Instructor’s Manual

**Case Notes**

**for**

**Chapters 5 through 15**

**Sections III, IV, and V**

**Chapter 5 Cases**

Case 5.1

***Citizens United v. Federal Election Commission***

**Case Summary**

In this now famous court decision, the U.S. Supreme Court concluded that a federal election law could not ban corporate expenditures for political campaigns or electioneering communications. The Supreme Court Justices (in a 5–4 vote) concluded that the federal law banning such spending violated the First Amendment rights of corporations and other institutions. The case, which follows up on the theme of corporate rights introduced in Chapter 2, has raised many vexing questions about the scope of those rights. Is this decision a logical extension of Supreme Court cases affirming a corporation’s limited right to political participation? Or is it a miscarriage of justice based on a misconception of the corporation? Does this sweeping decision represent sound legal reasoning, consistent with a reasonable view of the corporation, or is it grounded in fatally flawed assumptions about the nature and limited purpose of the corporate enterprise?

**Analysis and Teaching Suggestions**

*Citizens United* can allow for a fruitful (and sometimes emotional) discussion on the essence of the First Amendment and its scope. The First Amendment prohibits the government from “abridging freedom of speech and of the press.” Broad free speech rights are a distinctive quality of the U.S. Constitution, and it could be valuable for instructors to probe students on their views about the virtually “absolute” freedom of thought and speech that is characteristic of American political society. In *Citizens United*, the Supreme Court ruled that corporations and unions have the same First Amendment right to spend their money to influence elections as ordinary citizens do. According to law professor Eugene Volokh, money isn’t speech but the First Amendment protects your right to speak using your money. As Chapter 2 makes clear, this case follows a long line of judicial precedent that enshrines corporate liberty rights in the law. Some focus on this trend (if class time allows) can also be a useful avenue of discussion. The key issue in *Citizens United* is whether or not there is a fundamental liberty inherent in campaign spending that applies to corporations as well as individuals.

Consult the *Citizens United v. Federal Election Commission* Supreme Court case and outline the arguments on both sides of the debate. (The decision can be downloaded at the Supreme Court website: <https://www.supremecourt.gov/opinions/09pdf/08-205.pdf>.)

**Discussion Questions**:

* **In your view should for-profit corporations be entitled to the same rights of free speech and political participation as individual citizens? Or should those rights be limited in some way?**

The principal argument supporting the *Citizens United* outcome is that government should not restrict the speech of some elements of society such as wealthy corporations and organizations (including unions) simply because they have money and choose to use that money to favor a political candidate or cause. The First Amendment prohibits Congress from promulgating laws that fine citizens or associations of citizens for simply engaging in political speech. The main theme of the First Amendment is anti-censorial since it is meant to protect American citizens from regulations that stifle free expression. According to former Supreme Court Justice Antonin Scalia, “the government cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.” The bottom line is that the government should not limit or constrain the amount of “election speech” that is permissible, and the First Amendment prevents it from doing so, even if that political speech originates from within a powerful corporation.[[1]](#endnote-1)

* **Does this ruling threaten free, fair elections in any way?**

The big concern, of course, is the influx of too much money into political campaigns with political candidates beholden in some way to their major contributors. Those contributors are also more likely to gain access to political leaders and capture their attention, which is antithetical to democratic values. The danger is that the interests of ordinary and powerless citizens will be secondary to corporate interests. This was clearly the concern of the four justices in the minority who sought in vain to restrict corporate liberties and keep big money out of politics. One focus of their dissenting opinion was the fundamental dissimilarity between a human person, whom the crafters of the Constitution had in mind, and the corporation which is sometimes “managed and controlled by nonresidents” (p. 107). After the decision was handed down, the *New York Times* opined that the ruling would allow “corporations to use their vast treasuries to overwhelm elections.” On the other hand, prosperous families and individuals also spend a disproportionate amount of money on campaigns. (Wealthy and politically motivated individuals such as George Soros, Bill Gates, and many others can dip into their fortunes and use that money to try to influence an election).

* **How would you have decided this case if you were a member of the Supreme Court? What are the major reasons and assumptions underlying your decision?**

After a period of debate about *Citizens United* that airs these different issues and perspectives, students can be invited to cast their votes and give their personal reasons underlying their choice. After tallying the class vote, the instructor can query students about whether or not they changed their mind after listening to the various opinions expressed in the class debate.

Case 5.2

**The *Hobby Lobby* Case**

**Case Summary**

In *Burwell v.* *Hobby Lobby*, five Supreme Court justices concurred that a closely held, for-profit corporation is entitled to the free exercise of religion without undue government interference. The Justices exempted Hobby Lobby from providing to its employees several types of abortifacient contraceptives mandated by the Affordable Care Act’s HHS mandate because this requirement imposed a substantial burden on its religious beliefs. The four dissenting justices vigorously resisted this conclusion. A cardinal question in this case study is whether or not a for-profit corporation like Hobby Lobby can qualify as a “person” who can in some way “exercise religion.”

**Analysis and Teaching Suggestions**

Most students will be familiar with this well-known case that also follows up on the material about corporate rights presented in Chapter 2. Students should be asked to think about the scope of rights for corporations and whether any corporation deserves the right to religious liberty. The case dramatically juxtaposes employee rights to plenary health-care coverage to the employer’s right to decide for its employees what health-care options they will cover. The primary ethical issue in this case is about material cooperation--paying for an abortifacient that would cause the fertilized egg not to be implanted in the uterus. Is it morally wrong to prevent such implantation and thereby destroy this nascent embryonic life, and, if so, does Hobby Lobby “cooperate” in this act by paying for the drug through its insurance plan?

 One possibility for teaching this case is a mock trial where some students represent Hobby Lobby, others the federal government, while other students can comprise a panel of judges. If the mock trial method is adopted, it would be beneficial to have the students read pertinent sections of the Supreme Court decision as well as the summary presented in this case.

**Additional Resources**

Students can consult the Supreme Court website for the full text of this case and download the *Burwell v. Hobby Lobby* decision:

* <https://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf>

**Discussion Questions**:

* **Sketch out the arguments for and against Hobby Lobby Inc. In your view what are the strongest arguments that support the company’s position? Do you agree with Hobby Lobby’s contention of “complicity” if it provided the abortifacient contraceptives to its employees as part of its insurance package?**

Students who support the decision might cite the sincerity of the owners and founders of Hobby Lobby and the need to protect their right to religious liberty. This is an important issue and if it doesn’t come up, instructors should make sure background about the company (along with its history) is fully understood by the class. Some students will undoubtedly be familiar with Hobby Lobby stores if they or their parents have shopped there.

Due to its religious and moral convictions, Hobby Lobby executives do not want to cooperate in any way with the provision of abortifacients, which destroys the embryo trying to implant in the uterus. There is no formal cooperation on the company’s part since it does not intentionally participate in this act. But a strong case can be advanced that paying for the insurance people will use to purchase the abortifacient constitutes some level of illicit material cooperation. The company has never paid for these drugs and should not be forced to do so by the government. Moreover, purchasing insurance to cover this activity (abortifacient contraception) is a form of proximate (vs. remote) cooperation since it facilitates financially the performance of this activity.[[2]](#endnote-2) It could also be argued that women freely choose to work at Hobby Lobby stores and they know or should know about the company’s Christian heritage. Those women who want coverage for all forms of contraception are free to work somewhere else.

On the other side of the debate about this case, what about the precedent this case sets? Justice Ruth Bader Ginsburg offers many convincing arguments along these lines. Should corporations be allowed to deny their employees the full range of medical options provided by the Affordable Care Act? It appears from the ruling that any type of reasonable religious objection voiced by a sincere for-profit company like Hobby Lobby would be valid in the eyes of the court. Hence, regulations or rules that interfered with a company’s religious convictions would represent a “substantial burden” on that company’s exercise of religion if there were penalties for flouting those regulations. Also problematic is the court’s “expansive notion of corporate personhood” (p. 115). Are for-profit corporations really analogous to persons in such a way that they can express and exercise their religious beliefs? There is surely something to the claim that only a real person has such beliefs.

* **Do you agree with the reasoning behind the Supreme Court’s decision? If not, do you agree with the elements of Justice Ginsburg’s dissenting opinion which were presented in the case?**

The Supreme Court reasoned that the HHS mandate was a substantial burden on Hobby Lobby because of the onerous fines that would be imposed if Hobby Lobby did not comply with this law. Also, it concluded that while the government had a compelling interest in providing these contraceptives, it could have used less restrictive means and provided an opportunity for an exemption or accommodation to eligible for-profit corporations (such as the one offered to religious institutions). Given these factors, Justice Samuel Alito, who wrote the majority opinion, concluded that the mandate violated the RFRA as applied to corporations.

Students must also understand that Alito “pierced the corporate veil” to reach his decision. Recognizing and supporting free-exercise rights was a means of protecting the corporation’s owner and employees, not the corporate entity itself. Ginsburg’s point is that the court’s reasoning will be expanded to other religious objections, and various forms of federally mandated health-care coverage will be denied. Some employers might object to paying for all contraceptives, while another employer who embraces the tenets of the Jehovah Witness religion might object to paying for blood transfusions which is against their religious beliefs. One justice has written that the *Hobby Lobby* decision constrains the government’s ability to extend its “social safety net” to low-paid workers who cannot afford the coverage in question. This would apply to retail stores like Hobby Lobby where so much of the workforce is not highly compensated.

Second, some students who concur with Ginsburg’s reasoning will argue that the for-profit corporations are secular by definition and therefore they cannot “exercise religion” in any meaningful way. Corporations are operated exclusively to advance the interests of its shareholders or owners, to maximize shareholder value. This purpose seems to imply an incompatibility with religious exercise, but it can also call into question the validity of a corporation’s altruistic activities.

* **Should for-profit (but closely held) corporations like Hobby Lobby have a right to the free exercise of religion as guaranteed under the First Amendment? Do you worry about the negative implications of recognizing such a right?**

There are several ways to approach this question depending upon the preceding discussion. In retrospect, some legal scholars have criticized the Supreme Court decision because it conflated the Green family controlling Hobby Lobby with the corporation itself. In their view, the Supreme Court should have taken corporate personhood more seriously in this case. The Court should have considered whether the corporation itself as an independent entity should be recognized as having religious beliefs and rights. The birth control mandate was imposed on the corporation, not on the members of the Green family. Thus, this question can open up a debate with plausible arguments on both sides about the religious rights of for-profit corporations. This discussion follows up more directly on the explicit themes of corporate rights and personhood in Chapter 2.[[3]](#endnote-3)

1. See Abrams, F. (2017). *The soul of the First Amendment* (pp. 110–112)*.* New Haven: Yale University Press, and Shuchman, D. (2017, May 1). A fundamental liberty. *Wall Street Journal*, p. A15. [↑](#endnote-ref-1)
2. See Oderberg, D. (2018). *Opting out* (pp. 46–64)*.* London: IEA Press. [↑](#endnote-ref-2)
3. See Winkler, A. (2018). *We the corporations* (p. 387)*.* New York: W.W. Norton. [↑](#endnote-ref-3)