

## Hobby Lobby *and the Dictionary Act*

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Before the end of this month, the Supreme Court will decide *Burwell v. Hobby Lobby Stores, Inc.*<sup>1</sup> and in so doing will determine whether the Religious Freedom and Restoration Act (RFRA) exempts from the Affordable Care Act's (ACA) contraception mandate closely held, for-profit companies whose owners oppose contraception on religious grounds.<sup>2</sup> RFRA states that "[the] Government shall not substantially burden a *person's* exercise of religion."<sup>3</sup> A central issue in the case is whether corporate entities are "persons" covered by RFRA. That is, does RFRA extend religious freedoms to for-profit corporations?

The debate over how best to answer this question has largely overlooked the opportunity the case presents for the Court to resolve a longstanding problem of statutory interpretation<sup>4</sup>: how courts should determine when to apply the U.S. Code's Dictionary Act.<sup>5</sup> The Dictionary Act, enacted in 1871, instructs courts to apply to all federal statutes definitions of certain common words (including "person") and basic rules of grammatical construction (such as the rule

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1. *Sebelius v. Hobby Lobby Stores, Inc.*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354). The Court consolidated *Hobby Lobby* with *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356). The consolidated cases will come down as *Burwell v. Hobby Lobby*, reflecting Sylvia Mathews Burwell's replacement of Kathleen Sebelius as Secretary of Health and Human Services in June 2014.
  2. See Petition for Writ of Certiorari at I, *Hobby Lobby*, 134 S. Ct. 678 (No. 13-354); Petition for Writ of Certiorari at i, *Conestoga Woods*, 134 S. Ct. 678 (No. 13-356).
  3. 42 U.S.C. § 2000bb-1(a) (2012) (emphasis added).
  4. Understandably, given the more high-profile issues at stake.
  5. 1 U.S.C. § 1-8 (2012). See, e.g., Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014), <http://harvardlawreview.org/2014/05/hobby-lobby-corporate-law-and-the-theory-of-the-firm>. (impliedly characterizing one approach that the Court has taken to the Dictionary Act as the uncontested approach).

that plural words include the singular) “unless context indicates otherwise.”<sup>6</sup> The Act’s legislative history suggests that its purpose was “to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction.”<sup>7</sup> However, in line with general trends in statutory interpretation,<sup>8</sup> courts have applied the Act inconsistently for the past century.<sup>9</sup> The courts’ characterizations of the Dictionary Act have ranged from a tool of last resort<sup>10</sup> to a presumptive guide.<sup>11</sup>

The Dictionary Act states that “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>12</sup> RFRA does not contain an intra-statute definition of person that would override this definition. Of course, the Dictionary Act is not the only tool that courts can, or should, use to interpret ambiguous text. Other options, which have been deployed by the Tenth Circuit and other federal courts considering the implications of RFRA for the ACA’s contraception mandate, include RFRA’s legislative history<sup>13</sup> and case law concerning religious exemptions under the Free Exercise Clause,<sup>14</sup> to which RFRA

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6. 1 U.S.C. § 1. Congress updated the Dictionary Act most recently in 2002. *See* Born-Alive Infants Protection Act of 2002, Pub. L. No. 107-207, 116 Stat. 926 (codified at 1 U.S.C. § 8 (2012)) (defining “born alive”).
  7. CONG. GLOBE, 41st Cong., 3d Sess. 1474 (1871) (statement of Rep. Poland).
  8. For examples of articles responding to the inconsistency of the federal courts’ statutory interpretation methodology, see Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) (noting “the reality that many of these canons . . . are applied too inconsistently to advance any coherent set of judicial preferences or values”); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761 (2010) (“A half century has passed since Henry Hart and Albert Sacks . . . accused the American courts of methodological disarray in statutory interpretation, and the U.S. Supreme Court still is divided over which interpretive tools, in what order, should be used to resolve statutory questions.”).
  9. *Compare* Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908) (“[T]he provisions of [the Dictionary Act] are to be treated as if incorporated in and as part of subsequent enactments.”) *with* First Nat’l Bank in St. Louis v. Missouri, 263 U.S. 640, 657 (1924) (suggesting that a court should rely on the Dictionary Act only “where it is necessary to carry out the evident intent of the statute”) *and* Rowland v. Cal. Men’s Colony, 506 U.S. 194, 200 (1993) (characterizing the Dictionary Act as a presumption that courts should depart from only when it requires a court to “force a square peg into a round hole”).
  10. *First Nat’l*, 263 U.S. at 657; *see also* Reid v. Angelone, 369 F.3d 363, 369 n.2 (4th Cir. 2004). (applying the *First National* approach).
  11. *Rowland*, 506 U.S. at 200; *see also* United States v. Havelock, 664 F.3d 1284, 1289–90 (9th Cir. 2012) (applying the *Rowland* approach).
  12. 1 U.S.C. § 1 (2012).
  13. *See, e.g.*, Autocam Corp. v. Sebelius, 730 F.3d 618, 623 (6th Cir. 2013) (citing on this point *Jackson v. District of Columbia*, 254 F.3d 262, 266–67 (D.C. Cir. 2001)).
  14. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1167 (10th Cir. 2013) (Briscoe, J., dissenting), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-354).

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responded.<sup>15</sup> Three of the five circuits to consider the question posed in *Hobby Lobby*—the Sixth,<sup>16</sup> the Seventh,<sup>17</sup> and the Tenth<sup>18</sup>—grappled with the Dictionary Act, while two circuits—the Third<sup>19</sup> and the District of Columbia<sup>20</sup>—avoided it.

Because the circuit courts have used a full range of approaches in applying the Dictionary Act to RFRA’s use of the term “person,” litigation over RFRA’s relationship to the ACA is an especially apt vehicle for resolving how courts should determine whether the Dictionary Act applies generally.

Of the cases to interrogate how RFRA and the ACA interact, the Tenth Circuit’s *Hobby Lobby* opinion was the most deferential to the Dictionary Act.<sup>21</sup> Judge Cowen, writing for the majority, described the Dictionary Act as the “first resource”<sup>22</sup> in determining the meaning of “person”—a “default meaning,”<sup>23</sup> given the absence of an intra-statute definition in RFRA.<sup>24</sup> Judge Cowen ultimately found that the Dictionary Act was dispositive of the question whether RFRA covers corporations, since the plain language of the provision is clear when read in combination with the Dictionary Act.<sup>25</sup> The Seventh Circuit, meanwhile, explored the textual context of “person” more broadly in order to determine whether the Dictionary Act’s definition applies to the ACA. The court ultimately determined that “[n]othing in RFRA suggests that the Dictionary Act’s definition of ‘person’ is a ‘poor fit’ with the [broader] statutory scheme”<sup>26</sup> and thus held that corporations are persons under RFRA. The Sixth Circuit, noting that its analysis “begins with the Dictionary Act,”<sup>27</sup> treated as

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15. See H.R. REP. NO. 103-88, at 6 (1993) (noting that RFRA was intended to restore the governmental interest test applicable to First Amendment Free Exercise cases predating *Employment Div. v. Smith*, 494 U.S. 872 (1990)).
  16. *Autocam*, 730 F.3d at 626 (6th Cir. 2013) (describing the Dictionary Act’s terms as “default definitions”).
  17. *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013) (determining that the Dictionary Act applied to RFRA because its definition did not require it to fit “a square peg into a round hole” (quoting *Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 200 (1993))).
  18. *Hobby Lobby*, 723 F.3d at 1114.
  19. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (Nov. 26, 2013) (No. 13-356).
  20. *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013).
  21. *Hobby Lobby*, 723 F.3d 1114.
  22. *Id.* at 1129.
  23. *Id.* at 1133.
  24. *Id.* at 1129.
  25. *Id.* (“Thus, we could end the matter here since the plain language of the text encompasses ‘corporations,’ including ones like *Hobby Lobby* and *Mardel*.”).
  26. *Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013).
  27. *Autocam Corp. v. Sebelius*, 730 F.3d 618, 626 (6th Cir. 2013).

relevant context non-textual sources even further afield, including “the body of free exercise case law that existed at the time of RFRA’s passage” and RFRA’s legislative history.<sup>28</sup> Based on these sources, it ultimately concluded that Congress did not intend to include for-profit corporations as “persons” under RFRA.<sup>29</sup> The D.C. Circuit, one of the circuits that avoided grappling with the Dictionary Act, argued that the Act was not relevant because a court “must construe the term ‘person’ together with the phrase ‘exercise of religion.’”<sup>30</sup> To resolve the meaning of the phrase actually at issue, it continued, the relevant determination is whether “corporations enjoy the shelter of the Free Exercise Clause.”<sup>31</sup> Finally, the Third Circuit, claiming not to reach the question whether “person” under RFRA includes corporations, did not engage with the Dictionary Act at all.<sup>32</sup> Instead, it stopped its inquiry after concluding that a for-profit corporation cannot assert a claim under the Free Exercise Clause, which it deemed a “threshold question.”<sup>33</sup>

Despite the potential for *Hobby Lobby* to serve as a vehicle for resolving this lingering question of statutory interpretation, the Dictionary Act played an understated role in the *Hobby Lobby* oral arguments at the Supreme Court. Each party raised the issue exactly once – perhaps recognizing the potential for the Act to play a critical role in the Court’s disposition of the case – but both times the Justices changed the subject. Paul D. Clement, arguing on behalf of the private parties, urged the Justices to read “persons” as “pick[ing] up additional context through the Dictionary Act and [therefore] specifically appl[y]ing to all corporations, to joint partnerships, to societies.”<sup>34</sup> Justice Sotomayor, in response, deflected this purely textual approach, shifting the conversation towards how, as a practical matter and as a matter of business organizations law, a court would determine whether a corporation exercised religion.<sup>35</sup> Solicitor General Donald Verrilli also raised the Dictionary Act. He conceded that the

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28. *Id.* (quoting *Hobby Lobby*, 723 F.3d at 166-68).

29. *Id.*

30. *Gilardi v. U.S. Dep’t of Health & Human Services*, 733 F.3d 1208, 1211 (D.C. Cir. 2013) (noting that the plaintiffs “hop[ed]” that the Dictionary Act applied to their RFRA claim but insisting that “the focus on personhood is too narrow”).

31. *Id.* at 1212.

32. *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dep’t of Health and Human Services*, 724 F.3d 377, 388 (3d Cir. 2013).

33. *Id.* at 388. The court argued that its “conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot exercise religion, it cannot assert a RFRA claim.” *Id.*

34. Transcript of Oral Arguments at 17, *Sebelius v. Hobby Lobby Stores, Inc.* 134 S. Ct. 678 (2014) (No. 13-354), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-354\\_5436.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-354_5436.pdf).

35. *Id.* at 17-19.

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Dictionary Act “provides a broad definition of person,” but insisted that the “operative statutory language is exercise,” which the Dictionary Act does not define.<sup>36</sup> In response, Justice Alito, like Justice Sotomayor, reoriented the discussion, asking the Solicitor General how a different religious freedom statute<sup>37</sup> should affect the Court’s interpretation of RFRA.<sup>38</sup>

The Court, of course, is not limited to only those issues thoroughly fleshed out at oral arguments. *Hobby Lobby* presents a unique opportunity to clarify the methodology that courts ought to use to determine whether the Dictionary Act’s definitions apply, and the Court should seize it. Uniform application of the Dictionary Act would advance rule-of-law values: increased predictability, consistency among the federal courts, like treatment of like plaintiffs, and protection of reliance interests. Applying the Dictionary Act consistently would protect the reliance interests not only of litigants but also of Congress, which seems to draft, at least sometimes, with the Dictionary Act definitions in mind.<sup>39</sup> Moreover, establishing a standard methodology for determining whether the Dictionary Act’s provisions apply would send a signal that the Court is committed to increasing predictability and reining in judicial discretion to critics of courts’ inconsistency in statutory interpretation.<sup>40</sup> It could also be a small step forward in strengthening the dialogue between the courts and Congress.<sup>41</sup>

The Court could take one of two diametrically opposed approaches to uniform application of the Dictionary Act. First, the Court could create a clear

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36. *Id.* at 48.

37. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006).

38. Transcript of Oral Arguments, *supra* note 34, at 49.

39. See, e.g., U.S. SENATE, OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL 7 (1997), [http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel\\_LegislativeDraftingManual%281997%29.pdf](http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual%281997%29.pdf) (advising drafters to “[b]e aware of the rules contained in chapter 1 of title 1, United States Code, regarding terminology” and even noting that “[e]specially useful is the definition of the term ‘person’”); U.S. HOUSE OF REPRESENTATIVES, OFFICE OF THE LEGISLATIVE COUNSEL, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE 61 (1995), [http://legcounsel.house.gov/HOLC/Drafting\\_Legislation/draftstyle.pdf](http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf) (same).

40. For an example of a critical view of the Court’s approach to statutory interpretation, see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

41. Abbe Gluck and Lisa Bressman have published a two-part article presenting data about disjunctions between courts’ and Congress’s understandings of statutory interpretation and offering some solutions. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

statement rule embodying a presumption that the Dictionary Act is inapplicable. It could say to Congress that courts in the future will not turn to the Dictionary Act to determine the meaning of federal statutes unless Congress explicitly states in the particular statute that it intends for the Act's terms to apply. The Court might justify this position as dialogue-enforcing.<sup>42</sup> The downside of this approach is that it arguably demonstrates insufficient respect for Congress's role as the author of federal laws. Dan Farber has written that "[p]erhaps the most obvious understanding of legislative supremacy is that courts must follow legislative directives."<sup>43</sup> One might object that when Congress has given the courts a relatively unambiguous legislative directive such as the Dictionary Act, it is not appropriate for courts to disregard that instruction.<sup>44</sup>

A second approach that the Court could take – and a better approach, in my view – is to create a strong presumption in favor of the Dictionary Act's provisions. The approach could be modeled on the standard that the Court set out in *Rowland v. California Men's Colony*, which, in considering the Dictionary Act's "unless context indicates otherwise" escape hatch, held that "context" should "indicate[] otherwise" only on rare occasions.<sup>45</sup> Such a presumption would be premised on a separation of powers theory: the task of writing statutes (and in so doing, making policy determinations) is properly left to the legislature, and courts should defer to Congress's guidance for reading these statutes. Of course, the distinctly judicial role of *interpreting* words may at times appear to overlap with the legislative role of *defining* words. If there is to be any distinction at all, however, the courts should defer to the definitions that Congress has stated it intends to apply. Standardized application of the Dictionary Act would thereby promote, ever so slightly, Congress's original goal of avoiding "doubt and embarrassment" in the construction of statutes.

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42. Indeed, John Manning has noted that defenders of judicially crafted constitutional clear statement rules have argued that they "do not interfere with legislative supremacy but merely compel Congress to take responsibility for its choices." John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 417 (2010).

43. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 284 (1989).

44. For a similar argument, see Rosenkranz, *supra* note 37, at 2149 (suggesting that when Congress creates "interpretive instructions . . . [these instructions] leave all power over them squarely in the hands of Congress, where it belongs").

45. The *Rowland* Court limited context to "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts," 506 U.S. 194, 199 (1993), and suggested that context indicates otherwise when it would require the court to "forc[e] a square peg into a round hole," *id.* at 200.

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