

Constitutionalizing Corporate Law

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The Supreme Court has recently decided some of the most important and controversial cases involving the federal rights of corporations in over two hundred years of jurisprudence. In rulings ranging from corporate political spending to religious liberty rights, the Court has dramatically expanded the zone in which corporations can act free from regulation. This Article argues these decisions represent a doctrinal shift, even from previous cases granting rights to corporations. The modern corporate rights doctrine has put unprecedented weight on state corporate law to act as a mechanism for resolving disputes among corporate participants regarding the expressive and religious activity of business corporations. The result is a new reliance on state corporate law that gives a quasi-constitutional dimension to governance rules that were developed in a different era and with a different focus.

*The Article further illuminates the specific areas of mismatch between modern corporate rights doctrine and state corporate law. This examination offers two insights often overlooked in contemporary debate. First, it provides a deeper grounding for understanding where the Court has gone wrong and the importance of corporate governance proposals raised in the aftermath of its recent decisions such as *Citizens United v. Federal Election Commission*. Second, the Article shows that the significance of the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.* extends beyond issues of women's rights and sexual orientation, as is often emphasized. The decision undermines the very assumptions on which corporate law has been built: that private ordering and external regulations can be relied upon to address concerns that corporate law has been given a pass to ignore.*

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INTRODUCTION

Since the founding of the United States, state corporate law has established essential characteristics of the corporate form, including the idea that incorporation creates an entity with separate existence. By their very nature, corporations are legal persons. This separate corporate identity serves several important functions, including allowing corporations to lock in capital, limit shareholder liability, and exist in perpetuity.¹ These attributes enable corporations to attract long-term and large-scale investment to grow businesses into lasting institutions.²

1. For literature on the perpetual nature of the corporation, see Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012); Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015). For literature on “asset partitioning,” and locking capital into the corporation, see Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 423–24 (2003); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392–93 (2000).

2. Blair, *supra* note 1, at 387.

But while state corporate law provides the means for creating corporations with these useful legal features, other areas of law have had to determine the treatment of corporations. The most prominent example is the question of how to treat corporations under the U.S. Constitution, which does not expressly refer to corporations but does establish rights for “persons” and “citizens.”³ Statutes, both state and federal, also raise interpretation issues when they do not expressly include corporations or define “persons” to include corporations.

For nearly two centuries, the Supreme Court has determined the scope of corporate rights without significant incursion into the development of state corporate law. The Court has long granted constitutional rights to corporations based on the rationale that corporations are associations of people from whom rights can be derived.⁴ In the nineteenth century, the Court extended contract and property rights to corporations.⁵ By the early twentieth century, the Court recognized corporate criminal liability and granted corporations certain protections related to searches and trials.⁶ The Court has also recognized limits to the scope of corporate rights, for example denying corporations the privilege against self-incrimination and status as “citizens” for purposes of privileges and immunities.⁷ Some of the limits the Court has drawn for corporations, such as a distinction between property and liberty protections,⁸ have faded over time in cases

3. ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS* 10–15 (2010).

4. See Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1674 (2015) (arguing that the Court’s characterization of corporations as associations made sense through much of the nineteenth century, but became a poor fit for describing the wider spectrum of corporations that emerged by the late nineteenth century).

5. *E.g.*, *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (holding that corporations may claim protection under the Contracts Clause); *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (noting that corporations are included within the meaning of “person” under the Fourteenth Amendment); *Minneapolis & St. Lewis R.R. v. Beckwith*, 129 U.S. 26, 28 (1889) (“[C]orporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.”).

6. See, *e.g.*, *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493 (1909) (recognizing corporate criminal liability); *Hale v. Henkel*, 201 U.S. 43, 71 (1906) (holding that corporations enjoy Fourth Amendment protections against unreasonable searches and seizures but may not claim the Fifth Amendment privilege against self-incrimination).

7. *E.g.*, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586 (1839) (holding that corporations are not “citizens” for purposes of Article IV’s Privileges and Immunities Clause); see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 178–82 (1868) (same).

8. *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (stating that the liberty protected by the Fourteenth Amendment is “the liberty of natural, not artificial persons”); see also Ruth H. Bloch & Naomi Lamoreaux, *Corporations and the Fourteenth Amendment* 4–23

involving the speech and press rights of media corporations,⁹ and in the civil rights era when the Court recognized the associational and speech rights of nonprofit membership organizations.¹⁰ This jurisprudence has had broad significance for corporations in society, but through the late twentieth century it did not meaningfully impact the development of state corporate law, which was widely understood as private law.

A new dynamic between federal corporate rights and state corporate law has emerged that has been largely overlooked. With the Court's recent decisions in *Citizens United v. Federal Election Commission* and *Burwell v. Hobby Lobby Stores, Inc.*, business corporations can now claim unprecedented rights in the realms of speech and religious liberty.¹¹ Scholars and commentators in various areas of law have observed this dramatic expansion of corporate rights and many of the doctrinal and practical consequences that have followed.¹² But what has gone nearly unnoticed is that in expanding corporate rights, the Supreme Court has pointed to state corporate law as the mechanism for resolving disputes among corporate participants. For example, in *Citizens United*, the Court left to "the procedures of corporate democracy" the question of whose voice is expressed through the corporation and the treatment of dissenting voices.¹³ In *Hobby Lobby*, the Court likewise leaned on state corporate law to determine the religious identity of a business corporation and to resolve disputes among corporate participants regarding religious exercise.¹⁴ The result

(unpublished manuscript) (on file with author) (explaining the Court's parsing of the Fourteenth Amendment through the early twentieth century).

9. See *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

10. *NAACP v. Button*, 371 U.S. 415, 428 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958).

11. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (extending statutory free exercise rights under the Religious Freedom Restoration Act to closely held corporations owned and controlled by shareholders with sincerely held religious beliefs); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (holding that corporations have the First Amendment right to make unlimited independent political expenditures).

12. This literature is too voluminous to cite comprehensively, but includes articles in constitutional law, election law, law and religion and corporate law. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

13. *Citizens United*, 558 U.S. at 361–62 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

14. *Hobby Lobby*, 134 S. Ct. at 2775.

is a new reliance on state corporate law that gives governance rules a quasi-constitutional dimension that was not originally part of their DNA.

This Article identifies and critiques how recent Supreme Court decisions have upended the traditional function and domain of state corporate law. This observation leads to two useful contributions. First, it shines light on the uncomfortable fit between modern corporate rights doctrine and state corporate law. Elaborating the ways that corporate rights jurisprudence has miscalculated corporate law's ability to carry out the tasks assigned to it provides a deeper grounding for understanding where the Court has gone wrong and the importance of corporate governance proposals raised in the aftermath of *Citizens United* and *Hobby Lobby*.¹⁵ Second, it shows that by allowing business corporations to opt out of generally applicable federal regulation, *Hobby Lobby* has the potential to undermine the assumptions on which corporate law has been built: that private ordering and external regulations can be relied upon to address concerns that corporate law has been given a pass to ignore.

The Article proceeds as follows. Part I examines the development of corporate law as within the purview of the states. It traces how state corporate law originally served as a constraint on corporate activity, but over time liberalized to serve an enabling role with a focus on the business interests of shareholders, directors, and officers. Concerns about other corporate participants, stakeholders, and the public, and the negative externalities that corporations create, are primarily handled outside of corporate law. Part II contends that recent Supreme Court decisions have established a new relationship between corporate rights jurisprudence and state corporate law. Although the Court has a history of granting corporations protections under the

15. Scholars have offered a host of such corporate governance proposals. See, e.g., Bebhuk & Jackson, *supra* note 12, at 1 (arguing lawmakers should develop special rules governing who makes corporate political spending decisions); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 925 (2013) (arguing for SEC disclosure rules for corporate political spending); James Kwak, *Corporate Law Constraints on Political Spending*, 18 N.C. BANKING INST. 251, 265 (2013) (arguing for increased scrutiny beyond business judgment rule review of corporate political spending); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 805 (2012) [hereinafter Sachs, *Unions*] (arguing that unions and corporations should be treated symmetrically with respect to opt-out rights for political spending); Margaret V. Sachs, *Social Proposals Under Rule 14a-8: A Fall Back Remedy in an Era of Congressional Inaction*, 2 U.C. IRVINE L. REV. 931, 941–42 (2012) (discussing shareholder proposals as a solution to concerns about *Citizens United*); Ronald Gilson & Michael Klausner, *That's My Money You're Using*, FORBES (Mar. 11, 2010), <http://www.forbes.com/forbes/2010/0329/opinions-citizens-united-corporate-shareholders-on-my-mind.html> [<https://perma.cc/9LCW-ETEJ>] (arguing for a mandatory annual shareholder vote on whether the board is authorized to engage in corporate political activity).

Constitution, in recent years the Court's decisions granting rights to corporations have put new weight on state corporate law. Part III examines the uncomfortable fit between modern corporate rights doctrine and state corporate law. It focuses in particular on the Court's assumption that business corporations are "associations" that provide for effective "corporate democracy," oversights concerning the fit of corporate law principles such as fiduciary duties, and misunderstandings about corporate law participants. Further, the Part discusses the impact of *Hobby Lobby* on corporate law's foundational assumption that external regulations can address the interests of nonshareholder corporate participants.

I. THE DEVELOPMENT OF CORPORATE LAW AS WITHIN THE PURVIEW OF THE STATES AND AS INTERNAL FIRM GOVERNANCE

Two key points about the development of corporate law are essential to understanding the import of the Court's recent expansion of corporate rights. First, corporate law developed primarily as a matter of state statutory and common law, and its focus was on the business interests of the shareholders, directors, and officers. Second, although corporate law started on a different path, it settled into an equilibrium in which corporate law is enabling, and concerns about stakeholders and the impact of corporate activity and power on society are chiefly addressed by laws external to corporate law. Understanding these two points and their historical grounding is essential to understanding the latent federalism issues presented by the modern corporate rights doctrine and the heavy weight it has put on state corporate law.

A. *Corporate Law as State Business Law*

A corporation comes into being with a charter, which reflects a grant of authority from a sovereign.¹⁶ In the colonial period, nearly all corporations were churches, charities, educational institutions, and municipalities; business corporations were few in number.¹⁷ According to William Blackstone's *Commentaries*, corporations were created "for

16. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 129 (3d ed. 2005); JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 8–9, 14 (1970).

17. FRIEDMAN, *supra* note 16, at 129; HURST, *supra* note 16, at 7; RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855* at 3 (1982). For a discussion of the proliferation of corporate charters after the colonial period, see Walter Werner, *Corporation Law in Search of Its Future*, 81 *COLUM. L. REV.* 111, 1616–17 (1981).

the advantage of the public.”¹⁸ Corporate law was in its infancy and there was little English law to draw upon for business corporations.¹⁹ Historian James Willard Hurst explained, “to the end of the eighteenth century in the United States law had developed no separate policy or rules on business corporations; the same legislative committees handled applications for all types of corporate charters, and when questions arose, courts applied to business corporations the judge-made law that had developed out of problems of ecclesiastical, philanthropic, and municipal corporations.”²⁰

Incorporation offered businesses several advantages such as the potential for perpetual existence and making it easier to raise and lock in capital.²¹ These advantages were possible because of an essential characteristic of the corporation: it is a distinct legal entity, separate from the humans associated with it—the shareholders, directors, employees, and creditors.²² Incident to the corporation’s existence was the ability to hold and transfer property, sue and be sued, and contract in the corporate name.²³ Unlike partnerships, the corporation could remain a stable entity despite changes in the body of shareholders.²⁴ But the rights of business corporations were limited during this early time.²⁵ As Blackstone noted, “no trading company is . . . allowed to make by-laws, which may affect the king’s prerogative, or the common profit of the people, unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assise in their circuits.”²⁶

18. 1 WILLIAM BLACKSTONE, COMMENTARIES *455; *see also* Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History* 28 (Harvard John M. Olin Ctr. for Law, Econ., and Bus., Discussion Paper No. 812, 2015), <http://ssrn.com/abstract=2564708> [<https://perma.cc/9NMS-2C3Q>].

19. *See* HURST, *supra* note 16, at 7–9:

In sum, when we began making important use of the corporation for business in the United States from about 1780, there was little relevant legal experience on which to draw The one definite inheritance was the idea that some positive act of the sovereign was necessary to create corporate status.

20. *Id.* at 7; *see also* FRIEDMAN, *supra* note 16, at 137:

For all practical purposes, the courts created a body of corporation law out of next to nothing. Old decisions and doctrines, from the time when most corporations were academies, churches, charities and cities, had little to say about managers and directors that was germane to the world of business corporations.

21. SEAVOY, *supra* note 17, at 4; *see also* Schwartz, *supra* note 1, at 766.

22. *See, e.g.*, LARRY E. RIBSTEIN, THE RISE OF THE UNINCORPORATION 73 (2010) (“The corporation has been regarded from its inception as a legal entity distinct from its owners.”); Strine & Walter, *supra* note 18, at 18 (noting that the separate legal identity of the corporation “is the whole point of corporate law after all”).

23. The Case of Sutton’s Hospital (1612) 77 Eng. Rep. 960 (KB); HURST, *supra* note 16, at 19.

24. HURST, *supra* note 16, at 19.

25. Strine & Walter, *supra* note 18, at 18.

26. BLACKSTONE, *supra* note 18, at *464.

In the Constitutional Convention of 1787, James Madison proposed that, as part of a nationally integrated economy, Congress be given the power “[t]o grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent.”²⁷ The delegates could not agree on the scope of the power, however, and the proposal for federal incorporation was defeated.²⁸ One of the founding fathers, James Wilson, did note that such power was already included in the Commerce Clause and its power to regulate trade.²⁹ The issue arose again in the debate over Treasury Secretary Alexander Hamilton’s proposal to create a national bank. Congress passed the bill incorporating the Bank of the United States in 1791, following heated debate regarding whether Congress had such power to charter the corporation and concerns about the influence of a corporation closely tied to the federal government.³⁰ In *McCulloch v. Maryland*, the Supreme Court validated Congress’ chartering of the bank as a constitutional exercise of its Article I powers.³¹

Despite the ability of the federal government to charter corporations, the government rarely used such power. After the second Bank of the United States failed to secure re-charter, the federal government “used only a small portion of its power . . . to mobilize and allocate resources to socially desirable investments.”³²

Instead, the common early method of creating a corporation was by obtaining an individual charter from a state legislature, generally for a purpose consistent with public welfare.³³ As Ronald Seavoy explained, “[t]he constitutional authority for states to charter corporations, other than banks, was never questioned. It was part of their sovereignty not alienated to the national government.”³⁴ Thus,

27. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 325 (Max Farrand ed., 1911).

28. Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J. L. & PUB. POL’Y 115, 141 (2012).

29. *Id.*; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 615–16 (Max Farrand ed., 1911).

30. Speir, *supra* note 28, at 142–43; *see also* Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 406–13 (1997) (discussing the debate regarding federal incorporation power).

31. 17 U.S. 316, 343 (1819).

32. SEAVOY, *supra* note 17, at xi–xii (noting that the best known examples of such use of power were “the tariff and land grants after 1850”).

33. *See id.* at 5; *see also* HURST, *supra* note 16, at 15–17 (discussing how states chartered corporations during this early period for “activities of some community interest—supplying transport, water, insurance, or banking facilities”); *cf.* Werner, *supra* note 17, at 1616 (noting that “[a]ll corporations were public instrumentalities before 1800, but not thereafter” and that “states used their charter power extensively”).

34. SEAVOY, *supra* note 17, at 57; *see also* Mark, *supra* note 30, at 407 (“[N]either the federal government nor the states could lay sole claim to the power to incorporate.”); *id.* at 416

business corporations “were promoted by individuals operating almost entirely under state laws.”³⁵ From these early years, state statutory law defined the basic framework of corporate law and state judge-made common law built upon that framework.³⁶

The next stage was the passage of general incorporation statutes, which equalized the opportunity for incorporation.³⁷ Over the course of the nineteenth century, states moved from a system of exclusively granting charters by discretionary special acts of the legislature to a system in which such special acts were more limited, reserved for particular businesses such as for railroads and banks, and other businesses could seek a corporate charter without specific involvement of the legislature.³⁸

Until the late nineteenth century, state corporate law served as a constraining force on corporate behavior. States used several approaches to constrain business corporations and protect the public interest: including restrictions in charters concerning business purpose, capitalization, and time durations, providing for some amount of shareholder liability, narrowly interpreting the powers granted by charters, and creating independent regulatory commissions.³⁹ Such restrictions were understood as permissible constraints within the sovereignty of the states, and not infringements of property or associational rights.⁴⁰ Indeed, “corporations remained creatures of the

(“Incorporation was thus a power coextensive with legislative power. It was, in that sense, simply a constitutionally unallocated power of government.”); Speir, *supra* note 28, at 151–52 (“Of course, no *state* ever went so far as to deny its legislature the power of incorporation. That power was said to inhere in sovereignty.”).

35. SEAVOY, *supra* note 17, at xi–xii. As Hurst explained, after independence the authority to issue corporate charters was understood as vested in the legislative branch rather than executive. HURST, *supra* note 16, at 115; *see also* Mark, *supra* note 30, at 409:

The sovereign power to create corporations thus devolved from England to the former colonies, not in their confederated form, but to each of the former colonies specifically, and within the structures of the new state governments, to the legislatures . . . [S]tate legislatures immediately took over where the crown had left off, granting charters to corporations of all varieties.

36. HURST, *supra* note 16, at 122–25.

37. SEAVOY, *supra* note 17, at 6; Speir, *supra* note 28, at 152.

38. SEAVOY, *supra* note 17, at 9–10; HURST, *supra* note 16, at 21; Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 101 (1999). Many states continued to issue special charters for certain types of corporations such as railroads and banks until the 1930s when federal regulation emerged to regulate these industries. Hamill, *supra*, at 146–59.

39. HURST, *supra* note 16, at 39, 45–47; SEAVOY, *supra* note 17, at 237.

40. Speir, *supra* note 28, at 180; *e.g.*, *Head & Armory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127, 167 (1804) (Marshall, J.):

[T]his body . . . in its corporate capacity, is the mere creature of the act to which it owes its existence, [and] . . . it may correctly be said to be precisely what the incorporating

state in the sense that they were granted a legal existence on the condition that they operate within the constraints imposed upon them by society.”⁴¹

Furthermore, states reserved authority to allow the legislature to amend or repeal corporate charters. State reservations of authority came about as a response to the Supreme Court’s 1819 ruling in *Dartmouth College v. Woodward* that a corporate charter was a contract protected from impairment under the Contracts Clause of the federal Constitution.⁴² In dicta, Justice Story noted in his concurring opinion that state legislatures were the source and creators of corporate charters and therefore could reserve authority in the original grant if they wanted to later have the ability to alter or repeal a charter.⁴³ After *Dartmouth College*, in response to concerns about the economic and political influence of corporations, state legislatures began including reservation clauses in corporate charters, state constitutions, and general incorporation statutes.⁴⁴ States retained control over the corporations that they chartered and had the power to regulate “foreign” corporations, incorporated in other states, when they were operating within their jurisdiction.⁴⁵

The doctrines of ultra vires and quo warranto also restrained corporations. Under the ultra vires doctrine, all corporate acts not authorized by a corporation’s charter were null and void.⁴⁶ Shareholders were empowered to sue to enjoin any actions “beyond the powers” enumerated in the corporate charter.⁴⁷ Further, states brought quo

act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.

See generally Strine & Walter, *supra* note 18, at 47–51 (describing states’ broad regulation of corporations in the nineteenth century).

41. Strine & Walter, *supra* note 18, at 7.

42. *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 518 (1819).

43. See *id.* at 712 (Story, J., concurring) (“If the legislature mean to claim such an authority, it must be reserved in the grant.”).

44. See HURST, *supra* note 16, at 63 (“[T]he states came commonly to qualify corporate charters by reserving authority in the legislature to alter, amend, or repeal them.”); Speir, *supra* note 28, at 153 (explaining many states “insisted that a general power to amend or repeal corporate charters should be . . . reserved to the legislature”).

45. *Bank of Augusta v. Earle*, 38 U.S. 519, 531 (1839); George W. Wickersham, *State Control of Foreign Corporations*, 19 YALE L.J. 1, 4 (1909).

46. JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 94 (John Lanthrop ed., Little, Brown and Co., 11th ed. 1882) (1832) (“[T]he general powers of a corporate body must be restricted by the nature and object of its institution.”); Albert J. Harno, *Privileges and Powers of a Corporation and the Doctrine of Ultra Vires*, 35 YALE L.J. 13, 23–28 (1925); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1662–63 (1988).

47. See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV.

warranto actions against corporations for exercising unauthorized powers or failing to undertake the business for which they were chartered.⁴⁸ As Herbert Hovenkamp explained, “[t]his notion of corporate obligation rested on the premise that the proprietor of the corporation had been given a set of rights to something that was in the public interest but which one could not do without the state’s permission.”⁴⁹ Although *quo warranto* actions could only be brought by the states, they had a powerful impact because they could result in the dissolution of the corporation.⁵⁰

Corporate law provided still more limitations on corporate activity, even after general incorporation statutes swept across the states.⁵¹ For example, through much of the nineteenth century, corporations could not merge without unanimous shareholder consent.⁵² Until the turn of the century, many general incorporation statutes included significant restrictions, such as restrictions on capitalization and holding stock in other companies.⁵³ It was not until the late nineteenth century that New Jersey, the “traitor state,” passed its path-breaking liberal general incorporation law, attracting chartering revenues from businesses incorporating in the state.⁵⁴

Around this time a system of federal incorporation was again broadly debated. Proponents argued that a federal system would provide valuable uniformity and prevent states from competing for charters, which could allow corporations to evade one state’s requirements by reincorporating in another.⁵⁵

1279, 1281, 1302, 1307 (2001) (“Limiting the corporation’s legal authority to certain powers enumerated in the corporate charter, the doctrine was considered an important tool to protect the state’s interest in restricting the power and size of corporations and to protect the shareholders from managerial overreaching.”).

48. See *id.* at 1309 (commenting on states’ “powerful” *quo warranto* proceeding); Hovenkamp, *supra* note 46, at 1660 (noting that *quo warranto* actions “were common in the first half of the nineteenth century”).

49. Hovenkamp, *supra* note 46, at 1659.

50. *Id.* at 1659–60.

51. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 208 (“The pervasive adoption of general incorporation statutes by many states during the latter half of the 19th century did not signal abdication of the regulatory notion of corporate law. Some states continued to insist that corporate charters include specific limitations on corporate purposes and powers . . .”).

52. *E.g.*, *Mason v. Finch*, 28 Mich. 282, 286 (1873) (“There is nothing but unanimous consent which can bind any member of an unincorporated company by any action not within the terms of the association.”); HURST, *supra* note 16, at 56–57.

53. Millon, *supra* note 51, at 209–10.

54. HURST, *supra* note 16, at 69, 73 (discussing New Jersey’s progressive corporate laws and its resulting economic impact); see also Lincoln Steffens, *New Jersey: A Traitor State, Part II*, MCCLURE’S, May 1905, at 46–47 (same).

55. See James B. Dill, *National Incorporation Laws for Trusts*, 11 YALE L.J. 273, 273 (1902) (lobbying for national incorporation to prevent “interstate warfare”); Melvin I. Urofsky, *Proposed*

The champions for federal chartering ultimately lost. The topic would become one of occasional renewed interest, but this interest never produced meaningful changes.⁵⁶ And in 1913, when then-governor Woodrow Wilson persuaded the New Jersey state legislature to reform its liberal rule allowing corporations to hold stock in other corporations and thereby create holding companies, New Jersey corporations fled to Delaware.⁵⁷ With this advantage, Delaware captured a lead in attracting incorporations that it has maintained to this day.⁵⁸

The competitive chartering that started in a small number of states ultimately set a national pattern. In the early part of the twentieth century, the old internal restraints on corporations faded and doctrines such as *ultra vires* weakened.⁵⁹ States broadly adopted a new type of general incorporation act. The new corporate law statutes provided for a standard corporate structure, with management centralized in the board of directors, presumed limited liability for the shareholders, and certain other characteristics that had come to be understood as essential to the corporate form. State courts and

Federal Incorporation in the Progressive Era, 26 AM. J. LEGAL HIST. 160, 165 (1982) (calling for federal incorporation to promote uniformity).

56. *E.g.*, E. Merrick Dodd, Jr., *The Modern Corporation, Private Property, and Recent Federal Legislation*, 54 HARV. L. REV. 917, 930 (1941); Wiley B. Rutledge, *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 304, 340 (1937); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946, Part Two*, 59 HARV. L. REV. 883, 883 (1946); *see also* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 602–03 (2003) (discussing historical debates over federal incorporation). Proposals for a federal corporation law have continued to present day. *E.g.*, Alex Marshall, *How to Get Business to Pay Its Share*, N.Y. TIMES (May 3, 2012), <http://www.nytimes.com/2012/05/04/opinion/solving-the-corporate-tax-code-puzzle.html> [<https://perma.cc/9TF7-LSC4>] (arguing in favor of a National Companies Act).

57. HURST, *supra* note 16, at 69–70, 73; Roe, *supra* note 56, at 610. This jurisdictional competition was possible because of the internal affairs doctrine, which allows incorporators a choice of law regardless of the physical location of the business.

58. *E.g.*, Robert M. Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 539–40 (2001); *see also, e.g.*, KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 107 (2006) (“Delaware has a population less than one-third of one percent of the nation, but it is the state of incorporation of over 50 percent of U.S. public companies and 60 percent of the Fortune 500.”). For literature in the “race to the top and bottom” debate, *see* William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 663–72 (1974); Ralph K. Winter, Jr., *State Law, Shareholder Protection and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58 (1977); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U.L. REV. 913, 914–16 (1982); Lucian Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1438 (1992); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 739 (2002); Lucian Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 554 (2002).

59. *See, e.g.*, HURST, *supra* note 16, at 161; Greenfield, *supra* note 47, at 1310–13; Hovenkamp, *supra* note 46, at 1662–68; Strine & Walter, *supra* note 18, at 73.

legislatures abandoned the unanimity requirement for shareholder voting on important questions of corporate policy.⁶⁰ Mergers and fundamental corporate changes required merely majority shareholder approval with appraisal rights for dissenting shareholders.⁶¹

Moreover, the new corporate laws were enabling—they allowed for increasing customization, empowering corporate promoters and participants to design the corporation’s articles and bylaws as they saw fit.⁶² Statutory limits on capitalization and purpose disappeared, and authorization for holding companies and no-par and preferred stock appeared.⁶³ As James Willard Hurst has explained:

The new style of corporation statutes in effect judged that corporate status had no social relevance save as a device legitimized by its utility to promote business. The obverse of this judgment was that regulation of business activity was no longer to be deemed a proper function of the law of corporate organization. The function of corporation law was to enable businessmen to act, not to police their action.⁶⁴

Upon this enabling framework, a large body of state corporate law developed.⁶⁵ Courts, for example, developed doctrine specifying that directors and officers owe a fiduciary duty of care and loyalty to the corporation and its shareholders.⁶⁶ At the same time, courts developed rules deferring to the business judgment of the board of directors.⁶⁷ With the ubiquity of business corporations and an increasing diversity of corporations, including large corporations with separated share ownership and control, new concerns with corporate power arose after the 1920s.⁶⁸ They focused on the relationship among shareholders and between shareholders and managers; state corporate law shifted to take little formal account of other participants, such as employees and creditors, in the governance structure.⁶⁹

60. Millon, *supra* note 51, at 215.

61. *Id.*; Joseph L. Weiner, *Payment of Dissenting Stockholders*, 27 COLUM. L. REV. 547, 548 n.7 (1927).

62. HURST, *supra* note 16, at 70–71, 120–21.

63. *Id.* at 84. For a discussion criticizing the “enablingism” of corporate law, see GREENFIELD, *supra* note 58, at 16–20.

64. HURST, *supra* note 16, at 70.

65. *Id.* at 123, 71.

66. *Id.* at 98.

67. See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 309–10 (1998); see also S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97–100 (1979).

68. See Blair & Pollman, *supra* note 4, at 1700–12 (discussing the increasing use of the corporate form through the nineteenth century and the rise of huge, modern corporations by the early twentieth century, which broadened the spectrum of corporations in existence).

69. Creditors were left to look out for themselves and rely on their contractual dealings for protection. HURST, *supra* note 16, at 54–55. The twentieth century also brought about credit ratings and information, aiding creditors in taking preventive action on their own. *Id.* at 54. This

One of the primary concerns of corporate law centered on the ability of majority shareholders to oppress minority shareholders in closely held corporations.⁷⁰ The minority shareholders in such corporations typically had no market to sell their shares and were without protection from the majority vote.⁷¹ Early twentieth-century courts often refused to enforce shareholder agreements to pool votes or require unanimity on basic business matters, on the basis that “each participant was entitled to the independent judgment of each of his fellows and to the benefits of majority rule.”⁷² At the same time, courts recognized that a single body of corporate law did not fit all situations, and doctrines arose trying to manage the concerns.⁷³

The most famous example is *Dodge v. Ford Motor Co.*, involving an oppression claim by minority shareholders in a closely held corporation.⁷⁴ At trial, majority shareholder and director Henry Ford gave testimony that led the court to believe he was running the corporation as a “semi-eleemosynary” institution for the benefit of employees and consumers and only “incidentally to make money,” which came at the expense of the minority shareholders denied dividends.⁷⁵ The court stepped in to protect the minority shareholders, stating, “A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”⁷⁶

Another major concern in corporate law centered on corporations with dispersed shareholding. With the rise of giant modern corporations with large numbers of passive shareholders, concern arose that the shareholders lacked means to supervise the directors and managers controlling the corporation.⁷⁷ In addition, investors increasingly represented a broader range of the American public, whose concern was

was in contrast to earlier efforts by state corporate law to provide safeguards for creditors and employees. Millon, *supra* note 51, at 210–11.

70. HURST, *supra* note 16, at 75–76, 78.

71. *Id.* at 78.

72. *Id.* at 79–81. It was not until well into the twentieth century that some states designed statutory provisions to address the special circumstances of closely held corporations and that courts, in a limited movement, gave effect to shareholder agreements, corporate articles conditioning board action on shareholder consent, or classifying shares to guarantee particular shareholders representation on the board. *Id.*

73. See Smith, *supra* note 67, at 312–15 (discussing the origins of the shareholder minority oppression doctrine).

74. 204 Mich. 459, 492–510 (1919); see also Smith, *supra* note 67, at 315, 320 (“*Dodge v. Ford Motor Co.* is best viewed as a minority oppression case.”).

75. *Dodge*, 204 Mich. at 504, 507; Smith, *supra* note 67, at 317.

76. *Dodge*, 204 Mich. at 507.

77. HURST, *supra* note 16, at 50, 85. The seminal work of this period is Adolf Berle and Gardiner Means’s book, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

not short-term profit but rather appreciation and income for long-term savings such as retirement.⁷⁸ Such shareholders needed reliable information, but state corporate law failed to impose effective reporting requirements.⁷⁹

In the 1930s federal law stepped in to provide a layer of regulation above state corporate law, aimed at investor protection and maintaining confidence in the securities markets. Following the 1929 stock market collapse and the Great Depression, Congress passed the Securities Act of 1933, which imposed disclosure requirements on original public issues, and the Exchange Act of 1934, which imposed ongoing disclosure requirements for publicly reporting companies.⁸⁰ Subsequently, federal regulation increased, with the Securities and Exchange Commission promulgating rules on proxy voting and shareholder proposals.⁸¹

This layer of federal regulation increased the flow of information available about some corporations, but did not fully democratize governance. Management nominated directors for election to the board and defined other key issues to be put to shareholder vote.⁸² Shareholder proposals generally had to be non-binding in nature.⁸³

Furthermore, when Congress began to act in the 1930s, it did so in limited, piecemeal fashion that did not significantly interfere with the traditional allocation of state corporate law as governing the standards for internal governance.⁸⁴ Although federal regulation has increased over time, this allocation has endured.⁸⁵ Congress has sporadically regulated corporate governance and related business matters, typically after corporate scandals or economic crises, as with

78. HURST, *supra* note 16, at 86.

79. *Id.* at 90.

80. *Id.* at 91.

81. *Id.* at 94–95.

82. *Id.* at 96–97.

83. See 17 C.F.R. § 240.14a-8(i)(1) (2015) (noting that a company can exclude a shareholder proposal that is “not a proper subject for action by shareholders under the laws of the jurisdiction of the company’s organization”).

84. See HURST, *supra* note 16, at 140 (“The Supreme Court never ruled that the Tenth Amendment prevented Congress from preempting the field of corporation law, for Congress never made so broad an assertion of power as to present the question.”).

85. See, e.g., Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251, 290 (2005) (noting that SOX-related reforms were “limited” and “not based on a policy decision to effect a major ‘paradigm shift’ in the allocation of lawmaking authority between the federal government and the states”). For a discussion of federal regulation of corporate governance and an argument that the risk of federal action influences state corporate law, see Roe, *supra* note 56, at 600–32.

the Sarbanes-Oxley Act, the Dodd-Frank Act, and the JOBS Act.⁸⁶ But at its core, corporate law has remained primarily within the purview of the states.

B. Regulating Corporations By Law External to State Corporate Law

Around the turn of the nineteenth century, when state corporate law began to liberalize and become more enabling, the law increasingly turned to regulation outside the structure of the corporation to enforce responsibility on corporations and protect various stakeholders and the public.⁸⁷ For example, the Tillman Act of 1907 prohibited corporations from giving direct contributions to federal candidates or their campaigns.⁸⁸ When challenged, a federal court upheld the Act as constitutional, noting: “These artificial creatures are not citizens of the United States, and, so far as the franchise is concerned, must at all times be held subservient and subordinate to the government and the citizenship of which it is composed.”⁸⁹

The law settled on a system in which corporate law governed the internal structure of the corporation and laws outside of corporate law

86. For a discussion of the literature critiquing federal regulatory responses to corporate law, see Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1796–821 (2011); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 18–45 (2002); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1568–604 (2005).

87. HURST, *supra* note 16, at 110–11 (“We now relied primarily upon legal regulations external to the corporation’s own constitution to enforce its responsibility to its immediate economic functions and to its broader social relations.”); Strine & Walter, *supra* note 18, at 79.

88. Tillman Act of 1907, ch. 420, 34 Stat. 864 (codified as amended at 52 U.S.C. § 30118 (2012)).

89. *United States v. Brewers’ Ass’n*, 239 F. 163 (W.D. Pa. 1916); see also Adam Winkler, “Other People’s Money”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 873 (2004) (arguing that early twentieth century campaign finance regulation was aimed not only at concerns about excessive corporate power but also at constraining corporate managers from using “other people’s money” without their support and for self-serving purposes).

provided the primary check on corporate activity.⁹⁰ This division of corporate law and external legal regimes is widely acknowledged.⁹¹

Not all have agreed with this division as a normative matter, however. Most notably, proponents of corporate social responsibility and progressive corporate law theorists have argued for a socially responsive corporate law regime dedicated to the public interest. Literature espousing “stakeholder theory” or notions of corporate social responsibility—incorporating stakeholders and their interests in how companies are run—emerged in the 1960s, and more fully took shape in the 1980s and 90s.⁹² For example, Abram Chayes argued that people affected by corporate activity should have a right to participate in corporate decisionmaking.⁹³ He wrote:

A more spacious conception of [corporate] “membership,” and one closer to the facts of corporate life, would include all those having a relation of sufficient intimacy with the corporation or subject to its power in a sufficiently specialized way. Their rightful share in decisions on the exercise of corporate power would be exercised through an institutional arrangement appropriately designed to represent the interests of a constituency of members having a significant common relation to the corporation and its power.⁹⁴

90. For a discussion of theory legitimating the government’s role in protecting and furthering public values such as by regulating corporations, see for example Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1574 (1988) (noting that the government and courts “play a role in limiting the power of such organizations [such as corporations] without denying the importance of their continued existence”); see also J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 10 (1993):

[C]ompanies are able to make choices which have important social consequences: they make private decisions which have public results. It is possession of this kind of power that gives rise to a distinct need for justification, and which forms the basis for the claim that companies must be required to act in the public interest.

91. *E.g.*, STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 425 (2002) (noting that corporate “externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulations”); Timothy P. Glynn, *Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law*, 58 CASE W. RES. L. REV. 1067, 1070 (2008) (“Manager choice results in the exclusion of other stakeholder interests from corporate law itself—protection of these interests therefore defaults to market forces and external legal regimes.”); Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 951 (2008):

In the United States, the “internal” regulation of corporate law—for example, the legal imposition of fiduciary duties of care and loyalty on managers and directors—is used almost exclusively to protect shareholders or the firm itself. Other stakeholders in the firm—for example employees, communities, or customers—are left to depend primarily on “external” regulations, such as minimum-wage laws, environmental regulations, and consumer safety rules.

92. Discussion of whether public corporations primarily serve an economic role for shareholders or whether they more broadly serve society dates back to the famous Berle-Dodd debate of the 1930s. See generally William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99 (2008).

93. Abram Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION AND MODERN SOCIETY 41 (E. Mason ed., 1959).

94. *Id.*

More recently, legal scholars in the 1990s and 2000s developed a body of literature sometimes referred to as “progressive corporate law,” which argues for more comprehensive, mandatory changes in corporate law in order to serve the public interest.⁹⁵ Some researchers have focused on making the business case for corporate social responsibility or a paradigm change, apart from altruistic and ethical justifications.⁹⁶

The corporate social responsibility movement has had significant real-world impact. Self-regulations, codes of conduct, non-binding standards, and socially responsible investing funds have proliferated.⁹⁷

But corporate social responsibility has not changed the fundamental division of corporate law, as enabling and focused on the relationship of shareholders and directors, and outside legal regimes, which are relied on to regulate specific activity as part of our environmental laws, labor laws, etc.⁹⁸ Reflecting this understanding, corporate law scholars Henry Hansmann and Reinier Kraakman famously went so far as to declare that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”⁹⁹ The Chief Justice of the Delaware Supreme Court has argued that for-profit corporations will seek profits for their shareholders using all legal means available and thus we should not rely on corporations to self-regulate, but rather we should look to the government to regulate corporations and protect against externality risks.¹⁰⁰ As noted, these are not the only views on the topic, and should not be understood as a prescriptive recommendation here, but as a descriptive matter they illustrate commonly held notions concerning the focus of corporate law on

95. See, e.g., GREENFIELD, *supra* note 58; LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* (1995); Greenfield, *supra* note 91, at 952.

96. See, e.g., Matteo Tonello, *The Business Case for Corporate Social Responsibility*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (June 26, 2011), <http://blogs.law.harvard.edu/corpgov/2011/06/26/the-business-case-for-corporate-social-responsibility/> [<https://perma.cc/Y3QG-CB52>] (summarizing recent research justifying CSR on an economic basis).

97. See, e.g., Forum for Sustainable and Responsible Inv., *2014 Report on U.S. Sustainable and Responsible Investing Trends*, USSIF FOUNDATION (2014), http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf [<https://perma.cc/UT59-Z7XT>].

98. See Millon, *supra* note 51, at 228 (“Attractive as corporate social responsibility claims might be to many people, the calls for reform have had no discernible impact on corporate law.”).

99. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

100. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 136 (2012) (“In the end, policy makers should not delude themselves about the corporation’s ability to police itself; government still has a critical role in setting the rules of the game.”).

shareholders and directors and the allocation of other concerns to other areas of law.

II. CONSTITUTIONALIZING CORPORATE LAW

Corporate law has been an engine for economic growth. It established a legal form for enterprise with highly desirable attributes, particularly for large business—legal personality, limited liability for shareholders, transferable shares, and centralized management under a board of directors.¹⁰¹ Beyond establishing essential characteristics of the corporate form, it also represents a body of law that encourages investment and constrains opportunism among corporate participants to allow for value creation.¹⁰² As demonstrated, corporate law developed within the purview of the states, and although corporate law started on a different path, it became enabling and perceived as private law. Furthermore, concerns about stakeholders and the impact of corporate activity on society have been primarily addressed by laws external to corporate law.

But what corporate law has not done is provide a clear answer regarding the treatment of corporations under other areas of law. Most notably, it does not directly answer the question of how to treat corporations under the U.S. Constitution, which does not expressly refer to corporations but does establish rights for “persons” and “citizens.” It also does not answer the question with respect to state and federal statutes that do not expressly include corporations or define “persons” to include corporations. Nor is it clear that it is the role of state corporate law to do so.

This Part examines the relationship between state corporate law and the Supreme Court’s jurisprudence on corporate rights. It argues that the Supreme Court’s recent decisions on corporate rights represent a doctrinal shift from the past. For well over a hundred years, the Supreme Court granted corporations protections under the Constitution without relying upon corporate law mechanisms. The Court’s recent decisions in *Citizens United* and *Hobby Lobby*, which address corporate political spending and statutory protection of religious liberty, upend the traditional function and domain of state corporate law. They push to state corporate law the task of resolving disputes among corporate participants on issues of social, political, and religious dimension.

101. REINIER R. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1–2 (2004).

102. *Id.* at 2.

A. Pre-Modern Supreme Court Corporate Rights Jurisprudence

To understand the current doctrinal shift, and its importance, it is helpful to first look briefly to the past. Although the Court's corporate rights jurisprudence decidedly changed the status of corporations vis-à-vis the government,¹⁰³ until recently it did not significantly impact or give constitutional significance to the internal rules governing the corporation.

The Supreme Court first addressed the question of whether corporations were the subject of constitutional protections in early nineteenth-century cases involving Article III diversity jurisdiction, the Contracts Clause, and the Privileges and Immunities Clause of Article IV.¹⁰⁴ In these cases, the Court made clear that a corporation is not a "citizen" for purposes of Article III diversity jurisdiction, nor under the Privileges and Immunities Clause of Article IV, but that the Court could look to the natural persons composing a corporation and find that diversity jurisdiction exists where there is complete diversity of citizenship between the corporate shareholders and the opposing party.¹⁰⁵ Further, where the corporation was "endowed by private individuals," the Court would treat the corporate charter as a contract covered by the protection of the Contracts Clause.¹⁰⁶

Later in the nineteenth century, the Court recognized equal protection and due process protections for corporations under the Fourteenth and Fifth Amendments.¹⁰⁷ This line of case law has a

103. See John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 132 (Warren J. Samuels & Arthur S. Miller eds., 1987) ("Recognition of the corporation as a person for constitutional purposes . . . elevates this form of joint or collective action to a constitutional status with certain immunities from control by the community through government.").

104. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 666 (1819); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587 (1839). For a more detailed discussion of Supreme Court jurisprudence on corporate rights, see Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

105. *Deveaux*, 9 U.S. (5 Cranch) at 86 ("That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in the corporate name."); *id.* at 90–91 (explaining that the Court would "consider the character of the individuals who compose" the corporation "when they use the name of the corporation, for the purpose of asserting their corporate rights"); *Earle*, 38 U.S. (13 Pet.) at 586–87 (holding that when "a corporation makes a contract, it is the contract of the legal entity" which is not a "citizen" for purposes of the Privileges and Immunities Clause).

106. *Woodward*, 17 U.S. (4 Wheat.) at 631–39.

107. See Wickersham, *supra* note 45, at 10 ("[I]t may be safely asserted that the only limitation[s] upon the powers of the States to exclude foreign corporations . . . [include], first, that

curious history starting with *Santa Clara County v. Southern Pacific Railroad Co.*¹⁰⁸ In that case, the Court's opinion did not reach the constitutional issue of whether corporations were "persons" within the meaning of the Fourteenth Amendment, but the court reporter documented a comment from the bench to that effect in the headnotes to the opinion.¹⁰⁹ Subsequently, the Court relied on *Santa Clara* as precedent and noted in other cases around that time that corporations enjoyed equal protection and due process rights.¹¹⁰ These cases again acknowledged rights in the context of protecting the property interests of shareholders based on a view of the corporation as an association.¹¹¹ At that time, the Court parsed the due process protection as extending to corporate property, but explained that the liberty protected by the Fourteenth Amendment is "the liberty of natural, not artificial, persons."¹¹²

The impact of these early decisions was to solidify the corporate form as a useful vehicle for pursuing business ventures. Contract and property rights were incidental to the very purpose of corporations. The early decisions opened the door to the federal courts for corporations and provided standing for Contracts Clause claims against the state. Recognizing the corporation's property as protected by the Due Process Clause stabilized the corporation as a viable form of organization for large-scale and long-term private investment. Legal personality established by corporate law served the important function of providing for a separation of assets and locked in capital that allowed corporations to serve as lasting institutions over time.¹¹³ Similarly, these early corporate rights cases bolstered the corporation as a separate entity

the regulations so prescribed shall not deprive the foreign corporations of property without due process of law, or deny to them the equal protection of the laws.").

108. 118 U.S. 394 (1886).

109. *Id.* at 394–95. For a discussion of the *Santa Clara* case, see HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 567 (1968); Flynn, *supra* note 103, at 138–49; Malcolm J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 215–75 (2014); Pollman, *supra* note 104, at 1642–46.

110. See cases cited *supra* note 5.

111. Blair & Pollman, *supra* note 4, at 1688–96.

112. *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906); see also Bloch & Lamoreaux, *supra* note 8, at 4–23 (explaining the Court's parsing of the Fourteenth Amendment through the early twentieth century); Vince S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. (forthcoming 2016) (manuscript at 32), <http://ssrn.com/abstract=2569305> [<https://perma.cc/CL3M-VA9M>] (discussing *Riggs* and noting that "the cases disclaiming a corporate right to liberty under the fourteenth amendment may well be defunct").

113. *Supra* note 1.

from the government and protected the property interests of shareholders in the corporate property.¹¹⁴

Notably, these early cases did not rely upon or significantly impact state corporate law. As noted above, after *Dartmouth College*, states reserved the authority to allow the legislature to amend or repeal corporate charters. The Court's ruling that corporations were not citizens under the Privileges and Immunities Clause meant that states retained authority to regulate corporations, including foreign corporations acting within their jurisdiction.¹¹⁵

By the late nineteenth and early twentieth centuries, there were a greater number of corporations in the United States than in previous periods by orders of magnitude, and some of an unprecedented size, which began to have a significant impact on society. The spread of general incorporation statutes, the liberalization of state corporate law, and the merger movement of the 1890s had contributed to this trend.¹¹⁶

In the early twentieth century, the Court acknowledged this new dynamic with its ruling that established corporate criminal liability. Stating that "it [could] not shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands," the Court held for the first time that a corporation could be held criminally liable for acts by its agents.¹¹⁷

Also in the early twentieth century, the Court began to establish certain protections for corporations in searches and trials. As potential defendants in the criminal justice system, the Court ruled that corporations had "waive[d] no constitutional immunities appropriate to such body."¹¹⁸ In the Court's view, this meant that corporations had Fourth Amendment protections against unreasonable searches and seizures because "[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity."¹¹⁹ But corporations could not claim a Fifth Amendment privilege against self-incrimination because that is a right personal to the witness that cannot be asserted on behalf of another, including a corporation.¹²⁰ The

114. Pollman, *supra* note 104, at 1639.

115. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586–87 (1839) ("The only rights [the corporation] can claim are the rights which are given to it in that character."); *Wickersham*, *supra* note 45, at 3.

116. *See supra* Section I.A.

117. *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 495–96 (1909).

118. *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

119. *Id.*

120. *See id.* at 70 ("The [Fifth] amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.").

Court's ruling on corporate criminal liability used agency law as a foundation for attributing the acts of employees to the corporation—a building-block concept in corporate law—but these cases did not otherwise incorporate state corporate law or suggest a theory of the corporation that put weight on internal governance rules.

As the twentieth century wore on, and as First Amendment doctrine began to develop, the distinction between the property and liberty protections of corporations faded in a line of cases involving speech and press rights for media corporations.¹²¹ Further, in the 1950s and 60s, the Court recognized associational and speech rights of nonprofit organizations such as the NAACP.¹²² These cases were specific to the corporations involved. The early cases involving media corporations focused on the freedom of press and the First Amendment, not on the status of the parties as corporations. For example, *Grosjean v. American Press Co.* involved a state statute taxing businesses selling advertising in newspapers and other periodicals with a circulation of more than 20,000 copies per week. The Court ruled that the statute was “unconstitutional under the due process of law clause because it abridge[d] the freedom of the press.”¹²³ The Court focused overwhelmingly on the history of the First Amendment and freedom of the press, providing only a short paragraph to note that the Court could apply the First Amendment to the state statute at issue through the Due Process Clause of the Fourteenth Amendment even though the case involved a corporation. The Court simply cited two cases from the late nineteenth century recognizing that a corporation is a “person” within the meaning of the Due Process and Equal Protection Clauses.¹²⁴ Although the Court did not substantially address the corporate status of the newspaper corporation, nor its move to incorporate the First Amendment through the Fourteenth with regards to the corporation, the case did not broadly extend to corporations—it was about the rights of the press. Furthermore, it was also a tax case, and perhaps not perceived as significantly different in context from the property cases from the late nineteenth century.

In the 1970s, however, the Court established commercial speech rights for business corporations, and a new direction in the jurisprudence began to emerge. This line of cases, starting with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

121. *N.Y. Times v. Sullivan*, 376 U.S. 254, 266 (1964); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

122. *NAACP v. Button*, 371 U.S. 415, 428 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–62 (1958).

123. 297 U.S. at 251.

124. *Id.* at 244.

Council,¹²⁵ introduced a new rationale into the Court's corporate rights jurisprudence. Instead of extending protection to the corporation derivatively in order to protect the people involved in the corporation, the Court extended protection to the corporation in order to protect consumers.¹²⁶ The Court held that advertising is within the scope of the First Amendment, and, because of consumers' interest in hearing price information, a state could not forbid pharmacists from advertising drug prices.¹²⁷

In addition to using a new rationale, which disregarded the corporate status of the right holder, the Court's ruling was novel in that it provided an alarming breadth of protection to corporations and their publication of commercial information with no expressive value. As Tamara Piety has put it, this line of cases starting with *Virginia Pharmacy* "is a disturbing development, because if the government cannot regulate commercial speech, it cannot regulate commerce—period."¹²⁸ Although the full impact of *Virginia Pharmacy* was not apparent for some time, it seemed to have some immediate repercussions.¹²⁹

Shortly after the Court handed down *Virginia Pharmacy*, it heard its first case regarding business corporations' political speech rights.¹³⁰ In *First National Bank of Boston v. Bellotti*, a bank sought a declaratory judgment that it had a First Amendment right to make political expenditures on a referendum ballot.¹³¹ Massachusetts law

125. 425 U.S. 748 (1976).

126. Blair & Pollman, *supra* note 4, at 1719–20.

127. *Virginia Pharmacy*, 425 U.S. at 757–68; *see also* Cent. Hudson Gas & Elec. Corp. v. Public Servs. Comm'n of N.Y., 447 U.S. 557, 571–72 (1980) (holding that a state could not completely ban promotional advertising by an electrical utility).

128. TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 2 (2012). John Coates has argued that "corporations have increasingly displaced individuals as direct beneficiaries of First Amendment rights, they have done so recently, but with growing speed since *Virginia Pharmacy* (1976), *Bellotti* (1978), and *Central Hudson* (1980)." John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 223–24 (2015) (citations omitted).

129. *See* PIETY, *supra* note 128, at 26:

The timing of the *Bellotti* decision, occurring as it did in such close proximity to *Virginia Pharmacy*, suggests that the Supreme Court backed into the corporate speech formulation in *Bellotti* without fully considering the appropriateness of the corporate person as a rights holder under the First Amendment, its implications for the newly announced commercial speech doctrine, or the possibility that there might be valid reasons to distinguish between human beings engaging in commercial speech and entities such as corporations doing so.

130. In the same year that the Court established commercial speech rights in *Virginia Pharmacy*, the Court ruled in *Buckley v. Valeo* that limitations on campaign expenditures constituted an unconstitutional limitation on speech under the First Amendment. 424 U.S. 1, 18 (1976).

131. 435 U.S. 765, 775–76 (1978).

banned corporate expenditures which did not “materially affect” the property of the business. Justice Powell, writing for the majority, reframed the issue as “not whether corporations ‘have’ First Amendment rights . . . [but] [i]nstead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect.”¹³² The focus on the speech as quintessential political speech for listeners to hear echoed the rationale the Court relied upon in *Virginia Pharmacy* for commercial speech.

The Court struck down the state statute at issue, holding that “the corporate identity of the speaker” did not “deprive[] this proposed speech of what otherwise would be its clear entitlement to protection.”¹³³ To arrive at this result, the Court noted that freedom of speech has “always” been viewed as part of the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment and “the Court has not identified a separate source for the right when it has been asserted by corporations.”¹³⁴ The Court then included a string cite to the media corporation cases, including *Grosjean*, and the *NAACP* case regarding the rights of its members to freedom of association, as well as a footnote to the late nineteenth-century tax case *Santa Clara* regarding property rights.¹³⁵ The Court’s explanation was that “the press does not have a monopoly on either the First Amendment or the ability to enlighten.”¹³⁶ Further, the Court pointed to its commercial speech cases, claiming “[t]hey illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”¹³⁷

Many legal academics, this author included, have criticized the Court’s decision in *Bellotti* on grounds related to the Court’s own corporate constitutional rights jurisprudence.¹³⁸ But what matters here

132. *Id.* at 776.

133. *Id.* at 778.

134. *Id.* at 780.

135. *Id.* As one legal commentator noted:

The [*Bellotti*] majority opinion justified rejection of the Massachusetts argument by noting that no such distinction had been recognized in prior corporate speech cases, cases generally involving media, religious, and civil rights entities. One suspects that the cited cases did not consider the speech rights of purely commercial corporations because the issue was not raised in those cases, a factual distinction between the instant case and the cited precedent based on policy considerations and consequences the Powell opinion choose [sic] to ignore without explanation.

Flynn, *supra* note 103, at 148.

136. *Bellotti*, 435 U.S. at 782.

137. *Id.* at 783.

138. *E.g.*, PIETY, *supra* note 128; Blair & Pollman, *supra* note 4; David Ciepley, *Neither Persons Nor Associations: Against Constitutional Rights for Corporations*, 1 J. L. & CTS. 221 (2013);

is to notice that when the Court shifted focus away from the corporate identity of the speaker or spender, it pushed the debate regarding the appropriateness of corporations as holders of First Amendment rights into state corporate law and the inner workings of corporations themselves.

The *Bellotti* majority opinion brushed aside this problem, stating:

Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.¹³⁹

This explanation did not sufficiently recognize the weight that the decision put on corporate law to deal with social and political issues that it had not developed to address. The Court did not fairly characterize corporate procedures or the variety of interests at stake. But *Bellotti*'s ruling was understood as limited to corporate political spending on ballot issues, and subsequent cases established limits in other areas of campaign finance and showed a willingness to find distinctions between speakers on the basis of corporate status.¹⁴⁰ Corporations were required to form separate political action committees to ensure there was an associational and voluntary nature to political expenditures.¹⁴¹ This subsequent campaign finance architecture, albeit uneven and in tension with itself,¹⁴² stemmed the impact of *Bellotti* on state corporate law and corporate governance for a time.¹⁴³

Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011); Charles R.T. O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Express and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979).

139. *Bellotti*, 435 U.S. at 794–95.

140. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Federal Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986).

141. See 2 U.S.C. § 441b(b)(2) (2006) (current version at 52 U.S.C. § 30118(b)(2) (2012)) (defining “contribution” to exclude contributions to “separate segregated fund[s]” (PACs) established by corporations).

142. Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. (forthcoming 2016).

143. In two cases in the 1980s, the Supreme Court impacted state regulation of tender offers. In a plurality decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Court held that an Illinois anti-takeover statute concerning interstate tender offers was unconstitutional under the Commerce Clause. In the aftermath, states adjusted their takeover legislation in an effort to avoid conflict with federal securities law and apply their provisions only to corporations incorporated in their state. Subsequently, in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the

B. *The Modern Shift in Corporate Rights Doctrine*

The Court's recent decisions in *Citizens United* and *Hobby Lobby* have not only expanded corporate rights, they have also given a quasi-constitutional dimension to state corporate law. Whereas state corporate law historically served as a means of restraining and regulating corporations, now it establishes the procedures by which certain federal rights are exercised.

The Court's decisions expanding speech and religious liberty rights of business corporations rely, at least in part, on a view of corporations as associations and corporate law as establishing procedures of "democracy" for shareholders. But not all business corporations have an associational dynamic and existing corporate laws do not create democratic procedures, nor is that their aim.

This shift in the Court's corporate rights doctrine has effectively given constitutional significance to state corporate laws that developed to be enabling, to focus on the relationship between shareholders and managers, and to leave to external regulation issues concerning other corporate participants, the public, and non-economic values. There has been little reflection on whether these corporate law principles and arrangements, developed to enable business enterprise, fit with constitutional rights and values.

To see how this shift has occurred, *Citizens United v. Federal Election Commission*, which expanded on *Bellotti* and dismantled much of the corporate campaign finance regulation, serves as an analytical starting point. In *Citizens United*, a nonprofit political advocacy organization raised a facial and as-applied challenge to a provision of the Bipartisan Campaign Reform Act that prohibited corporations from using general treasury funds to make expenditures for electioneering communications within a certain period of a federal election.¹⁴⁴ As a nonprofit corporation formed for political advocacy, *Citizens United* would have fit within an exception to the prohibition but for the fact

Court upheld Indiana's second-generation statute on preemption and commerce grounds, emphasizing the state's legitimate interest in regulating the internal affairs of its corporations. These cases did not rely on state corporate law for ordering federal corporate rights or settling disputes amongst corporate participants concerning expressive values; rather they concerned the validity of state corporate law regulating a governance issue already addressed by federal regulation. For a discussion of *MITE* and *CTS*, see Larry E. Ribstein, *Preemption as Micromanagement*, 65 BUS. LAW. 789, 789–91 (2010); see also Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1059–62 (1986).

144. 558 U.S. 310, 319 (2010).

that a small portion of the funds it used for its electioneering communication was raised from for-profit business corporations.¹⁴⁵

Rather than ruling on narrower grounds, such as interpreting a *de minimis* safe harbor for expressive nonprofit corporations, the Court broadly ruled as to all corporations. In a 5-4 decision, the Court struck down the statutory provision at issue and campaign finance jurisprudence that had distinguished between individuals and corporations.¹⁴⁶ After *Citizens United*, corporations have been free to spend general treasury funds on independent political expenditures.¹⁴⁷

The Court's ruling was based not only on listeners' interests in hearing speech, but also on the Court's characterization of corporations as "associations of citizens" whose voices were being "muffled," and its implication that the First Amendment protection of corporations is equal to that of individuals.¹⁴⁸ The majority opinion's language suggests an expressive or dignitary value in the speaker, even in reference to business corporations: "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."¹⁴⁹

Yet, when the Court was asked to consider whether the government had a compelling interest to regulate in order to protect dissenting shareholders from being forced to fund corporate political spending, the Court refused to consider whether all business corporations truly are associational or democratic in nature. It expressed concern that this argument could limit the political speech of media corporations,¹⁵⁰ despite the fact that media corporations were not present in the case and could claim other grounds for protection. And it stated "[t]here is, furthermore, little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"¹⁵¹

145. *Id.* at 319, 327–29.

146. *Id.* at 318, 372.

147. The Court's reasoning regarding independent expenditures has also led to the creation of super PACs. See Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1644–46 (2012) (summarizing the rise in super PACs beginning with the 2010 election cycle).

148. *Citizens United*, 558 U.S. at 349, 354 (internal quotation marks and brackets omitted).

149. *Id.* at 341–42.

150. *Id.* at 361.

151. *Id.* at 361–62 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)); see also Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1021 (2011) ("Citizens United shifted the debate over corporate speech from corporations' power to distort political debate to the corporate governance processes that authorize this speech.").

Citizens United thus left to “the procedures of corporate democracy”—state corporate law—the question of whose voice is expressed through the corporation and the treatment of dissenting voices. Corporate law has not developed to facilitate the political expression of corporate participants,¹⁵² or to address the question of how to appropriately handle dissenters from such expression, however, and so rules that were developed to allow for private ordering of business ventures have taken on new significance.

This result was notably different from other cases concerning corporate constitutional rights, which did not give constitutional dimension to governance rules. From cases addressing the contract and property rights of corporations to protections from unreasonable searches and seizures, the Court never referred to corporate law as a mechanism for handling dissent or competing interests. Perhaps this is because corporate participants are aligned in their interest in the property of the corporation being protected against government impairment, taking, or inequitable treatment. Corporate participants have an economic interest in the labor or capital they have invested, whether they are employees, directors, or shareholders. Once the corporation is in the criminal justice system, it receives certain protections such as against double jeopardy and unreasonable searches and seizures. Apart from the logistical need to determine who will assert such right on behalf of the corporation, corporate law plays little role in sorting the interests of participants regarding corporate defenses against government prosecution. *Citizens United* was different because it concerned rights to political expression, which are not incidental to the purpose of business corporations and for which there is no reason to believe that the interests of corporate participants would be aligned in all types of corporations.

The Court’s recent decision in *Hobby Lobby* has put even more pressure on state corporate law to serve as a mechanism for ordering federal rights. The *Hobby Lobby* case arose in response to a provision of the Patient Protection and Affordable Care Act of 2010 which requires employers with fifty or more full-time employees to offer health insurance that meets certain minimum coverage standards, including preventive care for women.¹⁵³ The Health Resources and Services Administration, charged with defining such preventive care standards, included all FDA-approved contraceptive methods in its guidelines.¹⁵⁴

152. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting) (“The Campbell Soup Company does not exist to promote a message . . .”).

153. 42 U.S.C. § 300gg-13(a)(4) (2012).

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

The Department of Health and Human Services (HHS) provided an exemption for religious employers with religious objections, such as churches, and an accommodation for other religious nonprofit organizations.

For-profit business corporations that did not fit into the existing exemption or accommodation brought suit to challenge the HHS regulations on the basis of their asserted religious liberty. Two of these cases were consolidated before the Supreme Court: *Conestoga Wood Specialties* and *Hobby Lobby*.¹⁵⁵ Both cases involved a closely held corporation or corporations with all stock held by family members who were unanimous in their religious beliefs. Each family asserted that their religious beliefs would be violated if the corporation in which they held stock complied with the contraceptive provision of the HHS regulations.¹⁵⁶ As evidence that their religious beliefs were incorporated into the governance and operations of the corporation, the families referred to various statements and practices, such as “Vision and Values Statements” affirming one corporation’s mission to pursue “a reasonable profit in [a] manner that reflects . . . Christian heritage” and to a board-adopted “Statement on the Sanctity of Human Life.”¹⁵⁷

The novel question before the Court was whether the Religious Freedom Restoration Act (RFRA) applies to business corporations like those in the case—Conestoga, Hobby Lobby, and Mardel—and specifically whether the HHS regulations violated RFRA as applied to these corporations.¹⁵⁸ RFRA prohibits the “Government [from] substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applicability” unless that action constitutes the least restrictive means of serving a compelling governmental interest.¹⁵⁹ Thus, the important threshold question was

155. *Conestoga Wood Specialties Corp. v. Sec. of U.S. Dept. Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc).

156. *Hobby Lobby*, 134 S. Ct. at 2759, 2765. The Green family members hold their stock through a trust of which the five family members are trustees and beneficiaries. For a discussion of the trust aspect of the case, see Gregory Mark, *Hobby Lobby and Corporate Personhood*, 65 DEPAUL L. REV. (forthcoming 2016).

157. *Hobby Lobby*, 134 S. Ct. at 2764.

158. Given its RFRA ruling, the Supreme Court declined to address claims under the Free Exercise Clause of the U.S. Constitution. See *Hobby Lobby*, 134 S. Ct. at 2785 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).

159. 42 U.S.C. § 2000bb–1(a), (b) (2012) (emphasis added). In *Employment Division v. Smith*, the Supreme Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability.’” 494 U.S. 872, 879 (1990). RFRA is a legislative response to *Smith*, with a stated purpose to “restore the compelling interest test” as set forth in pre-*Smith* case law. § 2000bb(a)(4), (b)(1).

whether business corporations are “persons” capable of the “exercise of religion” within the meaning of RFRA.

In a 5–4 decision, the Court attributed the religious beliefs of the shareholders to the business corporations and ruled that the HHS regulations violated RFRA as applied to the corporations. In the Court’s words, extending RFRA protection to the corporations “protects the religious liberty of the humans who own and control these companies.”¹⁶⁰ The majority opinion’s pervasive use of the term “closely held corporation” suggested a limited ruling, but nothing in the Court’s logic imposed this limit besides its indication that the shareholders would have to agree to run the corporation under the same religious beliefs.¹⁶¹ Similarly, the Court reasoned that for-profit business corporations are not precluded from exercising religion because, while “a central objective of for-profit corporations is to make money,” they may support charitable causes, the environment, and employee interests “[s]o long as [their] owners agree,” and “there is no apparent reason why they may not further religious objectives as well.”¹⁶²

Although the theme of shareholder agreement underlies the *Hobby Lobby* opinion, the Court actually left the specific qualifications for RFRA protection quite vague.¹⁶³ The Court acknowledged that “the owners of a company might well have a dispute relating to religion,” but disposed of this concern by noting that “[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure.”¹⁶⁴

Like *Citizens United* before it, *Hobby Lobby* thus looked to state corporate law as a “ready means” for resolving issues related to federal rights. It is state corporate law that will determine whether a business corporation has established a religious identity that can be held at the entity level and exempt it from complying with generally applicable federal regulation. The problem is that state corporate law provides no

160. *Hobby Lobby*, 134 S. Ct. at 2768.

161. *See id.* at 2774 (noting that the case involved closely held corporations, not public corporations and it is “unlikely” that such “corporate giants” would “often assert RFRA claims” and “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”).

162. *Id.* at 2771.

163. Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149, 153–67 (Micah Schwartzman et al. eds., 2016) (discussing ambiguities and weaknesses in the Court’s analysis regarding its theory of the corporation as a rights holder, corporate purpose, “closely held” status, and using state corporate law to resolve disputes).

164. *Hobby Lobby*, 134 S. Ct. at 2775.

such simple answer or means of bearing the pressure to reconcile diverse religious, social, and political values and beliefs.¹⁶⁵

III. THE NEW FEDERAL-STATE DYNAMICS OF CORPORATE LAW

This Part attempts to deepen the broader observation of the changed federal-state interplay. It looks at the mismatch between state corporate law and the new corporate rights doctrine to show the difficulties with relying on state corporate law to resolve disputes regarding the expression of non-economic interests. In particular, this Part identifies the following areas of incongruence: (1) assumptions that business corporations are “associations” that provide for effective “corporate democracy”; (2) oversights concerning the fit of corporate law principles such as fiduciary duties; and (3) misunderstandings about corporate law participants.

These areas of mismatch are important because they put pressure on state corporate law to adapt. Although business corporations involve natural persons with religious, social, and political values and beliefs, state corporate law has developed without a focus on ordering or furthering these goals.¹⁶⁶ And in fact it has developed to rely on external law to do exactly what *Hobby Lobby* failed to do—protect corporate participants and stakeholders who are not protected through state corporate law. Furthermore, state corporate law by its nature

165. The fact that corporate law provides no ready means of resolving the religious identity of a corporation is exemplified by the variety of interpretations and recommendations offered by corporate law professors in response to HHS’s request for public comment on defining eligible organizations post-*Hobby Lobby*. See Lyman Johnson et al., *Comments on the HHS’ Flawed Post-Hobby Lobby Rules* (UCLA School of Law Research Paper No. 14-18, 2014), <http://ssrn.com/abstract=2512860> [<https://perma.cc/PY8W-F8Z8>]; Robert P. Bartlett III et al., *Comment on the Definition of “Eligible Organization”* (Oct. 8, 2014), <http://ssrn.com/abstract=2507305> [<https://perma.cc/R23C-Y259>] (authored by U.C. Berkeley Corporate Law Professors); Katherine Franke et al., *Comment on the Definition of “Eligible Organization”* (Oct. 21, 2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_comments_on_proposed_regs_corp_law_profs_for_submission.pdf [<https://perma.cc/2ZZT-FFKQ>] (composed by the Columbia Conscience Project and Corporate Law Professors).

166. HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 62 (1996) (“Investor-owned firms have the important advantage that their owners generally share a single well-defined objective: to maximize the net present value of the firm’s earnings.”); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 961 (1984) (stating that the pursuit of ends other than profit maximization is “especially disturbing because profit maximization is the only goal for which we can at least theoretically posit shareholder unanimity.”); see also, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010):

The corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment Having chosen a for-profit corporate form, . . . 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.

includes the potential for variation and lack of uniformity across the states, which could heighten the impact of the issues that this Part identifies.

To the extent that state corporate law is not equipped to deal with the issues raised by granting political and religious rights to corporations, or to the extent that state corporate law does not adapt in coming years or does not do so uniformly, federal regulation may play an increasingly important role in corporate governance. For example, after *Citizens United* the Securities and Exchange Commission considered mandating public company disclosure of political spending.¹⁶⁷ After *Hobby Lobby*, the Departments of Labor, Treasury, and Health promulgated a rule defining “closely held” corporations for purposes of implementing the decision.¹⁶⁸

This observation contributes a somewhat different critique from past discussions of the federal-state interplay in corporate governance. From time to time, Congress has stepped in during periods of perceived corporate law failings with regulation aimed at improving investor protection, accountability to shareholders, and market integrity.¹⁶⁹ After stock market crashes and corporate scandals, federal regulation has added an overlay on state corporate law to require, for instance, mandatory disclosures, certifications, board committees and director independence, and nonbinding shareholder votes.¹⁷⁰ Scholars have critiqued this federal regulation of corporate law as impinging on the longstanding respect for states to oversee the corporations they create, to promote the relationships in the corporations they charter, and to function as sites of experimentation to find solutions to the regulatory problems that arise in corporate law.¹⁷¹ Such scholars have disputed the

167. Petitions to the SEC on this topic, File No. 4-637, are available at <https://www.sec.gov/comments/4-637/4-637.shtml> [<https://perma.cc/4N6Q-WP2E>]. See also Michael Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593, 599–601 (2014) (discussing the agency’s consideration of the issue). After significant public debate and agency consideration, Congress blocked the SEC from using funds to mandate disclosure of corporate political disclosure. See Consolidated Appropriations Act, 2016, H. R. 2029, Title VII § 707 (2016), <https://www.congress.gov/bill/114th-congress/house-bill/2029/text> [<https://perma.cc/CP9S-FE6E>].

168. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,317 (Jul. 14, 2015).

169. See *supra* notes 80–86.

170. The landmark legislation for these measures includes the Securities Act of 1933, the Securities Exchange Act of 1934, the Sarbanes-Oxley Act, and the Dodd-Frank Act. See *supra* note 86; Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REG. 26, 26–27 (2013).

171. Bainbridge, *supra* note 170, at 30–31 (quoting Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932): “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.”).

“race to the bottom” theory that hypothesized states compete for incorporations by adopting management-friendly corporate law and instead they have suggested that there is a “race to the top” in which efficient solutions to corporate law win out over time.¹⁷² They have claimed that corporate governance is best left to the states because “competitive federalism” provides a check on excessive regulation and promotes economic freedom to pursue wealth.¹⁷³

But the observation offered here is not about the previous critiques or the increasing federalization of corporate law generally. In the past, the values and goals underlying the federal regulation of corporate governance have been at least largely consistent with existing corporate law, aimed at enhancing economic welfare and reducing harm to investors. The debate centered on whether regulation towards these ends is best achieved by federal or state governments. The observation here is instead aimed at showing that recent Supreme Court cases have created a new dynamic between federal rights and corporate law, an incongruence or mismatch that contributes to a need for legal change, whether at the state or federal level, and a better understanding of the expanded role of corporate governance rules for business corporations.

A. *Business “Associations” and “Procedures of Corporate Democracy”*

Despite the Court’s characterization of corporations as “associations of citizens” in *Citizens United*,¹⁷⁴ not all corporations are associational in nature.¹⁷⁵ Associations “produce connections, networks, and norms that make widespread social cooperation possible.”¹⁷⁶ Many

172. Bainbridge, *supra* note 170, at 30; *see also* Robert M. Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 525–27 (2001); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 226–27 (1985).

173. Bainbridge, *supra* note 170, at 31.

174. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349, 354 (2010).

175. A longstanding debate, beyond the scope of this Article, concerns the ontology of social groups and corporations. *See, e.g.*, Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345 (Micah Schwartzman et al. eds., 2016).

176. James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 477 (2015) (discussing democratic theories of association); *see also* Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1239–40 (1994); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1570–71. Alexis de Tocqueville wrote of an association as individuals combining for some purpose and he envisioned a certain level of involvement, in which individuals “become acquainted with each other, and their zeal increased by their number.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 219 (Bantam Classics 2000); *see also* RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 19–25 (2015) (discussing the characteristics of the Tocquevillian association and noting that “modern scholars have studied the role of associations in society, and their scholarship has generally supported and deepened Tocqueville’s insights and conjectures”).

business corporations do not fit the paradigm of a voluntary association or community, envisioned as a site in which individuals feel a sense of connection or identification.¹⁷⁷ As legal scholar Ernst Freund observed in 1897, we can see in some corporations “rather an aggregation of capital than an association of persons.”¹⁷⁸

Drawing lines between different kinds of corporations is undoubtedly difficult,¹⁷⁹ but that difficulty should not cloud judgment about the fact that many business corporations do not function like social associations that implicate First Amendment values. As James Nelson put it in recent work on the freedom of association, there may be tough cases at the margins, but “one might be less concerned about passing judgment on Wal-Mart or the NAACP.”¹⁸⁰

Several factors contribute to the lack of an associational dynamic in many business corporations. For example, many corporations have dispersed, passive investors who are diversified and rationally apathetic to involvement in the corporation.¹⁸¹ In recent decades, many investors hold stock through other institutions.¹⁸² This adds a layer of management, which “separates ownership from ownership,” and means that the beneficial owners of corporate stock are often completely uninvolved in the corporation and might even be unaware of their stock ownership.¹⁸³ Furthermore, the institutional investors are often short-

177. See MEIR DAN-COHEN, HARMFUL THOUGHTS 14–18 (2002) (discussing the concept of community and nondetached roles and noting that role distance is often engendered in organizations with a large size, formal and hierarchical structure); Nelson, *supra* note 176, at 493–95 (discussing the connection between “personhood” and associations); Seana Valentine Shffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 877 (2005) (noting that “[commercial] associations are not structured in such a way to function well as sites for the realization of freedom of speech values”).

178. ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS 60 (1897), *quoted in* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 100 (1992).

179. Pollman, *supra* note 142; see also Larry Alexander, *What Is Freedom of Association, and What Is Its Denial?*, 25 SOC. PHIL. & POL’Y 1, 13–14 (2008) (arguing it is impossible to distinguish between different kinds of associations); John Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1450–54 (2012) (contending there is no principled basis for distinguishing commercial businesses from expressive associations).

180. Nelson, *supra* note 176, at 469.

181. For the seminal work on this point, see ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 1–7 (1932); see also MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

182. Strine & Walter, *supra* note 18, at 17 n.74:

Corporations have perpetual existence, are not owned by anyone (stockholders own shares with certain legal rights, not pieces of the corporation), and have a separate legal existence from the stockholders, managers, and creditors Indeed, it is a stretch to say the modern corporation is an association of individuals, given that most corporate stock is held by institutional investors.

183. Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1828 (2011) (“Individual long-term capital holders no longer

term holders.¹⁸⁴ In public corporations, shareholders are a rapidly changing group.¹⁸⁵ Even in private corporations, shareholders have limited rights to participate meaningfully in the corporation, and the fiduciary duties of managers and controlling shareholders focus attention on the interest of overall share value.¹⁸⁶

In light of the above, shareholders often value the corporations in which they invest exclusively for the potential economic return they might provide and are uninvolved in their operation. Using the terminology of Meir Dan-Cohen, shareholders have detached roles.¹⁸⁷ This detachment is facilitated by the centralized, hierarchical structure of business corporations. The board of directors manages the affairs of the corporation and delegates the execution of day-to-day operations to corporate officers and other employees.¹⁸⁸ Decisionmaking rules are

hold shares of corporations directly; the direct holders of shares predominantly are institutional investors.”); see Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 879 (2010) (noting that as of 2009, institutional investors owned fifty percent of total U.S. equities); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 447–51 (1991) (discussing the rise of institutional investors).

184. Rodrigues, *supra* note 183, at 1823 (“[T]he immediate shareholders of the vast majority of publicly traded corporations have short-term investment horizons that can be measured in months, or even days.”).

185. See generally Blair & Pollman, *supra* note 4.

186. See Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 64–65, 78–79 (2014) (discussing the limited participation and connection of many shareholders to corporations); Nelson, *supra* note 176, at 499 (discussing how shareholders in private corporations typically “follow the same financially focused pattern” and do not develop associational ties); Smith, *supra* note 67, at 310 (discussing fiduciary duties in private corporations and the development of the shareholder wealth maximization norm).

187. MEIR DAN-COHEN, HARMFUL THOUGHTS 14–18 (2002).

188. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2015) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”); MODEL BUS. CORP. ACT § 8.01(b) (1969) (AM. BAR ASS’N, amended 2010) (“All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors”); WILLIAM A. KLEIN, JOHN C. COFFEE, JR. & FRANK PARTNOY, BUSINESS ORGANIZATION AND FINANCE 137 (11th ed. 2010) (“Legally, the officers (and other employees) of the corporation are agents of the corporation whose authority comes from a delegation by the board.”); see also STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE, at x (2008):

The public corporation is a large, complex, and geographically dispersed entity with multiple stakeholders. Participatory democracy would be untenable in such an organization. We’re dealing with vast numbers of people with radically asymmetric information and fundamentally competing interests. Under such conditions, collective action problems will prove intractable, even if the mechanics of allowing thousands of stakeholders to meaningfully participate in decision making could be solved. Instead, it will be more efficient for decision-making authority to be assigned to some central person or group.

often based on a majority of the board or left to individuals filling the ranks of the corporate management structure.¹⁸⁹

Not only are many business corporations not associational in nature; the “procedures of corporate democracy” are not an effective tool for dissenting shareholders as the Court suggested in *Citizens United*. As a preliminary matter, corporations are not democracies.¹⁹⁰ According to political theorist Robert Dahl, democracy entails effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion.¹⁹¹ Corporate governance does not meet these standards. Not all corporate participants have voting rights, and those who do have unequal votes.¹⁹² Corporations are, in Dahl’s words, “typically undemocratic; sometimes, indeed, they are virtually managerial despotisms.”¹⁹³ Another way to describe the contemporary corporate governance process is “plutocratic,” with voting proportional to the amount of investment.¹⁹⁴ Because of this dynamic, the political

189. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 8 (1977) (noting that over time corporate hierarchies have proven to have “a permanence beyond that of any individual or group of individuals who worked in them”).

190. See Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1389–90 (2006) (arguing that “comparisons between the corporate and civic polities, while intellectually tempting, ultimately falter because participation in a corporation fundamentally differs from participation in a nation”); Thomas W. Joo, *A Trip Through the Maze of “Corporate Democracy”*: *Shareholder Voice and Management Composition*, 77 ST. JOHN’S L. REV. 735, 735 (2003) (“According to a common American myth, shareholders govern corporations through a process of corporate democracy. Even the Supreme Court labors under this misconception.”); Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failure Analysis*, 23 DEL. J. CORP. L. 979, 1004 (1998) (“Public corporations are characterized not by participatory democracy, but by hierarchies in which decisions are made on an authoritarian basis.”); Dalia Tsuk Mitchell, *The End of Corporate Law*, 44 WAKE FOREST L. REV. 703, 725 (2009) (“[S]hareholder democracy [became] associated not with shareholder participation but with the investors’ twin rights of voice and exit. But . . . in the [late] twentieth century, the Delaware courts . . . render[ed] even this limited set of rights ineffective, to solidify management’s absolute power, and to shield it from liability.”).

191. ROBERT A. DAHL, *ON DEMOCRACY* 37–39, 95 (1998).

192. In explaining why these criteria for political equality are necessary for a democratic process, Dahl asked rhetorically:

[L]et’s assume that votes are assigned a weight in proportion to the amount of property a member owns, and members possess greatly differing amounts of property. If we believe that all the members are equally well qualified to participate in the association’s decisions, why should the votes of some be counted for more than the votes of others?

Id. at 39. Furthermore, with respect to inclusion, Dahl pointed out that the interests of those deprived a voice in governance “will *not* be adequately protected and advanced by those who govern.” *Id.* at 77.

193. *Id.* at 182. Dahl took this point a step further and argued that “[u]nequal ownership and control of major economic enterprises in turn contribute massively to the inequality in political resources . . . and thus to extensive violations of political equality among democratic citizens.” *Id.*

194. Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, in *CONSTRUCTING CORPORATE AMERICA* 66, 67 (Kenneth Lipartito & David B. Sicilia eds., 2004). For a discussion of historical patterns of shareholder voting

power of managers or shareholders with large blocks of stock is magnified.¹⁹⁵

Furthermore, as I have argued elsewhere, when shareholders invest in business corporations they are not generally doing so for political purposes. They do not have ready means for controlling corporate political spending and they cannot easily obtain relief if they dissent with the corporations' choices in that regard.¹⁹⁶

Shareholders elect the board of directors, but the shareholder franchise is not a device to aggregate the political, social, or religious values of shareholders, nor is it often a deliberative or associational process.¹⁹⁷ As Professors Robert Thompson and Paul Edelman aptly observed, “[v]oting plays a limited role in corporate decisionmaking, much more limited than in the public sphere.”¹⁹⁸ Furthermore, “[t]his reality should push any discussion of corporate voting away from a focus on democratic theory and legitimacy, which would imply voting is a way to aggregate the preferences of the rightful claimants as to who should run a corporation (or the country), and more toward a framework based on information theory, which treats voting as a means of error correction for decisions.”¹⁹⁹

rules, see Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948 (2014).

195. Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 258 (1981).

196. Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 56 (2009), <http://yalelawjournal.org/forum/citizens-not-united-the-lack-of-stockholder-voluntariness-in-corporate-political-speech> [<https://perma.cc/2435-YZ7U>]. For a discussion of the harm to individuals when corporations express points of view they do not wish to support, see LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 144–55 (1987); see also Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005).

197. HANSMANN, *supra* note 166, at 11, 288–89 (noting that voting “is not to provide a means for conveying the patrons’ preferences to the firm’s management, but rather to make it more difficult for the firm to exploit these patrons as a class . . . [t]o give the electorate some crude protection from gross opportunism on the part of those in power”); see also *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (noting the stockholder right to vote has long been viewed “as a vestige or ritual of little practical importance” but it legitimates the directors’ exercise of power over property they do not own). Historically, in some corporations shareholder voting had more associational or democratic characteristics such as each shareholder having one vote, or a graduated vote by stock ownership, and it was done in person, but these rules changed by the mid-nineteenth century “as the economic purpose and function of the corporation evolved.” Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 WASH. & LEE L. REV. 1407, 1408 (2006); see also Dunlavy, *supra* note 194, at 66–68; Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 149, 156–58 (1888).

198. Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 130 (2009).

199. *Id.*

Directors can be elected by a plurality vote in which shareholders do not have access to the nomination process or proxy.²⁰⁰ Responsibility for management is vested in the board of directors, and in practice many decisions are delegated to executives, who will make political expenditures from the corporate funds without a shareholder vote.²⁰¹ Under state corporate law, corporate political spending is an ordinary business decision, which receives the protection of the business judgment rule.²⁰² Derivative actions are highly unlikely to provide relief to dissenting shareholders because, unless the shareholder can make a case for fraud or self-dealing, they are unlikely to show demand futility and overcome the business judgment rule.²⁰³ Shareholder proposals, allowed in public corporations, are nonbinding unless aimed at amending the bylaws, which requires shareholders to overcome collective action hurdles and achieve a majority vote. In sum, existing corporate law rules give the management the voice in the corporation for ordinary business decisions including corporate political spending and dissenting shareholders are unlikely to have their concerns meaningfully addressed.

Moreover, shareholders lack information on corporate political expenditures and a large number of investors own stock indirectly through mutual funds, 401(k) accounts, or other pension or retirement plans.²⁰⁴ As noted, this indirect type of stock ownership through institutional investors means that many Americans do not even know in which corporations their money is invested, and, even if they did, they would not be able to sell the stock of a particular corporation.²⁰⁵

Fundamentally there is a mismatch between the Court's characterization of corporations in its modern rights doctrine and the reality of corporations and corporate law. The implication is that either corporate rights doctrine or corporate law should change.

200. *Id.* at 138 (“Typically there is only one slate of nominees, presented by the board itself, and directors can be elected by a simple plurality.”); see also Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 758 (2013) (discussing shareholder proxy access).

201. Lucian Arye Bechuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 843–47 (2005) (“Shareholders do not necessarily have the power to order directors to follow any particular course of action. Rather, the powers of shareholders are limited to what corporate statutes specify and . . . the company’s constitutional documents.”); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 363 (2015).

202. Bechuk & Jackson, *supra* note 12, at 83.

203. Pollman, *supra* note 196, at 56.

204. *Id.*

205. *Id.*; see also Strine & Walter, *supra* note 201, at 370.

As I have argued with Margaret Blair, the Court's modern corporate rights doctrine is flawed because it has extended its derivative rights logic beyond what is supported by fact—not all corporations can be fairly characterized as associations of persons from whom rights can or should be derived.²⁰⁶ For example, *Citizens United* represents an identifiable group of natural persons who associated for political purposes and the entity could logically be accorded a derivative right to protect such persons. But other corporations do not represent such an association and the purpose of the First Amendment was not served by the Court's broad ruling as to all corporations.²⁰⁷

Similarly, Larry Ribstein observed that “the dispersed, passive, and anonymous shareholders that corporate-governance-based regulation purports to protect are unlikely to have much expressive interest at stake in corporate activities.”²⁰⁸ He also recognized the implication that something must change, noting that if *Citizens United's* rationale were accepted, that business corporations are a vehicle for the expressive rights of shareholders, then it would justify changes such as subjecting decisions about corporate political spending to shareholder approval measures.²⁰⁹ Victor Brudney had foreseen this earlier, after *Bellotti*, arguing that the First Amendment does not inhibit the government from determining that corporate decisions should be made by officers or directors only after consulting shareholders, or even by supermajority or unanimous vote of shareholders.²¹⁰

206. Blair & Pollman, *supra* note 4, at 1733:

The derivative nature of rights for corporations requires the Court to pay attention to distinctions, to explicitly acknowledge that, for some purposes, some corporations can usefully and functionally be regarded as aggregates of their members from whom rights could be derived, while other corporations serve other purposes, and cannot be regarded as representing any particular natural person or group of natural persons.

207. *Id.*; see also ROBERT POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 70 (2014) (“Most corporations are not formed for the purpose of engaging in First Amendment activities. Ordinary commercial corporations are not expressive associations, and for this reason they may not assert the First Amendment rights of persons who make up ordinary commercial corporations.”).

208. Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1022 (2011). Ribstein also noted that it is not clear why shareholders would be the only constituency that matters for expressive purposes. *Id.* at 1038.

209. *Id.* at 1041–44. In this new federal-state dynamic, it becomes less clear what sort of regulation might pass scrutiny, however. In *Citizens United*, the Court suggested that a corporate governance regulation would be permitted, but a regulatory mechanism “based on speech, contravenes the First Amendment.” 558 U.S. 310, 362 (2010); see also Ribstein, *supra* note 208, at 1043–44 (explaining that “in determining the constitutionality of governance regulation, courts must weigh protection of shareholder expression against frustrating corporate speech generally and the expression rights of particular shareholders and stakeholders”).

210. Brudney, *supra* note 195, at 238, 256.

The need for a change in corporate law to deal with corporate political spending stems from the different values at stake in that context compared with other business decisions. For example, most business decisions made by the board of directors and managers focus on business operations and strategy that do not directly concern social, political, or religious values. Corporate law rules for these kinds of ordinary business decisions give authority and deference to the board of directors to manage the affairs of the corporation, promoting efficient passive investment and the pursuit of economic welfare.

By contrast, the closest analogy to corporate political spending is corporate charitable donations, a longstanding thorny issue for corporate law because of concerns that corporate managers can sacrifice profits for social issues that not all shareholders or corporate participants agree upon. Scholars have justified corporate law's treatment of charitable donations as ordinary business decisions on the basis that such treatment tempers profit-seeking obligations or pressures by giving corporate managers discretion to comply with social and moral norms.²¹¹ The structure of large corporations insulates dispersed shareholders from social or moral pressures to act as owners in a community and creates collective action obstacles for the corporation to act in a socially desirable way.²¹² According to this view, giving corporate managers the discretion to make corporate charitable donations optimizes corporate conduct.

Corporate political spending has not been similarly defended, however. Although some have argued that corporate political spending maximizes value for shareholders, it is not also discussed in terms of complying with social or moral obligations as are corporate charitable donations. Furthermore, corporate political activity raises additional concerns of compelled speech and impact on other social values such as electoral integrity.²¹³

211. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 745 (2005).

212. *Id.* at 739–40 (noting that even if corporate charitable donations are agency costs generated by the failure of corporate managers to act as loyal agents, “their exercises of profit-sacrificing discretion will generally still make corporate conduct more socially desirable”); *id.* at 798 (“Separating ownership from management of corporate operations also means the owner-shareholders do not participate in the sort of social and moral processes that give ordinary business owners affirmative desires to behave in socially desirable ways when the law and profit motives are insufficient to do so.”).

213. *See generally* POST, *supra* note 207, at 3–5 (discussing the value of electoral integrity imperiled by *Citizens United*); Bebchuk & Jackson, *supra* note 12, at 111–14 (discussing the expressive significance to shareholders of decisions about corporate political spending); Sachs, *Unions*, *supra* note 15, at 844 (arguing for political opt-out rights for corporate political spending).

B. Fiduciary Duties and Minorities

In addition to the failings of the Court's characterization of corporations as "associations of citizens" with "procedures of corporate democracy," other knotty issues also arise from the Court's reliance on the mechanisms of state corporate law without examination of the details to understand the fit and the implications.

One example concerns fiduciary duties and governance in business corporations in which the participants are conflicted about whether it should be run in accordance with religious values or goals. As we saw above, in *Hobby Lobby* the Court determined that a business corporation can pursue religious objectives at the expense of profits "[s]o long as its owners agree."²¹⁴ Later in the opinion, the Court acknowledged that "the owners of a company might well have a dispute relating to religion," but disposed of this concern by noting that "[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure."²¹⁵ The Court's opinion, however, did not delineate the separate roles of the shareholders and the board, nor did it square its reasoning in recognizing RFRA standing—to protect those who "own and control" the corporations—with the mechanics and structure created by corporate law.

Under state corporate law, for example, the shareholders and the board of directors have legally distinct roles and obligations. Shareholders do not have the authority to direct the business and affairs for the corporation. The board acts for the corporation, in its capacity as a collective body, or through delegation of authority to officers and other individuals.²¹⁶

One of the bedrock principles of corporate law regarding this division in roles and obligations is that corporate directors and managers are fiduciaries.²¹⁷ Fiduciary principles originated in equity.²¹⁸

214. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

215. *Id.* at 2775.

216. *See, e.g.*, 2 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 505 (2014) ("The board of directors controls the corporate business and authorizes the corporation's executive agents to enter into contracts and new business ventures Thus, the business and affairs of the corporation are managed by and under the direction of its board.")

217. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887; Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 800 (1983); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1402 (2002).

218. DeMott, *supra* note 217, at 880.

Scholars have defined the fiduciary relationship in myriad ways,²¹⁹ and the problems it seeks to address,²²⁰ but it is well established as one of the “core corporate law protections of capital.”²²¹

Hobby Lobby does not consider whether it is possible to reconcile fiduciary duty doctrine with a business corporation that exercises religion through those who “own and control” the corporation. In the factual situation of *Hobby Lobby*, the shareholders were unanimous in their religious beliefs and they actively managed the corporations involved in the case. There was therefore no one to disagree or raise a claim regarding fiduciary duties.²²² But the Court did not clearly limit

219. See, e.g., Frankel, *supra* note 217, at 809 (identifying “[t]he two central characteristics of fiduciary relations” as “the substitution function and the delegation of power”); Smith, *supra* note 217, at 1402 (“[F]iduciary relationships form when one party (the ‘fiduciary’) acts on behalf of another party (the ‘beneficiary’) while exercising discretion with respect to a critical resource belonging to the beneficiary.”); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 432 (1993) (characterizing the fiduciary relationship as contractual with “high costs of specification and monitoring” and fiduciary duties as default rules to reduce costs associated with incomplete contracts); Austin W. Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 540 (1949) (defining a fiduciary as “a person who undertakes to act in the interest of another person”).

220. See, e.g., DeMott, *supra* note 217, at 915 (“Described instrumentally, the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person’s discretion ought to be controlled because of characteristics of that person’s relationship with another.”); Frankel, *supra* note 217, at 811 (arguing that the need for fiduciary law is to protect the “entrustor” from “abuse of power”); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25 (1991) (asserting that “fiduciary duties should properly be seen as a method of gap-filling in incomplete contracts”); Smith, *supra* note 217, at 1424, 1497 (“The role of fiduciary duty is to curb such self-interested behavior in the absence of complete specification of the fiduciary’s obligations.”); Myron T. Steele, *The Moral Underpinnings of Delaware’s Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J.L., ETHICS, & PUB. POL’Y 3, 3 (2012) (arguing that fiduciary duties in the corporate context “support economic prosperity by establishing a liability framework to incentivize corporate directors and managers to engage in value-maximizing behavior” and “to serve as the moral pulse of our society as we define and set expectations for business relationships”).

221. William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 897 (1997); see also DeMott, *supra* note 217, at 881 (“Invested by corporation statutes with discretionary authority to manage or supervise the management of the corporation’s business, directors are bound by fiduciary principles.”). Courts developed the fiduciary duties of corporate directors and managers as a matter of common law. Smith, *supra* note 67, at 289. Some corporation statutes have evolved to include fiduciary duties. See, e.g., MODEL BUS. CORP. ACT §§ 8.30, 8.31 (1969) (AM. BAR ASS’N, amended 2010) (providing standards of conduct and liability for directors).

222. Arguably the unanimity of the shareholders and their role in management also supported a claim that the conduct of the corporation was in fact religiously motivated, an issue that would not be as clear where the will of only the majority of shareholders is expressed and not others who have conflicting interests and values. See Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 232 (1994) (noting that RFRA’s “legislative history is relatively clear . . . that the bill would protect conduct that was religiously ‘motivated’ ”); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 66 (2013) (“[T]he key to determining whether a particular action is a religious exercise is determining whether religious belief motivates the act.”).

its ruling to facts in which the shareholders are unanimous in their beliefs and all of the shareholders are involved in management of the corporation. Where this is not the case, and corporate constituents are in disagreement, exercising religion through the business corporation may conflict with fiduciary duties.²²³ Can a business corporation promote or exercise the religion of a majority of the directors or shareholders where such actions do not promote the value of the corporation for all of its shareholders?²²⁴ The answer is unclear or at least subject to significant debate. What is evident is that corporate law does not provide the “ready means” for resolving disputes regarding religious interests that the Court proclaimed.

To start, although it is axiomatic that corporate directors and managers are fiduciaries, the question of to whom they owe their fiduciary duties is a matter of longstanding controversy.²²⁵ To many, the answer depends on one’s view or theory of the corporation.²²⁶ Some scholars maintain that corporate directors and managers owe fiduciary duties to shareholders,²²⁷ while others assert that they owe fiduciary duties to the corporation itself.²²⁸ According to some, the task of sorting

223. See DeMott, *supra* note 217, at 918 (“[I]f the corporation owes a fiduciary obligation to each shareholder individually, does the majoritarian norm for shareholder decision-making apply to transactions that would otherwise breach the corporation’s fiduciary obligation? Or is the assent of each individual shareholder necessary?”).

224. In many instances, running a corporation in accordance with religious values might not be in conflict with promoting the value of the corporation, or might at least be justified under the business judgment rule, but it is possible that religious and economic goals could conflict. See Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 76–82 (2013) (discussing business models of religious for-profit corporations), <http://cornelllawreview.org/files/2013/12/99CLRO70-November.pdf> [https://perma.cc/7TL3-9JP4]. Resolving this potential conflict between social or religious goals and economic goals is indeed part of the catalyst for new forms of social enterprise such as benefit corporations. J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 346 (2014); Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”?*, 4 HARV. BUS. L. REV. 235, 242 (2014).

225. Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 493 (2012) (“[L]egally speaking, there is deep uncertainty as to precisely which parties are the beneficiaries of directors’ fiduciary duties.”).

226. See, e.g., Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1097 (2012) (“Different theories of the firm diverge sharply as to which parties directors should seek to benefit.”); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 536 (2015) (discussing how shareholder primacy theory identifies fiduciary duties as being owed to shareholders, team production theory identifies fiduciary duties as being owed to the corporation, and corporate law expresses ambivalence).

227. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 548 (2002); Jonathan R. Macey, *supra* note 220, at 25; Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 911.

228. See, e.g., E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160–61 (1932); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 298 (1999).

out with particularity which duties are owed to whom “is doomed to fail.”²²⁹ Further, even a leading corporate jurist has acknowledged the ambiguity underlying the application of fiduciary law in corporate law.²³⁰

Notwithstanding this complexity and debate, we can observe that *Hobby Lobby’s* focus on protecting the religious liberty of those “who own and control” the business corporation might not accord easily with fiduciary duty doctrine. Courts commonly identify the beneficiaries of fiduciary duties as “the corporation and its shareholders.”²³¹ One recent Delaware opinion explained this phrasing in terms of shareholder wealth:

“It is, of course, accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize profits currently. They may do so, however, because such activities are rationalized as producing greater profits over the long-term.” Decisions of this nature benefit the corporation as a whole, and by increasing the value of the corporation, the directors increase the share of value available for the residual claimants. Judicial opinions therefore often refer to directors owing fiduciary duties “to the corporation and its shareholders.” This formulation captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity’s residual claimants. Nevertheless, “stockholders’ best interest must always, within legal limits, be the end.”²³²

229. Douglas G. Baird & M. Todd Henderson, *Other People’s Money*, 60 STAN. L. REV. 1309, 1316 (2008).

230. Allen, *supra* note 221, at 894. Legal commentators have also noted the ambiguity in this area of law. See, e.g., Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1386 (2008) (arguing that corporate law is “ambivalent” regarding major issues such as the intended beneficiaries of corporate production); DeMott, *supra* note 217, at 916 (“[A]n institutional fact lending considerable importance to litigation over issues of fiduciary obligation in the United States is the relative absence of clear, statutory, prophylactic rules regulating the use of powers by corporate directors and controlling shareholders.”); Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1087, 1096 (2012) (discussing “judicial uncertainty regarding the correct theory of the firm” and “the indeterminacy of fiduciary beneficiaries”).

231. See, e.g., *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff’d*, 5 A.2d 503 (Del. 1939) (explaining that “the directors of a corporation stand in a fiduciary relation to the corporation and its stockholders”); *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (“In performing their duties the directors owe fundamental fiduciary duties of loyalty and care to the corporation and its shareholders.”); *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) (“In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders[.]”); see also E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 764 n.8 (2008) (noting the Delaware Supreme Court “sometimes articulates directors’ fiduciary duties as owed to ‘the corporation’ and sometimes articulates the duties as owed to ‘the corporation and its shareholders.’”). Scholars disagree regarding whether this language suggests an equivalence between the corporation and its shareholders. See Velasco, *supra* note 227, at n.154.

232. *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 36–37 (Del. Ch. 2013) (citations omitted). The court also explained:

Moreover, courts have emphasized that fiduciary duties are owed to *all* of the shareholders, not simply those who own and control the corporation.²³³ This concept originated in cases involving disputes among majority and minority shareholders in closely held corporations.²³⁴

This concept evolved into the notion that controlling shareholders themselves owe fiduciary duties.²³⁵ While corporate law allows for customizing governance rules and provides a majority decisionmaking norm in many instances, the protection of minority shareholders is also a principle of corporate law.²³⁶ Controlling shareholders are constrained to act equitably.²³⁷ Many states have developed a doctrine of shareholder oppression in closely held

In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment. When deciding whether to pursue a strategic alternative that would end or fundamentally alter the stockholders' ongoing investment in the corporation, the loyalty-based standard of conduct requires that the alternative yield value exceeding what the corporation otherwise would generate for stockholders over the long-term.

Id. at 37.

233. See *Phillips v. Insituform of N. Am., Inc.*, Civ. A. No. 9173, 1987 WL 16285, at *10 (Del. Ch. Aug. 27, 1987):

Much of the plaintiffs' argument . . . seems premised on an assumption that a right to designate a majority of the board involves legally the right to control the board's action and thus the corporation. However, so long as the law demands of directors, as I believe it does, fidelity to the corporation and all of its shareholders and does not recognize a special duty on the part of directors elected by a special class to the class electing them, such a premise must be regarded as legally incorrect.

Comm. on Corp. Laws, *Guidelines for the Unaffiliated Director of the Controlled Corporation*, 45 BUS. LAW. 429, 430 (1989) ("*All* directors have the same duties to the corporation and to *all* of its shareholders."); see also *In re Trados*, 73 A.3d at 38 ("The duty to act for the ultimate benefit of stockholders does not require that directors fulfill the wishes of a particular subset of the stockholder base.")

234. Smith, *supra* note 67, at 305–22 (arguing the shareholder primacy norm was first used to resolve disputes among shareholders in closely held corporations and this use evolved into the modern doctrine of minority oppression).

235. *Id.*

236. See Smith, *supra* note 217, at 1459:

Enforcing this [fiduciary] obligation is complicated in closely held corporations, where the norm of majority rule bumps up against the prohibition of self-interested behavior. Majority shareholders in closely held corporations are like partners in a partnership in the sense that their actions are necessarily self-interested. In this setting, whether the actions of a majority shareholder constitute a wrong toward the minority shareholders (often) depends on vague concepts of fairness.

237. See, e.g., 12B FLETCHER CYC. CORP. §§ 5810–11 (2014) (outlining the duties of majority shareholders); Adolf A. Berle, Jr., "*Control*" in *Corporate Law*, 58 COLUM. L. REV. 1212, 1212 (1958) (noting the rules of corporate law "were and still are directed primarily toward the protection of the property interests of minority stockholders"); Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 124 (2003) (arguing that corporate law is "a device to ensure that minorities will be treated fairly").

corporations because the lack of a public market leaves minority shareholders particularly vulnerable to the majority's actions.²³⁸ In sum, regardless of whether the beneficiary is expressed as "the corporation and its shareholders," the "corporation," or the "shareholders," there may be minority shareholders, and perhaps other constituents, to whom fiduciary duties are owed.²³⁹ This case law has roots in the closely held context, like *Hobby Lobby*, in that the corporate stock is privately held by a small number of shareholders.

Notably, the vast bulk of the corporate fiduciary duty scholarship and case law on these points considers conflicts that are economic in nature.²⁴⁰ For example, minority oppression cases have typically involved situations in which the majority used its power to obtain economic advantage or disproportionate benefit at the minority's expense, or to frustrate the reasonable expectations of the minority regarding other economic matters such as dividends or employment.²⁴¹ Some legal commentators might assert that this shows that modern rights doctrine does not implicate fiduciary duty analysis.²⁴²

But perhaps this disconnect is exactly the point. The difficult fit between the religious values at stake in *Hobby Lobby* and the corporate case law dealing with fiduciary duties and conflicts between

238. See Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1209 (2009) ("The potential for minority shareholder oppression should be understood, therefore, as an inherent structural characteristic of the close corporation form."). For a discussion of different approaches to the shareholder oppression doctrine, see Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749 (2000).

239. For a notable recent example involving a closely held corporation in which the founders/majority shareholders sought to run the corporation according to non-economic values, see *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010). The Delaware Chancery Court ruled:

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 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 If [the majority stockholders] were the only stockholders affected by their decisions, then there would be no one to object. [The minority stockholder], however, holds a significant stake . . . and [the majority stockholders'] actions affect others besides themselves.

Id.

240. See generally 2 F.H. O'NEAL & R. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS (2d ed. 1985 & Supp. 2003) (discussing the relevant scholarship and case law).

241. Stephen M. Bainbridge, *A Critique of the Corporate Law Professors' Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE 1, 17–18 (2014).

242. In an essay about *Hobby Lobby*, Professor Stephen Bainbridge noted the nature of the disputes in the minority oppression jurisprudence and asked: "Does anyone really see potential shareholder disputes over expressions of corporate religious identity as being particularly susceptible to analysis in these terms?" *Id.*

shareholders shows the weight that *Hobby Lobby* has put on corporate law to resolve problems of a type that it has not to date developed to address. It is at least possible that federal law according religious liberty protections to corporations on the basis of protecting controlling shareholders conflicts with state corporate law principles that require those controlling shareholders and corporate managers to act in the interests of the corporation and all of its shareholders.²⁴³

Another related point of corporate law that proves controversial is whether the governing documents of a corporation could alter or eliminate fiduciary duties and minority protections. The *Hobby Lobby* Court suggested that disputes could be settled in the corporation's governance structure, but whether fiduciary duties can be contracted around or whether they are inherent in the corporate form is the subject of significant dispute.²⁴⁴ As a descriptive matter, courts have suggested that they will give effect to a customized governance provision except where it conflicts with public policy or corporate law.²⁴⁵ Case law has

243. See Strine, *supra* note 100, at 145–46, 154–55 (explaining that although corporate founders or managers may have unique social or religious values which they wish to promote, “pursuing a controversial political or moral agenda is intrinsically problematic” when the corporation has taken money from other investors). One legal commentator has recently suggested that fiduciary duties are implicated by corporate religious exercise. Marc A. Greendorfer, *Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporation’s Right to the Free Exercise of Religion (With a Post-Hobby Lobby Epilogue)*, 39 DEL. J. CORP. L. 819, 834–35 (2015):

If, however, the shareholders were subsequently to disagree on the desired goal of the corporation, with one group seeking profit maximization and the other seeking another goal, the presumption of most courts would be in favor of profit maximization To the extent the promotion of religion were to negatively and materially deviate from the interests of the shareholders, the shareholders would have a number of claims against the traditional for-profit corporation’s board of directors.

244. The idea of contracting out of fiduciary duties refers to various possible actions or provisions such as charter provisions and shareholder agreements. See DeMott, *supra* note 217, at 921. For literature arguing that fiduciary duties in the business corporation can be modified or waived, see Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990); Easterbrook & Fischel, *supra* note 219. For literature on the other side of this debate, see Baird & Henderson, *supra* note 229, at 1315 (“[I]nvestors cannot easily opt out of a fiduciary duty once it is put in place.”); cf. STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* 316 (3d ed. 2012) (noting in the context of takeover defenses: “[S]tate law arguably does not permit corporate organic documents to redefine the directors’ fiduciary duties. In general, a charter amendment may not derogate from common law rules if doing so conflicts with some settled public policy.”).

245. See, e.g., Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1470 (1989) (“The core fiduciary rules which govern the close corporation are mandatory, but private rules that do not present the dangers of systematic unforeseeability and exploitation—such as rules that allow an interested director to be counted toward a quorum—normally will be given effect.”). Professor Eisenberg cited the following cases: *Pappas v. Moss*, 393 F.2d 865, 867–68 (3d Cir. 1968); *Irwin v. West End Dev. Co.*, 342 F. Supp. 687, 701 (D. Colo. 1972); *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (Del. 1952); *Abeles v. Adams Eng’g Co.*, 173 A.2d 246, 255 (N.J. 1961). State statutes permit the certificate of incorporation to limit or eliminate the

enforced fiduciary duties in the context of traditional issues such as self-dealing; it is not clear how courts would or should treat non-economic issues such as religious exercise in the structure of business corporations.²⁴⁶

*C. Corporate Law Participants and Reliance on
External Regulations for Protection of Non-shareholders*

Another issue regarding the fit between state corporate law and modern rights doctrine concerns the topic of corporate law participants. Corporations have multiple types of participants and stakeholders, for example: shareholders, directors, officers, employees, suppliers, creditors, and customers.²⁴⁷ Corporate law, however, focuses only on shareholders, directors, and officers. Other participants and stakeholders are protected by, or are the subject of, other areas of law such as labor and employment law, contract law, and consumer protection law. These other participants and stakeholders may constitute an important part of the corporation, or perhaps better said, of corporate activity,²⁴⁸ but corporate law itself does not traditionally govern these relationships.²⁴⁹

In *Hobby Lobby*, the Court belied its lack of understanding concerning who constitutes the subjects of corporate law, by including employees in its statement:

An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending

directors' personal liability for duty of care violations. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2015).

246. Other forms of business associations, such as LLCs and benefit corporations, might more clearly allow for opting out of traditional fiduciary duties or using a different standard. *See* Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 560–64 (2012) (discussing fiduciary duties under alternative entity law); Larry E. Ribstein, *Limited Liability Unlimited*, 24 DEL. J. CORP. L. 407, 417–18 (1999) (arguing for freedom of contract in unincorporated entities); Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 685–92 (2013) (discussing how social enterprise creates a specialized form for pursuing a dual mission); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 37–39 (2012) (discussing fiduciary duties in benefit corporations).

247. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 4–7 (1991) (discussing the various “inputs” of the corporate enterprise).

248. *See* GREENFIELD, *supra* note 58, at 142 (“The notion that corporations depend on multiple stakeholders is implicit in most theories of the firm and is not particularly contentious.”).

249. *See* Strine, *supra* note 100, at 153 (“The whole design of corporate law in the United States is built around the relationship between corporate managers and stockholders, not relationships with other constituencies.”).

Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And 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.²⁵⁰

In fact, corporate law does not specify the rights and obligations of employees.²⁵¹ The business judgment rule leaves discretion to the board of directors to consider a wide range of interests in the management of a corporation,²⁵² some states have constituency statutes that allow for the consideration of non-shareholder interests,²⁵³ and as discussed above, fiduciary duties are often articulated as being owed to the corporation and its shareholders,²⁵⁴ but corporate law does not actually have substantive content on employees. That is left to common law agency as well as labor and employment law.²⁵⁵

Some countries' systems of corporate governance give a voice to employees within the corporation, most notably in Germany's system of "codetermination," which gives employees seats on works councils and

250. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (emphasis in original).

251. See Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 283 (1998) ("Workers have no role, or almost no role, in the dominant contemporary narrative of corporate law."); Brett H. McDonnell, *Strategies for an Employee Role in Corporate Governance*, 46 WAKE FOREST L. REV. 429, 429 (2011) ("[C]orporate law does nothing to encourage any role for employees in corporate governance."); see also LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 208 (2001) ("American corporate law ignores workers. They don't figure into the structure of the corporation or its legal duties. But there is no one group of people more identified with a corporation and more responsible for its day-to-day conduct than corporate workers."); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1864 (2003) (arguing the interests of workers were removed from the core concerns of corporate law over the course of the twentieth century and that corporate law gradually transformed to focus on "the interests of shareholders vis-à-vis managers ultimately to the exclusion of all other corporate constituencies").

252. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 300–01 (1999); see GREENFIELD, *supra* note 58, at 226 (arguing that the business judgment rule "is a necessary corrective to the irrationality of the underlying [fiduciary] duty" and "empowers them to act more rationally" and "to take into account a broader range of factors").

253. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 585 (1992); Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16 (1992).

254. See, e.g., *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280, 1287 (Del. 1989); *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939); cf. MODEL BUS. CORP. ACT § 8.30(a) (1969) (AM. BAR ASS'N, amended 2010) (stating each member of the board shall act "in a manner the director reasonably believes to be in the best interests of the corporation").

255. See MARGARET M. BLAIR & MARK J. ROE, EMPLOYEES AND CORPORATE GOVERNANCE 1 (1999) ("Although human capital is widely acknowledged to be the most important asset of many firms, its role has been treated as a labor issue and not as a central concern of corporate governance.").

supervisory boards.²⁵⁶ Scholars have debated the merits of participatory management that includes employees in decisionmaking for the corporation, and vociferous participants have contributed to both sides,²⁵⁷ but as a practical matter in the United States proposals for change have never succeeded, perhaps because of the stickiness of the default status quo and the idea that it would increase the cost of decisionmaking and lead to inefficiencies in the well-oiled corporate form.²⁵⁸ Furthermore, major changes that could increase companies' costs raise questions about national competitiveness in a global marketplace and other unintended consequences.²⁵⁹

Because state corporate law does not include employees within the governance framework, give them a voice in the corporation, or protect their interests, it is particularly important that external employee-protective laws be given effect. Employees and investors

256. Codetermination exists within a dual board structure in which employees participate in a supervisory board that appoints a managing board, which in turn actively oversees the corporation. Klaus J. Hopt & Patrick C. Leyens, *Board Models in Europe: Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy* 4–8 (Eur. Corp. Governance Inst. Law, Working Paper No. 18, 2004).

257. See, e.g., Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 965 (1993) (arguing for legal reform requiring labor participation in corporate governance); Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 334 (2008) (arguing for employee primacy in corporate decision-making); see also GREENFIELD, *supra* note 58, at 146–52 (arguing for “participatory, democratic corporate governance”); PARKINSON, *supra* note 90, at 397–434 (examining the main arguments in support of employee participation in order to subject companies to “internal democratization”); Bainbridge, *supra* note 190, at 1060–75 (arguing that participatory management increases decision-making and agency costs and public corporation decision-making should thus be done on a representative basis by one constituency, and it should be shareholders, because they are residual claimants “generally united by a desire to maximize share value” and hold less diverse interests than employees).

258. See, e.g., HANSMANN, *supra* note 166, at 44:

In theory it would be possible to have all classes of patrons share in collective decision making But because the participants are likely to have radically diverging interests, making everybody an owner threatens to increase the costs of collective decision making enormously. Indeed, one of the strongest indications of the high costs of collective decision making is the nearly complete absence of large firms in which ownership is shared among two or more different types of patrons, such as customers and suppliers or investors and workers.

See also Katharina Pistor, *Codetermination: A Sociopolitical Model with Governance Externalities*, in EMPLOYEES AND CORPORATE GOVERNANCE 163, 163–93 (Margaret M. Blair & Mark J. Roe eds., 1999) (considering whether codetermination in Germany has raised the cost of collective decision making and altered corporate dynamics to a multiplayer game in which management's power is strengthened).

259. See BLAIR & ROE, *supra* note 255, at 13 (“[L]ifetime employment, codetermination, and other institutions may have been adopted to solve one problem but then had costs or unintended benefits.”); PARKINSON, *supra* note 90, at 433–34 (“[A]ny changes designed to increase corporate social responsiveness that are liable to add significantly to companies' costs cannot in an increasingly global marketplace be safely introduced in one country.”).

provide labor and capital, the two principal inputs to the firm.²⁶⁰ Employees are often in a vulnerable position, however, because they make a firm-specific investment of their human capital but have no future claim on the economic surpluses of the firm.²⁶¹

Yet giving effect to external employee-protective law is exactly what *Hobby Lobby* failed to do—it put the interests of five shareholders above those of over 13,000 employees. As Delaware Chief Justice Leo Strine has commented, *Hobby Lobby* revived corporate paternalism by ruling that “the worker’s right—as a minimum benefit of employment in a secular society—to make choices about her own medical needs is trumped by the employer’s right to ensure that any funds from its coffers are not used in ways that the employer finds objectionable.”²⁶²

Hobby Lobby thereby upset the implicit agreement that allows corporate law to serve as enabling rules for shareholders and directors because of the assurance that external legal regimes would address the interests of others. Even Milton Friedman, who famously wrote that “[t]he social responsibility of business is to increase its profits,” recognized that such unabashed pursuit of profit for shareholders was to be done “while conforming to the basic rules of the society, both those embodied in the law and those embodied in ethical custom.”²⁶³

Hobby Lobby is a landmark decision because, for the first time, the Court allowed business corporations to opt out of generally applicable federal regulation because of the beliefs of the shareholders. The case is about opting out and should not be confused with corporate social responsibility.²⁶⁴ Corporate social responsibility concerns putting nonshareholder interests ahead of those of shareholders in order to surpass the requirements of the law; by contrast, *Hobby Lobby* was about allowing corporations to avoid complying with the law.²⁶⁵ *Citizens United* further compounds the problem because corporate political

260. Edward B. Rock & Michael L. Wachter, *Tailored Claims and Governance: The Fit Between Employees and Shareholders*, in EMPLOYEES AND CORPORATE GOVERNANCE 121, 121 (Margaret M. Blair & Mark J. Roe eds., 1999).

261. Margaret M. Blair, *Firm Specific Human Capital and Theories of the Firm*, in EMPLOYEES AND CORPORATE GOVERNANCE, *supra* note 255, at 58, 63–67.

262. Leo E. Strine, Jr., *A Job Is Not a Hobby: Hobby Lobby and the Judicial Revival of Corporate Paternalism and Its Problematic Implications*, J. CORP. L. (forthcoming) (manuscript at 4), <http://ssrn.com/abstract=2555816> [<https://perma.cc/KM25-J5BX>].

263. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 1970, at 32, 33.

264. See Pollman, *supra* note 163, at 149–72 (criticizing corporate law scholars’ claims that *Hobby Lobby* is “a win for progressive values because of its recognition that business corporations can pursue goals other than shareholder profits”).

265. See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015) (arguing that “businesses, scholars, and courts increasingly incorporate the central premises of *Lochner* into religious liberty doctrine”).

spending may undermine the ability of “the regulatory process [to serve] as an adequate safeguard against corporate overreaching for non-stockholder constituencies and society generally.”²⁶⁶ In other words, *Hobby Lobby* and *Citizens United* have given new cause for concern that we can no longer rely on external regulation to constrain corporations in the interests of society.²⁶⁷

Because *Hobby Lobby* rests on statutory grounds rather than the First Amendment, Congress could amend RFRA to clarify that the statute does not include business corporations within its reach. Notwithstanding the issue of political viability, this fix should be made to preserve the equilibrium—a social compact—established in corporate law to rely on and require business corporations to comply with external regulations. This allocation of roles for different areas of law has allowed corporate law to be enabling and value creating—for corporations to serve as “great engines for the promotion of the public convenience, and for the development of public wealth.”²⁶⁸

If this disruption in the social compact is not fixed, that suggests corporate law may need to adapt to the new role with which it has been tasked. If the interests of employees are not protected outside of corporate law, they may need to be addressed within.²⁶⁹ As discussed

266. Strine & Walter, *supra* note 201, at 342; *see also* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 N.C. L. REV. 1197, 1236 (2011) (arguing after *Citizens United* that “[i]f we cannot rely on contract or external regulation to protect the interests of non-shareholders, then shareholder primacy must be altered in favor of a system that requires corporate directors to attend to the interests of non-shareholding stakeholders at the level of firm governance”). For a contrary view, *see* Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State*, 115 COLUM. L. REV. SIDEBAR 39 (2015).

267. *See* Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding “We the People’s” Ability to Constrain our Corporate Creations*, 15 HARV. C.R.-C.L. L. REV. (forthcoming 2016) (abstract of manuscript), <http://ssrn.com/abstract=2680294> [<https://perma.cc/M7JP-J5KM>]:

Taken together, the decisions of the Roberts Court and other like-minded federal judges have had the practical effect of increasing the power of corporations to influence the electoral and regulatory process, diminishing the ability of human citizens to constrain their corporate creations in the public interest, and reducing the practical ability of Congress and executive agencies to adopt and implement externality regulations and new social welfare regulation.

268. *Leslie v. Lorillard*, 18 N.E. 363, 366 (N.Y. 1888) (noting, however, that a corporation that acted outside of its charter became a “public menace”); *see* GREENFIELD, *supra* note 58, at 130–31 (noting corporations are “especially able to create financial prosperity” and that the “unique characteristics” making this possible are “creations of law” that would not be available without the state); *id.* at 133 (“[C]orporations should be appreciated for their special ability to create wealth but should be treated warily because of their inability (absent regulation) to take into account values far more important than wealth.”).

269. For an argument that we need “a more serious endeavor to reach common ground” in corporate governance between management and labor, *see* Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 20 (2007). For an argument for a

above, corporate law is not currently well suited for this sort of work and so changes could potentially be of a fundamental nature.

CONCLUSION

A new dynamic has emerged between federal corporate rights and state corporate law. Whereas state corporate law historically served as a means of constraining and regulating corporations, now it establishes the procedures by which business corporations exercise certain expressive and religious federal rights. Modern corporate rights jurisprudence has come to this result through a flawed understanding of corporations and an unreflective reliance on corporate law.

In some regards, the Supreme Court's failure to adequately comprehend corporations and their regulation is unsurprising. A long tradition exists of criticizing the Court on these grounds.²⁷⁰ Yet, as this Article has shown, the recent shift in corporate rights jurisprudence has broken new ground. Never before has the Court allowed business corporations to opt out of generally applicable federal regulation because of the beliefs of their shareholders. The Court has granted corporations the power to make unlimited independent political expenditures, subject only to the check of corporate governance.

There may be few, if any, alternatives to the new dynamic between federal corporate rights and state corporate law. Once the Supreme Court recognized corporations as having expressive and religious liberty rights, it was perhaps inevitable that the Court would turn to corporate law as the substantive law governing procedures and disputes. To do otherwise might risk judicially creating a federal common law of corporations or an even more intrusive "constitutionalizing" of corporate law.

Some of the new questions and issues that have arisen from the expansion of corporate rights have been and may continue to be dealt with by federal agencies. But to the extent that corporate governance is not further federalized, the weight of the new tasks for corporate law rests on state corporate law.

These observations also suggest important issues looming on the horizon. The Court is dangerously close to not just giving state

"democratic agenda" in reforming corporate law, see Allan C. Hutchison, *Hurly-Berle—Corporate Governance, Commercial Profits, and Democratic Deficits*, 34 SEATTLE U. L. REV. 1219, 1220 (2011).

270. See, e.g., Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 139 (2002); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–14 (1935).

corporate law a quasi-constitutional dimension, but actually conflating ordinary commercial corporations with expressive associations and subjecting corporate and securities law to heightened scrutiny.²⁷¹ Also, the recent uproar over state legislation allowing for religiously-based discrimination,²⁷² serves as a reminder of the ability of states to act as laboratories and the potential havoc this can wreak. Just as states experiment with new forms of business organization such as benefit corporations, theoretically they could also provide rules regarding which types of corporations have the power, or do not have the power, to exercise religion or make political expenditures. Would such laws, re-defining various business organizations and their characteristics, pass constitutional muster? They would pit the long recognized power of states to create and define corporations against principles of federalism. The existing, and potentially increasing, lack of uniformity across corporate law of the fifty states would seem to heighten the problems identified in this Article. These and other potential issues help sharpen the focus on just how far the Court has gone in re-shaping the role of corporate law.

271. See POST, *supra* note 207, at 70:

State corporate laws pervasively regulate how persons may join together to form a corporation and how they must act together once they are members of a corporation. If there were a First Amendment right to associate to form ordinary commercial corporations, . . . every aspect of state corporate law would be subject to strict First Amendment scrutiny.

For an example of a court applying strict scrutiny to a law setting out internal decision making procedures for corporations and unions to make campaign contributions or independent expenditures, see *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 12 (1st Cir. 2012). The court enjoined enforcement of the provision as unlikely to withstand strict scrutiny. *Id.* at 15.

272. See Michael Barbaro & Erick Eckholm, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), http://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html?_r=0 [<https://perma.cc/SZ8R-SGDZ>]; Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014).