held corporations and publicly held corporations. Majority opinion - the decision was limited to closely-held corporations and does not apply to public corporations.

II. Why would a business owner want to form a corporation?

• The benefit from incorporating is that corporations possess legal interests and a legal identity of their own that is separate and distinct from shareholders.

• An individual business owner creates a corporation to get "limited liability" for business founders and investors and to shield their personal assets.

• New York Times article by Professor Steven Solomon, professor of law at the University of California, Berkeley, -- The court's decision doesn't end the debate because it isn't clear what exactly is a closely-held corporation.

• Solomon: “Shareholders cannot be held responsible for the debts of the company because it exists separately. Because of this, imputing the intent of the shareholders has always been on thin ice from a corporate law perspective because having a separate existence is the whole reason for creating a corporation in the first place.”

• Solomon: "Corporate law theory allows courts to ignore the limited liability shield by piercing the corporate veil. "Courts pierce the corporate veil when there is no difference between the shareholders and the company. In other words, veil-piercing looks to whether the identity of the shareholders and the corporation is indistinguishable and they are acting as one. It is typically limited to companies that have only a few shareholders - certainly fewer than five or so because of the difficulty in identifying mutual interests." Hobby Lobby's test "appears to be a small number of shareholders".
• Justice Ginsburg vehemently disagreed with almost every part of the majority opinion in *Hobby Lobby*.

• Ginsburg: "Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption, from a generally applicable law, whether under the Free Exercise clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is 'an artificial being, invisible, intangible, and existing only in contemplation of law.' ... Corporations, Justice Stevens more recently reminded, 'have not consciences, no beliefs, no feelings, no thoughts, no desires,' *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 466 (2010) (opinion concurring in part and dissenting in part)."

• Ginsburg: "In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation."

• Ginsburg: The majority's decision ignores the rights of the corporation's employees and imposes the religious convictions of the employers on the employees. She would have focused on construing the *exercise of religion* in RFRA rather than on just the word "person".

• Justice Ginsburg thinks the decision will not be limited to closely-held corporations. RFRA claims will proliferate due to the Court's expansive notion of corporate personhood.

III. Is defining "person" to include a corporate entity so unusual?

The answer to this question is yes and no. It's long been recognized in the law that "person" can be defined to include corporate entities. As Justice Ginsburg points out the concept of a corporation is an artificial, legally created entity. So defining "person" in the Dictionary Act and in state statutes of statutory construction to include corporate entities is not a new idea. What is different is the application of the personal rights to corporate entities that has occurred in *Citizens United* and in *Hobby Lobby*. Saying that corporate entities have protected free speech rights and protected rights to exercise religion is a significant change in the law.

IV. What does this mean for legislative drafters?

A. The rationale in *Hobby Lobby* could be applied to state statutes that use the term
"person" without a specific definition and that have a statute like the Dictionary Act that defines persons to include corporate entities.

- **The vast majority of states have a statute that defines "person" as used in their statutes to include corporate entities.**

- States don't generally have a "Dictionary Act" like Congress but most states have adopted a set of statutes on statutory construction to guide the legislature and the courts on how to interpret statutes.

- Those statutes on statutory construction usually contain a set of common or standard definitions that automatically apply to every statute adopted in that particular state. This means the drafter does not have to redefine common words unless the drafter wants a different, specialized meaning to apply. By default, the terms that are defined apply to *all* of the statutes of that state unless the text of the statute being construed has a separate definition or unless the context of that statute otherwise requires.

- As you saw in the *Hobby Lobby* case, the Dictionary Act definition of "person" by default was interpreted to apply to RFRA. This same rationale could be applied to states through their equivalent of the Dictionary Act.

- See the chart entitled Default Definitions of "Person" in State Statutes. This is a 50-state survey of the term "person" to see how many states have these common definitions of person that apply by default to all of the statutes in the particular state. **What I found was that out of 50 states, 47 states have enacted a broad definition of the term "person" that applies by default to all of the state's statutes and defines "person" to include a corporation as well as a natural person.**

- Three states (Arkansas, California, and New York) do not have a default statute creating a definition of "person" that applies to all the statutes. Instead, these states define "person" or "words and phrases" for particular chapters or codes.

**B. How does the general definition of “person” affect the legislative intent of bills following these court decisions?**

- This raises an interesting drafting dilemma for legislative drafters. When "person" is no longer just a legal fiction, doesn't it behoove legislative drafters to think about the potential application of this approach to state statutes? Should legislative drafters discuss this policy choice with legislative sponsors?

- Legislative sponsors and drafters use "person" all the time in legislation and we
rarely define it separately. We've been taught that you don't have to define "person" in your bill because it's already defined for you by statute. How is "person" actually defined in your state's statutes of construction? If legislative drafters don't consider this drafting issue and continue on automatic pilot using the term "person" without considering this broader definition and the potential impact of this case, it's possible that other personal rights might be extended to corporate entities in the future. Perhaps the legislature might not have intended this result.

It seems to me that post-Citizens United and Hobby Lobby this is one of those policy choices that legislative drafters should discuss with legislative sponsors, particularly if the legislation is dealing with broad protections, like the Religious Freedom Restoration Act, or areas that could affect rights or aspects that are considered characteristics of natural persons.

C. How would you bring this up?

- Simply say - in our state, we have a generic common definition of person that includes natural persons and corporate entities. Do you want the bill to apply to corporate forms of persons or just to apply to “natural persons”? And then based on the legislator's response, you use "person" if they want the broader definition or you create a more narrow definition of person in the bill that applies to the topic of your bill.

V. What are the consequences of the Court's interpretation of the phrase in the Dictionary Act "unless the context otherwise requires"? What does "unless the context otherwise requires" mean in the federal Dictionary Act and under state Statutes of Construction?

A. Hobby Lobby case:

- The majority opinion seems to give great weight to this phrase.

- Justice Ginsburg looking at the very same language on the other hand draws a completely different conclusion - that the Dictionary Act definition does not apply in this context.

B. State Statutes

- Many state statutes use the phrase "unless the context otherwise requires" or something to that effect. The general interpretation is that if you are using one of these words and you do not want the general definition to apply by default, you need to create a specific separate definition that is only applicable to the subject matter of the bill. Otherwise, the use of that word will be construed as defined in
the general definition.

For example, the definition of "minor" in Colorado is age-based and many statutes draw the line in different places.

2-4-401. Definitions. The following definitions apply to every statute, unless the context otherwise requires:

(6) "Minor" means any person who has not attained the age of twenty-one years. No construction of this subsection (6) shall supersede the express language of any statute.

- 28 other Colorado statutes contain a separate definition of "minor" with a different age limit than under 21. Usually, these statutes define "minor" to be a person who has not attained the age of 18 years.

VI. Questions drafters should consider when drafting bills

- Another take-away is that drafters should look at the other definitions in their state statutes on statutory construction to see if there are other general definitions that might be problematic. When you are drafting a bill and using words that are defined in a general definition, you should ask yourself a series of questions:

- What are the general definitions for my state statutes as defined in an article on statutory construction?
- Am I using key words in the bill consistent with the definitions that would apply by default under the article on statutory construction?
- Should I consult with the legislative sponsor about whether he or she wants a broader or narrower definition than the one provided in that general default definition?
- Do I need to create a more specific, narrow definition for the bill to avoid the application of one of these general definitions?
- Are there definitions that are relevant for the particular topic of law?
- Am I using the terms in the bill consistent with the definitions for that particular topic of law?

VII. Questions? Comments? What do you think?

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