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## Who's Causing the Harm?

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## Who's Causing the Harm?

Catherine A. Hardee<sup>1</sup>

*My parents started a software company out of our family room when I was just five years old. As a child, the business felt like the sixth member of our family. A fourth child who grew up alongside my sisters and me and whom my parents struggled with, stressed over, and strove to infuse with their values just as they did their flesh and blood children. Take pride in your work and stand behind what you do applied equally to homework and product launches. The Golden Rule to treat others as you would like to be treated meant that, long before mandates, my parents provided all their employees with health insurance and a living wage. Along the way corporate documents were drawn up and the corporation was “born,” a legal resident of our home state of Washington. But such formalities were an inconsequential blip compared to the seemingly endless discussions around the dinner table about coding issues; playing hide and seek in successively larger office spaces; or watching my parents put on a good face while they stressed over sales numbers.*

*My family's business is the classic American success story. What started in our den now occupies a small office building housing several dozen employees. My older sister and her husband have taken over the business—the next generation of the family enterprise. There has never been a formal corporate policy instructing the business: “Don't be evil.” Instead my parents, and now my sister, run a company that mirrors their personal beliefs about honesty, integrity, morality, and hard work. A business that reflects who we are as a family. Envisioning my family without the business is difficult; but the idea that the corporation could exist apart from my family simply does not compute.*

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## INTRODUCTION

The story of my family's business is not unique. Starting a business and "being your own boss" is a key part of the American dream.

<sup>2</sup> Entrepreneurship represents a quintessentially American path for success and a way to pass your legacy on to your children.<sup>2</sup> As a result, owners of small businesses and family-owned businesses frequently see themselves as having a unity of interest with their business, describing their relationship to their company in intimate terms.<sup>3</sup>

Despite this cultural view of small and family owned businesses, as the Supreme Court will undoubtedly grapple with more requests for religious exemptions by family businesses,<sup>4</sup> it is important to keep in mind the separation corporate law requires between a corporation and its shareholders.<sup>5</sup> Courts and some commentators are tempted to see small businesses or family-run businesses as having a unity of interest with their owners.<sup>6</sup> This view is understandable given our cultural understanding of closely held corporations as extensions of their owners.<sup>7</sup>

But the history of corporate law tells a different story. For centuries, the law did treat businesses and their owners as one and the same under the law of general partnerships and sole proprietorships with its unlimited personal liability for business owners.<sup>8</sup> The key development found in the corporate form, however, is the

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<sup>2</sup> For example, President Lincoln, in a speech to the Wisconsin State Agriculture Society in Milwaukee, praised the entrepreneurial spirit that can "free" individuals from wage labor, stating:

The prudent, penniless beginner in the world, labors for wages awhile, saves a surplus with which to buy tools or land, for himself; then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is *free* labor—the just and generous, and prosperous system, which opens the way for all—gives hope to all, and energy, and progress, and improvement of condition to all.

Abraham Lincoln, Address Before the Wisconsin State Agricultural Society in Milwaukee, Wisconsin (Sept. 30, 1859), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 471, 478–79 (Roy P. Basler ed., 1953).

<sup>2</sup> See Chris Isidore, *Immigrants Made American Business What It Is Today*, CNN MONEY (Sept. 5, 2017, 1:26 PM), <http://money.cnn.com/2017/09/05/news/companies/immigrant-employers/index.html> [<https://perma.cc/U5S3-S4K4>] (discussing the role of immigrants in founding American businesses).

<sup>3</sup> See *infra* Section I.A.i.

<sup>4</sup> See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (refraining from deciding whether corporation is entitled to religious exemption to public accommodation laws).

<sup>5</sup> See *infra* Section I.B.i..

<sup>6</sup> See *infra* Section I.A.i..

<sup>7</sup> See *infra* Section I.A.i.

<sup>8</sup> See *infra* Section I.A.ii. A very large number of nonemployer businesses remain under such a legal regime as unincorporated partnerships or sole proprietorships. U.S. Small Bus. Admin. Office of Advocacy, *Frequently Asked Questions*, 4 (Sept. 2012), [https://www.sba.gov/sites/default/files/FAQ\\_Sept\\_2012.pdf](https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf) [<https://perma.cc/V9MZ-D88M>] [hereinafter *Frequently Asked Questions*] ("Sole proprietors and partnerships constituted 94 percent of nonemployers in 2010 . . ."); see also *Nonemployer Definitions*, U.S. CENSUS BUREAU, <https://www.census.gov/epcd/nonemployer/view/define.html>

separation of the owners and the business.<sup>9</sup> That separation is the foundation upon which corporate law is built, including providing a justification for limited liability and perpetual life.<sup>10</sup> The story of corporate law admittedly is complicated by relatively recent changes to corporate law and the emergence of new limited liability forms. States have been willing to allow small businesses to alter certain aspects of corporate law that have proven unwieldy for small business entities, perhaps justifying the feeling that closely held corporations are once again mere appendages of their shareholders.<sup>11</sup> Where most states have held the line, however, is enforcing the separateness requirement where third parties may be harmed.<sup>12</sup>

Prior to the *Hobby Lobby* decision,<sup>13</sup> when faced with a rights claim by a corporation, the Supreme Court almost exclusively gave the corporation itself the ability to exercise the right in question, respecting and furthering the corporate form.<sup>14</sup> These decisions reflect the legal reality of corporate separation. The *Hobby Lobby* decision, on the other hand, gives shareholders the right to utilize the corporation as a vehicle to exercise their personal religion.<sup>15</sup> Rather than treating the corporation as an entity with rights that derive from its aggregate members, *Hobby Lobby* treats the corporation as merely a collection of individuals who may use the corporation to express their personal religion.<sup>16</sup> In so doing, arguably, the Court adopts the cultural view of small businesses as alter egos of their owners. While this may appear to be a minor distinction, it strikes at the heart of state corporate law.

This break from precedent has particular relevance to the concern that religious exemptions have the potential to cause harm to others. When considering the harm caused by granting religious exemptions, an important aspect to consider is who is empowered to cause that harm. Under *Hobby Lobby*, the answer to who is causing the harm is neither a corporation nor an individual, but rather an individual granted the powers and privileges afforded corporations under state law. Given the sheer number of small and/or family-controlled businesses, the potential for harm caused by these super-charged shareholders is not one that is contemplated by state corporate law.

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[<https://perma.cc/PD89-7PYG>] (last visited Mar. 17, 2018) (discussing the definition of nonemployer businesses).

<sup>9</sup> See *infra* Section I.B.

<sup>10</sup> See Daniel J. Morrissey, *Piercing All the Veils: Applying an Established Doctrine to a New Business Order*, 32 J. CORP. L. 529, 536–37 (2007); see also *infra* Section I.B.i.

<sup>11</sup> See *infra* Section I.B.

<sup>12</sup> See *infra* Section I.B.

<sup>13</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>14</sup> See Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 658–60 (2016) (describing early corporate rights jurisprudence as helping to “solidify the corporate form” by giving the corporation the ability to enforce the rights of its members). Later jurisprudence gave corporations speech rights without concern for the protection of the individuals involved in the corporation, taking the idea of the corporation as a separate entity a step further. *Id.* at 661–62.

<sup>15</sup> See *Hobby Lobby*, 134 S. Ct. at 2768; *infra* Section II.B.; see also Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 314–15 (2015) (arguing that the *Hobby Lobby* decision rejects corporate separateness).

<sup>16</sup> See Greenfield, *supra* note 15, at 314–15; *infra* Section II.B.

## I. A TALE OF TWO COMPANIES: THE SMALL BUSINESS DILEMMA

A disconnect exists between the way modern society views small businesses and family-owned businesses as cultural enterprises and the way that corporations—including closely held corporations—are treated under the law. The owners of small businesses and family businesses often see a unity of identity between themselves and their business, and, historically, the law treated these businesses as such. But the advent of the corporate form changed the legal nature of business without necessarily changing this cultural identity, leading to pressure to allow flexibility within corporate forms. The requirement of legal separation, however, has remained, leading to tension with the way business owners relate to their companies.

### A. *Small and Family-Run Businesses*

Understanding the way that society sees small and family businesses, including the way that such business owners see themselves, is a key part of understanding the new doctrine of corporate personhood that is being developed by the Court in upholding the rights claims of such entities. Legal theory has the ability to shape social practice, but social practice also has the power to inform and shape legal theory and doctrine.<sup>17</sup> To understand how the Supreme Court has shifted its theory when evaluating claims by these businesses, it is necessary to examine the social practices of those involved in small and family-run companies.<sup>18</sup>

#### i. Unity and Connection in the Small and Family-Run Business

The United States is a nation of small businesses and family-run companies. Over 99% of all businesses in America are small businesses.<sup>19</sup> Over half of those small

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<sup>17</sup> David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 243 (1990) (“Theories about the corporation depend in large part on perceptions of what corporations look like. Law embodies beliefs about what is legitimate, and these beliefs influence the way people behave. Legal theory shapes social practice and practice informs theory—at the same time.”) (footnote omitted).

<sup>18</sup> Courts tend to use the language “closely held corporation” to draw legal distinctions between companies with overlapping ownership and control, despite the fact that the moniker is of little value from a definitional standpoint. See Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149, 164 (Micah Schwartzman et al. eds., 2016) (noting that there is no single definition for the term in corporate law and the Court utilizes a “general understanding” of the term). This Article uses the more colloquial terms of small business and family or family-run business because the terms collectively encompass the companies that courts likely intend when using the quasi-legal term of closely held companies—companies owned and operated by a small group of individuals motivated by similar moral or social concerns. See *id.* at 164–65. It also excludes corporations with a limited number of shareholders but likely lacking in a common moral compass, such as a start-up funded by venture capitalists, which are also generally referred to as closely held corporations. These terms also reflect the way that owners of such businesses describe themselves. The subjective views of such business owners are the focus of this Part.

<sup>19</sup> *Frequently Asked Questions*, supra note 8, at 1.

businesses are home-based companies.<sup>20</sup> Nearly half of America's reported labor force is employed by small businesses.<sup>21</sup> Of small businesses with reported employees, over 40% have fewer than five employees, and 90% have fewer than twenty employees.<sup>22</sup> The vast majority of small businesses are nonemployers, meaning they are a business venture without any employees on payroll, or sole proprietorships.<sup>23</sup> These businesses, however, frequently hide the employment of family members.<sup>24</sup>

A very large percentage of these small businesses are also family-run companies.<sup>25</sup> Academics have found it difficult to define a "family business" given the various potential levels of involvement of family members and the intent of the family to keep the business over generations.<sup>26</sup> One study found that under the broadest definition, 89% of all business tax returns are family businesses and that, when using the narrowest definition, 54% of all businesses reporting employees are family businesses.<sup>27</sup> Despite the imprecise nature of the data available, using the definition that a family business is one where "effective control of the business rests in family hands and that at least two family members be involved as owners or managers,"<sup>28</sup> it is still easy to conclude that "[m]ost U.S. businesses are family owned."<sup>29</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Ben Thornley, *The Facts on U.S. Social Enterprise*, HUFFPOST: BLOG (Nov. 8, 2012, 9:53 AM), [https://www.huffingtonpost.com/ben-thornley/social-enterprise\\_b\\_2090144.html](https://www.huffingtonpost.com/ben-thornley/social-enterprise_b_2090144.html) [<https://perma.cc/59VB-FZ6T>] (updated Jan. 8, 2013); *Facts & Data on Small Business and Entrepreneurship*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL, <http://sbecouncil.org/about-us/facts-and-data/> [<https://perma.cc/BXG3-VXGC>] (last visited Mar. 17, 2018).

<sup>23</sup> See U.S. Small Bus. Admin. Office of Advocacy, *Small Business Facts*, 1 (Dec. 2013), [https://www.sba.gov/sites/default/files/12-13\\_Nonemployer\\_v%20Sole\\_Prop.pdf](https://www.sba.gov/sites/default/files/12-13_Nonemployer_v%20Sole_Prop.pdf) [<https://perma.cc/E4TW-LKXV>]; *Firm Size Data*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/advocacy/firm-size-data> [<https://perma.cc/Q5C2-UFRH>] (last visited Mar. 17, 2018).

<sup>24</sup> Joseph H. Astrachan & Melissa Carey Shanker, *Family Businesses' Contribution to the U.S. Economy: A Closer Look*, 16 FAM. BUS. REV. 211, 213–14 (2003); see also Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA. J. CONST. L. 215, 232 (2009) ("[W]hen one takes an economic overview of the sole proprietorship, one uncovers that the sole proprietorship, while legally owned by one person, is often a family-run business, employing family members as functional, partial owners.") (footnotes omitted).

<sup>25</sup> See Astrachan & Shanker, *supra* note 24, at 216.

<sup>26</sup> See Astrachan & Shanker, *supra* note 24, at 211 (noting that the "challenge in quantifying family businesses' collective impact is that there is no concise, measurable, agreed-upon definition of a family business" and that criteria such as "percentage of ownership, strategic control, involvement of multiple generations, and the intention for the business to remain in the family" are often considered); Benjamin Means, *The Contractual Foundation of Family-Business Law*, 75 OHIO ST. L.J. 675, 690–91 (2014) (describing the difficulty of defining a family business).

<sup>27</sup> Astrachan & Shanker, *supra* note 24, at 216. The broadest definition of family business "requires only that there be some family participation in the business and that the family have control over the business' [sic] strategic direction." *Id.* at 211–12. The narrowest definition requires that "multiple generations have a significant impact on the business" and that there is "more than one member of the owner's family with management responsibility." *Id.* at 212, 215.

<sup>28</sup> Means, *supra* note 26, at 690.

<sup>29</sup> See *id.* at 676.

Given the sheer number of small businesses, it stands to reason that most family-run companies are also small businesses, though not all are. Family-controlled enterprises can also mean big business. More than 30% of all companies with sales in excess of \$1 billion are family-controlled enterprises.<sup>30</sup> One report estimates that family-controlled enterprises in the United States “employ 60% of workers and create 78% of new jobs.” In addition, “[i]n one-third of S&P 500 companies . . . family members own a significant share of the equity and can influence key decisions, particularly election of the chairman and the CEO.”<sup>31</sup>

My family's connection to our business is representative of the way many owners of small and family-run businesses think about their companies. Entrepreneurs speak about their companies in the most intimate terms— as extensions of themselves or part of their families.<sup>32</sup> Small business owners sometimes draw parallels between starting a business and giving birth and raising children.<sup>33</sup> Small and family businesses are encouraged to run their businesses in line with their values and to market the business as an expression of their personality.<sup>34</sup> And they do just that: 91% of family owned businesses report that the family's values are emphasized

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<sup>30</sup> Nicolas Kachaner et al., *What You Can Learn from Family Business*, HARV. BUS. REV., Nov. 2012, at 103, 103.

<sup>31</sup> Claudio Fernández-Aráoz et al., *Leadership Lessons from Great Family Businesses*, HARV. BUS. REV., Apr. 2015, at 82, 84.

<sup>32</sup> See, e.g., JUSTIN B. CRAIG & KEN MOORES, LEADING A FAMILY BUSINESS: BEST PRACTICES FOR LONG-TERM STEWARDSHIP 89 (2017) (“[T]he most effective stewards see the business as an extension of themselves. . . . ‘In my experience, those genuinely serious about a role in their family business don’t see it as a job, nor a career; it is more akin to a vocation.’”); Nicole Fallon, *Focus on ‘Family’ Is Key to Long-Term Family Business Success*, BUS. NEWS DAILY (June 10, 2014, 5:39 AM), <https://www.businessnewsdaily.com/6567-managing-family-business.html> [<https://perma.cc/8HV6-WYEC>] (“What truly drives many family businesses is the sense of connection and identity the owners and their family members feel with the business . . . . ‘They’re so focused on the business’ [sic] success that it’s part of their identity. The business isn’t the life of non-family employees. In general, they won’t identify themselves with the business being part of who they are the way family members do.”).

<sup>33</sup> One entrepreneur who is also a mother likens starting a business to having a baby. See Jillian Darlington, *Starting a Business Is Like Having a Baby*, MOMCO: JILLIAN SAYS (Mar. 11, 2015), <http://momcoapp.com/starting-a-business-is-like-having-a-baby/> [<https://perma.cc/Y3QB-C49V>] (“Your business is your baby. You put everything into it and won’t stop until it succeeds. Sometimes you want to pull your hair out, but there’s also nothing else in the world that is more fulfilling than creating and nurturing something that you made out of love and passion.”); Emmie Martin, *The Founder of Uggs Boots Explains Why You Should Treat Your Business Like a Baby*, BUS. INSIDER (Nov. 10, 2014, 11:11 AM), <http://www.businessinsider.com/treat-your-business-like-a-baby-2014-11>.

<sup>34</sup> See, e.g., Fallon, *supra* note 32; Martin, *supra* note 33; Russ Alan Prince, *The Importance of Family Values in the Family Businesses* [sic], FORBES (Jan. 5, 2016, 7:24 AM), <https://www.forbes.com/sites/russalanprince/2016/01/05/the-importance-of-family-values-in-the-family-businesses/#21c062631023> [<https://perma.cc/X8KE-6NWH>]; Oksana Tashakova, *Your Business Brand Is an Extension of Your Personal Brand*, ENTREPRENEUR MIDDLE EAST (Oct. 8, 2015), <https://www.entrepreneur.com/article/251371> [<https://perma.cc/S74W-XNDZ>]; Values, PWC GLOBAL, <https://www.pwc.com/gx/en/services/family-business/values.html> [<https://perma.cc/QU4T-ZAE6>] (discussing a company providing consulting services “to help you analyse the values of your family business, and identify opportunities to amplify them throughout your organisation and beyond”).



in the business and nearly 70% say that their “businesses contributed significantly to their family’s identity in their communities.”<sup>35</sup>

Despite their size, even large, family-run companies see a unity of ownership between the family and the business. Large, family-controlled businesses look longer term and behave differently than companies that are not family-controlled, suggesting that larger family-controlled businesses tend to see their futures as linked to the business in a way that an average CEO does not.<sup>36</sup> For example, family-controlled firms are less likely to lay off employees, regardless of the company’s financial performance, and a majority of family businesses “believe that their ethical standards are more stringent than those of competing firms” and report high rates of discussion of ethical standards throughout every level of the business.<sup>37</sup> Research has shown that family-controlled businesses have “family gravity” or a member or members of the family who “stand[] at the center of the organization, like the sun in our solar system” and “personify the corporate identity and align differing interests around clearly defined values and a common vision.”<sup>38</sup> These key family members “tend to embrace strategies that put customers and employees first and emphasize social responsibility.”<sup>39</sup>

Given the connection between business and owner, it is not surprising that this link is expressed in religious terms as well. Religion can influence how business owners think about their role as owner, service provider, and employer.<sup>40</sup> For the devout, religion can be an integral part of the way they run all aspects of their

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<sup>35</sup> MASS. MUT. FIN. GRP., AMERICAN FAMILY BUSINESS SURVEY 6 (Oct. 2007), <https://www.massmutual.com/mmfg/pdf/afbs.pdf> [<https://perma.cc/EPW6-43BK>]; see also Jamie Moullé, *Strong Family Values Bring Family Business Success*, FAM. BUS. NEWSL. (Nev. State Bank, Las Vegas, Nev.), Winter 2014, at 1, <https://nevadasmallbusiness.com/wp-content/uploads/2014/01/Family-Business-Newsletter-Winter-2014.pdf> [<https://perma.cc/Z9MC-N5DS>] (describing the way a family business infuses family values into the company).

<sup>36</sup> Kachaner et al., *supra* note 30, at 104 (“The simple conclusion we reached is that family businesses focus on resilience more than performance. They forgo the excess returns available during good times in order to increase their odds of survival during bad times. A CEO of a family-controlled firm may have financial incentives similar to those of chief executives of nonfamily firms, but the familial obligation he or she feels will lead to very different strategic choices. Executives of family businesses often invest with a 10- or 20-year horizon, concentrating on what they can do now to benefit the next generation.”).

<sup>37</sup> MASS. MUT. FIN. GRP., *supra* note 35, at 6.

<sup>38</sup> Fernández-Aráoz et al., *supra* note 31, at 85, 86.

<sup>39</sup> *Id.* at 86.

<sup>40</sup> See, e.g., Melinda Emerson, *12 Bible Verses Every Small Business Owner Needs*, HUFFPOST: BLOG (Apr. 15, 2015, 9:57 AM), [https://www.huffingtonpost.com/melinda-emerson/small-business-owner-bible\\_b\\_1426541.html](https://www.huffingtonpost.com/melinda-emerson/small-business-owner-bible_b_1426541.html) [<https://perma.cc/Z8AC-H75Q>] (updated June 15, 2012) (noting that “[s]tarting a small business is a spiritual journey[]” and listing bible verses to inspire business owners); Andre Yee, *Business as Ministry*, DESIRINGGOD (Jan. 28, 2013), <https://www.desiringgod.org/articles/business-as-ministry> [<https://perma.cc/6P79-SCVM>] (encouraging readers to think of their jobs as ministerial).

business, down to such details as whether to use a limited liability form to borrow money.<sup>41</sup> Some entrepreneurs even cite their faith as the reason to start a business.<sup>42</sup>

This unity of interest between owner and business expressed in religious terms is not just present in popular culture but bleeds into the legal discussions around corporate rights. It is reflected in the petitioners' and amicus briefs for both the large family-run businesses in *Burwell v. Hobby Lobby*<sup>43</sup> and the "mom and pop" small business in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.<sup>44</sup> It can also be seen in the words of a lesbian who owns a small business with her partner speaking out in defense of a t-shirt maker in legal trouble for refusing to make t-shirts for a gay pride event.<sup>45</sup> Her defense of the business that refused to provide a service to her community was that "[she] know[s] how hard it is to build a business and it's very personal . . . . You put your blood and your sweat and your tears into every bit of it."<sup>46</sup>

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<sup>41</sup> See, e.g., *DOING BUSINESS GOD'S WAY: Four Cornerstones and Three Key Principles*, MINDFULWORD (Dec. 23, 2014), <https://www.themindfulword.org/2014/business-gods-way-four-cornerstones-three-key-principles/> [<https://perma.cc/6KHN-HA5S>], excerpted from SANTIAGO RIVERA, *DOING BUSINESS GOD'S WAY* (2014) (describing cornerstones for running a business in accordance with the Christian faith, including not taking business loans without a personal guaranty).

<sup>42</sup> See, e.g., Jeff Haden, *Best Reason to Start a Business? God Asked*, INC. (Aug. 1, 2012), <https://www.inc.com/jeff-haden/can-god-call-you-to-start-a-business.html> [<https://perma.cc/72NZ-ZLQ7>].

<sup>43</sup> See, e.g., Brief for Petitioners at 5, 17, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (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 Hahns' faith from their business or its actions."); Brief of Am. Ctr. for Law & Justice et al. as Amici Curiae Supporting Petitioners at 7, *Hobby Lobby Stores*, 134 S. Ct. 2751 (No. 13-354, No. 13-356), 2014 WL 343201, at \*7 ("As the Catholic Church's Pontifical Council for Justice and Peace has stated with respect to living one's faith and engaging in business: 'Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today. . . . The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call.'").

<sup>44</sup> In their petition for a writ of certiorari, *Masterpiece Cakeshop* and Mr. Phillips, the cakeshop owner, argue that Mr. Phillips has "integrated" his faith into the business by treating his employees well, closing the business on Sundays, and choosing not to sell certain products, even aside from wedding cakes for same-sex couples. Petition for Writ of Certiorari at 4-6, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. July 22, 2016); see also Brief of Amicus Curiae Legal Scholar Adam J. MacLeod in Support of Petitioners at 5, *Masterpiece Cakeshop, Ltd.*, No. 16-111 (U.S. Sept. 7, 2017) ("Many owners exercise this right to form and build together their own life plans, not only in the privacy of the home, but also in religious assemblies, charitable works, businesses, and civic groups." (citing ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* 74-87, 114-21 (2015))).

<sup>45</sup> Billy Hallowel, *T-Shirt Maker Who Refused to Print Gay Pride Shirts Is Being Punished—But These Lesbian Business Owners Reveal Why They're Supporting Him*, BLAZE (Nov. 7, 2014, 12:05 PM), <https://www.theblaze.com/news/2014/11/07/lesbian-business-owners-tell-glenn-beck-why-they-support-the-t-shirt-maker-whos-now-being-punished-for-refusing-to-print-gay-pride-shirts> [<https://perma.cc/KZ3Z-SHCB>].

<sup>46</sup> *Id.*

## ii. The Unincorporated History of Small Business

The cultural view of small business as an extension of its owners is in line with the historical treatment of businesses. For most of history, for-profit businesses were run as general partnerships or sole proprietorships.<sup>47</sup> Under the common law, neither sole proprietorships nor general partnerships were considered separate entities from their owners.<sup>48</sup>

Under what is sometimes known as the “solitary ego view,” the law defines sole proprietorships “solely as the alter ego of its owner;” stating that they “[have] no separate identity from [their] owner[s].”<sup>49</sup> The “complete identity” overlap between the owner and her business allows a proprietor to run her business as herself without the necessity of complying with statutory requirements for creating and maintaining a separate entity.<sup>50</sup> The lack of separation between owner and entity reflects a unity of interest between them that indicates that what the business does cannot be separated from the actions or beliefs of its owner.<sup>51</sup> This unity of identity has distinct legal disadvantages for the sole proprietor, including unlimited personal liability and an inability for the business to contract and sue or be sued in its own right.<sup>52</sup> The solitary ego view of sole proprietorships continues to this day.<sup>53</sup>

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<sup>47</sup> “Until nearly the end of the nineteenth century business was generally conducted by single proprietorships or partnerships rather than corporations. Industrial enterprises in particular, because they did not partake of the public character of utilities or transportation facilities, remained the archetypal private and personal business concern.” Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443–44 (1987) (footnote omitted). Even after the advent of the corporation, until the 1880s, corporations were restricted to the limited business activities granted in their charters, which made them uncommon in most industries. *Id.* at 1444.

<sup>48</sup> Crusto, *supra* note 24, at 228, 253.

<sup>49</sup> *Id.* at 225–26; see also J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 2:1, Westlaw (2017) (“The key element of the sole proprietorship is the existence of a single owner operating the business as an individual activity. Unlike partnerships and corporations, there is a complete identity between the individual proprietor and his or her business.”).

<sup>50</sup> CALLISON & SULLIVAN, *supra* note 49, § 2:1 (“A principal benefit of the sole proprietorship is its simplicity. The proprietor does business in his or her own account, and under his or her own name or an assumed name.”).

<sup>51</sup> Crusto, *supra* note 24, at 228 (“Under the solitary alter ego view, if the sole proprietorship has been legally wronged, it is the proprietor and not the business who is the appropriate plaintiff; if the business does wrong, the proprietor and not the business is the proper defendant.”).

<sup>52</sup> *Id.* at 229 (“In summary, under the solitary alter ego view of sole proprietorship, a sole proprietor is legally disadvantaged in that, without further action, she is unable to own property in her business’s name, obtain credit in her business’s name, sue or be sued in her business’s name, avoid personal liability for her business’s contract and tort liability, and segregate the business’s tax liability from her own personal tax liability.”).

<sup>53</sup> See *id.* at 245 (arguing for modern business law to provide entity status to sole proprietorships due to the disadvantages of the form because of the class-based nature of the form).

A general partnership exists when “two or more persons . . . carry on as co-owners [of] a business for profit,”<sup>54</sup> and under the common law, they were considered to be merely an aggregation or association of individuals—persons conducting business together with “jointly owned property and jointly incurred obligations.”<sup>55</sup> Like the sole proprietorship, the partnership was not a separate entity but rather an association of individuals who did not take on a form separate from their business under the law.<sup>56</sup> For example, due to the associational nature of the partnership, a partnership was dissolved whenever a member of the partnership left.<sup>57</sup> In addition, each partner was personally liable for any debts of the partnership.<sup>58</sup> The aggregate or associational theory under the common law “placed emphasis on the individual rights of each partner rather than on the collective rights of the partnership.”<sup>59</sup>

The solitary ego theory of sole proprietorships and the associational theory of partnerships align with the unity of identity expressed by many owners of small or family-run businesses.<sup>60</sup> The company is not a separate entity from the proprietors or the family, but rather another facet of their identity, which family members can build and control to reflect their values.<sup>61</sup>

Running a business as one's alter ego, however, has drawbacks. The lack of a separate entity makes it impossible to contract or sue in the businesses' name.<sup>62</sup> It also makes it difficult to sell or continue the business after a founder's death.<sup>63</sup> Furthermore, one of the biggest drawbacks is unlimited personal liability. Under the common law, partners and sole proprietors were liable for the debts of the business just as if they were their own personal debts.<sup>64</sup> The owners of a business were personally responsible for the debts of the business because the law recognized no separation between the two.<sup>65</sup>

These drawbacks are reflected in changes to the common law of partnerships. The pure associational nature of the partnership under the common law was unworkable for commercial enterprises in more sophisticated business environments

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<sup>54</sup> REVISED UNIF. P'SHIP ACT § 202(a) (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 1997); see also Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395, 407 n.64 (1989).

<sup>55</sup> See Rosin, *supra* note 54, at 396–97.

<sup>56</sup> See Crusto, *supra* note 24, at 253 & nn.180–82.

<sup>57</sup> UNIF. P'SHIP ACT § 29 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 1914); CALLISON & SULLIVAN, *supra* note 49, § 3:7 (describing dissolution rules as adopting the aggregate theory of partnership law). Disassociation of a partner no longer triggers dissolution of the partnership under the Revised Uniform Partnership Act (“RUPA”). REVISED UNIF. P'SHIP ACT § 801.

<sup>58</sup> UNIF. P'SHIP ACT § 15; CALLISON & SULLIVAN, *supra* note 49, § 1.2. Personal liability remains even under RUPA. REVISED UNIF. P'SHIP ACT § 306(a).

<sup>59</sup> CALLISON & SULLIVAN, *supra* note 49, § 3:1.

<sup>60</sup> See *supra* Section I.A.i.

<sup>61</sup> See *supra* Section I.A.i.

<sup>62</sup> CALLISON & SULLIVAN, *supra* note 49, § 2:1; Crusto, *supra* note 24, at 244–45.

<sup>63</sup> CALLISON & SULLIVAN, *supra* note 49, § 2:1; Crusto, *supra* note 24, at 264.

<sup>64</sup> CALLISON & SULLIVAN, *supra* note 49, § 3:1 n.7.

<sup>65</sup> See *id.* § 3:1; Morrissey, *supra* note 10, at 531.

so eventually changes were made to begin to recognize partnerships as distinct from their partners.<sup>66</sup> The Uniform Partnership Act (“UPA”), adopted in 1914, took an approach that sometimes maintained the aggregate theory of partnerships and at other times utilized the concept of partnerships as a separate entity.<sup>67</sup> The Revised Uniform Partnership Act of 1997 (“RUPA”) officially adopted the entity view of partnerships, which has been adopted by most, but not all states.<sup>68</sup> The RUPA, however, arguably, left the most important element of the aggregate theory of general partnership intact—the unlimited personal liability of partners.<sup>69</sup> Thus, while the law treats a general partnership as a separate entity for formalistic purposes, such as bringing suit, the individual partners are still treated as having sufficient unity of identity with the partnership to be held responsible for all partnership debts.

Although partnerships and sole proprietorships lack the advantages of limited liability business forms, the majority of small businesses in America are still organized as general partnerships or sole proprietorships.<sup>70</sup> Twenty-seven percent of small businesses with employees are operated as sole proprietorships

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<sup>66</sup> See generally Rosin, *supra* note 54, at 397–99 (quoting Dean Lewis, principal drafter of the Uniform Partnership Act (“UPA”), as describing partnership common law as a “hopeless confusion” and seeing the role of UPA as creating a “careful statutory expression of rules of law based on clear ideas of fundamental principles”).

<sup>67</sup> See Thomas Earl Geu, *Understanding the Limited Liability Company: A Basic Comparative Primer (Part One)*, 37 S.D. L. REV. 44, 77–78 (1992) (describing the UPA’s inconsistent approach and the, then still-ongoing, debate); Rosin, *supra* note 54, at 400 (arguing that the UPA was not a “compromise” between the two theories of partnerships but rather reflects a functional approach emphasizing “either the individual or the collective rights of the partners,” depending on the context). The conflict between the two theories of partnerships is attributed to the two draftsmen of the UPA—Deans Ames and Lewis—who disagreed on which approach was appropriate. *Id.* at 401–04 (describing the adoption process). Eventually the aggregate approach was officially adopted, but scholars quickly began to argue that the UPA, in fact, treats partnerships as a separate entity for many purposes. See, e.g., Judson A. Crane, *The Uniform Partnership Act: A Criticism*, 28 HARV. L. REV. 762, 769–70 (1915); Judson A. Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838, 838–39 (1916). That debate continued until the Revised Uniform Partnership Act settled the question in favor of the entity theory of partnerships. See *infra* note 68 and accompanying text.

<sup>68</sup> REVISED UNIF. P’SHP ACT § 201(a) (NAT’L CONFERENCE OF COMM’RS OF UNIF. STATE LAWS 1997) (“A partnership is an entity distinct from its partners.”). The RUPA has been adopted in forty states, as well as the District of Columbia. See *Legislative Fact Sheet – Partnership Act (1997) (Last Amended 2013)*, UNIFORM L. COMMISSION, [http://uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership%20Act%20\(1997\)%20\(Last%20Amended%202013\)](http://uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership%20Act%20(1997)%20(Last%20Amended%202013)) [https://perma.cc/LYB6-NTQF] (last visited Mar. 17, 2018). For an example of a state that has not adopted RUPA’s entity view, see *Unifund CCR Partners v. Kinnamon*, 384 S.W.3d 703, 705–06 (Mo. Ct. App. 2012) (holding that “Missouri adheres to the common-law ‘aggregate theory of partnership’” and thus “a general partnership has no authority to sue in the firm name alone”).

<sup>69</sup> REVISED UNIF. P’SHP ACT § 306(a) (“[A]ll partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”). The RUPA does provide for the creation of limited liability partnerships, which provide for full limited liability—and thus full entity status—for the LLP. See *infra* Section I.B.ii.

<sup>70</sup> *Frequently Asked Questions*, *supra* note 8, at 4.

or partnerships.<sup>71</sup> Of nonemployer businesses, 86% operate as sole proprietorships—with an additional 7% run as partnerships.<sup>72</sup>

A sole proprietorship is the default business form for an individual running a business,<sup>73</sup> while a general partnership is the default rule for two or more individuals operating a business.<sup>74</sup> Given the default rule, it may be unfair to claim that business owners “choose” these forms, but rather that they have not actively chosen a limited liability form. The point, however, remains that, despite their disadvantages, a large percentage of small business owners find such forms sufficient, as evidenced by the fact that they have not taken the minimal steps necessary to register a limited liability entity form with the state.<sup>75</sup>

### *B. Corporations and the Advent of Legal Separation*

The law of general partnerships and sole proprietorships stands in stark contrast to the law of corporations and other limited liability entities, such as the Limited Liability Company (“LLC”). The legal advancement central to the invention of the for-profit limited liability forms was the separation of owner and corporation. This separation is found throughout corporate law. Over time, however, states have blurred the separation line by allowing more flexibility to small business owners who wish to keep management or tax structures more reminiscent of a general partnership or sole proprietorship. Maintaining legal separation has remained the hallmark of limited liability forms, however, especially when third party harms are involved.

#### *i. Separation Defines the Corporation*

Prior to the end of the nineteenth century, nearly all business was conducted by sole proprietorships or partnerships.<sup>76</sup> The modern corporation emerged from the implementation of specialty charters designed to allow the aggregation of capital for large endeavors.<sup>77</sup> Eventually, larger businesses were no longer owned and operated by one person or family but increasingly had more dispersed ownership and

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Crusto, *supra* note 24, at 231 (noting that sole proprietorships are formed by merely conducting business or can result from defects in creation of a corporation or LLC).

<sup>74</sup> CALLISON & SULLIVAN, *supra* note 49, § 2:3 (noting that general partnerships are created even without a formal intention to be “partners”).

<sup>75</sup> *Cf.* Crusto, *supra* note 24, at 266 (arguing that the sole proprietorship form disadvantages proprietors to such an extent that they should be granted entity status at minimum for titling purposes on equal protection grounds).

<sup>76</sup> Mark, *supra* note 47, at 1443–44.

<sup>77</sup> *See id.* at 1441–83, for a more thorough history of the emergence and early history of corporations. *See also* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1633–39 (2011).

separation of management and ownership, requiring the development of the modern corporation.<sup>78</sup>

The legal separation between the corporation and its shareholders is the hallmark of the modern corporation.<sup>79</sup> A separate legal entity gives the corporate form many advantages, including perpetual life, the ability to lock in capital, the ability to contract and sue or be sued in the corporation's name, and limited shareholder liability.<sup>80</sup> Legal separation can be demonstrated by the classical model of the corporation, which separates ownership from control.<sup>81</sup> Financial separation between shareholder and corporate assets is required to maintain the benefits of limited liability.<sup>82</sup> These indicia of legal separation are most evident in large corporations with dispersed shareholders, which is logical given that corporate law developed to accommodate the needs of such entities.<sup>83</sup> Modern corporate law was developed with large corporations in mind and the requirements of separation required for the corporate form reflected that fact.<sup>84</sup>

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<sup>78</sup> Mark, *supra* note 47, at 1445 (characterizing this shift as a movement “of business from personal to impersonal”).

<sup>79</sup> Pollman, *supra* note 18, at 154; Pollman, *supra* note 77, at 1638–39; *see also* Greenfield, *supra* note 15, at 314 (“[I]t is not an overstatement to say that corporate separateness has been one of the legal innovations most important to the development of national wealth.”).

<sup>80</sup> Pollman, *supra* note 77, at 1638–39, 1639 n.56; *see also* Crusto, *supra* note 24, at 230 (arguing that sole proprietorships should have entity status so that they can take advantage of corporate features); 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5 (2017), Westlaw (characterizing a corporation as “an artificial person, a legal entity, capable of acting through its corporate officers and agents, of suing and being sued, of taking and holding property, of contracting in its own name, and of continuing to exist independently of the individuals who compose it” (footnotes omitted)).

<sup>81</sup> William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1485 (1989) (“Corporate law favored strong central direction of assets, barred stockholders from a direct managerial voice, and accorded management considerable assurances of tenure.”); *cf.* Harry G. Hutchison, *Religious Liberty for Employers as Corporations, Natural Persons or Mythical Beings? A Reply to Gans*, 120 PENN ST. L. REV. 537, 559 (2015) (noting rules requiring separation of ownership and control are default rules and may be modified by contract).

<sup>82</sup> 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, *supra* note 80, § 41.50 (“In order to be recognized as an entity separate from its shareholders, a corporation should be operated as a distinct and separate business and financial unit, with its own books, records and bank accounts. Evidence that shareholders used corporate funds for personal purposes, mixed corporate and personal accounts, or commingled assets so that the ownership interests were indistinguishable will be weighed, along with other factors, when a disregard of corporate separateness is pleaded.” (footnotes omitted)).

<sup>83</sup> *See* Bratton, *supra* note 81, at 1488–89 (describing development of management corporations); *see also* Hutchison, *supra* note 81, at 553 (describing Berle and Means’s influential development of the management theory of the corporation).

<sup>84</sup> *See* Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 281 (2008) (describing the innovations of modern corporate law tailored to big businesses).

## ii. The Trend Toward Flexibility

As the foregoing demonstrates, there are dramatic differences between the legal regime that developed over time to govern the small and family-run businesses that predominated throughout most of history and the invention of modern corporate law as a method for providing large businesses a way to raise capital. The advantage of limited liability, however, created an incentive for small businesses to take on the corporate form, even though it does not necessarily reflect their governing structure or their understanding of their own relationship to the company.<sup>85</sup> As a result, states have made concessions to this desire for limited liability forms that are better suited for small and closely held businesses.<sup>86</sup>

Taking into account the needs of companies that are controlled by their owners, states have allowed certain adaptations to the corporate form, which loosen the requirements for demonstrating separation. For example, under the Model Business Corporation Act (“MBCA”), the owners of non-public corporations may make shareholder agreements to dramatically modify and simplify the corporate structure without losing the limited liability nature of the entity.<sup>87</sup> With unanimous approval, shareholders may use a shareholder agreement to dissolve the board of directors and run the corporation directly as shareholders, much like the default rules for partnership control of general partnerships.<sup>88</sup>

New limited liability forms also provide greater flexibility to business owners who wish to own and manage their business directly. The LLC provides a fully customizable limited liability entity that allows a single individual to run her business without any corporate formalities.<sup>89</sup> Limited Liability Partnerships (“LLP”) allow partners to complete the entity status of the general partnership by registering the LLP with the state to receive limited liability for all partners.<sup>90</sup> These new limited

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<sup>85</sup> See *id.* at 286–88 (noting bad fit between modern corporate law and the needs of closely held corporations); Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1464 (1998) (describing the driving force behind creation of the first LLC as a desire “to combine the tax advantages of a partnership with direct limited liability commonly associated with corporations”).

<sup>86</sup> See Hamill, *supra* note 85, at 1470–77 (discussing the rapid adoption of the LLC). The federal government has also made exceptions to the traditional separation model with respect to taxation of limited liability companies and S corporations. See *id.* at 1470, 1484 n.180.

<sup>87</sup> MODEL BUS. CORP. ACT § 7.32 (AM. BAR ASS’N 2016).

<sup>88</sup> *Id.* § 7.32(a)(1).

<sup>89</sup> See Jeffrey K. Vandervoort, *Piercing the Veil of Limited Liability Companies: The Need for a Better Standard*, 3 DEPAUL BUS. & COM. L.J. 51, 68 (2004).

<sup>90</sup> Robert R. Keatinge et al., *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization*, 51 BUS. LAW. 147, 148 (1995) (“A registered limited liability partnership (LLP) is a general partnership, that, by registering with the secretary of state or other filing officer, limits the individual vicarious liability of the partners for some or all of the obligations of the partnership.” (footnotes omitted)).



liability entities are easy to create, generally requiring only registration with the secretary of state and an indication of limited liability status in the entity's name.<sup>91</sup>

Although states have made it easier for shareholders of closely held corporations to break down the separation between management and ownership, when parties outside of the corporation are harmed, states have more strictly required separation.<sup>92</sup> States will disregard the corporate entity and “pierce the corporate veil” to allow recovery for corporate debts from shareholder's personal assets when shareholders have treated the corporation as their alter ego.<sup>93</sup> Piercing the veil is also available in LLCs when members have treated the entity as their alter ego.<sup>94</sup> As a result, while states have granted many concessions to small businesses and closely held corporations to better align limited liability business entities with the reality of these enterprises, some level of separation is still required to fully take advantage of the modern business forms.

## II. THE SUPREME COURT AND THE AGGREGATE ENTITY THEORY VERSUS THE AGGREGATE UTILITY THEORY OF THE CORPORATION

An active scholarly debate has long raged regarding the nature of a corporation. The debate includes several axes on which one can define a corporation—public or private, concession or natural entity, and aggregate or entity.<sup>95</sup> The entity/aggregate dichotomy revolves around questions “about whether it is appropriate to equivocate the corporation and the people behind it in rights determinations.”<sup>96</sup> Under the aggregate entity theory, the corporation is viewed as a collective of individuals and the corporation derives its power and rights from them.<sup>97</sup> Most scholars agree that the Supreme Court has failed to take a consistent position regarding the underlying theory of what a corporation is.<sup>98</sup> Many accuse the Court of being outcome driven,

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<sup>91</sup> See *id.* at 148, 171.

<sup>92</sup> Vandervoort, *supra* note 89, at 56–58.

<sup>93</sup> See *id.* at 57–58; Catherine A. Hardee, *Veil Piercing and the Untapped Power of State Courts*, 94 Wash. L. Rev. (forthcoming 2019) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2969109](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2969109) [<https://perma.cc/4Z8N-WV8C>].

<sup>94</sup> Vandervoort, *supra* note 89, at 78.

<sup>95</sup> See Pollman, *supra* note 18, at 155 (outlining several “dichotomies or views of the corporation”). A full discussion of the theories of corporate personhood is not possible in this limited space.

<sup>96</sup> *Id.*

<sup>97</sup> See Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 58 (2015).

<sup>98</sup> See Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 99 (2014); Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005); Eric W. Orts, *Theorizing the Firm: Organizational Ontology in the Supreme Court*, 65 DEPAUL L. REV. 559, 572 (2016). Some scholars argue, however, that a coherent theory of corporate personhood is an unnecessary argument that distracts from the real question of what rights a corporation should have. See, e.g., Pollman, *supra* note 77, at 1647, 1670–71.

selecting the corporate personhood theory that best supports the Justices' desired outcome in a particular case.<sup>99</sup>

Without wading into the debate over the “correct” view of the corporation, looking at the Court's most recent forays into corporate rights reveals a subtle shift in the Court's thinking. In *Citizens United v. FEC*, the Court utilized, at least in part, the aggregate entity theory of the corporation to grant a free speech right to corporations based on the rights of their aggregated shareholders.<sup>100</sup> Although a corporation's right to free speech is based on the rights of its members, that right is nonetheless held and exercised by the corporation as a separate legal entity, furthering the conception of the corporation as a separate legal entity.<sup>101</sup> In granting shareholders a statutory right to exercise their religion through their corporation rather than allowing the *corporation* to exercise religion, the Court seems to have put the locus of control in shareholder hands, apart from the corporation. This stance arguably adopts the cultural view of family-controlled businesses as having a unity of identity with their company, which allows shareholders to utilize the corporation as an extension of themselves. In doing so, the Court bypassed the corporate form and created an aggregate utility theory of the corporation.

#### A. *Citizens United*—Aggregate Entity Theory and Separation

*Citizens United v. FEC* re-ignited the debate over corporate rights and corporate personhood. The Roberts Court found that campaign finance laws restricting political donations by corporations infringed on their freedom of speech.<sup>102</sup> The Court, keeping with tradition, did not provide a clear explanation of what theory of corporate personhood animated their holding. The majority seemed to favor the aggregate entity theory, focusing on the rights of corporate speakers as an association of individuals.<sup>103</sup> The majority, however, also placed emphasis on the utilitarian value of speech and the rights of the listener to hear corporate speech.<sup>104</sup> The Court stopped short, of creating a First Amendment right for listeners to hear speech, regardless of the speaker. Justice Scalia's concurrence relied heavily on the aggregate

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<sup>99</sup> See, e.g., Orts, *supra* note 98, at 571. A thorough summary of all the Court's corporate rights precedent is outside the scope of this Article. Several scholars have compiled insightful descriptions of these cases. See, e.g., Garrett, *supra* note 98, at 107–08; Pollman, *supra* note 77, at 1635–39; 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, 913–17 (2016).

<sup>100</sup> See *Citizens United v. FEC*, 558 U.S. 310, 342–43, 348 (2010).

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* at 351–56, 363–66.

<sup>103</sup> See, e.g., *id.* at 342 (“The Court has recognized that First Amendment protection extends to corporations.”); *id.* at 342–43 (stating precedent that corporations receive the same First Amendment protections as any other association).

<sup>104</sup> See *id.* at 341 (“The First Amendment protects speech and speaker, and the ideas that flow from each. . . . [I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”).

entity theory— positing that corporations have the same rights as the individual stakeholders who make up the corporation.<sup>105</sup>

Despite being seen by many as a departure from previous corporate rights cases, the *Citizens United* decision did track previous cases with respect to the corporation's separation from its constituent members.<sup>106</sup> To the extent that the decision was based on the aggregate entity theory, it is consistent with the theory in that the speech rights of the corporation were not kept and exercised by the individual shareholders, but rather the right to exercise those rights was aggregated for the benefit of the entity.<sup>107</sup> In other words, the corporation, as a separate entity from the collection of its members, was granted the right to speak.

Throughout the opinion, the Court reinforces the corporation's right to speak, with little mention of the shareholders.<sup>108</sup> The only mention in the majority opinion regarding the shareholder's individual speech rights is in response to the government's argument that the holding will force shareholders to participate in speech with which they do not agree.<sup>109</sup> The majority's response is that "the procedures of corporate democracy" will prevent abuse.<sup>110</sup> For this proposition, the Court quotes the *Bellotti* decision, which clarifies that the procedures of corporate democracy referenced are the shareholders' power to elect the board of directors and sue for breach of fiduciary duties.<sup>111</sup>

The reality is that the "procedures of corporate democracy" in a public corporation generally provide little shareholder control over corporate decisions;

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<sup>105</sup> *Id.* at 385–86 (Scalia, J., concurring) (criticizing dissent for not showing why the freedom of speech does "not include the freedom to speak in association with other individuals, including association in the corporate form"); *id.* at 392 ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons.*").

<sup>106</sup> The *Citizens United* decision is problematic in many other areas of state corporate law. As the Chief Justice of the Delaware Supreme Court has argued, the decision raises thorny questions about the fiduciary duties of directors in deciding to spend corporate funds on electioneering communication that does not directly benefit the corporation. See 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, 440–42 (2016). In addition, the mechanics of corporate governance that the majority in *Citizens United* relied on to make its determination were not designed to protect or further the speech rights of shareholders, creating a tension between state corporate law and federal rights. See Pollman, *supra* note 14, at 667.

<sup>107</sup> See Gregory A. Mark, *Hobby Lobby and Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value*, 65 DEPAUL L. REV. 535, 542 (2016) (noting that in speech cases, the Court "recognized that the entity spoke" through its managers regardless of the manager's personal beliefs).

<sup>108</sup> See, e.g., *Citizens United*, 558 U.S. at 342–43.

<sup>109</sup> *Id.* at 361–62.

<sup>110</sup> *Id.* at 362 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)).

<sup>111</sup> *Bellotti*, 435 U.S. at 794–95 ("Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.")

directors make decisions on behalf of the corporation, including decisions regarding the expenditures of corporate funds.<sup>112</sup> While it is true, as the Court notes, that shareholders have the power to elect directors, in reality that power is minimal given the control incumbent boards have over the process and the limited voting power inherent in modern stock ownership.<sup>113</sup> The power to sue a board for breach of fiduciary duties is unlikely to result in relief unless the board has engaged in fraud or self-dealing.<sup>114</sup> Even the power to sell one's shares to express disagreement with management largely is illusionary in the modern market system where most shareholders own stock through intermediaries, such as pension plans or mutual funds.<sup>115</sup> The end result is that whether all, or even most, shareholders agree with the corporation's expression, as determined by the managers of the corporation, as a practical matter is irrelevant. Not only does the Court fail to require a determination that shareholders agree with the corporation's speech, the result of its holding is that shareholder dissent does not matter.

In a closely held corporation, the procedures of corporate democracy do frequently place more control in the shareholders' hands. Majority shareholders often have complete control over the election of the board of directors, giving them confidence that the board will be responsive to their wishes.<sup>116</sup> Frequently, the shareholders of a closely held corporation sit on the board of directors and exercise direct control over the day-to-day affairs of the corporation.<sup>117</sup> As noted, shareholders can even dissolve the Board and run the corporation directly if they so choose.<sup>118</sup> One could argue that the opinion thus provides shareholders in closely held corporations with the right to speak rather than locating the right in the entity.

The argument that the Court recognized these differences in corporate control and intended to locate the right in individual shareholders for closely held corporations rather than the entity seems less likely, however, when one considers the voluntary breadth of the Court's holding. The plaintiff in *Citizens United* was a nonprofit corporation created to spread a political message.<sup>119</sup> The Court could have followed its holding in *Massachusetts Citizens For Life* and ruled narrowly that a

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<sup>112</sup> DEL. CODE ANN. tit. 8, § 141 (West 2017); 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).

<sup>113</sup> See Pollman, *supra* note 14, at 677; Strine & Walter, *supra* note 112, at 370 (“[T]he practical realities of stock market ownership have changed in ways that deprive most stockholders of both their right to voice and their right of exit.”).

<sup>114</sup> Pollman, *supra* note 14, at 677.

<sup>115</sup> See Strine & Walter, *supra* note 112, at 369–70. In addition, the large quantities of capital in index funds further mutes the messaging power of the market as many funds take large positions in a predetermined set of funds. See *id.* at 372.

<sup>116</sup> See Wells, *supra* note 84, at 286–87 (discussing the power of majority shareholders to control the corporation vis-à-vis minority shareholders).

<sup>117</sup> See *id.* at 286 (discussing how closely held corporations consist of “individuals who serve simultaneously as shareholders, directors, and employees of the firm”).

<sup>118</sup> MODEL BUS. CORP. ACT § 7.32 (AM. BAR ASS'N 2016).

<sup>119</sup> *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

corporation created to convey a political view has a right to speak even if it receives de minimis corporate funding.<sup>120</sup> That right could have been derived directly from the corporation's constituents—those who donated to or worked for the nonprofit—because it is safe to assume that they supported the message of the organization. This was in fact the ruling the *Citizen United* plaintiffs asked for in their as applied challenge to the law.<sup>121</sup> The Court had precedent that would have allowed them to hold that when a corporation is formed to spread a message, the constituent members can express those views using the corporate form.<sup>122</sup> Instead, the Court issued a sweeping holding that the statute was facially invalid, even as applied to for profit and public corporations.<sup>123</sup> This suggests the majority not only intended to grant speech rights to all corporations, but intended for them to be located in and exercised by the entity, not by the individuals who constitute the corporation.

### B. Hobby Lobby and the Aggregate Utility Theory of the Corporation

The *Hobby Lobby* decision rests on a different footing. The *Hobby Lobby* majority does not treat corporations as a separate entity but rather as a conduit through which the owners of the corporation may express their personal religious beliefs.<sup>124</sup> The opinion in *Hobby Lobby* lacks nuance regarding the nature of the corporation, making it difficult to determine how the Court will apply the case moving forward,<sup>125</sup> but a careful reading of the Court's language and the issues the majority chose to address suggests that the Court took a view of the corporation as having a unity of identity with its owners. The Court provides some explanation for why state law allows such a departure from the traditional separation requirement,<sup>126</sup> although they are unconvincing when state corporate law is put in the correct context.

The details of the case are familiar to most readers: Five members of the Green family owned and operated two corporations—Hobby Lobby Stores, Inc. and

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<sup>120</sup> *Id.* at 327–28 (rejecting this argument); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 242–44, 264–65 (1986).

<sup>121</sup> *Citizens United*, 558 U.S. at 327; see also Strine, *supra* note 106, at 476–77 (noting that the Court's holding was “broader in scope than even the plaintiff . . . had asked for”).

<sup>122</sup> See *Mass. Citizens for Life*, 479 U.S. at 263–65.

<sup>123</sup> See Orts, *supra* note 98, at 580 (noting the Court's broad holding, which rejected a more narrow position regarding dissenting shareholders).

<sup>124</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 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 also Greenfield, *supra* note 15, at 314–15; Mark, *supra* note 107, at 541 (“Note that to assert the rights of its owners’ equity, the collective acts of the entity are beside the point; entities exist solely as vehicles to ‘provide protection for human beings.’”).

<sup>125</sup> See Mark, *supra* note 107, at 537 (noting that the Court's opinion “lacked nuance” and, as such “it contained errors”); Pollman, *supra* note 18, at 150 (noting the “anemic treatment of corporate law in *Hobby Lobby*”). The Court's decision in *Masterpiece Cakeshop* is even more opaque as the Court ignores the corporate entity in the case and instead focuses on the “baker” and his “shop.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

<sup>126</sup> See *Hobby Lobby*, 134 S. Ct. at 2771–72.

Mardel, Inc.<sup>127</sup> Five members of the Hahn family owned Conestoga Wood Specialties, Corp.<sup>128</sup> Both the Green and Hahn families were devout Christians who objected on religious grounds to the Affordable Care Act's mandate to provide insurance plans that included certain contraceptives.<sup>129</sup> The individual family members, as well as the corporations, sued to block enforcement of the mandate under the Religious Freedom Restoration Act of 1993 ("RFRA") and the Free Exercise Clause.<sup>130</sup> The Court limited its holding to the RFRA claim, finding that RFRA provides for an exemption from the neutrally applicable contraceptive mandate.<sup>131</sup>

The Court rooted its opinion in a near singular focus on the religious beliefs of the owners of the corporations at issue. While the majority paid lip-service to other constituencies in the corporation—employees and officers—and the notion of control, it is clear that owners in their shareholder capacity are the only ones capable of using the corporation to exercise their sincere religious beliefs.<sup>132</sup> Employees, as a group who may exercise the corporation's religion, drop out of the equation quickly. The Court began by noting the groups of "people (including shareholders, officers, and employees), . . . associated with a corporation" and stated that when a corporation was granted rights, "the purpose is to protect the rights of *these people*."<sup>133</sup> The majority then specifically recognized that the Fourth Amendment rights of corporations protected the privacy interests of employees.<sup>134</sup> When it comes to protecting the free exercise rights of the corporation in the case at hand, however, employees are left out as the majority noted that their holding "protects the religious liberty of the humans who *own and control* those companies."<sup>135</sup> The free exercise rights of employees were not considered relevant, which is demonstrated by the fact that if all employees shared the same religious convictions as the shareholders, there would be no cause for concern about the insurance coverage to begin with.<sup>136</sup> The majority never again mentioned the employees' right to free exercise rights vis-à-vis the corporation.

Management's role in the corporation was given more attention. The majority mentioned, on several occasions, that the Hahns and Greens both owned and

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<sup>127</sup> *Id.* at 2765.

<sup>128</sup> *Id.* at 2764.

<sup>129</sup> *Id.* at 2764–66.

<sup>130</sup> *Id.* at 2765–66.

<sup>131</sup> *Id.* at 2759–60.

<sup>132</sup> *See id.* at 2768; Pollman, *supra* note 18, at 157–58.

<sup>133</sup> *Hobby Lobby*, 134 S. Ct. at 2768 (alteration in original) (emphasis added).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (emphasis added); *see also* Mark, *supra* note 107, at 545 (describing how the majority opinion limits the interests at stake to only the owners).

<sup>136</sup> *See* Mark, *supra* note 107, at 544 (noting that "[t]he interests of employees who might be indifferent or opposed to the free exercise claim are ignored, as might their claims of conscience or reproductive rights, because those claims are apparently not religious"); Orts, *supra* note 98, at 588 ("What happened to the rights of employees when the topic of religion within the firm arose? They simply appear to have been ignored.")

controlled the corporations but left many details regarding control unanswered. They reported that Conestoga was run by a board of directors, that the Hahns “control[led] its board of directors,” and that one of the sons was the president and CEO.<sup>137</sup> The Court gave no indication, however, regarding whether there were other members of the board and whether those directors held the same religious convictions as the Hahns.<sup>138</sup> With respect to Hobby Lobby and Mardel, the Court noted that the Greens and their children “retain[ed] exclusive control of both,” that David was CEO, and the “three children serve[d] as the president, vice president, and vice CEO.”<sup>139</sup> Both companies owned by the Greens were operated through a management trust and the Court noted that each family member served as trustee.<sup>140</sup>

While the Court was careful to lay out the methods by which the families involved exerted at least majority control over the controlling corporate bodies—in Conestoga through the board of directors and in Hobby Lobby through the management trust—the majority’s dicta suggested that ownership rather than control was central to a claim for an exemption under RFRA. In dismissing the likelihood that a public corporation could bring a successful RFRA claim, the majority noted that it was unlikely that “unrelated *shareholders*” would agree to run the corporation “under the same religious beliefs.”<sup>141</sup> This language is in striking contrast to the language in *Citizens United* emphasizing that shareholder agreement is unnecessary for a corporation to exercise its speech rights via management.<sup>142</sup> As discussed, that decision placed the right to speak in the corporation’s hands, with the instruction to look to state law to determine who has the power to speak for a particular corporation.<sup>143</sup> If the Court was recognizing the *corporation’s* right to exercise religion, one would expect the appropriate inquiry for a public corporation to be whether a majority of the board of directors agrees to run the corporation under the same sincerely held religious beliefs.<sup>144</sup> Under that metric, it would not be surprising that a majority of a board of directors could share sincere religious beliefs.<sup>145</sup>

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<sup>137</sup> *Hobby Lobby*, 134 S. Ct. at 2764.

<sup>138</sup> The Amended Complaint clarifies that the five members of the family were on the Board of Directors but not whether there were any other members. First Amended Verified Complaint at ¶¶ 11–16, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d. 394 (E.D. Pa. 2013) (No. 5:12-CV-06744-MSG).

<sup>139</sup> *Hobby Lobby*, 134 S. Ct. at 2765.

<sup>140</sup> *Id.* at 2765 n.15.

<sup>141</sup> *Id.* at 2774 (emphasis added).

<sup>142</sup> *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010).

<sup>143</sup> *Id.*

<sup>144</sup> See Pollman, *supra* note 18, at 150 (suggesting that “the Court’s analysis obscured the role of the board of directors”).

<sup>145</sup> See, e.g., Holly Lebowitz Rossi, *7 CEOs with Notably Devout Religious Beliefs*, FORTUNE (Nov. 11, 2014) <http://fortune.com/2014/11/11/7-ceos-with-notably-devout-religious-beliefs/> [<https://perma.cc/ASK6-7MGL>] (describing the religious beliefs of the CEOs of seven public corporations). There are public companies whose boards have already agreed to integrate faith-based practices into the corporation. See, e.g., *Faith in the Workplace*, TYSON,

The “procedures of corporate democracy,” which rest control of the corporation in the hands of the board of directors and not the shareholders, appear to be insufficient to give the corporation a right to exercise religion.<sup>146</sup> This reading is buttressed by the fact that the Court ponders the outcome of a religious claim of a corporation whose *shareholders* disagree about whether the corporation should exercise a religion, but not situations where there is disagreement among management.<sup>147</sup> This dicta suggests that the right is not exercised by the corporation as an entity but rather by the individual shareholders themselves acting through the entity.<sup>148</sup>

Arguably, it is possible to find that a corporation exercises religion in its own right. For example, Profesor Iuliano makes a compelling case that a corporation as an entity can have a distinct separate identity, capable of exercising religious beliefs without reliance on channeling the shareholders beliefs.<sup>149</sup> He argues that a “group[’s] beliefs are not derived from what individual members of the group actually believe; they are derived from what individual members of the group accept as true given their obligations to the group entity.”<sup>150</sup> Thus, “[w]hen board members or executives make decisions, they are not reporting what they personally believe to be true; they are reporting what they positionally accept as true given their position within the corporation.”<sup>151</sup> If the corporate charter provides a religious purpose for the corporation, then the board will further that purpose because it is in line with the beliefs of the corporation, despite the fact that the religious purpose may not align with the board’s personal beliefs.<sup>152</sup> Because the corporation will adopt positions in line with the corporation’s belief system regardless of agreement by its members, “it is . . . reasonable to conceive of the corporation as having an independent intentional state.”<sup>153</sup> The sincerity of that intentional state may be judged by “examining the corporation’s historical religious commitments” and whether it has “always operated according to the religious belief it seeks to claim protection under[.]”<sup>154</sup>

This concept of corporate religion would allow for a religious claim by even a public corporation with no family control if its founder had operated the company according to his religious beliefs and inserted a religious purpose in the corporate

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<https://www.tysonfoods.com/sustainability/workplace/faith-workplace> [<https://perma.cc/T3E9-T7CQ>] (last visited Mar. 18, 2018).

<sup>146</sup> See Pollman, *supra* note 18, at 168–69 (quoting *Citizens United*, 558 U.S. at 361–62).

<sup>147</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774–75 (2014).

<sup>148</sup> See Pollman, *supra* note 18, at 157 (describing the opinion as giving the corporation “the right on a derivative basis[,]” to be used as a “tool” for shareholders to exercise their ends).

<sup>149</sup> See Iuliano, *supra* note 97, at 49.

<sup>150</sup> *Id.* at 86.

<sup>151</sup> *Id.* at 87.

<sup>152</sup> *Id.* at 93 (giving an example of a three-member board of atheists who would nonetheless seek an exemption to the contraception mandate if the charter mandates the corporation has “strong Catholic commitments”).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 98.



charter. The board would be obligated to follow the charter regardless of their personal religious beliefs or those of its, potentially millions of, shareholders. Given the perpetual life of corporations, this religious exemption still could be available to the corporation long after the death of the founder, whose sincere religious beliefs initially provided the rationale for the exemption.

The type of corporate religion Professor Iuliano theorized is not the religious exercise by corporations the Court in *Hobby Lobby* contemplated. As noted, the focus in *Hobby Lobby* is on the shareholders' sincere beliefs, not the board's decision making process.<sup>155</sup> In addition, the documents the Court relied on to evidence the families' sincerity of belief do not appear to be corporate documents but rather individual promises.<sup>156</sup> The statements the Court relied upon merely show the sincerity of the shareholders' beliefs and not that such beliefs are expressions of the corporation itself, like a statement of purpose in the corporate charter might provide.<sup>157</sup>

Rather than looking at management or the corporation's documents, the Court focuses on the Hahns and the Greens individually. The opinion most frequently discusses the Hahns' and Greens' personal beliefs and religion.<sup>158</sup> On several occasions the opinion lumps the families and the companies together and utilizes an ambiguous pronoun to describe "their" religion.<sup>159</sup> There is only one place in either

<sup>155</sup> See *supra* notes 132–148 and accompanying text.

<sup>156</sup> See Pollman, *supra* note 18, at 162; 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).

<sup>157</sup> Strine, *supra* note 156, at 109 ("At least in Delaware, if a corporation wishes to have a religious purpose, the traditional method is to set forth that purpose in the corporation's certificate of incorporation.").

<sup>158</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (noting "the sincerely held religious beliefs of the companies' owners"); *id.* ("The owners of the businesses have religious objections to abortion[] . . . . If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price . . . ."); *id.* at 2764–65 (describing the Hahns' 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); *id.* at 2769 (allowing the corporations "to assert RFRA claims protects the religious liberty of the Greens and the Hahns"); *id.* at 2775 ("[T]he Hahns and Greens have a sincere religious belief that life begins at conception."); *id.* at 2778 (stating that "[t]he Hahns and Greens believe that providing the coverage demanded" is an abortion and is, thus, "immoral"); *id.* at 2783 ("The owners of many closely held corporations could not in good conscience provide [coverage for abortion or assisted suicide] . . . ."); *id.* at 2785 (Kennedy, J., concurring) ("In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations.").

<sup>159</sup> See, e.g., *id.* at 2774 (noting that the companies are "each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs"); *id.* at 2775 ("By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates *their* religious beliefs.") (emphasis added); *id.* at 2776 (stating that "the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees[.]" and noting that, before the ACA, they provided insurance "because their religious beliefs govern their relations with their employees"—demonstrating that the Court sees owner and corporation as interchangeable); *id.* at 2779 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance . . . .").

the majority or the concurrence where the language suggests a corporation is capable of religious beliefs.<sup>160</sup> On the other hand, the majority was able to express entity beliefs when talking about not-for-profit entities, stating “[t]he Mennonite Church opposes abortion and believes that ‘[t]he fetus in its earliest stages . . . shares humanity with those who conceived it.’”<sup>161</sup> Despite this, nowhere in the opinion does the Court so clearly ascribe a belief system to Hobby Lobby or Conestoga.<sup>162</sup>

The opinion in *Hobby Lobby* makes it relatively clear that, in order to claim a RFRA exemption, the shareholders must be exercising their personal, sincerely held religious beliefs through the corporation rather than the corporate entity exercising religion. In other words, RFRA exemptions are only available to shareholders who see their business as an inseparable facet of their personal or familial identity such that their most personal beliefs are imputed to the corporation.<sup>163</sup> The corporation is merely a tool to be utilized in the expression of their personal religious beliefs.

Perhaps the Court took this path because an opinion that clearly stated that a corporation holds sincere religious beliefs would have challenged the notion of what we mean by sincere beliefs. The notion that ExxonMobil could declare itself to be a Presbyterian is absurd on its face. Even stating that Hobby Lobby Stores, Inc. “believes” in the teachings of Jesus Christ challenges traditional conceptions about the nature of religious belief. Instead of a ruling that would challenge the sanctity of religious beliefs, the Court adopts a definition of the corporation that is more in line with the way the owners of small and family-run businesses think of themselves than the way they are treated under the law.

The Court justifies its focus on the shareholders’ beliefs by stating that, “[c]orporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”<sup>164</sup> While that may be true in a physical sense—a corporation cannot physically sign a contract, for example, without human assistance—it is incorrect from a legal standpoint. The benefit of the corporate form is that the corporation can do many things—like sue or be sued, enter into contracts, borrow money, or own property—separate and apart from the human beings that

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<sup>160</sup> *Id.* at 2777 (“doubt[ing] that the Congress that enacted [the] RFRA—or . . . [the] ACA—[wanted] to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans”). Interestingly, this language occurred in the discussion regarding whether the corporations could avoid the fine by canceling health insurance entirely. So, the “belief” at issue was not the specific belief that life begins at contraception but a more general belief that businesses should provide health insurance to their employees, which could be seen as a more broadly held Judeo-Christian value in line with the Golden Rule. *See Matthew 7:12* (King James).

<sup>161</sup> *Hobby Lobby*, 134 S. Ct. at 2764 (alteration and omission in original).

<sup>162</sup> This difference is somewhat at odds with the majority’s rejection of the difference between for-profit and nonprofit corporations’ abilities to exercise religion. *See id.* at 2769; *see also* Mark, *supra* note 107, at 540 (noting that the Mennonite church is ascribed beliefs while the corporations at issue are not).

<sup>163</sup> *See* Pollman, *supra* note 18, at 157.

<sup>164</sup> *Hobby Lobby*, 134 S. Ct. at 2768.

own and operate it.<sup>165</sup> The owner or manager who signs a contract on behalf of the corporation does not become personally liable for that debt because of the legal separation of the corporate entity.

The majority's justifications for allowing shareholders to exercise their personal beliefs through the corporate form are unconvincing as they do not actually evidence a breakdown of the separation between shareholder and corporation. The Court uses the fact that corporations can donate money to charitable causes or go above and beyond regulations based on social aims as evidence that state corporate law permits shareholders to treat corporate entities as extensions of themselves.<sup>166</sup> But these acts are capable of being exercised by the corporation itself, as evidenced by the fact that they can be undertaken without any inquiry into the beliefs of any of the corporation's constituent members.

With respect to entity status, corporate charity merely stands for the proposition that those who control the entity have the authority to decide what is in the best interest of the corporation within the parameters of corporate law, which governs the relationship between corporate constituents.<sup>167</sup> Even taking as accurate the Court's statement that state corporate law does not require profit maximization, that fact is best seen as altering the view of intra-corporation relationships to include other stakeholders as corporate constituents.<sup>168</sup> While corporate charity and religious acts by corporations may be indicative of the sincerity of the beliefs of those who run the corporation—its board of directors or the shareholders who elect them—the fact that state corporate law allows for such acts does not indicate a lack of entity separation. The people who make decisions on behalf of the corporation will always be guided by their personal beliefs, but subject to the requirements of corporate law.

The request for exemptions granted in *Hobby Lobby* represents a corporate decision that is different in kind. It requires a professed unity of interest with the corporation not found in other corporate decisions, even ones relating to religion. The condition that RFRA exemptions are only available when *shareholders* are motivated by sincerely held religious beliefs demonstrates this difference.<sup>169</sup> A corporation, even a public corporation, may decide to engage in acts of corporate charity or religion, even if no one involved in the entity holds those beliefs.<sup>170</sup> Corporations may donate money to help the environment out of a sincere desire to

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<sup>165</sup> See *supra* notes 79–80 and accompanying text.

<sup>166</sup> *Hobby Lobby*, 134 S. Ct. at 2770–71.

<sup>167</sup> The business judgment rule provides directors with broad discretion to engage in corporate charity or other socially desirable behavior as long as it is couched in a concern for the corporation's welfare. Leo E. Strine, Jr., Essay, *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, 776 (2015).

<sup>168</sup> See Greenfield, *supra* note 15, at 328–29 (describing the corporate social responsibility movement's efforts to replace profit maximization with fiduciary duties that extend "to employees and other corporate stakeholders"); Hardee, *supra* note 93.

<sup>169</sup> See discussion *supra* pp. 863–64.

<sup>170</sup> See Iuliano, *supra* note 97, at 90–93.

make a positive impact or as a crass money grab for environmentally friendly customers.<sup>171</sup> A public corporation may employ chaplains to minister to their employees and promote spirituality among their ranks, whether it is a closely held corporation run by an evangelical founder or a public company with diffused shareholders.<sup>172</sup> While individuals must make these decisions, they are decisions of the corporation and are treated as such under the law.

This, however, is not so for the ability to claim exemptions from the law under RFRA. The decisions to opt out of a neutrally applicable law must be made by individuals to further their own personal religious beliefs rather than prioritizing other stakeholders.<sup>173</sup> This turns corporate social responsibility on its head. As one prominent commentator notes:

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.<sup>174</sup>

The same can be said about the existence of benefit corporations, which the majority also raised as an indication that state corporate law allows for an overlap of economic and other interests.<sup>175</sup> Benefit corporations require the corporation to consider stakeholders *other than shareholders* when making corporate decisions.<sup>176</sup> In this way, they are similar to constituency statutes, which allow "corporate directors to consider interests *other than those of their shareholders* when exercising their corporate decision-making authority."<sup>177</sup> Regarding both, one could argue that the

<sup>171</sup> See, e.g., Jacob Vos, Note, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 674, 677 (2009) (describing "greenwashing" where corporations overstate their environmental impact to lure consumers).

<sup>172</sup> For example, Tyson Foods was founded by the Tyson family, whose founder was a devout Christian and whose grandson, a born-again Christian, is now the CEO. Justin Rohrlach, *Religious CEOs: Tyson Foods' John Tyson*, MINYANVILLE (May 19, 2010, 5:25 AM), <http://www.minyanville.com/special-features/articles/john-tyson-christian-church-chaplain-methodist/5/19/2010/id/28276> [<https://perma.cc/NC6K-4JX9>]. The company is now a public company, but it still provides 120 chaplains to minister to employees and donates 25,000 booklets that "guide families through the process of saying grace at the dinner table." *Id.*

<sup>173</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014) (rejecting difficulty of determining sincerity of belief of a corporation because the owners sincerely believed).

<sup>174</sup> Pollman, *supra* note 18, at 170.

<sup>175</sup> *Hobby Lobby*, 134 S. Ct. at 2771. It is interesting that the Court raised this point because none of the parties to the litigation had opted to actually use the benefit corporation form. See Strine, *supra* note 156, at 107.

<sup>176</sup> See Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 142 (2016) (describing benefit corporations as requiring "a corporate purpose of creating a *general public benefit*" and "consider[ation of] *non-shareholder interests* (such as impact on employees, community, and the environment) when making business decisions") (emphasis added).

<sup>177</sup> Nathan E. Standley, Note, *Lessons Learned from the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 212 (2012) (emphasis added). Constituency statutes differ from benefit corporations

religiously motivated owners of corporations are thinking of others when they request exemptions from the law—other members of their faith, those favoring fetal life, those concerned with the sanctity of marriage, etc.

The majority's singular focus on the sincerely held religious beliefs of the shareholders, however, weakens this comparison. The right to an exemption from the law was not given to advance the interests of anyone but the shareholders.<sup>178</sup> To look at the issue from another angle, it seems unlikely that a benefit corporation could claim an exemption to a neutrally applicable law because it believed violating the law was necessary to further its social mission. This is arguably true even if that social mission aligned with the goals of some religious faiths. Without the shareholders' desire to express their own religious beliefs, even a benefit corporation may not opt out of the law on the grounds of furthering a social good.

Interestingly, the Court did not mention the elements of state law that actually challenge the separation between corporation and shareholder. Perhaps this is because the shareholders of the corporations at issue had not taken advantage of such devices, like altering the management structure so shareholders directly manage the corporation.<sup>179</sup>

#### CONCLUSION: THE SUPER SHAREHOLDER IS CREATED

When you total the number of small businesses and family-run enterprises, their owners have an enormous impact on the lives of their fellow citizens. Through employment, the provision of goods and services, and their impact on the electoral process, owners of small businesses and family-run businesses have an outsized influence in society.<sup>180</sup> If you are running a family business, that may not seem like a bad thing. My family has done wonderful things with its business, including benefiting employees and the community in which it operates, and will continue to have a positive impact for years to come. Much of that comes from the values and beliefs that my parents and sister have used to guide their decisions. There is undeniably room for business to do good.

But even well-meaning people can harm others in the pursuit of a noble goal. History is replete with examples of business owners engaging in “benevolent paternalism”—mandating church attendance and dictating moral standards to their employees down to the condition of their homes, their appearance, and how they

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in that they were initially enacted to allow boards to defend against hostile takeovers and some statutes still retain that focus. *See id.* at 218–19.

<sup>178</sup> *See Hobby Lobby*, 134 S. Ct. at 2768 (holding that protecting the corporation's rights “protects the religious liberty of the humans who *own and control* those companies”) (emphasis added).

<sup>179</sup> *See, e.g., id.* at 2764 (describing Conestoga as being run by a board of directors).

<sup>180</sup> Strine, *supra* note 106, at 473 n.209; *see also* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455–56 (2015) (describing the demands that various corporations have made on government regulators);

spend their wages.<sup>181</sup> Henry Ford was determined to create a “corporation with a soul,” which he achieved by setting up a “Sociological Department” to monitor and evaluate every aspect of the lives of his workers and their families to make sure they “were living their lives according to middle class, Protestant values.”<sup>182</sup> More recently, neutrally applicable laws have prevented such personal intrusions. For-profit corporations have been unsuccessful in their efforts to thwart antidiscrimination laws to force employees to attend trainings “that teach, for example, that women’s place is in the home” and to discriminate against non-Christians, “co-habiting couples, gay[s] . . . , and women working without the consent of their fathers or husbands.”<sup>183</sup> As the notion of corporate religion pushes out of the limited parameters of the *Hobby Lobby* decision, however, the threat of unchecked employer interference in their employees’ lives no longer seems buried in history.<sup>184</sup>

In discussing the *Braunfeld* case, the majority in *Hobby Lobby* lamented that the merchants involved, who operated their business as a sole proprietorship, would have been denied a right to be heard if they had incorporated, “without in any way changing the size or nature of their businesses.”<sup>185</sup> What the Court does not seem to appreciate is that incorporating does change the nature of a business, including the relationship between the owners and the business. People die; corporations do not. Corporations aggregate the wealth of a few—or many—and hold that wealth in an entity with perpetual life. Those owners are not answerable to their communities for the debts of the corporation. Business owners have a choice when they pick a limited liability form. Those forms represent an evolution in the law from when small businesses were the alter ego of their owners. In exchange for all the benefits of the entity form, one of the few things states still require is a separation between the owners and the business. The Court rejected this choice in *Hobby Lobby*, at least as it pertains to statutory claims under RFRA.<sup>186</sup> They held the language of RFRA does not “discriminate” between individuals and businesses.<sup>187</sup>

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<sup>181</sup> See Strine, *supra* note 156, at 79 (describing employers of the late nineteenth century, including George Pullman of the Pullman Palace Car Company, and their efforts to engage in “benevolent paternalism”).

<sup>182</sup> *Id.* at 81.

<sup>183</sup> Sepper, *supra* note 180, at 1515–16.

<sup>184</sup> See Press Release, U.S. Dep’t of Health & Human Servs., Trump Administration Issues Rules Protecting the Conscience Rights of All Americans (Oct. 6, 2017), <https://www.hhs.gov/about/news/2017/10/06/trump-administration-issues-rules-protecting-the-conscience-rights-of-all-americans.html> [<https://perma.cc/8LBQ-9GTN>] (providing “conscience protections to Americans who have a religious or moral objection to paying for health insurance that covers contraceptive/abortifacient services”).

<sup>185</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014); see *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>186</sup> *Hobby Lobby*, 134 S. Ct. at 2759 (“[W]e reject HHS’s argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships.”).

<sup>187</sup> *Id.* at 2759, 2768 (“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.’”).

The Court's opinions in *Masterpiece Cakeshop* could be read as expanding this trend of ignoring the legal separation between owner and entity. Not one of the five opinions in the case mention the incorporated status of *Masterpiece Cakeshop*.<sup>188</sup> The corporation was instead described only as “a bakery” that has been “owned and operated” by Jack Phillips for 24 years.<sup>189</sup> The majority opinion focus exclusively on Jack Phillips' beliefs without any attempt to attribute those beliefs to the corporation.<sup>190</sup> In short, the Court made no effort to distinguish between Jack Phillips and *Masterpiece Cakeshop*.

There are, however, other possible readings of the case. For example, the majority disposed of the case based on the Commission's “impermissible hostility toward” Phillips' personal religious beliefs.<sup>191</sup> This holding could suggest that the Court was merely addressing Jack Phillips' Free Exercise claims.<sup>192</sup> Because the Court ultimately did not reach the question of whether to grant an exemption to Colorado's public accommodations law, it may not have felt it necessary to determine which, if any, business entities may claim such an exemption.

While it is impossible to predict how the Court will address future claims by corporations for religious exemptions, such claims will inevitably be raised. If the Court continues to treat small and family-run businesses as mere extensions of their owners, it risks creating supercharged shareholders who claim all of the benefits of the entity form while still maintaining the unity of identity with the corporation as if they were a sole proprietorship or general partnership. This is not a type of shareholder contemplated by state corporate law.

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<sup>188</sup> Nowhere in the opinions does any Justice mention what type of corporation *Masterpiece Cakeshop* is, where it is incorporated, or any other information about the corporate party in the case. *Contra* *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2764, 2765 (2014) (describing the corporate parties to the case, including their states of incorporation, shareholders, and management structures).

<sup>189</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1724 (2018).

<sup>190</sup> *See, e.g., id.* at 1724 (describing Phillips' religious beliefs); 1729 (describing the statements as regarding Phillips' religious beliefs and as a disparagement of “his religion”). *See also id.* at 1735 (focusing on Phillips' religious faith); 1742-43 (describing Phillips' artistry and the way he conceives of his cakes) (Gorsuch, J. *concurring*). Only Justice Thomas in his concurrence, joined by Justice Gorsuch, addresses the argument that *Masterpiece Cakeshop* is a for profit entity. He dismisses *Masterpiece Cakeshop*'s profit motive using much the same reasoning as the *Hobby Lobby* opinion – by focusing on the ways that Phillips operates the bakery in line with his Christian faith. *Id.* at 1745 (detailing that Phillips closes *Masterpiece Cakeshop* on Sundays, “pays his employees a higher-than-average wage,” and refuses to “bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween”).

<sup>191</sup> *Id.* at 1729.

<sup>192</sup> This reading is weakened by the fact that the Court reversed the Colorado Court of Appeals decision in its entirety. *Id.* at 1732.