2019

Veil Piercing and the Untapped Power of State Courts

Catherine A. Hardee
California Western School of Law, chardee@cwsl.edu

VEIL PIERCING AND THE UNTAPPED POWER OF STATE COURTS

Catherine A. Hardee*

Abstract: The U.S. Supreme Court in recent years has embraced an anti-majoritarian trend toward providing constitutional protections for the elite who own or control corporations. This trend is especially troubling as it threatens to undermine the balance found in state corporate law between private ordering for internal corporate matters and government regulation to police the negative externalities of the corporate form. The Court's interventions also have the potential to leave vulnerable groups without the protection of religiously-neutral laws designed to prevent discrimination, protect workers, or provide essential services such as health care. While the U.S. Supreme Court has not yet explicitly preempted what has traditionally been the province of states, the Court has relied, both implicitly and explicitly, on its own controversial definitions of state law as the foundation on which to create speech rights for corporations and religious rights for corporate owners. Absent explicit federal preemption, states can and should fight back against this creeping federalization of state corporate law.

This Article provides a roadmap. It suggests modest changes to the veil piercing doctrine that can help to restore, at least in part, the balance of power between states and their corporate creations. A state court signaling to business owners even a potential for piercing, and thus the potential for unlimited personal liability, could discourage corporations doing business in the state from seeking religious exemptions to neutrally applicable laws. Most importantly, these changes do not threaten to undermine the corporate control mechanisms that have allowed for efficient private ordering within corporations, nor will they allow corporations to avoid these third-party protections by reincorporating in a different state. Forcing the federal courts to confront state assertions of their right to limit and define corporations will, at the very least, require the U.S. Supreme Court to be transparent about the extent to which it intends to federalize state corporate law, advancing rule of law values like certainty and predictability that are important to individuals and corporations alike.

---

* Associate Professor of Law, California Western School of Law; J.D. New York University School of Law. I am grateful for the helpful feedback from scholars at the Kentucky Law Journal Symposium on Religious Exemptions and Harm to Others, the Southeastern Association of Law Schools New Scholars Workshop, and the Southern California Junior Scholars Workshop. Special thanks to Professor Melissa Durkee for her insights. I also wish to thank my research assistant Sara Gold and the helpful research staff of the California Western School of Law Library, especially Robert O'Leary. I am especially grateful to the *Washington Law Review* editorial staff for all their hard work.

INTRODUCTION

In dodging the substance of the corporate claim in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] the United States Supreme Court has ensured that the issue of corporate rights will remain a subject of ongoing litigation and scholarly critique. Critics of the Roberts Court's expansion of free speech and religious rights to corporations argue that the Court is using its anti-majoritarian power to protect the rights of powerful elites at the expense of women, labor, and

1. 584 U.S. __, 138 S. Ct. 1719 (2018).

the poor.[2] In addition, the Court's corporate rights opinions exert pressure on state corporate law.[3] The Court relied on its own definitions of state corporate law to create speech and religious rights for corporations, definitions with which many corporate law scholars disagree as a matter of state law interpretation.[4] The Court has also left to state courts the burden of determining how corporations can exercise such rights, creating tension between corporate law's historical purpose of facilitating private ordering and its new need to balance the constitutional rights of shareholders.[5] This Article departs from prior commentary to argue that, counterintuitively, this apparent flaw in the Court's doctrine provides a significant opportunity for states to ameliorate the third party harms caused by corporate exercise of Court-recognized constitutional rights. In short, state corporate law doctrines like piercing the corporate veil provide an avenue for states to incrementally reassert their regulatory prerogatives, while balancing classic private ordering with corporate constitutional rights.[6]

The Court's opinion in *Citizens United v. FEC*[7] sparked a new era of corporate rights by granting all corporations the right to political speech.[8] The *Burwell v. Hobby Lobby Stores, Inc.*[9] decision gave shareholders of certain corporations a statutory right under the Religious Freedom Restoration Act (RFRA) to utilize the corporate form to exercise their personal religion.[10] These expanded corporate rights, along with other

---

2. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 440 (2016).

3. *See, e.g.*, Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 657 (2016) (noting that corporate speech and religious rights "push to state corporate law the task of resolving disputes among corporate participants on issues of social, political, and religious dimension").

4. Such critics include Chief Justice Leo E. Strine, Jr. of the Delaware Supreme Court, the most influential corporate law court in the country, who has been an outspoken critic of the U.S. Supreme Court's foray into corporate law. *See* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 109 (2015); 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).

5. *See* Vincent S.J. Buccola, *States' Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595 (2017); Pollman, *supra* note 3, at 369.

6. *See infra* Part III.

7. 558 U.S. 310 (2010).

8. *Id.* at 365 (holding that "the Government may not suppress political speech on the basis of the speaker's corporate identity").

9. 573 U.S. __, 134 S. Ct. 2751 (2014).

10. *Id.* at 2785 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA."). In *Masterpiece Cakeshop*, the Court was expected to determine whether shareholders have

doctrinal shifts in recent years, have led to concerns that the Roberts Court is stacking the deck in favor of corporate elites over the general public.[11] *Citizens United* and its progeny have made it difficult to limit moneyed interests' ability to influence politics, with election spending skyrocketing since the controversial decision.[12] Scholars are concerned that the *Hobby Lobby* decision will leave political bodies unable to protect third parties—especially historically vulnerable populations—from the increasing power of corporations in our society.[13] Taken together, these trends suggest the Roberts Court is reviving a legal era where the judiciary prevented the political bodies from enacting legislation to protect vulnerable populations from perceived corporate excess.[14]

For those concerned with the consolidation of corporate power in society, the first best option is for the U.S. Supreme Court to change direction and reign in this relatively new corporate rights doctrine.[15] Given the current composition of the Court, however, that may be unlikely. This Article suggests that if reversing course is doubtful as a practical matter, focus may be productively directed to ways that state corporate law can

---

a constitutional right to use their corporation to exercise their personal religion, express artistic speech, or some combination of the two. *See* Eric Segall, *Symposium: Disentangling Free Speech and Freedom of Religion in* Masterpiece Cakeshop, SCOTUSBLOG (Sept. 13, 2017, 10:33 AM), http://www.scotusblog.com/2017/09/symposium-disentangling-free-speech-freedom-religion-masterpiece-cakeshop/ [https://perma.cc/7HRP-G2QY] (describing potential claims at issue, including hybrid speech and free exercise claims); Tobias Barrington Wolff, *Symposium: Anti-Discrimination Laws Do Not Compel Commercial-Merchant Speech*, SCOTUSBLOG (Sept. 14, 2017, 10:25 AM), http://www.scotusblog.com/2017/09/symposium-anti-discrimination-laws-not-compel-commercial-merchant-speech/ [https://perma.cc/U8AT-P9NY] (describing the difference between personal expression and corporate expression). Instead, the Court punted on the substance of the claim, leaving the constitutional questions for another day. *See infra note* 77 and accompanying text.

11. *See infra* Section I.A.

12. *See infra* Section I.A.1.

13. *See infra* Section I.A.2.

14. *See* Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527 (2015) (arguing that conservative legal theorists have set the stage to embrace the economic rights doctrine underlying the *Lochner* decision); Sepper, *supra* note 2, at 1518 (arguing that corporate First Amendment rights "suggest[s] a religious freedom regime that protects rich, powerful, and mainstream entities while burdening poor, vulnerable, and minority individuals"); Strine, *supra* note 2, at 431–32 ("In sum, although courts have been more receptive to business litigants seeking to overturn the decisions of the political branches, the more intensive judicial scrutiny traditionally given to legislative policies that are disadvantageous to minority groups and women has seemed to relax.").

15. Much of the extensive scholarship on corporate rights focuses on carefully laying out the U.S. Supreme Court's missteps in this area and urging reconsideration. *See, e.g.*, Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015) (critiquing the Court's treatment of complicity-based claims); Pollman, *supra* note 3 (critiquing effect of corporate rights on state law); Strine, *supra* note 2 (same); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897 (2015) (proposing a revised balancing test for complicity claims).

be reformed to maintain the balance between corporations and their employees and third parties. In doing so, this Article builds on, and contributes to, an emerging body of scholarship that urges a more muscular use of state corporate law in response to federal encroachments.[16]

Corporations are creatures of state law.[17] The Court recognized this when it directed state corporate law to flesh out the free speech and free exercise rights it granted to corporations.[18] Scholars have noted that state corporate law was not designed for this Court-mandated task, but rather evolved to allow maximum flexibility to private ordering between shareholders and management.[19] In addition, states have the power to define what constitutes a corporation and what actions fall outside the corporate purview.[20] So far it has been unclear whether or how these new corporate rights alter this traditional power of states to define the corporation. First, both *Citizens United* and *Hobby Lobby* make statements regarding the nature of existing state corporate law that scholars have challenged on factual grounds.[21] Moreover, it is unclear whether the Court's pronouncements about the way state corporate law *is* are in fact statements about the way corporate law *must be* under the Constitution.[22]

The uncertainty in the Court's doctrine creates a threat of a creeping federalization of state corporate law if states blindly assimilate corporate rights into existing doctrine. States concerned with growing corporate power should actively engage with these new federal rights to find a new

---

16. *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (arguing that state corporate law should create special decision-making rules for corporate political speech); Buccola, *supra* note 5 (providing justification for state power in this area); Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. COLO. L. REV. 477 (2015) (arguing that political expenditures could constitute bad faith under state corporate law).

17. *See* Pollman, *supra* note 3, at 644 (noting that "corporate law developed primarily as a matter of state statutory and common law").

18. *See* Burwell v. Hobby Lobby Stores, 573 U.S. __, 134 S. Ct. 2751, 2775 (2014) ("State corporate law provides a ready means for resolving any conflicts [about the corporation's religion] by, for example, dictating how a corporation can establish its governing structure."); Citizens United v. FEC, 558 U.S. 310, 361 (2010) (holding that "procedures of corporate democracy" will determine who speaks for the corporation).

19. *See* Pollman, *supra* note 3, at 639 (arguing that corporate rights place "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"); *infra* Section II.B.

20. *See* Buccola, *supra* note 5, at 598–99.

21. *See infra* Section II.B.

22. *See infra* Section II.B.

equilibrium that balances the need for corporate flexibility with the desire to protect vulnerable citizens.[23] In doing so, states can use their traditional power to define corporate law to force clarification by the federal courts.[24] An ideal test case would utilize an existing common law doctrine that can be adapted to protect third parties without dramatic changes to the internal governance rules of the corporation.[25]

This Article proposes that states could adapt the existing doctrine of veil piercing to use in circumstances when shareholders have claimed religious exemptions from neutrally applicable laws. Veil piercing—the practice of disregarding the limited liability shield of the corporation and exposing shareholders to personal liability—is appropriate when there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist."[26] A shareholder claiming an exemption to a neutrally applicable law by utilizing the corporation as a vehicle with which to exercise their personal rights arguably displays just such unity of interest, at least with respect to certain creditors or claims.[27] States have defined limited liability as available only to shareholders who maintain a separation from their corporation and who use the corporation to further the corporation's ends rather than for personal purposes.[28] Thus, courts should take into account a shareholder's prior professed unity with their corporation and their use of the corporation to pursue purely personal ends when the same shareholder seeks to use the corporation to shield their personal assets.[29]

In addition to finding substantial support in existing veil piercing doctrine, this proposal has several practical benefits. First, veil piercing involves adjudicating the rights of third parties, so states should not feel compelled by the internal affairs doctrine to apply the law of the state of incorporation.[30] This prevents opportunistic shareholders from incorporating in another state while still harming the citizens of the states where they do business. Second, because veil piercing is an equitable common law doctrine, state courts can, through incremental changes,

---

23. *See infra* Section II.C.

24. *See infra* Section II.C.

25. *See infra* Part III.

26. Automotriz Del Golfo De Cal. v. Resnick, 306 P.2d 1, 63 (Cal. 1957).

27. *See infra* Section III.B.1.

28. *See infra* Section III.A.

29. *See infra* Section III.B.1.

30. *See* Gregory S. Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice of Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85 (2008); *infra* Section III.C.1.

clearly and thoughtfully develop a body of law in response to new corporate rights.[31] Although any action by state courts to minimize the impact of expanded federal corporate rights is likely to meet stiff opposition, clarification of state law regarding corporate structure and purpose will, at the very least, force the U.S. Supreme Court to be upfront about the extent to which it intends to federalize corporate law.

This Article proceeds in three parts. Part I describes how recent decisions by the Supreme Court granting corporate rights have expanded the power of corporations, tipping the balance of power in favor of corporate elites over traditionally disadvantaged groups. Although some scholars hold out hope that corporate social responsibility will rebalance power, this Part argues that by allowing corporate management to thwart external regulation, corporate rights remove the only remaining check on the power of corporate insiders. Part II examines the traditional power of states to create and define corporations and explores how the Court's recent rights decisions encroach on that power. It concludes by advocating that states that are concerned about the negative impact of corporate exemptions to laws designed to protect third parties should reassert their power to define corporate structure and purpose to discourage corporations from claiming such exemptions. Finally, Part III provides a roadmap for how states can reassert themselves. It argues that when engaging in a veil piercing analysis, state courts should take into account the fact that a shareholder has claimed a prior exemption to the law based on a unity of interest between shareholder and corporation. This is not only a doctrinally sound adaptation to personal exemptions for corporations, but it also has practical advantages that may help states better defend themselves when challenged in federal court. While the outcome of any proposal to discourage corporations from claiming rights-based exemptions is uncertain, states' assertion of their own authority will, at the very least, force the U.S. Supreme Court to be transparent about the lengths to which it intends to federalize corporate law.

I. THE EXPANDING POWER OF CORPORATIONS

Scholars have accused the Roberts Court of ushering in a quiet revolution that is turning *Carolene Products* footnote four on its head.[32]

---

31. *See infra* Section III.C.2.

32. United States v. Carolene Prods., 304 U.S. 144, 152–53 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

Rather than protecting "discrete and insular minorities," they argue the Court is wielding its anti-majoritarian power to protect "corporate elites."[33] The Court has issued several landmark rulings with respect to corporate power, most notably *Citizens United v. FEC* and *Burwell v. Hobby Lobby Stores, Inc.*, which gave corporations a right to evade democratically imposed mandates. Critics argue that these cases, taken together with the Court's opinions on labor unions[34] and voting rights,[35] have served to expand the power of corporations and advance an anti-regulatory agenda at the expense of the democratic power of women, people of color, and the poor.[36]

Some believe that the Court's denouncement of the shareholder profit maximization principle in *Hobby Lobby* paves the way for corporations to exercise these corporate rights on behalf of other stakeholders, leading to more corporate social responsibility.[37] This hope seems unlikely to materialize, however, when considering where the Court located the ability to exercise these rights and the practical realities of corporate governance.[38]

A. Corporate Rights: Increasing the Power of the Powerful

1. Campaign Finance

The issue of campaign finance naturally holds a central position in debates over wealth and the balance of power in society. Campaign donations and independent expenditures on behalf of political candidates make politicians more responsive to donor needs.[39] In addition, the sheer

---

33. *See, e.g.*, Sepper, *supra* note 2, at 1510 ("For-profit corporations are not the insular or religious minority individuals of past accommodations, but politically powerful religious and commercial entities—the very centerpiece of regulatory efforts." (citation omitted)); Strine, *supra* note 2, at 431 (noting that under *Carolene Products*, courts intervened to protect those who "could not sufficiently protect themselves at the ballot box" but now "federal courts appear more inclined to come up with reasons to upset the determination of political branches" for "those with the most resources—such as business corporations"). *But see* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1916 (2016) (arguing that U.S. Supreme Court has long used the First Amendment in a "Lochnerian" fashion).

34. *See infra* notes 98–99 and accompanying text.

35. Shelby Cty. v. Holder, 570 U.S. 579 (2013) (striking down key portions of the Voting Rights Act).

36. *See generally* Sepper, *supra* note 2; Strine, *supra* note 2.

37. *See* Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777, 804 (2015) (arguing that *Hobby Lobby* embraces a progressive view of the corporation).

38. *See infra* Section I.B.

39. *See* Albert W. Alschuler, *Limiting Political Contributions After* McCutcheon, Citizens United, *and* SpeechNow, 67 FLA. L. REV. 389, 425 (2015) (noting that campaign contributions influence politicians). Even within the *Citizens United* opinion itself, Justice Kennedy recognized that "[i]t is

amount of money in the political system shapes the discourse because the fundraising needs of *all* candidates make both parties responsive to moneyed interests.[40]

Some scholars see *Citizens United* as the Roberts Court's first step in expanding control by the wealthy over American politics by allowing unlimited expenditures in support of a candidate directly from corporate coffers.[41] In that case, the majority exceeded even the plaintiff's request for relief and struck down the McCain-Feingold Act's prohibition on corporate expenditures as facially invalid because corporations have a First Amendment right to speak.[42] The Court clarified that its holding applies not just to nonprofit corporations created to convey a message, such as the plaintiff in the case, but also to for-profit corporations, including public corporations.[43]

The ability to exercise this corporate speech right was vested in the board of directors, who have the power under corporate law to make decisions on behalf of the corporation and its shareholders.[44] It is important to note that directors of public corporations as a class are notoriously unrepresentative of society at large.[45] Public company

---

in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies." *Id.* at 427 (quoting Citizens United v. FEC, 558 U.S. 310, 359 (2010)).

40. Strine, *supra* note 2, at 445 (noting that "[w]hen money matters, candidates must find it to win," which creates an agenda driven by the fact that "both parties must look to moneyed interests for their political survival").

41. *Id.* at 433 ("As is well known, the Supreme Court's 2010 decision in Citizens United gave corporations the ability to influence the political process more directly, which has therefore in turn made elected officials more responsive to moneyed interests, and therefore, as a matter of logic, less responsive to less wealthy citizens.").

42. *Citizens United*, 558 U.S. at 327 (rejecting narrow holding); Eric W. Orts, *Theorizing the Firm: Organizational Ontology in the Supreme Court*, 65 DEPAUL L. REV. 559, 580 (2016) (noting the Court's broad holding).

43. *Citizens United*, 558 U.S. at 362.

44. *Id.* (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)) (The *Bellotti* opinion describes the corporate procedures as the shareholders' ability to elect the board of directors, who manage the corporation, and to sue for breaches of fiduciary duty). *Bellotti*, 435 U.S. at 794–95; *see also* Catherine A. Hardee, *Who's Causing the Harm*, 106 KY. L.J. 751 (2018).

45. A 2016 report found that over 85% of Fortune 500 company directors are white, while fewer than 8% are African American and 3.5% are Hispanic/Latinx. Women make up only 20% of boards. ALL. FOR BD. DIVERSITY, MISSING PIECES REPORT: THE 2016 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 13 (2016), https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/board-diversity-census-missing-pieces.html?id=us:2el:3dp:adbcenpr16:awa:ccg:020617 [https://perma.cc/LL4B-7N8L]; *see also* Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379 (2014) (providing statistics on the lack of diversity on corporate boards).

shareholders—the more representative body of the corporation—have little to no influence over corporate decisions.[46]

As the Chief Justice of the Delaware Supreme Court has noted, Delaware law "requires corporate directors to manage the corporation in the best interests of the corporation's stockholders."[47] The only goal that all shareholders of a corporation can be certain to share is the desire for corporate profit.[48] Profit maximization suggests that corporations "will focus any involvement in the political process on electing candidates who will support public policies favorable to corporate interests," including fewer regulations, or regulations that benefit their industry or company, and lower taxes.[49] Focusing primarily on shareholder profits, however, may not align with many, or even most, shareholders' overall values. Unlike corporations, humans have a wide variety of interests, which manifest themselves in virtually infinite sets of preferences.[50] However, this does not mean that directors may never consider other interests. Directors still have broad discretion under the business judgment rule to support environmental, labor, or social issues so long as such support is couched in a belief that it is in the long-term interest of the company.[51]

The evidence regarding the impact of the *Citizens United* decision is mixed. Some argue that the decision may not have actually led to an increase in political expenditures made directly by public corporations.[52] Others have pointed out that there were undoubtedly massive increases in spending after the decision and that much of that spending was "dark money," i.e., money that cannot be traced to its source.[53] Much of this dark money "was funneled through trade associations like the U.S. Chamber of Commerce," leading to a "deep suspicion that much of this

---

46. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1037 (1998) (describing how shareholder votes are structurally designed to largely favor management); Strine, *supra* note 2, at 443–44 (noting that most shareholders own stock through intermediaries such as mutual or pension funds and therefore do not have the right to vote or to sell their stocks).

47. Strine, *supra* note 2, at 440.

48. Greenwood, *supra* note 46, at 1049 ("While real people must balance competing interests . . . corporations . . . just maximize shareholder value."); Strine & Walter, *supra* note 4, at 347.

49. Strine, *supra* note 2, at 441.

50. *See* Greenwood, *supra* note 46, at 998 (noting that "important and widely shared values conflict or are self-contradictory" and citizens are faced with balancing different sets of values that might conflict with corporate profits).

51. Strine & Walter, *supra* note 4, at 347.

52. Alschuler, *supra* note 39, at 418 (arguing that there is little evidence that large corporations made more independent expenditures on behalf of candidates after *Citizens United*).

53. CIARA TORRES-SPELLISCY, CORPORATE CITIZEN? AN ARGUMENT FOR THE SEPARATION OF CORPORATION AND STATE 14 (2016).

dark money came from corporations exercising their new *Citizens United* rights to spend."[54] We may never know how big of a part direct corporate spending has played in the massive increases in election spending and increasing influence by wealthy donors, including business leaders.[55] In addition, the Court's reasoning was used to strike down other campaign finance restrictions, most notably by the D.C. Circuit Court of Appeals in *SpeechNow.org v. FEC*,[56] invalidating contribution limits to Super PACs, and later by the Court in *McCutcheon v. FEC*[57] to do away with the aggregate limits on contributions to candidates or PACs.[58]

Regardless of its origins, money undoubtedly influences the political system. Business leaders report that they believe that the campaign finance system is "pay-to-play."[59] There is evidence that business leaders and the corporations they run are pressured to donate to politicians to avoid unfavorable political action against the company's interests.[60] The pressure to donate to ensure business interests are protected helps to explain why business groups, individual corporations, and their executives donate to both major political parties in large amounts.[61] The effect of such spending ensures that both political parties are responsive to corporate interests.

---

54. *Id.*; *see also id.* at 14–15 (describing inadvertent disclosures of corporate spending via lawsuits and bankruptcy filings that confirm that at least some of this dark money originated from corporations).

55. *Id.* (describing exponential increases in election spending after *Citizens United*, but noting that direct contributions to campaigns from large public corporations did not increase); Strine, *supra* note 2, at 437 (noting that not all the increase is spending comes from corporations, but that the increase in spending is linked to corporate influence).

56. 599 F.3d 686 (D.C. Cir. 2010) (en banc).

57. 572 U.S. __, 134 S. Ct. 1434 (2014).

58. *See* Alschuler, *supra* note 39, at 393 ("A super PAC is a political action committee that does not contribute to the official campaigns of candidates for office but instead prepares and places its own advertisements supporting candidates and/or disparaging their opponents."). Professor Alschuler describes how *Citizens United* was used by the D.C. Circuit in *SpeechNow.org v. FEC* to strike down any limits on donations to super PACs. *Id.*; *see also* Strine, *supra* note 2, at 437–38.

59. *See* Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783, 1816 (2015) ("A 2013 poll of 302 business leaders by the non-partisan Committee for Economic Development found that seventy-five percent of respondents reported that the U.S. campaign finance system is 'pay-to-play,' and sixty-four percent believe it is a serious problem.").

60. *See id.* at 1817–18 (describing the unwilling donor and pressure put on business executives by legislators).

61. *Id.* at 1814 (noting that individuals and PACs donate to both parties in large amounts).

The increase in campaign spending leaves the poor with less influence in the political process. The cost of elections has gone up dramatically.[62] As a natural corollary, the cost of access to politicians has risen as well.[63] For example, one study unambiguously demonstrated that elected representatives and their senior staffers are willing to meet "considerably more frequently" with donors than non-donor constituents.[64] This result is not surprising as politicians are forced to spend increasing amounts of time raising campaign funds.[65] The need to fundraise means that politicians on both sides of the aisle must be responsive to moneyed interests in crafting their agendas.[66]

2. *Religious Exemptions*

Corporate influence over the political process is exacerbated by allowing corporations religious exemptions to neutrally applicable laws and regulations that survive the democratic process. The ability of corporations to claim exemptions to the law based on the religious beliefs of corporate owners provides an avenue to erode democratically enacted protections.[67] It is especially worrisome because the religious exemptions claimed by corporations thus far are broader than traditional religious claims. These claims generally involve "religious objections to being made complicit in the assertedly sinful conduct of others."[68] Such

---

62. *See* Alschuler, *supra* note 39, at 418 (describing the "stunning increase" in spending following *Citizens United* and *SpeechNow*, with spending on elections nearly tripling in the elections immediately following the cases).

63. *See, e.g.*, Editorial, *The Soaring Price of Political Access*, N.Y. TIMES (Sept. 26, 2015), https://www.nytimes.com/2015/09/27/opinion/sunday/the-soaring-price-of-political-access.html [https://perma.cc/KF97-EPP3] (reporting that both parties planned to increase tenfold the cost of exclusive dinners with candidates and party leaders, with Republicans charging $1.34 million per couple, and Democrats charging $1.6 million).

64. Mueller, *supra* note 59, at 1816–17 (describing study).

65. *See* Ezra Klein, *The Most Depressing Graphic for Members of Congress*, WASH. POST (Jan. 14, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/14/the-most-depressing-graphic-for-members-of-congress/?utm_term=.302bb0f829a9 [https://perma.cc/XB5H-ZUXZ] (discussing a leaked Democratic Congressional Campaign Committee document that suggests spending four hours a day on fundraising calls and additional time on "constituent visits" and "strategic outreach," which also likely includes time with donors).

66. Strine, *supra* note 2, at 445; TORRES-SPELLISCY, *supra* note 53, at 59 (describing the phenomenon of corporate donors making donations to both parties to insure influence); *id.* at 61–62 (quoting candidates and others discussing the influence of money on political agendas).

67. *See* Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 303, 305 (2014) [hereinafter Sepper, *Contraception*] (noting that giving secular corporations the same exemptions as religious organizations risks eroding "gender equality and religious freedom in all workplaces").

68. NeJaime & Siegel, *supra* note 15, at 2519.

"complicity-based conscience claims" do not involve actions by the corporation but rather focus on a third party's conduct and the claimant's belief that the lawful conduct of that third party is sinful.[69] In *Hobby Lobby*, petitioners' claim was not that they were required to use certain contraception. Instead they objected to paying for insurance that some employees, in connection with their doctors, might utilize to purchase forms of contraception that petitioners believed were sinful.[70] Similarly, in *Masterpiece Cakeshop*, petitioner argued that decorating a cake for a gay wedding makes him complicit in what he views as a sinful marriage.[71]

Complicity-based religious claims have the potential to cause great harm to third parties.[72] In the employment context, these claims require an employee to make a particular decision with which the corporate employer disagrees, thus they necessarily involve subordinating the employee's right "to make his or her own moral decisions."[73] As such, the ability for corporations to raise complicity-based claims has the potential to put much more of employees' lives under the influence of their employers.[74] When the believed sinful conduct is engaged in by members of the public, the burden of the corporation's exemption falls on that group. When large numbers of exemptions are claimed alleging sinful behavior by a discrete group, "accommodating the claim has the distinctive power to stigmatize and demean third parties."[75]

---

69. *See id.*; Sepinwall, *supra* note 15, at 1905.

70. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2778 (2014).

71. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. __, 138 S. Ct. 1719, 1724 (2018).

72. *See* NeJaime & Siegel, *supra* note 15, at 2527 ("Complicity-based conscience claims are oriented toward third parties who do not share the claimant's beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn."); Sepinwall, *supra* note 15, at 1973 (arguing that complicity claims' potential for third party harms means courts should focus on balancing third party costs rather than the scope of complicity).

73. Sepper, *Contraception*, *supra* note 67, at 337.

74. There is historical precedent for massive intrusion on employees' personal lives based on the employer's desire to cabin the sins of employees. *See* Strine, *supra* note 4, at 79 (describing how employers in the late nineteenth century mandated church attendance and dictated moral standards to employees, including how to maintain their appearance and how to spend their wages). More recent examples include unsuccessful efforts by corporations to avoid anti-discrimination laws on religious grounds in order to force employees to attend trainings that teach that "women's place is in the home" and to discriminate against non-Christians, gays, and "women working without the consent of their fathers or husbands." Sepper, *supra* note 2, at 1515–16.

75. NeJaime & Siegel, *supra* note 15, at 2566; *see Masterpiece Cakeshop*, 138 S. Ct. at 1727 (recognizing that widespread refusal to serve gay couples would "result[] in a community-wide stigma inconsistent with the history and dynamics of civil rights laws").

Religious exemptions by corporations have thus far largely come at the expense of the reproductive and privacy rights of female employees and are particularly burdensome on low-income employees.[76] Religious exemptions by corporations are not necessarily limited to women's reproductive issues, however. In *Masterpiece Cakeshop*, the Court left open the possibility that corporations serving the public may have a Free Exercise right to thwart anti-discrimination public accommodation laws, with three Justices strongly signaling they would favor such an exemption.[77]

Even if limited to the statutory exemptions under RFRA in *Hobby Lobby*, religious exemptions by corporations have the potential to undermine regulatory efforts across the board as settled legal questions about the ability of the law to regulate the employer–employee relationship are thrown into doubt.[78] In *Hobby Lobby*, the majority dismissed these potential harms to employees by noting that the government could achieve the goal of universal contraceptive coverage by simply utilizing a workaround or by providing coverage as a government benefit.[79] The majority noted that the statute already contains such a workaround for religious nonprofit employers, requiring insurance companies to provide contraceptive coverage to employees of objecting religious nonprofits free of charge.[80] In his concurrence, Justice Kennedy relied heavily on the availability of this workaround as a less restrictive means of accomplishing the mandate's goals.[81]

---

76. The contraceptive mandate in the Affordable Care Act was designed to ensure access to contraceptive care for poor and low-income women by removing the cost barrier, including co-pays. *See* Evelyn M. Tenenbaum, *The Union of Contraceptive Services and the Affordable Care Act Gives Birth to First Amendment Concerns*, 23 ALB. L.J. SCI. & TECH. 539, 540–44 (2013) (summarizing evidence in favor of contraceptive mandate). Contraceptive coverage provides myriad health benefits to women, including avoiding unintended pregnancies and ensuring healthier intended pregnancies. *See id.* at 541–42; Seema Mohapatra, *Time to Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 179 (2015); Sepper, *Contraception*, *supra* note 67, at 336.

77. *See Masterpiece Cakeshop*, 138 S. Ct. at 1734–40 (Gorsuch, J., joined by Alito, J., concurring); *id.* at 1740–48 (Thomas, J., joined by Gorsuch, J., concurring).

78. *See* Sepper, *supra* note 2, at 1513 (noting that enjoining the contraceptive mandate injects a "formalist view of employment relations into religious liberty doctrine [that] calls into question the regulation of employers").

79. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2781–82 (2014). At oral argument for *Masterpiece Cakeshop*, several Justices appeared to embrace a similar argument that there is no harm from businesses discriminating against the LGBTQ community so long as they can buy the same item from a different establishment. Transcript of Oral Argument at 62–64, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111).

80. *Hobby Lobby*, 134 S. Ct. at 2782–83.

81. *Id.* at 2787.

Even if the harm from religious exemptions could be ameliorated by direct government provisions of benefits or through exemptions to the regulatory framework, these are frequently not a practical option. Government-provided health insurance has thus far proven politically impossible and a separate program to provide government-funded contraceptive coverage to all women seems even less likely. In addition, exemptions make general regulations more expensive to administer and implement, making regulations less likely to be adopted.[82]

That may, in fact, be the larger goal of advocates for complicity-based conscience claims. Unlike traditional exemptions claimed by religious minorities seeking to engage in religious practices disfavored by the majority, these claims are "asserted in society-wide conflicts by mobilized groups and individuals acting in coalitions that reach across religious denominational lines and in coordination with a political party."[83] This coalition includes two major religious groups—Catholics and Evangelical Protestants—who have joined together with the Republican Party since the late 1970s in an attempt to reestablish laws relating to traditional moral views on sexuality, abortion, and contraception.[84] When the legislative process fails to provide an avenue to "chang[e] the sexual mores of the wider community . . . [s]eeking an exemption to avoid complicity in the sins of others can serve the same end."[85] Accommodating such claims allows claimants to preserve prior legal restrictions on the "sinful" activities of disfavored groups by recharacterizing the private policing of such behavior as necessary to support religious pluralism.[86]

The financial power of corporations who could claim exemptions should not be underestimated. The Court in *Hobby Lobby* does not define "closely held corporation,"[87] but the corporations in the case demonstrate

---

82. *See* Strine, *supra* note 2, at 458–59 (noting that "carve-outs and work-arounds" increase costs and lessen accountability and efficiency of government programs).

83. NeJaime & Siegel, *supra* note 15, at 2542–43.

84. *See id.* at 2544–52 (detailing decades-long campaign organized by religious groups in connection with the Republican party).

85. *Id.* at 2552.

86. Professors Nejaime and Siegel refer to this process as "preservation through transformation." *Id.* at 2553 ("Accommodating complicity-based conscience claims in these circumstances may function to enable 'preservation through transformation': when an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that preserve elements of the challenged regime.").

87. Indeed, there is no single definition of closely held corporation. *See* Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 149, 163–64 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) [hereinafter Pollman, *Corporate Law*] (noting that there is no single definition for the term in corporate law and the U.S. Supreme Court utilized a "general understanding" of the term).

that the label does not limit the holding to "small businesses."[88] Any corporation whose controlling shareholders agree to run the corporation according to the same religious tenets may be able to claim an exemption.[89] The most likely types of corporations to fit this bill are family-controlled corporations, like Hobby Lobby. These corporations are significant drivers in our economy.[90] More than 30% of all companies with sales in excess of one billion dollars are family-controlled enterprises.[91]

Even smaller "mom and pop" shops like Masterpiece Cakeshop—owned by a married couple—represent a powerful force. The owners of

---

88. At the time of the case, Hobby Lobby Stores, Inc. had more than 13,000 employees and Conestoga Wood Specialties Corp. employed 950 people, making neither company a "small business" under the Small Business Association's definition. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2764, 2765 (2014); *see also* U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS 1 (2012) [hereinafter FAQ], https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf [https://perma.cc/BD75-LXUU] (defining a small business as any business having fewer than 500 employees). Mardel employed almost 400 people at the time of the case, making it the only "small business" involved. *Hobby Lobby*, 134 S. Ct. at 2765.

89. There is no definition of closely held corporations in either the opinion or in the law, but the Court found that the corporations at issue qualified for the mandate because they were "owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2774. This suggests that to qualify for an exemption, a corporation's shareholders must have the same sincerely held religious beliefs. *See* Jennifer S. Taub, *Is* Hobby Lobby *A Tool for Limiting Corporate Constitutional Rights?*, 30 CONST. COMMENT. 403, 426–27 (2015).

90. *See* Hardee, *supra* note 44, at 755–57 (describing economic impact of small and family-run businesses).

91. Nicolas Kachaner, George Stalk, Jr. & Alain Block, *What You Can Learn from Family Business*, HARV. BUS. REV., Nov. 2012, at 103, 103. The Court in *Hobby Lobby* refused to exclude the possibility of an exemption for publicly held corporations, merely noting that such corporations are unlikely to claim exemptions for "practical" reasons—namely that unrelated shareholders would be unlikely to agree to it. *Hobby Lobby*, 134 S. Ct. at 2774. It is perhaps not so unlikely though. One third of S&P 500 companies have some level of family control. Claudio Fernández-Aráoz, Sonny Iqbal & Jörg Ritter, *Leadership Lessons from Great Family Businesses*, HARV. BUS. REV., Apr. 2015, at 83, 84. For example, Tyson Foods was founded by a devout Christian whose grandson is now the CEO. The company is a public company, but the family's religious influence can be seen in the company providing 120 chaplains to minister to employees and donating 25,000 booklets that "guide families through the process of saying grace at the dinner table." Justin Rohrlich, *Religious CEOs: Tyson Foods' John Tyson*, MINYANVILLE (May 19, 2010), http://www.minyanville.com/special-features/articles/john-tyson-christian-church-chaplain-methodist/5/19/2010/id/28276 [https://perma.cc/99U6-9KF4]. The Court left open whether unanimity is required among *voting* shareholders, but the fact that the Court did not even reference Hobby Lobby's nonvoting shareholders suggests that a public corporation with significant nonvoting stock could still qualify. Going public with few voting shareholders and large swaths of nonvoting shareholders has been a practice for family businesses and is growing in popularity with other companies. *See* Keith Griffith, *Viacom and 27 Other Stocks That Come with Restricted Voting Rights*, THESTREET (June 23, 2016, 10:55 AM), https://www.thestreet.com/story/13612197/1/viacom-and-27-other-stocks-that-come-with-restricted-voting-rights.html [https://perma.cc/3Q2L-62UP].

Masterpiece Cakeshop have been portrayed by some as powerless victims, and it is true that they have fewer resources than the families who own the multi-million dollar corporations in *Hobby Lobby*.[92] However, even the individual owners of small businesses are in a position of power over their employees, and when taken collectively, they employ nearly half of America's workforce.[93] This has the potential to give a more economically elite class the ability to regulate the sexual choices of a large percentage of Americans, even when the democratic process has determined that such choices are protected.[94] Representing nearly 43% of private sector output, small businesses likewise provide a significant portion of public goods and services.[95] Collective action by even a small percentage of such businesses can impose significant economic and dignitary harm on those engaged in protected behavior that is deemed "sinful" by business owners.[96] By giving corporations the power to police the "sinful" behavior of their employees and third parties, the Roberts Court is again, on balance, taking the side of the more economically powerful party.

Although *Hobby Lobby* and *Citizens United* each create corporate rights, the former differs from the campaign finance decisions in that it gives the power to claim an exemption to the shareholders rather than the board of directors.[97] The effect of both cases is the same: they concentrate

---

92. *See, e.g.*, James Gottry, *Bakers Should Be Allowed to Have Their Cake—and Their Freedom*, HILL (Oct. 13, 2017, 2:20 PM), http://thehill.com/opinion/civil-rights/355341-bakers-should-be-allowed-to-have-their-cake-and-their-freedom [https://perma.cc/9NGP-3AN9] (giving sympathetic profile of Jack Phillips and noting the loss to his business); George F. Will, *A Cake Is Food, Not Speech. But Why Bully the Baker?*, WASH. POST (Dec. 1, 2017), https://www.washingtonpost.com/opinions/a-cake-is-food-not-speech-but-why-bully-the-baker/2017/12/01/7e05773c-d5f0-11e7-b62d-d9345ced896d_story.html?utm_term=.14417909e547 [https://perma.cc/FE6P-F8NH] (arguing that it was "nasty" for the gay couple to "sic[] the government" on Phillips and noting that Phillips has lost 40% of his business because he stopped making wedding cakes to comply with the law).

93. *See* FAQ, *supra* note 88, at 1; Hardee, *supra* note 44, at 755–57 (describing economic power of small businesses).

94. *See* NeJaime & Siegel, *supra* note 15, at 2556 (arguing that "conscience provisions allow advocates to rework a traditional norm that was once enforced through the criminal law into a norm that is now enforced through a web of exemptions in the civil law").

95. *See* FAQ, *supra* note 88, at 1 (42.9%).

96. *See* NeJaime & Siegel, *supra* note 15, at 2566 ("When a religious claim objecting to others' sinful conduct is based on a traditional norm that is reiterated by a mass movement over time and across social domains, accommodating the claim has the distinctive power to stigmatize and demean third parties."). This is especially true when corporations in a geographic area band together to target a disfavored group. *See id.*

97. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2768 (2014) ("[P]rotecting 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."). *See* Hardee, *supra* note 44, at 770–78 (arguing Court has created an aggregate utility theory of the corporation by which

the ability to wield corporate power in the most elite hands—the owners of a closely held corporation and the management of a public corporation.

This concentration of corporate power in the hands of the few stands in stark contrast to the Court's treatment of labor unions.[98] The Court in *Citizens United* allows management to use shareholder funds to speak on behalf of the corporation regardless of individual shareholder agreement. With respect to labor unions, the Roberts Court has only strengthened the ability of employees to withhold funds from unions that bargain on their behalf.[99] While discussed in terms of protecting employee speech rights, the effect is to disperse power to each individual employee or member, leaving the union as an entity weaker. In other words, corporations may draw in and concentrate the rights and economic power of its constituent members and wield that power through the corporate form, while labor unions are not afforded that option.

B. Corporate Social Responsibility Will Not Rebalance Power

Some scholars hope that the *Hobby Lobby* decision contains the solution to the problem of corporations utilizing the power of the corporate form to reinforce power imbalances in society.[100] In the *Hobby Lobby* opinion, the Court stated for the first time that corporate purpose is not limited to the pursuit of profit.[101] Some advocates of increased corporate social responsibility (CSR) have heralded this decision as a victory for CSR.[102] The CSR movement has long tried to encourage

---

shareholders may use the corporation to further their personal ends); Pollman, *supra* note 87, at 165–66 (describing the corporation as a tool to be used by the shareholders to exercise their ends). This distinction is critical in the veil piercing analysis. *See infra* Section III.B.1.

98. *See* Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After* Citizens United, 112 COLUM. L. REV. 800, 819–27 (2012) (describing differences between treatment of corporate and union expenditures); Strine, *supra* note 2, at 450–53.

99. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 585 U.S. __, 138 S. Ct. 2448, 2459 (2018); Strine, *supra* note 2, at 452 (noting that "the Roberts Court ha[s], if anything, widened the gap [between corporations and labor unions] and made it more difficult for unions to exercise voice").

100. *See, e.g.*, McDonnell, *supra* note 37, at 804 (praising *Hobby Lobby* as "a ringing endorsement of the stakeholder conception of the corporation that many liberals and progressives prefer"); Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 22 (2014) (calling the *Hobby Lobby* opinion "a landmark in corporate law" that furthers the CSR movement).

101. *Hobby Lobby*, 134 S. Ct. at 2770–71 ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.").

102. *See* McDonnell, *supra* note 37, at 804. Even among supporters, there is some criticism of the case on CSR grounds, as the opinion still requires that shareholders approve of the social purpose of the corporation rather than a stronger version of the stakeholder model, which would allow management to consider non-shareholders without shareholder approval. *Id.* at 804–05.

corporations to exceed the minimum standards owed to non-shareholder corporate stakeholders, including employees, the environment, and society as a whole.[103]

Advocates of CSR are frequently critiqued by conservative corporate scholars who argue that shareholders are the only corporate constituency with the power to hold management accountable, and thus, the only group to whom the board of directors owe fiduciary duties.[104] Because the only common interest among all shareholders is a desire for profit, they argue that is the only appropriate goal for the corporation.[105] This requirement that corporate purpose be limited to the pursuit of profits is commonly referred to as the shareholder profit maximization theory.[106]

Even conservative corporate scholars agree, however, that if management believes that exceeding regulatory standards, promoting labor's interests, or donating to social causes will be in the best interest of the corporation and its shareholders in the long term, management is free to enact such policies.[107] Management has broad discretion under the business judgment rule to make such determinations, with courts very rarely finding liability for socially conscious acts by corporations or even large charitable donations made by corporations.[108] Management need only couch their discretion to do so in terms that prioritize shareholders' common interest in profiting from their investment in the corporation.[109]

---

103. *See* Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605 (2001) (providing an excellent history of CSR movement through the modern governance movement); Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187, 1192 (2017) (providing definitions of CSR).

104. Strine & Walter, *supra* note 4, at 346–47 (summarizing conservative corporate law theory and discussing scholars who favor it).

105. *Id.* at 351–52.

106. *Id.* at 347 ("Put simply, conservative corporate theory embraces the notion that seeking profit for the stockholders is the only proper end.").

107. *See* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 273 (1992) (noting that the differences between CSR and profit maximization can be largely "papered over" because of the broad latitude given to management to determine what is best for the long term interests of the company); Strine & Walter, *supra* note 4, at 347 ("Under this theory, that does not mean that corporate managers cannot consider other constituencies and interests affected by the corporation's conduct—such as employees, customers, communities in which it operates, and society generally—but it does mean that they can only do so when that is instrumental to profit generation.").

108. Management's discretion is so broad that the claim for corporate waste is often referred to as a "theoretical exception" to the business judgment rule. Large corporate donations have been sanctioned by the courts. *See* Kahn v. Sullivan, 594 A.2d 48 (Del. 1991) (approving a donation valued at over $140 million).

109. Take for example, Marriott's decision to remove pay-per-view pornography from its hotel rooms. The Marriott company was founded by a devout Mormon and the company has been

Thus the shareholder profit maximization theory is not incompatible with corporations engaging in the activities that CSR advocates.[110]

While the Court in *Hobby Lobby* explicitly rejects the premise that corporations must be driven by profit motives alone, at least with respect to some corporations, it is a mistake to read the decision as supporting CSR. Religious exemptions do not involve shareholders exceeding the minimum requirements of the law to further the interests of other corporate stakeholders. Instead they permit shareholders to provide *less* for other corporate stakeholders and the general public than the law requires from their competitors in order to further the shareholders' own personal religious interests.[111] The *Hobby Lobby* decision demonstrates this: the shareholder families involved took away their employees' statutory right to contraceptive coverage in order to further the family members' own religious interests.[112]

---

influenced by the Marriott family's religious beliefs. *See* Kim Bhasin & Melanie Hicken, *17 Big Companies That Are Intensely Religious*, BUS. INSIDER (Jan. 19, 2012, 11:29 AM), http://www.businessinsider.com/17-big-companies-that-are-intensely-religious-2012-1#alaska-air-7 [https://perma.cc/NVP9-LZT9]. Two members of the Marriott family sit on the board of directors, including the founder's son who is the chairman of the board. *See Board of Directors*, MARRIOTT, https://marriott.gcs-web.com/board-of-directors [https://perma.cc/6NR2-79SW]. J.W. Marriott, Jr. was the CEO and Mitt Romney was serving on the Board of Directors when the decision to stop selling pornography was made and, while that decision was likely in line with the religious beliefs of the company's leadership, it was justified on economic grounds. *See* Elia Gourgouris, *Marriott Hotels to Drop Pornographic Videos*, DESERET NEWS (Feb. 1, 2011, 6:00 AM), https://www.deseretnews.com/article/705365621/Marriott-hotels-to-drop-pornographic-videos.html [https://perma.cc/NE7E-L37T] (praising the decision for its religious outcome but not the corporation's economic justification); Yitz Jordan, *How Marriott's Owner Put Aside His Mormon Beliefs to Cash in on the LGBT Travel Market*, QUARTZ (June 5, 2014), https://qz.com/216328/how-marriots-owner-put-aside-his-mormon-beliefs-to-cash-in-on-the-lgbt-travel-market/ [https://perma.cc/72MZ-69E5].

110. For example, the connection between social causes and the bottom line can be seen in the history of Subaru's marketing to, and financial support for, the LGBTQ movement. *See* Alex Mayyasi, *How Subarus Came to be Seen as Cars for Lesbians*, ATLANTIC (June 22, 2016), https://www.theatlantic.com/business/archive/2016/06/how-subarus-came-to-be-seen-as-cars-for-lesbians/488042/ [https://perma.cc/7QXE-LJM7] (describing Subaru's marketing campaign to lesbians and their financial support for LGBTQ causes). Likewise, Google has made massive investments in renewable energy on the grounds that it is both a socially responsible choice and one that provides the company with a financial advantage, both in terms of public relations and new market generation.

111. *See* Mohapatra, *supra* note 76, at 180; Pollman, *supra* note 87, at 170 ("Whereas the pursuit of corporate social responsibility often entails questions of whether the board of directors can put nonshareholder interests ahead of those of shareholders in order to surpass legal compliance, the pursuit of religious accommodation asks the law to bend around the shareholders' will to avoid generally applicable laws.").

112. *See* Matthew T. Bodie, *Faith and the Firm*, 60 ST. LOUIS U. L.J. 609, 619 (2016) ("Rather than simply an accommodation of one sincere religious belief, the case came across as one (powerful) group trying to impose its religious beliefs on another (less powerful) group. As this played out in the

Essentially, the decision retains the shareholders' right to be self-interested but gives them even more leeway to use the benefits of the corporate form to further non-monetary self-interested pursuits, such as exercising their personal religious beliefs.[113] These self-interested pursuits are not inherently bad; in fact, they can be seen as seeking to advance a social good—e.g., protecting the sanctity of marriage, preserving fetal life, promoting religious practices. These are certainly issues of public import that some socially conscious corporations have sought to advance.[114] In a culture that values religious freedom and encourages a multitude of viewpoints, such corporate activism should not be discounted simply because it contradicts many liberal scholars' personal political views.[115]

CSR differs from religious exemptions, however, because with CSR the corporation is necessarily furthering a social good that is not in conflict with the law.[116] Corporations are not permitted to substitute their judgment about what is best for society by violating the law to further what they believe to be a more important social end.[117] In contrast, the

---

Hobby Lobby case, the five members of the Green family used their religious beliefs to defeat a regulatory obligation to the 13,000-plus employees at the company.").

113. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2768 (2014) (describing RFRA as providing protection for the individuals to exercise their personal beliefs). In the future such exemptions could be expanded to include pursuit of personal artistic expression. Justice Thomas, joined by Justice Gorsuch, argued in his concurrence in *Masterpiece Cakeshop* that Colorado's public accommodations law as applied to the petitioner violated his right to free exercise and free speech. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. __, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring).

114. *See* Rohrlich, *supra* note 91. The fast food corporation Chick-fil-A discovered that engaging in CSR can be problematic when the restaurant chain came under fire for donating to organizations that opposed same-sex marriage. While the company has backed away from such politically charged topics, the company has retained its corporate purpose "[t]o glorify God by being a faithful steward of all that is entrusted to us and to have a positive influence on all who come into contact with Chick-fil-A" and still closes its stores on Sundays. Hayley Peterson, *'Chick-fil-A Is About Food': How National Ambitions Led the Chain to Shed Its Polarizing Image*, BUS. INSIDER (Aug. 6, 2017, 7:42 AM), http://www.businessinsider.com/chick-fil-a-reinvents-itself-liberal-conservative-2017-5 [https://perma.cc/MHN3-VPWE].

115. *See* McDonnell, *supra* note 37, at 811–12 (arguing that liberals should embrace core values of liberty and diversity, including protecting the viewpoints of conservative Christians).

116. *See* Wade, *supra* note 103, at 1189 ("While law compliance is mandated, the quality of that compliance is within corporate officers' discretion.").

117. If allowing corporations to substitute their moral judgment for that of society falls within the ambit of CSR, the Trump Administration's rule allowing any company with a religious or moral objection to contraception to avoid the requirements of the Affordable Care Act would be a major victory for CSR. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) (allowing any corporate entity to claim an exemption from the contraceptive mandate on religious grounds); Moral Exemptions and

Court in *Hobby Lobby* did not view the exemption as furthering a public good. The Court specifically premised the exemption on the shareholders' right to exercise their *personal* religion, not on the desired good for society that their exercise of religion would create.[118] Rather than furthering the ability of corporations to advance the interests of other stakeholders, the formal recognition by the Court that shareholders may pursue non-profit-related purposes merely opened the door to claims that the corporate form can be used to advance the shareholders' interest *at the expense of other stakeholders*.[119]

Critics of non-mandatory CSR argue that the fatal flaw in the concept of corporations voluntarily putting other stakeholder interests over those of shareholders is that it actually expands the power of management.[120] In practice, allowing management to consider corporate purposes other than shareholder profit simply frees management from its accountability to the only group within the corporation with power over them, namely the shareholders.[121] By embracing an expansive view of corporate purpose to allow for religious exemptions by shareholders, the Court exacerbates this flaw by removing the most powerful check on corporate authority *outside* the corporation—regulation by the democratic process.[122]

Under the conservative theory of the corporation, for-profit corporations are required to "stick to trying to make money within the

---

Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) (allowing small businesses to claim religious or moral exemptions to the contraceptive mandate).

118. *See Hobby Lobby*, 134 S. Ct. at 2768 (holding that the purpose of RFRA as it applies to corporations is to protect the shareholder's sincere religious beliefs).

119. *See id.* at 2770–71 (rejecting profit motive as the sole corporate purpose to justify the use of the corporation to further shareholders' religious beliefs); Johnson & Millon, *supra* note 100, at 22 (noting that allowing non-financial corporate purposes "was essential to the conclusion in *Hobby Lobby* that business corporations can exercise religion").

120. Mandatory CSR does not necessarily suffer from this flaw if other stakeholders are given a seat at the table. For example, Germany's two-tiered boards give labor a say in corporate management. *See infra* note 211.

121. *See* A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) ("Now I submit that you cannot abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else."); Strine & Walter, *supra* note 4, at 353 (describing concerns that "corporations would be dangerously unaccountable if the managers were given broad discretion to pursue diverse ends").

122. *See* Strine & Walter, *supra* note 4, at 356 (noting that corporate law "looks to the political process as the legitimate and sound form of protection" for dealing with negative externalities); *infra* Section II.A.

'rules of the game' set by the government."[123] Rather than changing that paradigm to advance interests of stakeholders outside of the corporate structure, corporate rights upset the balance established by flexibility for private ordering within the corporation tempered by governmental regulation of the corporation to limit negative externalities.[124] The net effect of corporate rights is not just to give corporations heightened ability to influence what rules the government creates, but also to allow certain shareholders to disregard the rules of the game to further their own interests. This gives corporate elites—management who control public corporations and the managing shareholders who control private corporations—unprecedented power to wield using the corporate form.

II. STATE LAW AND CORPORATE CONSTITUTIONAL RIGHTS

The inability to curb the power of corporations through external regulations is problematic for the balance of power developed over time between states and corporations. This balance has evolved to provide corporations great freedom within state corporate law to structure the internal governance of the corporation, tempered by laws regulating the negative externalities made possible by the corporate form. The Court has upset that balance not just by the granting of corporate rights that provide an avenue to sidestep certain regulatory efforts but also by placing pressure on state corporate law to flesh out those rights. The matter is complicated by the controversial understandings of state corporate law, both explicit and implicit, in the Court's opinions, leading to an open question: how much do states retain of their traditional power to define corporations? This Section argues that states should cautiously test their power by pushing back against the creeping federalization of state corporate law.

A. State Law Defines a Corporation

Corporations are creatures of state law.[125] Although the federal government has the power to charter corporations and create a body of federal corporate law, it has largely elected not to do so.[126] Instead, states

123. Strine & Walter, *supra* note 4, at 358.

124. *See infra* Section II.A.

125. 1 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2.50 (rev. vol. 2015) [hereinafter FLETCHER CYC.] ("Modern corporations are creatures of statute, deriving their existence and authority to act from the state.").

126. Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 915–16 (1982) (describing efforts at

create corporations by granting them charters under the law of the state of incorporation.[127] State corporate law, in turn, defines the corporations chartered by the state, including defining the purpose of the corporation, the rules that must be followed in governing the corporation, and which rules the parties may alter by contract.[128] With the grant of a corporate charter, the corporation receives a panoply of benefits that come with the corporate form, including perpetual life, limited liability for shareholders, the right to hold and transfer property, the right to sue and contract in the corporation's name, and the ability to aggregate and lock capital into the corporation.[129] The principle underpinning most of these benefits is the legal separation between the corporation and the humans associated with it.[130]

Placing the power to create and define the governing law for corporations in the hands of the states naturally results in competition between the states for corporate charters and their resulting tax revenue. Corporations are free to incorporate in any state or reincorporate in a different state if they determine that another state's corporate law is more beneficial.[131] The internal affairs doctrine provides that for issues relating to the internal governance of the corporation, the law of the state of incorporation governs.[132] Thus, unlike the residency of a human being, choosing a state of citizenship does not require corporations to "live" in any sense in the state whose law they choose, making concerns about

---

federalization, but no result); Pollman, *supra* note 3, at 646. The federal government has been actively involved in securities regulation, which is largely focused on investor protection rather than corporate governance, with some limited exceptions. *See* Pollman, *supra* note 3, at 653–54.

127. *See* Pollman, *supra* note 3, at 644.

128. *See id.* at 650–51.

129. *See id.* at 645; Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PENN. J. CONST. L. 215, 230 (2009) (describing the benefits of the corporate form that unincorporated entities lack).

130. *See* Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 887 ("A business corporation is *not* simply 'individual men and women': it is a distinct entity that is separate from its stockholders, managers, and creditors."); Pollman, *supra* note 3, at 645 ("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.").

131. *See* Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 966 (1995).

132. Crespi, *supra* note 30, at 96. Whether the internal affairs doctrine is merely a matter of comity or is constitutionally mandated is a matter of debate, as is the breadth of what should be considered an internal governance matter. *See infra* Section III.C.1.

quality of life or regulatory burdens outside of corporate governance largely irrelevant.[133]

This mobility gives corporations a strong hand to play in terms of encouraging states to create corporate law that is responsive to business interests. A vigorous academic debate has long raged as to whether this competition leads to a "race to the top" or a "race to the bottom" among the states.[134] Proponents of the "race to the bottom" characterization argue that because the real power of a corporation lies with management, competition leads to state corporate law favoring managers at the expense of shareholder control.[135] Critics of this view argue that, in fact, competition between states gives investors more options and the rational investor will choose to invest in corporations that are chartered in a state whose law will allow for the maximization of their investment.[136] Thus, "permissive corporation law maximizes, rather than minimizes, shareholders' welfare" and state competition leads to a race to the top rather than the bottom.[137] Notably, for purposes of this Article, both theories focus on whether competition creates the best, or worst, relationship between management and shareholders. Questions of whether state corporate law provides the best protection for parties outside the corporate governance structure are largely disregarded when debating state corporate law.[138]

---

133. *See* FLETCHER CYC., *supra* note 127, § 114 ("The domicile or place of creation and existence of a foreign corporation is the state of incorporation, although its principal place of business may be in the foreign state or states.").

134. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Fischel, *supra* note 126. *But see generally* Kaouris, *supra* note 131 (arguing the "race" is not really among the states but rather between the states and the threat of federal government intervention).

135. *See, e.g.*, Cary, *supra* note 134, at 666 (arguing that competition for charters and the resulting "modernization" of corporate law has "watered the rights of shareholders vis-à-vis management down to a thin gruel").

136. *See* Fischel, *supra* note 126, at 919.

137. *Id.* at 919–20. The benefits to the corporation are not illusory—studies have shown that reincorporation in Delaware can result in a higher stock price. *See* Fischel, *supra* note 126, at 920–21; Kaouris, *supra* note 131, at 981.

138. *See* 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."); Pollman, *supra* note 3, at 651 (noting that corporate law is "focused on the relationship among shareholders and between shareholders and managers" and not "other participants, such as employees and creditors").

This was not always the case. The aggregation of power made possible by the corporate form has long engendered public concern and mistrust.[139] Initially states attempted to control the power of corporations using corporate law.[140] At the founding, corporations were available only by petition to the state legislature and required the corporation to declare a limited corporate purpose.[141] By the early 1800s, states had begun to enact general incorporation statutes that allowed for incorporation without petitioning the legislature, and they were widespread by the 1860s.[142] These statutes were not "liberal incorporation statutes" as we would think of them today; they were not available in all industries, and state legislatures retained the right "to change or revoke corporate charters at will."[143] In addition, several states still maintained restrictions on capitalization and purpose.[144] Further, during the nineteenth and early twentieth centuries, the ultra vires doctrine provided "a meaningful way to limit the power and size of corporations," by limiting "the authority of corporations to the purposes and activities named in the corporate charter."[145]

Once the first states enacted what would now be characterized as liberal incorporation statutes in the early 1900s, corporations fled to those states.[146] In reaction to the loss of tax revenue, all states eventually enacted

---

139. *See* Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635 (2011) (detailing the long history of public concerns regarding corporations and the response of the business community to improve the corporate image); Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), *in* 10 THE PAPERS OF THOMAS JEFFERSON 521–22 (J. Jefferson Looney ed., 2013) ("I hope we shall take warning from the example and crush in it's [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength, and to bid defiance to the laws of their country.").

140. *See* Pollman, *supra* note 3, at 646 (noting that "[u]ntil the late nineteenth century, state corporate law served as a constraining force on corporate behavior"); Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1244 (2017) (describing nineteenth-century methods of corporate control, including the ultra vires doctrine).

141. *See* Pollman, *supra* note 3, at 646–47; Strine & Walter, *supra* note 130, at 897 ("[C]orporations could do only what their legislatively granted charters empowered them specifically to do, acts incidental to those specific powers and nothing else.").

142. *See* Strine & Walter, *supra* note 130, at 908 (providing historical background on general incorporation statutes).

143. *Id.*

144. *See* Pollman, *supra* note 3, at 649; Strine & Walter, *supra* note 130, at 909.

145. 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. 1279, 1283 (2001) (providing a thorough history of the rise, fall, and potential reemergence of the ultra vires doctrine).

146. *See* Cary, *supra* note 134, at 663–64. New Jersey was the first to adopt a liberal corporation statute, followed by Delaware shortly thereafter. When New Jersey tightened its corporation statute at

liberal incorporation statutes,[147] allowing corporations to charter for "any lawful business or purpose whatever."[148] This move was made to give management the ability to "move freely into new business lines and out of old ones," and was not viewed as undermining the for-profit nature of the corporation.[149] Thus state corporate law evolved from a tool to cabin the negative externalities of the corporate form to a permissive framework for private ordering within the corporation.[150]

Despite the trend towards liberal incorporation, states have not ignored the potential harms that can be inflicted by the ability to aggregate wealth in the corporate form. These dangers have been largely addressed, however, not as a matter of state corporate law, but rather in terms of external regulation to protect parties outside the corporate control structure.[151] Examples of such regulations are abundant, including regulations designed to protect employees, customers, and the environment.[152] States also enacted laws attempting to limit the political power of corporations in state elections, though corporate speech rights have now abolished that constraint on corporate power.[153]

While states have traditionally relied on external regulation to control corporations that operate within their state, existing state corporate law does not entirely ignore the potential for harm to third parties. Where states have created the most mandatory rules for corporate insiders is

---

the behest of then-Governor Woodrow Wilson, Delaware took the lead in the race for corporations and remains the leading state for incorporation. *Id.* at 664–65; Strine & Walter, *supra* note 130, at 923.

147. *See* Greenfield, *supra* note 145, at 1311 (noting that competition among the states leads to liberal incorporation statutes).

148. *See* Strine & Walter, *supra* note 130 (quoting WILLIAM W. COOK, A TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW 1604 (3d ed. 1984)).

149. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 784, 784 n.90 (2015); *see* Greenfield, *supra* note 145, at 1313 (noting that the profit maximization rule largely replaced the ultra vires doctrine).

150. *See* Strine & Walter, *supra* note 4, at 356 ("Instead of entrusting corporate managers whose ultimate right to office depends solely upon election by stockholders to protect other constituencies and society from externality risk, conservative corporate theory looks to the political process as the legitimate and sound form of protection."); Pollman, *supra* note 3, at 654–55 ("The law settled on a system in which corporate law governed the internal structure of the corporation and laws outside of corporate law provided the primary check on corporate activity.").

151. *See* Pollman, *supra* note 3, at 655 (describing the "widely acknowledged" division between corporate law and "external legal regimes").

152. *See* Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 951 (2008) (noting that interests outside the power structure of the corporation "are left to depend primarily on 'external' regulations, such as minimum-wage laws, environmental regulations, and consumer safety rules" for protection).

153. *See* Buccola, *supra* note 5, at 615–16; *supra* Section I.A.1 (discussing corporate speech rights).

when the rights of third parties and minority shareholders are affected.[154] For example, all states require corporations to use an entity name that puts the public on notice of the corporation's limited liability status.[155] Perhaps most importantly, the equitable doctrine of veil piercing was developed by state courts to protect corporate creditors from abuses of the privilege of limited liability.[156]

B. The Creeping Federalization of State Corporate Law

There is a growing body of scholarship detailing the ways in which speech and religious rights for corporations have put pressure on state corporate law, potentially upsetting the balance between states and their corporate creations.[157] The Roberts Court has put pressure on state corporate law in two related ways: first, by requiring state law to flesh out and implement these new rights and, second, by using (or, arguably, misusing) principles of state corporate law to support its holdings. This combination makes it clear that states will necessarily play a role in defining the rights of corporations, but leaves it unclear which, if any, of the Court's declarations about the nature of state corporate law are constitutionally or statutorily mandated. The lack of clarity has the potential to lead to a creeping federalization of state corporate law as the Supreme Court preempts by implication.

The U.S. Supreme Court has a long history of granting rights to corporations.[158] Early cases giving corporations equal protection and due process rights in the context of protecting corporate property solidified the legal personality of corporations to enter into contracts and protect the

---

154. *See* Richard M. Buxbaum, *Facilitative and Mandatory Rules in the Corporation Law(s) of the United States*, 50 AM. J. COMP. L. 249, 252–53 (2002) (describing mandatory rules to protect third parties and non-controlling shareholders).

155. *See, e.g.*, CAL. CORP. CODE § 202 (West 2019) (requiring "corporation," "incorporated," or "limited" to appear in corporation's name); DEL. CODE ANN. tit. 8, § 102(a)(1) (2017) (requiring a name indicating limited liability status such as "corporation" or "incorporated" unless the corporation certifies it has more than $10 million in assets).

156. *See infra* Section III.A.

157. *See* Buccola, *supra* note 5; Pollman, *supra* note 3; David Rosenberg, *The Corporate Paradox of* Citizens United *and* Hobby Lobby, 11 N.Y.U. J.L. & LIBERTY 308 (2017) (noting the tension between the *Hobby Lobby* decision and corporate law); Strine & Walter, *supra* note 4. These rights have also created tension with aspects of federal law. *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125 (2013) (describing tension between corporate rights and personal jurisdiction).

158. *See* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 99 (2014) (detailing history of corporate constitutional rights); Pollman, *supra* note 3, at 658–64.

property interests of shareholders.[159] These rights were in line with important principles of corporate law, such as maintaining the corporation as a separate entity, without needing to "rely upon or significantly impact state corporate law."[160]

This changed as the Court expanded corporate speech rights into speech not necessary to protect corporate property.[161] In *First National Bank of Boston v. Bellotti*,[162] the Court gave corporations the right to make political expenditures on ballot measures.[163] For the first time, the Court implicated the internal control mechanisms of the corporation in its holding, stating that the "shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[164] The Court pointed to the power to elect directors and the ability to bring derivative suits for claims of corporate waste as the "procedures" that shareholders can use to guide corporate decision-making.[165]

The *Bellotti* holding was cabined to ballot measures until the Court revived it in *Citizens United*, creating a seismic shift in corporate rights doctrine.[166] In *Citizens United*, the Court held that the corporation as an association of individuals has the right to speak via campaign expenditures from the corporation's general treasury funds.[167] The right to speak was firmly grounded in the corporation, with the "procedures of corporate democracy" once again tapped as the mechanism for determining who speaks for the corporation.[168] But, as scholars have noted, corporate law was designed to "allow for private ordering of business ventures," not to "facilitate the political expression of corporate

159. Pollman, *supra* note 3, at 658–60 ("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.").

160. *Id.* at 660.

161. *See id.* at 661–62.

162. 435 U.S. 765 (1978).

163. *Id.* at 776–78.

164. *Id.* at 794.

165. *Id.* at 794–95; *see* Pollman, *supra* note 3, at 664 (describing the origination of corporate law interference in *Bellotti*). The ability for shareholders to participate in "corporate democracy" are largely illusionary in the modern corporation, however, given the prevalence of stock ownership through intermediaries. *See* Strine, *supra* note 2, at 443–44.

166. *See* Pollman, *supra* note 3, at 664–65; Strine & Walter, *supra* note 4, at 363.

167. Citizens United v. FEC, 558 U.S. 310, 318–319 (2010).

168. *Id.* at 361–62 (quoting *Bellotti*, 435 U.S. at 794); *see also* Hardee, *supra* note 46, at 768–69.

participants."[169] The opinion thus places strain on state corporate law to assume a quasi-constitutional role that is a poor fit.[170]

The Court's decision in *Hobby Lobby* exacerbated this problem. The Court granted the shareholders of certain corporations the statutory right under RFRA to exercise their personal religion via the corporation.[171] In doing so, the Court's opinion repeatedly runs up against state corporate law. Like *Citizens United*, the *Hobby Lobby* opinion relies on state law to flesh out the contours of this new right. In response to the problem of minority shareholders who might disagree with the corporation's religious choice, the Court assigns state corporate law the task of working out any such disagreements.[172]

The *Hobby Lobby* decision went a step further by not only turning to state law to flesh out corporate rights, but also relying on its own controversial definitions of state corporate law to support its holding. The most obvious example is the majority's statement that state corporate law does not require corporations to act solely in the pursuit of profit.[173] The Court's statement regarding corporate purpose was not mere dicta; it is essential to its holding that shareholders may wield the corporate form to further any purpose they choose, including exercising their personal religion.[174] The question of corporate purpose is one that has been, and continues to be, vigorously debated by corporate law scholars and state courts.[175] The Court did not acknowledge this debate with its sweeping pronouncement, but rather characterized its finding as settled state law across all jurisdictions.[176] The goal of this Part is not to settle the debate

---

169. Pollman, *supra* note 3, at 667; *see also* Strine & Walter, *supra* note 4, at 364 (arguing that corporate law was designed to allow disinterested shareholders to make profits rather than to express shareholders' "diverse moral and political beliefs").

170. Pollman, *supra* note 3, at 665.

171. *See* Burwell v. Hobby Lobby Stores, 573 U.S. __, 134 S. Ct. 2751, 2768 (2014); Hardee, *supra* note 44, at 771–73 (describing holding in detail); Gregory A. Mark, Hobby Lobby *and Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value*, 65 DEPAUL L. REV. 535, 541 (2016) (noting that the decision protects the shareholders' right to exercise religion).

172. *Hobby Lobby*, 134 S. Ct. at 2774–75. Corporate law does not present an easy answer. *See infra* notes 188–193 and accompanying text.

173. *Hobby Lobby*, 134 S. Ct. at 2771 ("While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else.").

174. *Id.* ("If for-profit corporations may pursue [non-monetary social] objectives, there is no apparent reason why they may not further religious objectives as well.").

175. *See supra* Section I.B.

176. *Hobby Lobby*, 134 S. Ct. at 2771. The Court's language regarding corporate purpose can be read narrowly as limited only to circumstances where all shareholders of a closely held corporation are in agreement to put aside profit in favor of a religious purpose. *See id.* (stating that corporations can pursue other purposes "[s]o long as its owners agree" and "with ownership approval");

regarding corporate purpose for all fifty states, or to suggest that all jurisdictions would even come to the same conclusion, but rather to note where the Court's reasoning runs into conflict with some views of existing state laws regarding corporate purpose. This conflict indicates that at least some states may wish to challenge the Court's assertion of corporate purpose.[177]

The Court points to inconclusive evidence to challenge the idea of profit maximization. The fact that many companies exceed environmental standards or make charitable donations fits comfortably within the view of either conservative corporate theory or CSR, so long as the board can justify them as beneficial to the long-term financial interests of shareholders.[178] The Court also references the trend toward enacting statutes for the creation of benefit corporations—corporations with mixed profit and socially beneficial purposes—as evidence that states allow socially conscious corporations.[179] The reference is somewhat puzzling as the existence of a separate incorporation statute for corporations with a mixed purpose suggests that general incorporation statutes do *not* provide that option.[180]

In addition, benefit corporation statutes require benefit corporations to place a social purpose *above* shareholders' financial interests.[181] These are

---

McDonnell, *supra* note 37, at 805 (noting that the Court's language might suggest the "weaker conception" of stakeholder involvement where shareholder approval is required). Given that there is no cause for litigation when shareholders agree, there is scant evidence of what states consider to be the limits of corporate purpose in such circumstances.

177. For example, Chief Justice Strine of the Delaware Supreme Court has argued forcefully that the purpose of Delaware for-profit corporations is shareholder profit maximization. *See* Strine, *supra* note 2, at 440–41; Strine, *supra* note 4, at 107–08; Strine & Walter, *supra* note 4, at 346–51.

178. *See supra* notes 107–110 and accompanying text. By allowing shareholders to put their personal interests above the interests of other stakeholders, such as employees, the *Hobby Lobby* decision is arguably not in line with CSR. *See supra* notes 111–112.

179. *Hobby Lobby*, 134 S. Ct. at 2771.

180. *See* Strine, *supra* note 4, at 107. In addition, none of the corporations at issue are incorporated under a benefit corporation statute. *See Hobby Lobby*, 134 S. Ct. at 2764 ("Conestoga is organized under Pennsylvania law as a for-profit corporation."); *id.* at 2765 (noting that both Hobby Lobby and Mardel are for-profit corporations under Oklahoma law).

181. *See* FLETCHER CYC., *supra* note 125, § 70.50 ("A benefit corporation (B corporation) is a new class of corporation that uses the corporate form to solve social and environmental problems. . . . It's [sic] purpose is to create a positive impact on society and the environment, even if it sacrifices profit to do so."). California's Benefit Corporation statute provides that "[a] benefit corporation shall have the purpose of creating general public benefit." CAL. CORP. CODE § 14610 (West 2019). "General public benefit" is defined as "a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard." *Id.* § 14601(c). Specific benefits may be defined in the charter, including benefits to third parties such as providing low-income services or "[p]romoting the arts, sciences, or advancement of knowledge," with a catch-all category for "[t]he accomplishment of any other particular benefit for society or the environment." *Id.* § 14601(e).

similar to constituency statutes, which specifically allow for-profit corporations incorporated under general incorporation statutes to consider non-shareholder interests in making corporate decisions.[182] Both can be interpreted as undercutting the shareholder maximization principle by requiring or permitting corporations to place the interests of non-shareholders over shareholder profit.[183] The fact that states are willing to allow shareholders to use the corporate form to benefit third parties over personal profit does not necessarily lead to the conclusion that the corporate form provides *more* leeway to shareholders to use the corporate form to further their own personal interests at the expense of third parties.[184]

The benefit corporation and constituency statutes demonstrate the difficulty with the Court's statement regarding corporate purpose. It is one thing to say that corporations may (or must) consider the interests of people *other than shareholders* when wielding the power of the corporate form. Such a statement is in line with concerns that self-interested shareholders will lead to the power of the corporate form being used to the detriment of those outside the corporate power structure.[185] It is another thing to argue that states allow those *within the corporate power structure* to wield the benefits of incorporation for any personal ends they choose, even at the expense of other stakeholders. Such an argument broadens, rather than limits, the ability of shareholders to use the

---

182. *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 986 (1992) (defining the basic model of non-shareholder constituency statutes as providing "that in discharging their duty of care, directors may consider the effects of a decision on not only shareholders, but also on a list of other constituency groups"). Unlike benefit corporations, which were created to advance CSR, constituency statutes arose as anti-takeover protection for management. *Id.*

183. *See* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 634 (2007) ("[S]hareholder constituency statutes have opened the door to allow directors of public companies to take non-shareholder interests and concerns into consideration when making investment decisions."); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 25 (2012) (noting that benefit corporations attack the shareholder wealth maximization principle while also noting they allow management more discretion than constituency statutes).

184. *See* Murray, *supra* note 183, at 28 (arguing that guidance and oversight is necessary to avoid having directors of benefit corporations to "default to seeking their own self-interest or their own objectives"); Pollman, *Corporate Law*, *supra* note 87, at 170.

185. *See* Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 642 (2013) (noting the increased call for socially conscious corporations who "consider stakeholder interests and embrace socially and environmentally responsible business models" over shareholder wealth maximization); Daniel J. Morrissey, *The Riddle of Shareholder Rights and Corporate Social Responsibility*, 80 BROOK. L. REV. 353, 387 (2015) (same).

corporate form in their own self-interest.[186] It is questionable whether states intended the benefits of the corporate form, especially limited liability, to be used by shareholders for their purely personal, non-economic, ends.[187]

The denouncement of the shareholder maximization principle is also problematic in relation to the Court's tasking of state corporate law to determine the rights of minority shareholders in determining the corporation's religion.[188] The opinion states that in resolving disputes regarding the corporation's religion, courts should look to the corporation's management structure and "underlying state law in resolving disputes."[189] In resolving intracorporate disputes, however, states have relied on the profit maximization principle to settle conflicts between shareholders when a majority shareholder wishes to put a personal or social goal over profits.[190] When the majority shareholder professes to be seeking to further some other goal at the expense of profits, states have stepped in to protect the minority shareholder based on the grounds that in taking the corporate form, controlling shareholders have a duty to put the corporate profit ahead of other interests.[191]

The *Hobby Lobby* opinion thus creates a paradox. If a majority shareholder states that she is claiming a RFRA exemption to maximize the profits of the corporation, she does not violate state corporate law and the minority shareholder has no claim against her. But in alleging a profit motive, she has disqualified herself from claiming a religious exemption,

---

186. *See* Mohapatra, *supra* note 76, at 180–81 (noting that contraceptive mandate was determination by Congress that socially responsible corporations must provide contraceptive coverage and *Hobby Lobby* allowed shareholders' personal beliefs to nullify that right); Pollman, *Corporate Law*, *supra* note 87, at 170.

187. The veil piercing doctrine generally makes limited liability unavailable to shareholders who use the corporation's assets for their own personal use. *See infra* Section III.A.

188. The fact that the Court recognized the possibility that there could be conflict over the decision to claim a RFRA exemption suggests that its rejection of the shareholder maximization principle is not limited to only corporations where shareholders unanimously agree to adopt a corporate religion.

189. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2775 (2014).

190. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (holding controlling shareholders cannot put social goals over profit for minority shareholder in a for profit corporation); Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (same); *see also* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 318–21 (1998) (demonstrating that the shareholder primacy norm arose out of minority oppression cases). Professor Smith argues that the shareholder primacy norm is largely irrelevant under modern law and such issues should be considered under the doctrine of minority oppression. *Id.* at 322–23. He notes that whether a change in doctrine will lead to different outcomes is up for debate. *Id.* at 321.

191. *See Newmark*, 16 A.3d at 34 ("The corporate form in which craigslist operates, however, 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.").

as the *Hobby Lobby* decision makes it clear that any exemption must be motivated by the sincere religious beliefs of the shareholders.[192] If, on the other hand, the majority shareholder claims that the exemption is motivated by her sincere religious belief and not profit, then she is permitted to claim the RFRA exemption but may run afoul of state corporate law, possibly giving the minority shareholder a claim against her.[193]

The Court's holding in *Hobby Lobby* also conflicts with the separation required between the corporation and its shareholders. Legal separation between shareholders and the corporation is the foundational principle of corporate law.[194] The legal existence of the corporation, distinct from its shareholders, forms the basis for the benefits that flow from entity status, such as perpetual life, the ability to contract in the corporation's name, and, most importantly, limited liability for shareholders.[195] The Court's opinion breaks down this separation by looking through the corporate entity to reach the personal rights of the shareholders.[196] Corporations qualify for a RFRA exemption only if the corporation's shareholders can claim a unity of interest with the corporation such that their personal religious beliefs can infuse the corporation with their religion.[197]

---

192. *See Hobby Lobby*, 134 S. Ct. at 2774 (basing its decision on the sincerity of the shareholders' religious beliefs).

193. *See* Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 962–63 (2016) (arguing that it is "hard to imagine" that RFRA would allow a controlling shareholder to elevate their personal religious beliefs over the rights of the minority shareholders "in contravention of the controlling shareholders' fiduciary obligations"). The *Hobby Lobby* opinion can thus only be reconciled with all states' corporate law if the Court's language regarding corporate purpose is taken to mean that corporations with unanimous shareholder agreement may claim any shareholder purpose, but shareholders who are not in agreement are limited to solely profit motives. As noted, the accuracy of allowing expanded shareholder purposes, even with unanimity, is not without doubt under state law. *See supra* Section II.B.

194. *See* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 10 (2018) ("[I]t is not an overstatement to say that corporate separateness has been one of the most important legal innovations in the development of national wealth."); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1638–39; Sepper, *Contraception*, *supra* note 67, at 318 ("The very goal of the corporate form is to separate the person from the entity, shielding the person from obligation and liability and ensuring that the entity focuses on profit maximization.").

195. *See* Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners at 14, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751 (Nos. 13-354, 13-356), 2014 WL 333889, at *6–10 [hereinafter Corporate Law Professors' Brief]; Greenfield, *supra* note 145, at 314.

196. The Court held that "[a] corporation is simply a form of organization used by human beings to achieve desired ends" and that "protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies." *Hobby Lobby*, 134 S. Ct. at 2768.

197. *Id.* at 2774 (limiting holding to companies where owners share sincere religious beliefs).

Numerous scholars have argued that such a holding violates basic principles of state corporate law.[198]

In light of these U.S. Supreme Court decisions, states are faced with several unanswered questions that threaten to undermine the principles of federalism that have been the hallmark of state corporate law. While it is clear that state law must flesh out corporate rights, must they do so in a way that furthers the corporate right at issue?[199] Other questions are raised regarding the Court's use of controversial descriptions of state corporate law: are states required to utilize the Court's definition, even if corporations are not constituted in such a way under their law? Even if the Court accurately characterized state law as it existed at the time of the decision, do states retain their historic power to alter corporate law to adapt to new circumstances?[200] These questions speak to the heart of a state's power to define the acceptable uses of the corporate form.

In responding to these questions, states will be faced with policy decisions regarding the balance of power within a corporation that take on new import given the now quasi-constitutional implications of corporate governance. State corporate law was designed to provide flexibility to corporate insiders, not to protect the ability of shareholders to exercise their constitutional rights through the corporation.[201] Likewise, protecting the rights of third parties and the integrity of the political system was taken out of the ambit of corporate governance and largely entrusted to external regulation.[202] If such regulations are no longer constitutionally permitted, states must find new ways (or return to their old ways) to contend with the unleashed power of the corporate form.

---

198. Before the Court's decision, corporate scholars urged the Court to reject an alter ego view of the corporation that would weaken the separation requirement. *See* Corporate Law Professors' Brief, *supra* note 195 (arguing against allowing RFRA exemptions on corporate law grounds); Greenfield, *supra* note 145, at 1313–14; Sepper, *Contraception*, *supra* note 67, at 318–19. After the Court's decision, many prominent corporate scholars have decried the decision as fundamentally at odds with the principle of a separate corporate entity. *See* Ackerman & Cole, *supra* note 193, at 948; Mark, *supra* note 171, at 540; Pollman, *Corporate Law*, *supra* note 87, at 157; Thomas E. Rutledge, *A Corporation Has No Soul—the Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 17–18 (2014).

199. *See, e.g.*, Pollman, *supra* note 3, at 686–87 (discussing open questions regarding application of corporate religious rights).

200. *See, e.g.*, Buccola, *supra* note 5, at 621–22 (exploring whether states may change status quo to adapt to corporate speech rights).

201. *See supra* Section II.A.

202. *See supra* Section II.A.

C. *Pushing Back, but with Caution*

Given the shift in the foundation of state corporate law created by granting corporations personal rights, states may decide that some reconceptualization of the architecture of corporate law is in order.[203] Because the Court has been unclear about what areas of state law it is preempting, however, it is difficult to know how much states can push back.[204] For constitutional law scholars, these issues may appear clear cut. When the Constitution gives a right to a natural born person, it is axiomatic that the state cannot try to redefine what it means to be a "person."[205] Corporations, however, are different.[206]

What a corporation *is* is not a matter of natural law or biology; it necessarily depends on how a corporation is defined by the state.[207] A state may create corporations that lack the power to engage in certain behaviors, even if those behaviors arguably implicate constitutional rights.[208] Historically this line was policed more vigorously by the states with limited corporate purposes, the ultra vires doctrine, and stricter requirements regarding corporate structure.[209] While the trend has been to provide shareholders and management more leeway in terms of corporate purpose and structure, that is not a requirement.[210]

---

203. *See* Buccola, *supra* note 5, at 599 (arguing that although "states cannot overrule the Court's understanding of corporate rights" they can "disempower the corporations they create from doing the kinds of things that implicate disfavored federal rights").

204. *See id.* at 616–17 (noting that the Court's corporate speech cases create uncertainty regarding whether states retain "their historical authority over domestic corporations").

205. *Id.* at 600 (noting that most rights cases involve questions of individuals who undoubtedly have the "*power* to act contrary to the regulation").

206. *See* Bebchuk & Jackson, *supra* note 16, at 86 ("A corporation, after all, is not a natural, Platonic entity. It is a legal arrangement, and its internal allocation of authority is a product of legal rules."); Buccola, *supra* note 5, at 600 (describing corporations as requiring positive law to establish their capacities to act).

207. This is meant in the weak sense that whether a corporation has the power to engage in an activity or what procedures are required by corporate governance law to authorize certain activities is a matter of state law. It is not meant to state a position in the debate over corporate personhood and the epistemological nature of a corporation.

208. *See* Buccola, *supra* note 5, at 599. Professor Buccola gives the "trivial yet telling example" that Delaware law forbids the issuing of "honorary degrees" by corporations without approval by the Secretary of Education. *Id.* It is likely that individuals would have a protected First Amendment right to express approval of someone by conferring such an honor, while it seems unlikely that the First Amendment would require that corporations be empowered to do so. *Id.*

209. *See supra* notes 139–145 and accompanying text.

210. *See* Buccola, *supra* note 5, at 610 (finding that the states did not lose their authority to limit corporate power, "they simply ceased to exercise it").

Corporate purpose and structure can be dictated in myriad ways, including by requiring other stakeholders or members of the broader community to have a binding say in corporate governance.[211] The Court implicitly recognized this fact by acknowledging that state corporate law will determine how corporate rights can be exercised.[212] It remains an open question, however, whether states must respond in a way that merely incorporates these new rights into the existing rules regarding corporations or whether states retain the power to rethink the rules in light of the new weight put on corporate governance.

Scholars are beginning to suggest ways that states can adapt corporate law in light of these new rights.[213] For example, in *Citizens United*, the Court noted that the "procedures of corporate democracy" determine who speaks for the corporation.[214] Traditionally, the board of directors makes such decisions about the management of the corporation, including corporate expenditures, without shareholder approval.[215] Scholars have suggested that states could create a requirement that shareholders be given

---

211. For example, in Germany employees make up half of the supervisory board, leading to true codetermination by statutory mandate. *See* Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 1054 (1998) (comparing American and German efforts at participatory management). German boards also often include representatives of banks or other businesses who represent a constituency with a relationship to the company. Donald C. Clarke, *Three Concepts of the Independent Director*, 32 DEL. J. CORP. L. 73, 99 (2007). California became the first state to attempt such corporate engineering by enacting a law requiring any corporation headquartered in the state to have a minimum amount of gender diversity. *See* Sophia Bollag, *California Just Became the First State to Require Women on Corporate Boards. Here's What You Need to Know*, MONEY (Oct. 1, 2018), http://time.com/money/5411416/california-women-corporate-boards/ [https://perma.cc/MGT8-D3W7].

212. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2775 (2014) ("State corporate law provides a ready means for resolving any conflicts [about the corporation's religion] by, for example, dictating how a corporation can establish its governing structure."); Citizens United v. FEC, 558 U.S. 310, 361–62 (2010) (noting that the "procedures of corporate democracy" will determine corporate speech).

213. *See, e.g.*, Ackerman & Cole, *supra* note 193 (making statutory proposals to curb the effects of *Citizens United* and *Hobby Lobby*); Bebchuk & Jackson, *supra* note 16 (outlining proposals to give shareholders a role in the decision to make political expenditures); Buccola, *supra* note 5 (outlining the power of states to define corporate law despite the Court's incursions). While not directly making a state law proposal, Professor Bodie argues that a corporation should only have a right to exercise religion if the employees have a say in its adoption. *See* Bodie, *supra* note 112, at 618–21.

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

215. *See* Bebchuk & Jackson, *supra* note 16, at 87 (describing corporate governance rules relating to the decision to engage in political speech); Rosenberg, *supra* note 157, at 312 (noting that under existing corporate law, the decision to spend money is an everyday business decision and thus under the power of the board).

a say on corporate political expenditures.[216] As a practical matter, shareholder votes are expensive and would draw attention to any campaign spending, thus voting requirements would likely hamper the exercise of political speech by corporations.[217]

Although states should seek to rebalance the power corporations can exert within their territory, it is important not to throw the proverbial baby out with the bathwater. The genius of the modern corporation is the enabling of private ordering to achieve economic efficiencies. Dramatic changes to that system could lead to unintended consequences. The prospect of corporate flight raises another limitation to proposals regarding state corporate law: the internal affairs doctrine.[218] For a proposal to actually protect its citizens, a state would need to disregard the internal affairs doctrine and apply their own law to foreign corporations.[219] Disregarding the internal affairs doctrine, especially for core internal governance issues like shareholder voting, raises constitutional concerns of its own.[220] Perhaps more importantly, it leads to practical problems as corporations may be subject to inconsistent governance requirements from multiple states.[221]

This Article suggests that while states should push back, the best response—at least initially—may be a tentative one.[222] States should turn to the courts to enforce those aspects of corporate common law that provide balance between corporate power and its impact on third parties. Utilizing an existing common law doctrine already in service of protecting parties outside the corporation from the state-sanctioned power of the

---

216. *See* Bebchuk & Jackson, *supra* note 16 (outlining proposals to give shareholders a role in the decision to make political expenditures); Taub, *supra* note 89, at 426–27 (proposing limiting corporate speech rights to only those corporations that qualify for the *Hobby Lobby* exemptions, including shareholder agreement).

217. *See* Greenwood, *supra* note 46, at 1037 (noting that shareholder elections are "enormously expensive" but are largely predetermined in favor of management).

218. *See supra* Section II.A.

219. *See* Buccola, *supra* note 5, at 635–36. Professor Buccola also notes that host states can protect their citizens by refusing to recognize corporations chartered in other states if they do not meet the requirements of the host state. *Id.* at 644.

220. *See id.* at 638–40 (describing the debate over whether the internal affairs doctrine is constitutionally mandated).

221. Despite this concern, both California and New York have passed outreach statutes that regulate at least some of the internal affairs of corporations with strong ties to the state. CAL. CORP. CODE § 2115 (West 2019); N.Y. BUS. CORP. LAW §§ 1301–20 (McKinney 2018).

222. Depending on the response from the federal bench to initial attempts to modify existing state law, a dramatic rethinking of corporate law may be required, but it is not clear that such revolutionary action is necessary yet. *Cf.* Ackerman & Cole, *supra* note 193, at 1000–01 (arguing for mandatory constituency statutes that would adopt a communitarian model of the corporation).

corporation would make a good start. An ideal candidate would involve parties outside the corporation to provide the strongest basis for disregarding the internal affairs doctrine. The doctrine of veil piercing provides just such a test case. While utilizing the veil piercing doctrine in such a way is not without its challenges, at the very least it will force the Court to be transparent about the lengths to which it intends to federalize state corporate law in the name of corporate rights.

III. RETHINKING LIMITED LIABILITY AND VEIL PIERCING

The protection of shareholders' personal assets from corporate debts is a hallmark of the corporate form. But limited liability is not unlimited. Courts will pierce the corporate veil to allow creditors to reach shareholders' personal assets in cases where the shareholder has abused the corporate form or used the corporation for personal ends.[223] The Supreme Court's corporate rights decisions implicate both the separation requirement and corporate purpose, making adaptations to the veil piercing doctrine a doctrinally justifiable response. While there will likely be pushback against state attempts to minimize the impact of corporate rights, there are several practical reasons why changes to the veil piercing doctrine enacted through the common law puts states in the best position to respond to challenges.

A. Limited Liability and Veil Piercing

Limited liability is generally regarded as the most important benefit provided by the corporate form.[224] Limited liability prevents creditors from reaching the personal assets of corporate shareholders to pay the debts of the corporation unless the shareholder is personally liable for the debt.[225] Shareholders are only liable for debts that they personally

---

223. *See* Carol Goforth, *A Corporation Has No Soul, and Doesn't Go to Church: Relating the Doctrine of Piercing the Veil to* Burwell v. Hobby Lobby, 67 S.C. L. REV. 73, 86–87 (2015).

224. *See* Corporate Law Professors' Brief, *supra* note 195, at 6; Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 536 (2007) ("Limited liability is considered the most important aspect of a corporation . . . .").

225. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(6) (2017) (providing that "the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts"); MODEL BUS. CORP. ACT § 6.22(b) (AM. BAR ASS'N 2016) ("A shareholder of a corporation is not personally liable for any liabilities of the corporation (including liabilities arising from acts of the corporation) except (i) to the extent provided in a provision of the articles of incorporation permitted by section 2.02(b)(2)(v), and (ii) that a shareholder may become personally liable by reason of the shareholder's own acts or conduct."); *see also* Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE

guarantee or for torts that they commit in their personal capacity.[226] This allows the corporation to incur sizeable liability in both contract and tort while shareholders "only stand to lose their initial investments in the business. The rest of their personal assets will be safe."[227]

Limited liability is a radical departure from the traditional forms of business—general partnerships and sole proprietorships—that were used for nearly all business prior to the end of the nineteenth century.[228] Under such forms, business owners were treated as having a unity of identity with their business and thus were personally responsible for the debts of the business.[229] Personal liability was justified on the grounds that business owners reaped the profits of the business enterprise and generally exercised control over the business and therefore should be held liable for its debts.[230]

Numerous justifications have been offered in support of altering this baseline rule that those who profit from a business are responsible for its debts.[231] First and foremost, limited liability is justified on the grounds that, unlike general partnerships or sole proprietorships, a corporation has

---

FOREST L. REV. 1, 8 (1997) ("All state corporate statutes provide shareholders limited liability either explicitly or implicitly.").

226. *See* Morrissey, *supra* note 224, at 536; Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1, 10 (1994) (noting direct liability for "tort, crime, or regulatory actions" taken by shareholders in their personal capacity).

227. Morrissey, *supra* note 224, at 537.

228. *See* Hardee, *supra* note 44, at 12–13 (describing history of unincorporated forms); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443–44 (1987); Thompson, *supra* note 226, at 9 (noting that limited liability did not become the standard until the middle of the nineteenth century).

229. *See* Hardee, *supra* note 44, at 11–12 (describing relationship between partners and sole proprietors and their business entities); Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 396–97 (describing partnerships as people conducting business with "jointly owned property and jointly incurred obligations").

230. *See* Lawrence E. Mitchell, *Close Corporations Reconsidered*, 63 TUL. L. REV. 1143, 1171 (1989) (comparing closely held corporations with active shareholders and general partnerships, concluding that "the issue of control is crucial in determining the appropriateness and legitimacy of limited liability"); Morrissey, *supra* note 224, at 536 (describing conceptual difference between partnerships and corporations with respect to limited liability).

231. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93 (1985) (arguing that limited liability exists to "facilitate[] the corporate form of organization" and lower transaction costs); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1394–95 (1992) (critiquing traditional justifications of limited liability through a feminist lens); Mitchell, *supra* note 230, at 1147 (focusing on limited liability driven by judicial decisions and as a result of separation of control and ownership). It would be impossible to cover all the proffered justifications for limited liability in this Article and thus the focus is on the rationales that relate most closely to veil piercing and corporate purpose as relates to corporate rights. *See infra* Section III.B.1.

its own legal existence "separate and apart from its shareholders."[232] This legal separation provides the conceptual basis for treating corporate debt as distinct from personal debt.[233] Separation is most cleanly observed in corporations where shareholders are passive investors with little control, making it "unfair to hold shareholders accountable for [corporate] obligations."[234] However, shareholders are not required to remain passive for limited liability to apply, so long as corporate debts are not a result of their personal conduct.[235]

Strong economic rationales also support the concept of limited liability. It is no coincidence that widespread limited liability in the corporate form arose during the Industrial Revolution.[236] In order to amass the capital necessary for substantial building projects, investors needed a way to invest without the burden of actively monitoring the management of each entity to protect their personal assets.[237] Limited liability provided the solution. It allowed investors to diversify their holdings by removing the threat of personal liability.[238] It also democratized investment by giving less wealthy individuals the ability to access the capital markets without

---

232. Morrissey, *supra* note 224, at 536; *accord* Gabaldon, *supra* note 231, at 1394–95 (discussing the "perception that unlimited liability is the natural consequence of carrying on a business and limited liability is a special benefit conferred in exchange for the expense and constraints of the corporate format"); *see also* Easterbrook & Fischel, *supra* note 231, at 89 (arguing that under the nexus of contract theory, limited liability exists because the corporation is not "real" and thus shareholders are only liable for the amounts they invest).

233. *See* Gabaldon, *supra* note 231, at 1396 (noting that early American courts found limited liability based on the "separate juridical stature of the corporation").

234. Morrissey, *supra* note 224, at 537; *see also* Thompson, *supra* note 225, at 10 (noting that veil piercing is very rarely successful against passive investors in a corporation).

235. *See supra* notes 225–226.

236. *See* Smythe, *supra* note 139, at 645 (describing the economic changes of the Second Industrial Revolution that were facilitated by corporate law); Jeffrey K. Vandervoort, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DEPAUL BUS. & COM. L.J. 51, 53–54 (2004) (describing limited liability as helping fuel the Industrial Revolution). *But see* Mitchell, *supra* note 230, at 1165–67 (noting that the history of limited liability is "inconclusive" and that limited liability may not have been a primary driver of industrialization).

237. *See* Morrissey, *supra* note 224, at 537–38 (stating that limited liability alleviates the need for shareholders to avoid the need to actively monitor management); Smythe, *supra* note 139, at 645 (noting the increased capital needs of the Second Industrial Revolution). Limited liability thus allows for efficient capital markets by relieving shareholders of the need to "assess[] the value of [their] potential shares vis-à-vis those of every other stockholder." Morrissey, *supra* note 224, at 539.

238. *See* Henry Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262 (1967) (noting that personal liability would prevent diversification by wealthy investors); Vandervoort, *supra* note 236, at 54 ("With limited liability, owners are set free to invest in various business ventures without the need to incur the excessive costs necessary to monitor each enterprise closely.").

shouldering monitoring costs.[239] Such justifications do not necessarily apply to closely held corporations, especially because creditors of small corporations will frequently require debts to be personally guaranteed.[240] However, limited liability arguably promotes entrepreneurship by limiting the risk to small business owners' personal assets.[241]

While there are many reasons why limited liability has flourished, it is not without its costs. The risk of corporate debt is not magically whisked away by the corporate form. Limited liability simply takes the economic risk off the backs of entrepreneurs and investors and places it on creditors and tort victims.[242] Thus, corporate shareholders enjoy the profits of the business enterprise while passing a significant share of its risks onto others. Externalizing risks in such a way creates a moral hazard as entrepreneurs are incentivized to take outsized risks because they do not bear the full loss.[243] Given these costs, limited liability can be seen as a "trade-off" society makes in order to "encourage economic expansion."[244]

Limited liability is not an absolute privilege, however. If shareholders are found to have abused the corporate form, the doctrine of veil piercing allows the court to "pierce" the limited liability shield of the corporation to allow corporate creditors to recover from the shareholders' personal assets.[245] Veil piercing is an equitable remedy developed under the common law to avoid injustice created by limited liability.[246] It occurs

---

239. *See* Stephen V. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 408–09 (2006) (stating that limited liability allowed diversification of the ownership of corporations, thus spreading wealth among the community); Vandervoort, *supra* note 236, at 55 (noting that limited liability allows those who cannot afford monitoring costs access to capital markets).

240. *See* Morrissey, *supra* note 224, at 540 (noting that limited liability for small companies may make little difference for contract claims, but not for tort claims).

241. *But see* Mitchell, *supra* note 230, at 1172 (arguing that "limited liability makes little, if any, difference in the decision of small businesspersons to incorporate").

242. Morrissey, *supra* note 224, at 535; *see also* Gabaldon, *supra* note 231, at 1429 ("Limiting liability is about imposing risks that someone else must bear.").

243. *See* Morrissey, *supra* note 224, at 540 (noting limited liability in closely held corporations can "allow the owners to unfairly externalize the costs of their enterprise"); Thompson, *supra* note 226, at 14 (explaining that limited liability may create incentives to engage in hazardous activities or fail to make safety investments).

244. *See* Morrissey, *supra* note 224, at 535. Limited liability is such a success that it has been expanded into other forms, including the Limited Liability Company and the Limited Liability Partnership. *See* Vandervoort, *supra* note 236, at 63–64.

245. *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL 1–12 (2018); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991).

246. *See* Morrissey, *supra* note 224, at 541 (noting that veil piercing is an equitable remedy developed under the common law); Thompson, *supra* note 245, at 1041 ("Resolution of a piercing question is almost always left to a judge's determination of corporate illegitimacy."); *cf.* Alexander

when a court determines that the corporate shield ought to be disregarded, or pierced, because "the debt in question *is not really a debt of the corporation,* but ought, in fairness, *to be viewed as a debt of the individual or corporate shareholder or shareholders*."[247] Courts are likely to pierce when "the owners are using the business in such a way as to advance only their personal interests rather than the corporation's legal interests."[248]

A noted scholar and empiricist found that "piercing the corporate veil is the most litigated issue in corporate law."[249] Despite its prevalence, scholars frequently bemoan the lack of uniformity and clarity in the doctrine.[250] The vagaries or, more charitably, the flexibility of veil piercing cases may simply be a side effect of the "discretion necessarily inherent in equitable jurisprudence," or the ambiguity may be necessary to prevent giving corporations a "road map for fraud."[251] A leading treatise on veil piercing posits that "the doctrine is never likely to be pinned down to rigid particulars, and that it will evolve and change as long as our conception of, and our goals for, the corporation remain changing."[252] Thus, "[a]s long as our theories of the corporation are changing," the doctrine will continue to evolve.[253] Although the exact contours of veil piercing are difficult to pin down, even critics of the doctrine concede that the body of cases "may be understood, at least roughly, as attempts to balance the benefits of limited liability against its costs."[254]

While pinning down a definitive test across jurisdictions is impossible, most veil piercing cases require a showing that a corporation was an "alter ego" or "mere instrumentality" of the shareholder.[255] Extensive empirical

---

v. Abbey of the Chimes, 163 Cal. Rptr. 377, 381 (Ct. App. 1980) ("When considering the application of the alter ego doctrine to a particular situation, it must be remembered that it is an equitable doctrine and, though courts have justified its application through consideration of many factors, their basic motivation is to assure a just and equitable result." (citation omitted)).

247. PRESSER, *supra* note 245, at 8 (citation omitted).

248. Goforth, *supra* note 223, at 86–87; *see also* Morrissey, *supra* note 224, at 544–46 (expressing veil piercing at its essence as "courts seem to be saying, if you fail to act like a corporation . . . we won't afford your owners limited liability, which is the principle privilege of [the corporation's] artificial existence").

249. Thompson, *supra* note 245, at 1036.

250. *See, e.g.*, Mitchell, *supra* note 230, at 1169 ("The circumstances under which [veil piercing] will occur are unclear; the tests that courts apply in deciding whether to disregard the corporate fiction richly reflect judicial ambivalence."); Morrissey, *supra* note 224, at 542 (noting that "the piercing doctrine has been widely disparaged as a confusing anomaly").

251. Morrissey, *supra* note 224, at 543.

252. PRESSER, *supra* note 245, at 12.

253. *Id.*

254. Easterbrook & Fischel, *supra* note 231, at 109.

255. Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010).

work has found a set of common factors that courts frequently consider when determining whether the shareholder is an alter ego of the corporation such as commingling of funds, control or domination by the shareholder, fraud or misrepresentation, inadequate capitalization, and injustice or unfairness.[256] Commingling occurs when a shareholder fails to maintain the corporation as a separate business unit by "us[ing] corporate funds for personal purposes, mix[ing] corporate and personal accounts, or commingl[ing] assets so that the ownership interests [are] indistinguishable."[257] The factor of control or domination by the shareholder requires more than just a shareholder who runs the corporation and profits from it.[258] Rather, it requires a showing that a shareholder or shareholders so dominate the affairs of the corporation that there is no separation between the two.[259]

Many states have incorporated these factors into a two-part test. For example, California is typical in this approach where veil piercing requires: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[260] The ultimate question in the veil piercing analysis is to determine whether maintaining the separate

---

256. John H. Matheson, *Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil*, 7 BERKELEY BUS. L.J. 1, 32–36 (2010) (performing statistical analysis and finding the following factors applied by courts in veil piercing cases: fraud/misrepresentation (49.2%), owner control/dominance (48.6%), commingling of funds (38.1%), undercapitalization (32.6%), non-functioning leadership (30.3%), overlap (28.7%), unfairness/injustice (28.5%), nonexistent leadership (22.1%), assumption of risk (3.9%)); *see also* Oh, *supra* note 255, at 90 ("[Q]uite predictable suspects comprise the most common instrumental rationales: commingling, control or domination, injustice or unfairness, fraud or misrepresentation, and inadequate capitalization."); Thompson, *supra* note 245, at 1044 (reporting empirical work).

257. FLETCHER CYC., *supra* note 125, § 41.50 (Analysis of specific factors—Commingling of assets); *see, e.g.*, Macaluso v. Jenkins, 420 N.E.2d 251, 256 (Ill. App. Ct. 1981) (finding commingling of assets because shareholder gave corporate funds to another corporation, used corporate property for the benefit of other corporations, and paid personal bills with corporate funds, including donations to charitable causes).

258. FLETCHER CYC., *supra* note 125, § 41.10 (alter ego or mere instrumentality doctrine).

259. *See, e.g.*, Quinn v. Butz, 510 F.2d 743, 758 (D.C. Cir. 1975) (holding that piercing is appropriate when a party has "such domination of a corporation as in reality to negate its separate personality").

260. Mesler v. Bragg Mgmt. Co., 702 P.2d 601, 606 (Cal. 1985) (quoting Automotriz Del Golfo De Cal. v. Resnick, 306 P.2d 1, 3 (Cal. 1957)); *see also* FLETCHER CYC., *supra* note 125, § 41.30 (determinative factors in general) (noting the "two general elements required by most jurisdictions" are such a "unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist [and], the circumstances must indicate that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice"); PRESSER, *supra* note 245, at 138 (referring to the *Automotriz* test as the "standard two-part test in use in many jurisdictions").

corporate identity in the circumstances would "defeat the rights and equities of third persons."[261]

B. Claiming an Exemption Based on Unity of Interest with the Corporation Should Factor into the Veil Piercing Analysis

Scholars have noted the logical fit between veil piercing and the rationale behind religious exemption claims made by corporations.[262] Even before *Hobby Lobby* was decided, a group of prominent corporate scholars argued that religious exemptions for corporations raise veil piercing issues because those exemptions rely on a sufficient unity of interest between shareholder and corporation to allow the religious beliefs of the individuals to carry over to the corporation.[263] They argued the petitioners in *Hobby Lobby*, in fact, were asking the Court to disregard the corporate veil so that they could be treated as one and the same as their corporations—a controversial practice referred to as reverse veil piercing.[264] The Supreme Court ultimately rejected the argument that Congress intended that corporate law's separation requirement should deny shareholders the right to raise RFRA claims on behalf of themselves and their corporations.[265] Since the decision, scholars have urged reversal on the grounds that the decision is inconsistent with the veil piercing doctrine.[266]

The Court's decision that Congress intended that shareholders be allowed to use their corporation to exercise their personal religion does not necessarily settle the question of how states may respond when

---

261. *Mesler*, 702 P.2d at 607 (quoting Kohn v. Kohn, 214 P.2d 71, 78 (Cal. Ct. App. 1950)).

262. *See, e.g.*, Corporate Law Professors' Brief, *supra* note 195, at 7–8 (using veil piercing and reverse veil piercing doctrine to argue against allowing RFRA exemption); Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235, 236–37 (2013) (arguing that reverse veil piercing provides the analytical framework to disregard the corporate entity to allow shareholders to exercise religion through the corporation); Goforth, *supra* note 223, at 97 (concluding that veil piercing doctrine is evidence that the *Hobby Lobby* decision is incompatible with state corporate law); Mohapatra, *supra* note 76, at 169–75 (describing arguments relating to veil piercing for and against allowing corporate religious claims).

263. *See* Corporate Law Professors' Brief, *supra* note 195, at 6.

264. *See id.* at 16–18; Bainbridge, *supra* note 262, at 237 (arguing that reverse veil piercing "provides the analytical framework currently missing" from the lower court cases granting exemptions).

265. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2768 (2014) ("Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of 'persons.'").

266. *See generally* Goforth, *supra* note 223; *see also* Mohapatra, *supra* note 76, at 169–75.

shareholders do.[267] Corporate law professors from the University of California Berkeley raised this point to the Department of Health and Human Services in a comment on the definition of "eligible organization" for purposes of claiming a *Hobby Lobby* exemption.[268] They argued that to qualify for a RFRA exemption, "shareholders of a corporation should have to certify that they and the corporation have a unity in identity and interests, and therefore the corporation should be viewed as the shareholders' alter ego."[269] The Berkeley professors recognized that such a certification would likely be considered a factor in any veil piercing action later brought against the shareholder claiming the exemption.[270]

While scholars have discussed the lack of separation implicit in the *Hobby Lobby* opinion and the connection between the requirement of legal separation and veil piercing, what is missing from the literature is an analysis of how states may adapt their existing corporate doctrine in light of the *Hobby Lobby* decision.[271] This Part provides a framework for state courts to utilize to better define the nature of their corporate law relating to separation and corporate purpose. It concludes that there is a strong legal argument available to states that a past claim for an exemption based on the unity of interest with a shareholder's corporation should be a factor in the veil piercing analysis. In light of the Court's broad language regarding corporate law, states are not assured of success but, at the very

---

267. *See* Buccola, *supra* note 5, at 598–99 (arguing that while the U.S. Supreme Court decides if "the corporation is, as a general matter, a kind of entity capable of [a] right," states are generally responsible for determining whether a corporation "has been constituted with the power to do whatever it is the right immunizes").

268. Letter from Robert P. Bartlett III et al., Professors of Law, Univ. of Cal., Berkley Sch. of Law, to Ctrs. for Medicare & Medicaid Servs., Dep't of Health & Human Servs. (Oct. 8, 2014) (on file with author) [hereinafter Berkley Letter].

269. *Id.* at 2.

270. *Id.* at 7 n.25. Rather than taking a narrow view of corporate eligibility, the Trump administration has finalized rules that open the door for any corporation to claim an exemption if they object to any contraception coverage on religious or moral grounds. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) (allowing any corporate entity to claim an exemption from the contraceptive mandate on religious grounds); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) (allowing small businesses to claim religious or moral exemptions to the contraceptive mandate).

271. The Court will need to utilize the same lack of separation rationale in *Masterpiece Cakeshop* to find standing to reach the claims of the corporation involved, making this strategy relevant for potential future First Amendment claims as well. *See* Brief of Amicus Curiae Corporate Law Professors in Support of Respondents, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. __, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127303 at *2–3.

least, asserting it will force the Supreme Court to be upfront about how far it intends to go in preempting state corporate law.

1. The Legal Argument for Veil Piercing

As discussed, the test for veil piercing is not uniform across all jurisdictions but, in general, it requires finding a unity of interest that demonstrates the corporation is the alter ego of the shareholder and that equity counsels in favor of ignoring the corporate form.[272] In order to claim a religious exemption, shareholders must demonstrate that they have disregarded the corporate form in order to utilize the corporation for their own personal ends.[273] These prerequisites for claiming an exemption are related to the veil piercing inquiry both with respect to the lack of separation and corporate purpose.

Legal separation is the hallmark of the corporate form.[274] It is not surprising, therefore, that the veil piercing doctrine focuses on the separateness of the corporation.[275] The lack of separation appears in courts' reasoning as an independent question and also within several of the commonly used factors to justify veil piercing, including commingling and control or domination by the shareholder.[276] At its core, the veil piercing doctrine reflects that limited liability is premised on the legal distinction between shareholder and corporation.[277]

---

272. *See supra* notes 255–256 and accompanying text.

273. *See supra* notes 194–198 and accompanying text.

274. *See* Rutledge, *supra* note 198, at 18 ("There exists a real distinction between the corporation and its shareholders. The shareholders do not 'do business as' the corporation, but rather, the corporation does business as distinct legal being."); *supra* note 194.

275. *See* FLETCHER CYC., *supra* note 125, § 41.10 ("The alter ego theory applies when there is such unity between a corporation and an individual that the separateness of the corporation has ceased."); Presser, *supra* note 239, at 412–13 (noting that some jurisdictions "have hinted" that veil piercing does not require anything more than showing the shareholder and corporation are the alter ego of each other).

276. *See, e.g.*, Medlock v. Medlock, 642 N.W.2d 113, 124 (Neb. 2002) (noting that a factor relevant to piercing is "the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity"); Carlton v. Carlton, 997 P.2d 1028, 1031–32 (Wyo. 2000) (finding corporation was a "sham" based on commingling of assets); Presser, *supra* note 239, at 412 (noting that the alter ego test frequently comes down to domination or control by shareholders).

277. *See* Rutledge, *supra* note 198, at 35–36 ("The corporation is not an agent acting on behalf of the shareholders; were that the case, then the shareholders would be personally responsible for all the debts and obligations incurred by the corporation on behalf of its principals, and the corporation would not be liable thereon.").

The *Hobby Lobby* decision is based on the lack of separation between shareholders claiming the exemption and the corporation.[278] Scholars have noted that in order to claim a RFRA exemption under the opinion, shareholders must demonstrate a unity of interest with the corporation such that it is appropriate to ignore traditional legal separation.[279] The petitions in both *Hobby Lobby* and *Masterpiece Cakeshop* made such claims in their filings with the Court.[280] In determining whether veil piercing is appropriate, future state courts should be permitted to consider the parties' previous admissions that they meet the unity of interest criteria when claiming an exemption.

The connection between corporate purpose and veil piercing is perhaps less obvious than the related concept of separation, but is no less important for state courts to consider. In the *Hobby Lobby* opinion, the Court emphasized that every state authorizes corporations to be formed "for *any lawful purpose* or business."[281] The Court reasoned from that language that corporations may be utilized to exercise their shareholders' personal religious beliefs.[282] But that phrase was never intended to allow shareholders to further purely personal ends through the corporate form.[283] The "any lawful purpose" language was adopted by states to further the profit-making ability of the corporation by giving "greater flexibility to

---

278. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2768 (2014) (holding that the corporate right to free exercise is protected to "protect[] the religious liberty of the humans who own and control those companies"); *cf.* Hardee, *supra* note 44, at 23–25 (arguing that RFRA exemptions require the shareholders ignore the corporate form); Mark, *supra* note 171, at 541 (noting that the "entities exist solely as vehicles" to provide protection for the shareholders).

279. *See* Mark, *supra* note 171, at 541 (noting that *Hobby Lobby* sees the corporate entity merely "as vehicles" used to further shareholders' personal beliefs); Taub, *supra* note 89, at 405 (arguing that *Hobby Lobby* permits RFRA exemptions based on three conditions, including having "human owners that [are] co-extensive with the corporation").

280. *See, e.g.*, Petition for Writ of Certiorari at 4–6, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. __, 138 S. Ct. 1719 (2018) (No. 16-111), 2016 WL 3971309, at *4–6 (arguing that Mr. Phillips has "integrated" his faith into the business); Brief for Petitioners at 5, 17, Conestoga Wood Specialties Corp. v. Sebelius, 573 U.S. __, 134 S. Ct. 678 (2014) (No. 13-356), 2014 WL 173487, at *5, *17 ("[T]hey cannot separate their religious beliefs from their business practices . . . . When a religious family runs a business, the family itself is impacted by what the business does, or what it is required to do. There is no separating the Hahens' faith from their business or its actions.").

281. *Hobby Lobby*, 134 S. Ct. at 2770–71 (quoting 1 J. COX & T. HAZEN, TREATISE OF THE LAW OF CORPORATIONS § 4:1 (3d ed. 2010)).

282. *Id.* at 2771.

283. *See* Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 783–84 (2015) (noting that the language was adopted "to give corporate managers the authority to move freely into new business lines and out of old ones without the inhibiting effect of old style charters and their complement, the ultra vires doctrine").

corporate managers to expand into new business areas over time" without the need for long lists of particular business purposes in their charter.[284] This purpose is in line with the rationale for limited liability as a tool to spur economic growth.[285]

Veil piercing doctrine supports the argument that limited liability was not designed to allow individuals to place a liability shield around their personal lives. The case law is replete with veils being pierced because shareholders used the corporation to further their own personal ends: to remodel their home,[286] pay for vacations and cars,[287] and for other personal expenses.[288] The veil is pierced in these cases not because, for example, remodeling a home is not "a lawful purpose" for a corporation—there are corporations that remodel homes for profit and corporations that donate home remodels to the needy in their community.[289] The veil is pierced in these circumstances because remodeling the shareholder's *own* home furthers the *shareholder's* interests, not the corporation's interest. Therefore, there is no justification for limited liability.

A state need not embrace profit maximization as the sole justification for the corporation in order to utilize this reasoning.[290] Even assuming that corporations may engage in activities to help others regardless of corporate profit, it does not support the argument that shareholders can use the corporation to further their own personal ends.[291] Courts have recognized this distinction and pierced even when the shareholder had

---

284. Ackerman & Cole, *supra* note 193, at 957–58; *see also* Strine, *supra* note 283, 783–84.

285. *See supra* notes 236–241 and accompanying text.

286. *See, e.g.*, *In re* Marriage of Noble, 193 Wash. App. 1040, No. 71206-3-I, 2016 WL 1734259 (Ct. App. May 2, 2016) (unpublished decision) (piercing the veil of an LLC because, *inter alia*, the LLC paid for the owners' home remodel).

287. *See, e.g.*, Medlock v. Medlock, 642 N.W.2d 113, 125 (Neb. 2002) (piercing veil of nonprofit church during divorce proceedings because husband exerted control over the corporation, as demonstrated by using corporate funds for personal vacations and vehicles, among other personal expenses).

288. *See, e.g.*, Shisgal v. Brown, 801 N.Y.S.2d 581, 584 (App. Div. 2005) (denying motion to dismiss veil piercing claim because of allegations that the shareholders used the company for personal expenses such as plastic surgery and personal parking tickets); NEC Elecs. Inc. v. Hurt, 256 Cal. Rptr. 441, 443 (Ct. App. 1989) (piercing because corporation paid personal expenses of shareholder); *see also* Rutledge, *supra* note 198, at 19–20 ("The property of the corporation is that of the corporation as a legal entity distinct from the shareholders, and those assets are not available to satisfy the personal debts of the shareholders.").

289. *See, e.g.*, *Corporate Partners*, HABITAT FOR HUMAN., https://www.habitat.org/about/partners/corporate [https://perma.cc/M67Q-AJ2C] (listing corporate partners of Habitat for Humanity, a nonprofit organization that builds homes for people in need).

290. *See supra* Section I.B. (discussing debate around profit maximization principle).

291. *See supra* notes 116–119 and accompanying text (describing difference between CSR and exemptions based on personal religious exercise).

personal motives to give corporate funds to others, including personal donations to the shareholder's church.[292]

The *Hobby Lobby* decision predicates the corporations' RFRA exemptions on the requirement that they be motivated by the shareholders' personal, sincere religious beliefs.[293] The majority makes no pretense that the corporation itself can hold sincere religious beliefs and instead rests its holding on the fact that the shareholders are advancing their own personal beliefs.[294] These beliefs are necessarily personal as a corporation can no more hold sincere religious beliefs than it can desire a home remodel. A shareholder using the corporate form to further either personal end arguably creates conflict with the purpose of the corporation underlying the veil piercing doctrine.[295] While this distinction may appear a mere technicality, it has a long pedigree in veil piercing cases.

It is true that when determining whether the corporation is an alter ego of the shareholder courts have historically focused on the corporation being used to further the shareholders' *financial* ends, as those were the only ends available to shareholders.[296] Now that the Court has created a new way, shareholders can further personal, non-financial ends through the corporation; however, courts will need to address the impact of such use. In doing so, the religious nature of the shareholders' personal ends should not be outcome determinative.[297] Veil piercing can provide state

---

292. *See, e.g.*, *In re* Crabtree, 554 B.R. 174, 198 (Bankr. D. Minn. 2016) (piercing corporate veil in bankruptcy case because shareholder commingled funds, including the corporation making "a personal contribution . . . to their church"); Macaluso v. Jenkins, 420 N.E.2d 251, 256 (Ill. App. Ct. 1981) (piercing veil because shareholder made personal donations to charity that were reimbursed by the corporation and gave corporate funds to a friend); *Shisgal*, 801 N.Y.S.2d at 584 (denying motion to dismiss on piercing claim because corporate funds were used to help "friends, relatives and associates").

293. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2774–75 (2014) (stating that the sincerity of the corporation's "beliefs" are determined by the sincerity of the shareholders' beliefs); Taub, *supra* note 89, at 419–20 (arguing that the Court's language demonstrates that exemptions are predicated on the requirement that they be motivated by the shareholders' shared sincere religious beliefs).

294. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2759 ("the sincerely held religious beliefs of the companies' owners"); *id.* at 2764–65 (describing the Hahn's religious beliefs and how they exercise those beliefs through Conestoga); *id.* at 2765–66 (describing the Greens' beliefs and how they exercise those beliefs through Hobby Lobby and Mardel); *see also* Hardee, *supra* note 44, at 28–29 (analyzing language regarding the personal nature of the shareholders' beliefs throughout the opinion).

295. *See supra* note 292 (listing cases holding that personal expenditures justify piercing).

296. *See supra* notes 286–288 and accompanying text (describing cases involving corporate expenditures for personal expenses).

297. For example, to allow shareholders to use corporate funds to pay for a religious pilgrimage to Mecca with impunity but then pierce when a shareholder uses corporate funds for a vacation would lead to inequitable results for corporate creditors. In fact, courts have not treated religion as taking

courts the opportunity to clarify the purpose of the corporation vis-à-vis the shareholder's personal, non-financial interests.

2. *Analyzing the Effect of Religious Exemptions on Veil Piercing*

A shareholder's previous claim to an exemption based on a unity of interest with the corporation could play out in different ways in the fact-intensive veil piercing inquiry.[298] The strongest case for piercing would be one in which a corporation incurs a debt related to the religious identity that was grounds for the prior exemption. For example, consider a hypothetical involving a corporation, Corp., Inc., that had claimed a RFRA exemption to the contraceptive mandate based on the sincere religious beliefs of its two controlling shareholders. It is then discovered that Corp., Inc. has been paying female employees less than its male counterparts and not promoting women to leadership positions because mid-level managers believed that doing so would contradict the company's religious principles.[299] A class of female employees sues under the state's anti-discrimination statute and wins a substantial judgment against Corp., Inc. The corporation has insufficient assets to satisfy this judgment, so the class seeks to pierce the corporate veil and hold the shareholders personally liable for this debt. The court analyzing this veil piercing claim might use the shareholders' previous exemption in several ways.

The court could make the fact that the shareholder has previously claimed an exemption based on a unity of interest with the corporation a new, additional factor in the veil piercing test. This factor might be particularly strong in this case as what passed through the veil previously—the shareholders' religious beliefs—is closely related to the liability in the underlying employment litigation. In other words, if the corporation has been deemed to have a religious identity based on the shareholders' personal religion, then liability based on the exercise of the

---

personal use outside the reach of the veil piercing doctrine. *See In re Crabtree*, 554 B.R. at 198 (piercing veil of corporation in bankruptcy in part because corporate funds were used to make "personal contributions" to the shareholders' church); Medlock v. Medlock, 642 N.W.2d 113, 128 (Neb. 2002) (piercing veil of nonprofit church because defendant controlled it as his alter ego).

298. *See* FLETCHER CYC., *supra* note 125, § 41.10 ("The propriety of piercing the corporate veil is highly dependent upon the equities of the situation, and the inquiry tends to be highly fact-driven.").

299. This hypothetical is in line with claims that have been made by for-profit companies seeking to evade anti-discrimination laws because their religious beliefs counsel "that women's place in the home and the Bible gives husbands authority superior to that of their wives." Sepper, *supra* note 2, at 1515 (describing past religious objections to laws in the context of religious discrimination lawsuits).

corporation's religion should likewise pass back through the veil to the shareholder.

Alternatively, or in addition, the shareholders' previous exemption could factor into the court's analysis of traditional veil piercing factors. The fact that the shareholders wield the corporation to further their personal beliefs could be used to demonstrate control and domination of the entity by the shareholders.[300] A previous exemption could be taken into account using the commingling factor in two ways. First, a court could determine that in claiming that the expenditure of corporate funds to pay for employees' contraceptive coverage is attributed to the shareholders personally, they are commingling corporate and personal assets.[301] Second, even without financial expenditures by the corporation, the court could consider the commingling of the shareholders' personal purpose and the corporation's economic purpose, to find the shareholders are using the corporation to further their own personal ends. Finally, in weighing the injustice or unfairness of maintaining the corporate form, a court may entertain the argument that it is generally unfair to allow someone to pierce the veil at their own behest and for their personal benefit and then disavow any debt of the corporation arising from it. Similar to using exemptions as a stand-alone factor, the injustice claim is strongest when the underlying liability is directly linked to the right the shareholders have previously exercised via the corporation. Taken collectively, these arguments could make a strong case for the court to use its powers in equity to pierce the corporate veil of the hypothetical Corp., Inc. under these circumstances, even if no other veil piercing factors were present.[302]

Not all veil piercing claims would necessarily give the same weight to the shareholders' previous exemptions. If the corporate debt was from a slip and fall negligence action or a contract claim by a supplier, there

---

300. *See* Mitchell, *supra* note 230, at 1169–70 (noting that closely held corporations are more likely to have their veil pierced because courts see control over the corporation as linked to responsibility for the corporation's acts).

301. This was the argument of Judge Rovner in dissent in one of the cases leading up to *Hobby Lobby*. *See* Grote v. Sebelius, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) ("To suggest, for purposes of the RFRA, that monies used to fund the [corporation's] health plan—including, in particular, any monies spent paying for employee contraceptive care—ought to be treated as monies from the [shareholders'] own pockets would be to make an argument for piercing the corporate veil.").

302. For example, even if Corp., Inc. had observed all corporate formalities such as maintaining corporate books and holding regular board meetings. *See* Oh, *supra* note 255, at 138 (noting that failure to observe corporate formalities is a factor considered by courts but carries more weight for contract claims).

would be less to tie the exemption to the corporate debt.[303] However, a connection between the debt in question and the factors favoring piercing is not always required.[304] The shareholders' previous claim of a unity of interest with the corporation could merely serve as one additional fact to use in determining whether the shareholders treated the corporation as a separate entity or as their alter ego. In doing so, the court should be cognizant of "balanc[ing] the benefits of limited liability against the costs," including the harm from using the corporate form to evade protections for third parties.[305]

3. *Considering Prior Exemptions Faces Substantial Hurdles*

The argument that states can consider prior exemptions made by the corporation in the veil piercing analysis is likely to be met with opposition. The Court in *Hobby Lobby* held that it is inappropriate under RFRA to "discriminate" against individuals who decide to incorporate.[306] Although RFRA does not apply to the states, the idea that state law may not impose consequences on corporations who claim RFRA exemptions could find purchase in arguments that veil piercing creates a burden on the exercise of a federal right.[307]

A burden argument would likely boil down to a question of defining the appropriate baseline for determining what constitutes a "burden" on religion.[308] If the baseline of state law is defined as providing limited liability for any corporation conducting business for any purpose, then forcing individuals to give up their rights under RFRA "in exchange" for limited liability could be problematic.[309] But such a baseline ignores the

---

303. *See, e.g.*, Fanning v. Brown, 85 P.3d 841, 847 (Okla. 2004) (holding trial court erred in denying motion to dismiss veil piercing claim where allegations of abuse of corporate form related to the neglect and abuse of plaintiff that formed basis of the claim); Presser, *supra* note 239, at 412 (noting that some jurisdictions require fraud for veil piercing for contractual creditors).

304. *See* Presser, *supra* note 239, at 412–13 (noting that jurisdictions differ on whether they require injustice beyond use of the corporation as an alter ego and what that injustice needs to entail).

305. Easterbrook & Fischel, *supra* note 231, at 93, 109 (discussing that courts balance the economic gain of limited liability against the social costs of excessive risk taking).

306. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __, 134 S. Ct. 2751, 2759 (2014).

307. If in the future the Court provides a constitutional right to corporations to engage in the expressive speech of their shareholders or grants corporations a free exercise right, the doctrine of unconstitutional conditions could similarly be raised. *See* Buccola, *supra* note 5, at 653–54 (recognizing the potential challenge to states ability to abrogate corporate rights).

308. *See* Sepper, *supra* note 2, at 1471–77 (describing how religious liberty claims by corporations replicate the baseline problems inherent in *Lochner* and how setting the baseline can be outcome determinative).

309. There is language in the *Hobby Lobby* decision that suggests this is how the majority views the baseline for corporations. *See Hobby Lobby*, 134 S. Ct. at 2767 (noting with disapproval that the

"artificiality of the market."[310] The incorporated form is not the "natural" state of the market—it is a result of states altering the market to provide special benefits, including limited liability, in exchange for agreeing to a state-imposed structure and purpose.[311]

The more appropriate baseline is that people—even associations of people engaged in business—are responsible for their own debts *unless* they have established a legally separate entity that operates to further its own economic ends, rather than the shareholders' personal ends.[312] This is a more accurate description of state law.[313] With the baseline set as such, there is a strong argument that under the state's definition of a limited liability entity, shareholders who utilize their corporations for personal ends are not burdened at all; they simply do not qualify for the privilege.

Until the federal courts explicitly preempt state power to define corporate structure, power, and purpose, how much power states retain to define corporations remains an open question. Like the power to make corporate political expenditures, it seems clear that states do not have the power to prevent looking through the corporate form to allow shareholders to claim exemptions under RFRA.[314] There is still a viable argument, however, that states can determine when a shareholder has misused the corporate form under state law and the consequences that flow from it.[315] While the outcome of that argument is uncertain, in advancing it the states will, at minimum, force the Supreme Court to be transparent about the extent to which it intends to preempt state power to define corporations.

HHS's position forces business people to face a "difficult choice" between giving up "judicial protection of their religious liberty or forgo[ing] the benefits . . . of operating as corporations").

310. *See* Sepper, *supra* note 2, at 1463 (arguing that the Court in the infamous *Lochner* case made the mistake of assuming the baseline for evaluating burdens is the market status quo).

311. *See* Hardee, *supra* note 44 (describing the evolution of state law from unlimited liability entities to limited liability corporations).

312. *See* Sepper, *supra* note 2, at 1484–85 (noting that incorporating under state law for corporate benefits is engagement with the state that alters the market baseline).

313. *See supra* Section II.B.

314. *See Hobby Lobby*, 134 S. Ct. at 2768 (holding that Congress intended to include shareholders acting through the corporate form under the definition of "persons" for purposes of RFRA); Buccola, *supra* note 5, at 599 (recognizing that "states cannot overrule the Court's understanding of corporate rights").

315. *See* Buccola, *supra* note 5, at 599 (arguing that states can "disempower the corporations they create from doing the kinds of things that implicate disfavored federal rights").

C. *The Practical Advantages of Adapting Veil Piercing to Corporate Rights*

In addition to its substantive fit, utilizing the veil piercing doctrine has many practical advantages that make it a good test case to begin to push back on the federalization of corporate law. First, there is a strong argument that the internal affairs doctrine does not apply to veil piercing claims, thus preventing corporate flight and ensuring the benefits of the change inure to the citizens of the state.[316] Second, as an equitable common law doctrine, state courts can evolve the doctrine slowly for maximum impact with minimal disruptions to businesses in the state.[317]

1. *The Internal Affairs Doctrine May Be Disregarded for Veil Piercing Claims*

If a state wishes to protect its citizens from the power wielded by the corporations that employ and serve them, changes to the law must apply to all corporations doing business in the state. The potential for unlimited personal liability for shareholders is a powerful motivator for corporate shareholders.[318] If the internal affairs doctrine applies, a corporation that wishes to avoid the host state's protective measures can simply reincorporate in another state to take advantage of a more accommodating corporate law.[319]

For veil piercing claims, some courts currently use the internal affairs doctrine and apply the law of the state of incorporation, while others already apply general choice-of-law principles.[320] Professor Crespi makes a compelling argument that the internal affairs doctrine should not apply

---

316. *See infra* Section III.C.1.

317. States can take a page from the Delaware Chancery Court for the best way to encourage business leaders to act without putting economic priorities at risk. *See, e.g.*, *infra* notes 331–332 and accompanying text (describing how Delaware Chancery Court previews changes to the law through dicta, academic papers, and participation in conferences, allowing companies to adjust their business practices before the imposition of liability on any one company).

318. *See* Thompson, *supra* note 225, at 6 ("Limited liability is a much more important determinant of business form than any particular governance rule in that entrepreneurs will react more to any change in the liability risk than to a change in a governance rule.").

319. *See id.* (noting that entrepreneurs will opt for liability benefits over internal governance rules). It is possible that corporations will still choose to stay in a state where veil piercing is more likely if they see other benefits from that choice. *See* Crespi, *supra* note 30, at 101 (hypothesizing that veil piercing doctrine might not be the most important factor to shareholders in choosing place of incorporation). Shareholders who wish to claim exemptions, however, might be more motivated to avoid the law than an average shareholder as their risk for piercing would be known.

320. *See* Crespi, *supra* note 30, at 90 nn.13–14 (citing choice-of-law determinations from various jurisdictions). Only Texas requires by statute that the internal affairs doctrine be used. *Id.* at 88.

to veil piercing claims.[321] The principles of equity inherent in veil piercing suggest that general choice-of-law principles be used, giving "courts the latitude to consider the interests of each jurisdiction involved in protecting the legitimate rights and interests of its citizens."[322] Tort claimants are involuntary creditors external to the corporate governance structure and "simple fairness concerns" mandate the use of law appropriate to the tort claim rather than defaulting to the law of the state of incorporation.[323] For contract claims, if the choice-of-law is specified for piercing claims, that choice should govern.[324] However, if the contract does not state which law should be used for piercing claims, Professor Crespi argues that standard choice-of-law analysis should apply because a contract's general choice-of-law provision is insufficient to infer that the parties negotiated a preference for veil piercing controversies.[325]

Balancing the interests of all jurisdictions involved is the better method for both tort and contract creditors because it "removes the ability of corporations and their shareholders to limit the shareholders' exposure to piercing claims merely by selectively incorporating" in jurisdictions they consider favorable.[326] This prevents shareholders and corporations from "externalizing the consequences of their inequitable conduct."[327]

Rejecting the internal affairs doctrine for veil piercing is less problematic than doing so for matters of pure internal governance, like shareholder voting. Adding prior exemptions as a factor to the veil piercing test does not create "inconsistent internal governance demands" because the decision to claim an exemption is not a matter of internal governance procedure but rather a substantive business decision, and not one any corporation is *required* to make.[328]

2. *As an Equitable Common Law Doctrine, Veil Piercing Provides Flexibility and Allows for Incremental Change*

There are also practical benefits deriving from states limiting corporate power through an equitable common law doctrine like veil piercing.

---

321. *Id.* at 125–26. Professor Crespi also argues that the same analysis counsels using general choice-of-law analysis for piercing claims regarding other business entities, i.e., LLCs or LLPs. *Id.* at 127.

322. *Id.* at 108.

323. *Id.* at 98.

324. *See id.* at 105.

325. *See id.* at 107.

326. *Id.* at 125; *see also id.* at 98.

327. *Id.* at 125.

328. *See id.* at 103.

Common law allows for incremental changes to the law focused on cases that provide the most compelling argument for legal innovation.[329] Given the potential pushback from federal courts to states attempting to limit the use of corporate exemptions, incremental change may be wise. It will allow state courts to consider exemptions in the cases presenting the strongest argument for finding a lack of separation or improper corporate purpose, thereby clarifying the state's law regarding both. Once a state has clearly defined the requirements of separation and corporate purpose in order to receive limited liability under its law, it will force the federal courts to either accept the state's power to do so or explicitly preempt it.

Common law adjudication has the potential to disrupt corporations doing business in the state by retroactively holding an unsuspecting shareholder personally liable for massive corporate debts.[330] If used carefully, however, the common law can allow evolution of the veil piercing doctrine without major business disruption. For guidance on how to do so, state courts should look to the nation's premier corporate court—the Delaware Court of Chancery. The Delaware Court of Chancery frequently uses "careful and considered" dicta to regulate corporate conduct "without requiring the litigants before it to bear the cost (through retrospective application)."[331] By announcing potential changes to corporate governance rules through well-reasoned dicta in legal opinions, participation in legal conferences, and publishing academic pieces, the members of the Delaware Court of Chancery engage in an ongoing dialogue with the business and legal community.[332] In this way, changes to the law can be phased in and the theoretical kinks worked out over the course of several opinions.[333] In a similar vein, careful consideration and discussion of how claiming corporate exemptions may affect the limited liability of shareholders by state courts through these channels can both put shareholders on notice of potential personal liability and allow for the development of the doctrine prior to a legal challenge.

---

329. *See* Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1255 (2015) (arguing that "the common law's conceptual architecture . . . is intrinsically designed to accommodate the process of incremental normative change over time").

330. *See* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 591 (2012) ("It may be that the retroactive application of new rules is a necessary if unfortunate byproduct of the traditional common law system . . . .").

331. *Id.* at 590 (arguing that dicta allows innovation in the law while still minimizing uncertainty).

332. *See id.* at 591–92 (describing process and various corporate governance rules that have evolved through it).

333. *See id.* at 592–93 (describing "a long-running debate" over a potential change in review standards carried out through court dicta and legal commentary by academics and practitioners).

CONCLUSION

The laws governing corporations are in flux. The U.S. Supreme Court has greatly expanded corporate rights and, consequently, expanded the power of corporations to both influence the democratic process and claim exemptions from democratically enacted laws designed to protect third parties. This has upset the balance of power inherent in state corporate law, which has long placed the regulation of harm in the realm of external regulation rather than corporate governance. In light of recent cases, states have no choice but to respond to the Supreme Court's instructions to flesh out these new corporate rights within existing corporate governance structures.

But states do have decisions to make about how their law should adapt. They can either incorporate new rights into their existing framework without concern for the side effects or they can rethink the balance of power and pursue a path that restrains corporate might when third parties are harmed. This Article advocates the latter. Starting with a relatively minor change to veil piercing doctrine to discourage corporations from utilizing exemptions to the law, this Article shows how states can help protect the interests of its human citizens. Such a change will also put states in the best position to test how far the Supreme Court is willing to go in federalizing corporate law. The veil piercing doctrine is not a panacea, but it is a good first step in reasserting the right of states to define their corporate creations.