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## Who Speaks the Culture of the Corporation?

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# WHO SPEAKS THE CULTURE OF THE CORPORATION?

Gwendolyn Gordon\*

*Recent cases – Burwell v Hobby Lobby Stores and Citizens United chief among them – evince a new understanding of the nature of the corporation and its place in society. Whether a corporation has rights – such as those of religious exercise – is not, however, just a question of legal interpretation. To answer this question requires a theory of group or cultural identity, that is, a theory of how a group may have “culture” separate and apart from those of the individuals that comprise it. And such a theory must address how to understand the meaning of culture when the beliefs of people within the group diverge. However, the Supreme Court’s analysis has fallen short by glossing over this step in the analysis. In Hobby Lobby, the Supreme Court indicated that the question of the religious identity of the corporation might easily be resolved by the semi-democracy of state corporate law: those shareholders and managers controlling the corporation, that is, decide the identity of the corporation. As Justice Ginsburg noted in her dissent, however, in the case of religious belief, things can get fairly gnarly. This Article critiques the Supreme Court’s oversimplified view of how group identity is formed using anthropology as its guide. This anthropological approach argues that the question of corporate “culture” is far more complex than the Court’s jurisprudence acknowledges. This approach requires rethinking the corporate rights doctrine and its assumptions about shareholder democracy. One or the other must fall – either the notion that corporations have cultural rights such as those of a “religion,” or the processes of majority shareholder voting that do not track an ingrained cultural identity.*

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## INTRODUCTION

In *Burwell v. Hobby Lobby Stores*, the Supreme Court indicated that the question of the religious identity of the corporation might easily be resolved by the semi-democracy of state corporate law: the controlling party or parties, that is, decide the cultural identity of the corporation.<sup>1</sup> The case forms part of a set of recent Supreme Court decisions that have begun to instantiate a unique theory of the corporation.<sup>2</sup> In these cases, the Court reconceptualized corporations in such a way as to essentially conflate and equate the personal rights of the corporation with those of the human persons controlling them. I call the result of this shift the *contingent corporation*.<sup>3</sup> The term highlights the processes by which a simplified notion of corporate personhood makes it easier to assign to the corporation-as-entity the characteristics, social ties, civic commitments, and internal lives of the aggregate of humans involved with it.

The present article explores one consequence of the new vision of the corporation I outline: its meaning for shareholder voting.

Majority rule may be seen to be well suited to the types of disputes through which corporate law has developed: those regarding the distribution of the corporations' profits. In the case of religious belief and exercise in closely held corporations, however, the propriety of majority rule becomes much less certain.<sup>4</sup>

In the wake of *Hobby Lobby*, new rules were proposed outlining what a closely held corporation means for the purposes of religious exercise exemptions to the Affordable Care Act ("ACA").<sup>5</sup> The rules specify group-rights attached to corporate control, but they leave unanswered a number of questions regarding the freedoms of individual persons.

Imagine that some member of the Hahn or the Green families (the families controlling the corporations in *Hobby Lobby*) began to re-think his family's version of Christianity. Imagine that he disagreed with his family's determination not to subsidize birth control. Imagine further that he came to believe this behavior to be precisely the opposite of Christian. As things stand now, the corporation's "exercise" of religion is entirely dependent upon the will of the shareholders or managers in control. The religious preferences of our renegade Hahn or Green become silenced—overwhelmed by the actions and identity of the corporation. Ought the law leave matters of corporate belief to majority rule in the same way that

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

2. *See generally* *Citizens United v. FEC*, 558 U.S. 310 (2010); *Hobby Lobby*, 134 S. Ct. 2751.

3. *See* Gwendolyn Gordon, *Culture in Corporate Law*, 39 SEATTLE U. L. REV. 353 (2016). Here, I look to the concept of culture in corporate law to theorize this set of developments, and specifically at the way that jurists articulate their understandings of the relationship between homogeneity and group formation.

4. *Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting).

5. *See generally* Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010); 45 C.F.R. 147.131 (2015).

it leaves matters of corporate distribution, or are these matters *different* in some material way?

Lucian Bebchuk and Robert Jackson, considering the question in regard to corporate political speech, argue that there absolutely *is* a difference: the personal nature of political speech decisions renders them different from ordinary business decisions. Like other such decisions, political speech decisions ought to be subject to special rules to protect shareholders from action by directors stemming from interests divergent from those of the shareholders.<sup>6</sup> To meet this challenge, Bebchuk and Jackson suggest rules buttressing shareholder input and shifting oversight responsibilities to independent directors; mechanisms by which shareholders may opt out of these rules; and the bolstering of disclosure rules. To protect minorities from “forced association” with the corporation’s speech, Bebchuk and Jackson suggest procedural rules requiring strong supermajorities.<sup>7</sup>

That Bebchuk and Jackson are so staunch in their defense of dissenters’ rights aligns with the central importance of the freedom of speech in American legal culture. Political and religious preferences belong to a class we might call “close concerns”: those with regard to a subset of expressive rights based in personal attributes, and traditionally considered applicable only to natural persons.<sup>8</sup>

Yet religion is different again. In the traditions of American law, freedom of and from religion is fundamentally intertwined with individual human choice, and primarily justified with reference to individual human potential.<sup>9</sup> While political decisions are developed in compromise with

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6. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) [hereinafter *Corporate Political Speech: Who Decides?*].

7. *Id.* at 115-17.

8. Martin Redish has described the guarantee of freedom of speech as “a catalyst in tapping and developing the uniquely human creative and intellectual capacities of the individual.” Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618, 627 (1988). See also MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 21 (1984) (“a use, and therefore a development, of an individual’s uniquely human faculties”); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 190-193 (2002) (discussing individual liberty as the primary concern underlying freedom of speech).

9. See, e.g., Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989) (outlining the history and animating principles of religious liberty in American constitutional law and politics); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810-11 (1978) (“If there is any single unifying principle underlying the two religion clauses, therefore, it is that individual choice in matters of religion should remain free: individual decisions are to be protected whether they operate for or against the validity of any or all religious views.”); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); KENT GREENAWALT, RELIGION AND THE CONSTITUTION, VOL 1: FREE EXERCISE AND FAIRNESS (2006).

others—a central basis of the American commitment to democracy—one’s religious belief and religious exercise are matters not best left to committee. In the American imagination, each person makes his or her own decisions with regard to his or her relationship to religion.

Thus, while Bebchuk and Jackson’s approach provides a sound starting point for considering corporate speech issues, it cannot reach some important issues brought into relief with the Supreme Court’s articulation of the image of the contingent corporation. Their argument stems from concerns for shareholder wealth maximization, and is built on related assumptions that become problematic post-*Hobby Lobby*. According to their reasoning, an improved decision-making apparatus for the corporation’s political speech appears to be necessary primarily because of the tendency for such decisions to affect shareholder wealth. Even the expressive significance of such decision-making must then be analyzed in terms of the calculation of agency costs.<sup>10</sup>

With *Hobby Lobby*, the Supreme Court at last acknowledged, and appeared to accept, a stance that had been voiced for many decades: the argument that maximization of shareholder financial wealth is not the only legitimate purpose for a for-profit corporation.<sup>11</sup> Further, the Court hinted that the interests of directors, employees, and other non-shareholder constituencies as individuals might matter in terms of the appraisal

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10. *Corporate Political Speech: Who Decides?*, *supra* note 6, at 95-96.

11. *E.g.*, David K. Millon, *Redefining Corporate Law*, 24 *IND. L. REV.* 223 (1991); Lawrence Mitchell, *A Theoretical And Practical Framework For Enforcing Corporate Constituency Statutes*, 70 *TEX. L. REV.* 579 (1992); Marleen A. O’Connor, *Human Capital ERA: Reconceptualizing Corporate Law To Facilitate Labor-Management Cooperation*, 78 *CORNELL L. REV.* 899 (1993); Lawrence Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry Into the Causes of Corporate Immorality*, 73 *TEX. L. REV.* 477 (1995); David J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees*, *Revisited* 69 *S. CAL. L. REV.* 1021 (1996); LAWRENCE E. MITCHELL, *PROGRESSIVE CORPORATE LAW* (1995) (challenging shareholder primacy from communitarian or progressive corporate law stances); Paddy Ireland, *Company Law and the Myth of Shareholder Ownership*, 62 *MOD. L. REV.* 32, 32-57 (1999) (arguing that in Britain, shareholder ownership of the company ruled in the popular imagination as foundational to company law while lawyers merely mumbled along: “Company lawyers, while generally skirting this issue, sometimes acknowledge that shareholders are not ‘owners’ of the company in the usual sense of the word. They tend to assume, however, that they have a proprietary interest in the company akin to ownership, hence, for example, the widespread references to ‘the separation of ownership and control.’ Non-lawyers tend to be less hesitant.”); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *V.A. L. REV.* 247, 257 (1999) (“despite the growing popularity of shareholder primacy rhetoric among academics and commentators. . . corporate law itself has so far rejected the shareholder primacy norm and refused to give shareholders tighter legal control over directors.”); ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013) (“There is no natural law of corporations, for example, that mandates ‘shareholder value maximization’ as the only permissible goal of management. This mantra is merely a prescription recommended by some economic theories of the firm.”). It must, however, be acknowledged that the Court appeared to de-legitimize the centrality of shareholder wealth maximization – *not* shareholder *primacy*.

of corporate religious claims.<sup>12</sup> To properly deal with this variety of interests, we need an account that does not depend so heavily on an assumption of shareholder wealth maximization as its primary concern.<sup>13</sup>

Constitutional questions relating to corporate political speech and religious exercise have been hotly debated in the wake of *Citizens United* and *Hobby Lobby*. Among these have been concerns for establishment clause and forced speech claims.<sup>14</sup> In this article, rather than focus on these constitutional questions, I get down to corporate law brass tacks: I focus upon what the changes introduced by *Citizens United* and *Hobby Lobby* ought to mean for state law, and how courts might face them.

In *Citizens United*, the Court presented as a *fait accompli* a simplified mode of analyzing corporate rights—one that presumed that constitutional protections traditionally considered applicable only to natural persons are both properly extended to corporations and coterminous with protections of political speech for human speakers.

In *Hobby Lobby*, the Court gave its imprimatur to the prioritization of values outside of profit. The primary protections in place for minority shareholder interests were acceptable because (1) the subject of those protections were interests that, unlike religious beliefs, could essentially be described in economic terms; and (2) profit was accepted as the be-all and end-all. *Hobby Lobby* has brought into play more personal interests, while simultaneously having destabilized the efficiency-based reasoning that legitimized majority rule. It is not enough to hew to business as usual—to majority rule—when rights of such importance are at stake. We are in a different world, and we must seek a conceptual language for dealing with this difference.

This inquiry treads two paths. My anthropologist's heart wonders: how are we to understand the nature of a corporate belief where the beliefs of minority shareholders diverge in the face of those of the majority? How are we to understand what Adolf Berle might have imagined as the *collective spiritual sensibility* of the corporation?<sup>15</sup> My question as a legal scholar then becomes: in the face of the articulation of conceptual limits post-*Hobby Lobby*, how should “belief” or “opinion” or “culture” or

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12. *Hobby Lobby*, 134 S. Ct. at 2768 (“An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another.”).

13. After *Hobby Lobby*, even political concerns may be susceptible to some such broader analytic.

14. While constitutional issues are not my focus here, other commentators have noted the “quasi-constitutional” nature of corporate law post-*Citizens United* and -*Hobby Lobby* (see, e.g., Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016)). My particular concerns – which go to the ordinary functioning of business – are likely not amenable to establishment clause protection. Nonetheless, these seemingly quotidian interests need protection.

15. ADOLF A. BERLE, *THE TWENTIETH-CENTURY CAPITALIST REVOLUTION* 148 (1955).

other minority shareholder non-”business” preferences matter in state corporate law?

It becomes clear that these developments do not merely provide the occasion to consider the dealings of corporate law with the personal preferences of minority shareholders. They also demand a re-evaluation of the role of majority rule in corporate governance.

### I. THE DIVERSITY OF CLOSE CORPORATIONS

There is no one all-encompassing definition of the “closely held” business corporation.<sup>16</sup> Definitions differ in terms of their colloquial or official usages, and these may not in fact be clearly delineated from each other.<sup>17</sup> Colloquially speaking, to describe a corporation as closely held might be to indicate any or many of several characteristics: for example, the corporation may have a small number of shareholders, or a small number of employees, or a limited market for its shares. Legally speaking, however, there are specific definitions, differing state-to-state.<sup>18</sup>

What are the implications of “closeness”? Why does closeness make a difference here?<sup>19</sup>

Social science has long acknowledged the problematic nature of the assumption of greater homogeneity in smaller social groupings—tribes, families, villages.<sup>20</sup> Indeed, in many cases—*Hobby Lobby* included—jurists

16. Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 756 n.33 (2000).

17. *Id.* (quoting WILLIAM L. CARY & MELVIN ARON EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 389 (7th ed. 1995) (unabridged) (“Exactly what constitutes a close corporation is often a matter of theoretical dispute. Some authorities emphasize the number of shareholders, some the lack of a market for the corporation’s stock, and some the existence of formal restrictions on the transferability of the corporation’s shares.”); citing 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, *O’NEAL’S CLOSE CORPORATIONS* § 1.02, at 4-7 (3d ed. 1994) (“noting the following possible definitions of a ‘close corporation’: a corporation with relatively few shareholders; a corporation whose shares are not generally traded in the securities markets; a corporation in which the participants consider themselves partners interse; a corporation in which management and ownership are substantially identical; and any corporation which elects to place itself in a close corporation grouping”).

18. Moll, *supra* note 16, at 756, n.33. (“Nevertheless, the typical close corporation possesses most, if not all, of the attributes described in these various definitions.”).

19. F. Hodge O’Neal, *Close Corporation Legislation: A Survey and an Evaluation*, 1972 DUKE L.J. 867, 867 (1972) (“Many corporate concepts and principles, undoubtedly created with public-issue corporations primarily in mind, are ill-adapted to close corporations.”).

20. For example, in sociologist and philosopher Emile Durkheim’s view, solidarity requires conflict. Groups in this conceptualization are not so much entities as ongoing processes; their existence arises out of, is dependent upon, and may be described by a state of tension between mechanical togetherness and organic entropy. Instead of contradicting or negating each other, each becomes the condition for the other. *See* Gordon, *supra* note 3, at 379-382. For a very swift introduction to these themes as expressed in anthropological research, *see generally* JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE AND ART* (1988); JEAN COMAROFF & JOHN L. COMAROFF, *ETHNICITY, INC.*, (2009) (discussing the complexity of ethnically differentiated groups’ engagements with capitalist enterprise); JOHANNES FABIAN, *TIME AND THE OTHER:*

too have acknowledged the irreducible heterogeneity of the group.<sup>21</sup> The greater ease in imagining the closely held corporation as possessing race, or ethnicity, or religion appears, then, connected to how one imagines the interplay of group dynamics.

But if shareholders are not owners in the way usually imagined—as many have argued,<sup>22</sup> and as was arguably endorsed in *Hobby Lobby*—and if we mean to link what “the people” think to what the corporation is—Christian, non-religious, black, what-have-you—then we must take seriously, somehow, these heterogeneous preferences. These issues regarding who makes up the corporation are all bound up in the question of how groups form and what that means for the heterogeneity of its elements. Of how interests ought to be privileged or subjugated in describing what “the group” thinks. Of whose voice should rule where there is heterogeneity in individual preferences. Of who may speak for the group, and based on what type of authority—consensus? Democracy? Fiat?<sup>23</sup>

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HOW ANTHROPOLOGY MAKES ITS OBJECT (2002) (unsettling classical anthropological perceptions of tribal and indigenous societies as timeless, homogenous “others”); AKHIL GUPTA ET AL., CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY, (Akhil Gupta & James Ferguson, eds., 1997) (challenging the naturalization of links between “place” and culture); *see generally*, PAUL NADASDY, TRANSCENDING THE DEBATE OVER THE ECOLOGICALLY NOBLE INDIAN: INDIGENOUS PEOPLES AND ENVIRONMENTALISM, ETHNOHISTORY 52 Ethnohistory 2, 291 (2005); GANANATH OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK: EUROPEAN MYTHMAKING IN THE PACIFIC (Princeton University Press 1997) (arguing the existence of particular epistemologies for indigenous and tribal societies); Elizabeth A. Povinelli, *Consuming Geist: Popontology and the Spirit of Capital in Indigenous Australia*, 12 PUBLIC CULTURE 501, 501-528 (2000) (describing the fetishization into “real culture” of indigenous internal struggles regarding deontological orders, of the frictions between simultaneous, antithetical compulsory strictures—of conflicting requirements to indigenous and non-indigenous social demands); RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS (1993) (reflexivity and positionality can allow modern-day anthropologists to understand their interlocutors as contingent and granular subjects in a manner inaccessible to classic ethnography); MARSHALL SAHLINS, HOW “NATIVES” THINK: ABOUT CAPTAIN COOK, FOR EXAMPLE (1996) (countering OBEYESEKERE, *supra* note 20, to argue for the legibility to anthropological interpretation of contemporary indigenous peoples’ perceptions of the death of Captain Cook); MICHAEL TAUSSIG, MIMESIS AND ALTERITY: A PARTICULAR HISTORY OF THE SENSES (1992) (demonstrating a connection between mimesis and colonial powers’ conceptions of tribal peoples as “savages”); ERIC WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY (2nd ed. 2010) (challenging then-current beliefs that the small-scale societies anthropologists studied were static and monolithic).

21. *Hobby Lobby*, 134 S. Ct. at 2774-75 (“HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about the conduct of business.”).

22. *See, e.g.*, William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010).

23. *See, e.g.*, Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1118-20 (2002) (arguing that minority shareholders can simply leave); *id.* at 1120-22 (arguing that Easterbrook and Fischel’s ideas regarding voting rights proportional to stake obtain in the arena of corporate political speech) (citing Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395-427, and 405-409 (1983)); Lucian A. Bebchuk & Robert J. Jackson



The answer to this question is either incredibly simple or exquisitely complicated.

## II. WHOSE PREFERENCES SHOULD MATTER, AND HOW?

In considering a corporation's personal attributes, we have to know at which constituencies we ought to look to find them. One standard account holds this group to be shareholders alone; implied or explicit within this account is the idea that it is the interests of the majority of the shareholders that matters, rather than, say, those of the corporation as an entity. Both of these ideas have been subject to critique, and both become yet more problematic post-*Citizens United* and *Hobby Lobby*. And yet we have to look *somewhere* for group preferences. Where?

### A. *The Easy Answer: Majority Rules*

Majority rule rules in the corporate law of every state. Easterbrook and Fischel mark as “the most basic statutory rule” of voting in corporate law the idea that “[a]ll common shares vote, all votes have the same weight, and no other participant in the venture votes, unless there is some express agreement to the contrary.”<sup>24</sup> While acknowledging arguments that this state of affairs is undemocratic because those with more shares

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Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 97-111 (2010) (arguing that corporations' decisions around who it is who speaks and what it is the corporation will say in undertaking political speech should have more shareholder input; the procedures for making these decisions should more closely resemble those established for special corporate decisions); Scholars' formal and informal discourse in the immediate wake of *Hobby Lobby* was notable for the extent to which it circulated around these questions. See, e.g., Grant Hayden & Matthew Bodie, *Who Controls Corporate Culture?*, ST. LOUIS POST-DISPATCH (July 16, 2014), [http://www.stltoday.com/news/opinion/columns/who-controls-corporate-culture/article\\_5dbb9b4c-8c6e-500e-9c3f-2a2a4abe18c3.html](http://www.stltoday.com/news/opinion/columns/who-controls-corporate-culture/article_5dbb9b4c-8c6e-500e-9c3f-2a2a4abe18c3.html) [hereinafter *Who Controls Corporate Culture?*] (“It’s not just that Hobby Lobby chose to exercise its religious principles in a certain way—its 13,000 employees had no say whatsoever in the exercise of those principles.”); Ann Lipton, *Yet Another Person Weighs in on Hobby Lobby*, LAW PROFESSOR BLOGS NETWORK (July 12, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/yes-another-person-weighs-in-on-hobby-lobby.html](http://lawprofessors.typepad.com/business_law/2014/07/yes-another-person-weighs-in-on-hobby-lobby.html) (“Justice Alito couldn’t neglect employees in his description of the corporation in Hobby Lobby. Yet immediately after this explanation, he reads employees out of the equation. This was necessary to reach the result—after all, if Justice Alito admitted that employees, as much as owners and controllers, make up the corporate entity, he would have been forced to recognize that many of these employees do not share the religious beliefs of the owners and controllers, and the religious identity of the corporation as a whole would not have been so clear.”); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 AM. U. J. GENDER, SOC. POL’Y & L. 303, 319 (2014).

24. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 408 (1983) [hereinafter *Voting in Corporate Law*].

have more votes,<sup>25</sup> Easterbrook and Fischel regard the current state of affairs to be “a logical consequence of the function of voting.”<sup>26</sup>

One formerly common alternative to the current “one share one vote” norm, cumulative voting, weighted minority voter preferences—putatively improving the deliberation process by easing the ability for otherwise less-powerful shareholders to have a say in corporate governance. Yet cumulative voting, note Easterbrook and Fischel, has become practically extinct, at least in publicly traded firms.<sup>27</sup>

The writers see this as a natural outcome of its costs: in over-weighting minority shares, cumulative voting renders the decision-making process more inclusive, and thus likely less efficient. It is this “lumpiness” that Easterbrook and Fischel see as the greatest flaw in cumulative voting and in other schemes to empower minority shares; a lumpiness that “makes realignments of control blocs very difficult by distributing a form of holdup power widely.”<sup>28</sup>

But this is not a problem merely of costs and efficiencies. Easterbrook and Fischel’s position also articulates something of their theory of group preferences and thus of the social values underlying their contractual stance: Hayden and Bodie describe profit-centricism such as that evinced here as a utilitarian approach oriented primarily toward public choice.<sup>29</sup> As a way of theorizing corporate law, it “generally seeks to foster a system of corporate governance that maximizes overall individual utility.”<sup>30</sup> But since there is no such thing as a normativity-free zone, a commitment to shareholder primacy is also a commitment to the idea “that maximizing shareholder wealth is in the best interests of society.”<sup>31</sup> An efficient decision-making process cuts less dramatically into the resources of the corporation; a lumpy process risks “expos[ing] the firm to an uncompensated risk of making inconsistent or illogical decisions.”<sup>32</sup> The real harm of cu-

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25. See David Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of “One Share, One Vote,”* 56 CORNELL L. REV. 1 (1970) (making the argument that the rule of “one share, one vote” is undemocratic).

26. *Voting in Corporate Law*, *supra* note 24, at 408-409 (“Voting flows with the residual interest in the firm, and unless each element of the residual interest carries an equal voting right, there will be a needless agency cost of management.”).

27. *Id.* at 409.

28. *Id.*

29. Grant M. Hayden & Matthew T. Bodie, *Shareholder Democracy And The Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2081 (2010) [hereinafter *Shareholder Democracy And The Curious Turn Toward Board Primacy*].

30. *Id.*

31. *Id.* at 2082.

32. WOLF-GEORGE RINGE, *THE DECONSTRUCTION OF EQUITY: ACTIVIST SHAREHOLDERS, DECOUPLED RISK, AND CORPORATE GOVERNANCE* 93 (Oxford University Press 2016). Arguing for a broadening of the electorate to non-shareholder constituents, Hayden and Bodie note that “[i]n justifying the limitation of the franchise to shareholders, scholars have repeatedly turned to social choice theory – specifically Arrow’s theorem.” Grant Hayden & Matthew Bodie, *Arrow’s Theorem and the Exclusive Shareholder Franchise*, 62 Vand. L. Rev. 1215, 1219 (2009) [hereinafter *Arrow’s Theorem and the Exclusive Shareholder*

mulative voting, then, is in its inability to capture (to paraphrase Bernard Grofman) what most of the people want.<sup>33</sup>

In the face of these and other practical issues and theoretical quandaries, “one share, one vote” and majority rule are dominant in today’s corporate law arenas.<sup>34</sup> Dominant but—importantly—not entirely unqualified. Adolf Berle wrote that while “[t]he corporation was formed and existed to make money for its stockholders . . . several other considerations have been added to the picture.”<sup>35</sup> Previously, “[i]n case of disagreement, the majority holders, having the largest interest at stake in the profits, would have the most powerful motivation in the direction of sound profit-making personnel and policy. This, after all, was what control was all about.”<sup>36</sup>

As Berle wrote in 1958, however, things had shifted: in the face of motivations like directors’ and officers’ perks, corporate empire-building, or the effect of the graduated income tax on shareholders’ preferences for dividend distribution, profit-maximization might be “a secondary interest.”<sup>37</sup> Further, the single-minded pursuit of profit in the name of the majority shareholders was now limited by the keen interest of the public in the question of the impact of such single-mindedness upon society.<sup>38</sup>

Control thus became “essentially a variety of political process—non-statist and therefore, in our vocabulary, ‘private,’ but with substantial public responsibilities.”<sup>39</sup> It is in recognition of this political character of corporate control that Berle emphasized limitations to majority rule: as in American democracy, minority and other interests would necessarily be

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*Franchise*]. Hayden and Bodie argue that this preference for the reduction of multiple “peaks” may not be empirically supported – in fact, lumpy, spiky, diverse decision making processes may result in more considered decisions. *See also, Shareholder Democracy And The Curious Turn Toward Board Primacy*, *supra* note 29, at 2103 (citing Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1388-1405 (2002)).

33. *See* Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L. REV. 1541, 1549 (as quoted in *Shareholder Democracy And The Curious Turn Toward Board Primacy*, *supra* note 29, at 2080).

34. Anupam Chander, *Minorities, Shareholders and Otherwise*, 113 YALE L.J. 119 (2003) (quoting 2 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS, pt. 7, ch. 4, introductory note (1994) (describing corporate law as a “largely unqualified system of majoritarian control”)).

35. Adolf A. Berle, “Control” in *Corporate Law*, 58 COLUM. L. REV. 1212, 1214 (1958) [hereinafter *Control in Corporate Law*].

36. *Id.*

37. *Id.*

38. *Id.* at 1215 (“[T]he community now has a vivid interest in the policies and operations of corporations, especially the giants in the field. They administer the essential services of supply in the current American economy. Their failure to function reasonably well in many key situations could bring disaster or at least hardship to substantial sectors of the population.”).

39. *Id.*

shielded to some extent from the brute force of the interests of the majority, as “[w]ithout some means of organization”—some limits—the system would probably break down.”<sup>40</sup>

Thus it is that these limits, far from being a side-note, become existentially important to corporate finance.<sup>41</sup>

Even as scholars have addressed over the past decades the practical ineffectiveness or theoretical red-herring status of the shareholder vote,<sup>42</sup> there are a number of transactions in which shareholder input has a pronounced effect on the actual actions of the corporation. For example, note Easterbrook and Fischel, “[s]tatutes in every state require votes to be taken on certain ‘fundamental’ transactions, such as mergers and sales of substantially all the assets of the firm.”<sup>43</sup> The voice of the majority shareholders matters.

Yet to leave the issue to corporate democracy in its current guise appears to end the discussion before it starts. Ultimately, the religious beliefs that ought, in the *Hobby Lobby* Court’s estimation, to rule the corporation’s “beliefs” are simply those of the controlling shareholders-officers (in the relevant companies, these were the same people). But *Hobby Lobby* itself destabilized the propriety of such a route, both by leaving such a sensitive question to majority rule and by destabilizing the very profit focus thought to justify such deferral to majority rule. Thus the facility of the easy answer implies the importance, and the promise, of the more complex one.

### B. The Gnarly Answer

The easy answer leaves open the questions of why shareholder beliefs are the sole indicator for corporate belief, why controlling shareholders’ beliefs ought to be allowed to outweigh those of others, and why belief should be left up to democracy in the first place. Given the centrality of the freedom of religion in American law and society, may we legitimately leave the determination of belief to what arguably amounts to plutocracy?<sup>44</sup>

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40. *Id.* at 1216.

41. “[T]he ALI carefully observes that ‘unless counterbalanced, majoritarian control also creates a potential risk for many investors.’” Chander, *supra* note 34, at 127 n.34, (quoting ALI, 2 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS, pt. 7, ch. 4, introductory note (1994)).

42. See, e.g., Easterbrook & Fischel, *supra* note 24; Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 682-694 (2007).

43. Easterbrook & Fischel, *supra* note 24, at 400, 415.

44. “In *Hobby Lobby*, the Court suggests that wealth determines religion, because state corporate law will resolve intra-corporate disputes according to who owns the most voting shares of the company.” Sarah Haan, *Closely Held Means “Controlling Shareholder”?*, BUS. L. PROF. BLOG (July 10, 2014), [http://lawprofessors.typepad.com/business\\_law/2014/07/guest-post-closely-held-means-controlling-shareholder.html](http://lawprofessors.typepad.com/business_law/2014/07/guest-post-closely-held-means-controlling-shareholder.html).

In the narrative of shareholder primacy, corporations' characteristics are commonly cast as those of "the shareholders" —with shareholders imagined as its "owners" and (the argument goes) thus natural recipients of the franchise. Scholars have challenged this stance by means of arguments dismantling the assumption of a legal requirement for business corporations to hold profit as primary.<sup>45</sup> Still, many of these arguments do not necessarily delegitimize shareholder-centric reasoning.

While some have viewed *Hobby Lobby* as an affirmation of these challenges, others note that while the decision disclaims share value as the only legitimate goal of business, it very much does not decenter shareholder preferences. Instead, the reasoning in *Hobby Lobby* uses the desires and characteristics of the controlling shareholders-officers as the central consideration in determining the characteristics of the corporation.<sup>46</sup>

The Court considered this a valid way to work because the corporation was closely held. The closer the imagined link between shareholders and the corporation appears, the easier the conceptual transfer of the former's identities, rights, and preferences to the latter.<sup>47</sup>

The reasoning in *Hobby Lobby* appears to suggest that the priorities and preferences of those controlling the closely held corporation are those of the corporation — that is, to suggest that these closely held corporations have no factor meaningfully distinguishing their form from that of a part-

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45. *E.g.*, Paddy Ireland, *Company Law and the Myth of Shareholder Ownership*, 62 *MOD. L. REV.* 32, 32-57 (1999); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *V.A. L. REV.* 247, 247-328 (1999); ORTS, *supra* note 11 at 54-62, 78-84.

46. *See* Gordon, *supra* note 3, at 373 n.67. ("That belief matters is, uncontroversially, an essential part of a free exercise claim; RFRA's definition of the free exercise of religion, while discrete and distinct from that within the First Amendment, does not excise this requirement. Although RFRA analysis does not demand evidence that an exercise be 'compelled by, or central to, a system of religious belief,' the requirement of the *presence of* the assertion of belief in some such system is quite clear. Regarding the ability of the corporate entity to have beliefs, the Court cited as 'true—but quite beside the point.' *Hobby Lobby*, 134 S. Ct. at 2768. The Third Circuit also stated that '[g]eneral business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees*, exercise religion,' *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013) (emphasis added). But the Court does not read the beliefs of the corporation to be 'separate and apart from' those of the corporate entity: 'Corporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.' *Hobby Lobby*, 134 S. Ct. at 2768. The Court is able to minimize discussion of the beliefs of the corporation 'on its own terms' —the beliefs of the corporation 'itself'—precisely because with this comment it made coterminous the beliefs of the corporation and the beliefs of the human beings (specifically the controlling human beings) associated with it.")

47. Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Māori Corporation Walk into a Bar . . .*, 39 *SEATTLE U. L. REV.* 353, 375 (2016) [hereinafter *Culture in Corporate Law*].

nership. The claim makes a measure of sense: shareholder status evolved out of partnership status.<sup>48</sup> But historical context is crucial here.

Before modern notions of shareholder status began to develop in the late 1800s, corporations were smaller and less complex, individual shareholding was more prevalent and more concentrated, and shareholder status much more closely resembled partnership status.<sup>49</sup> During that time, the distinction between the partnership form and the corporate form was weak.<sup>50</sup> Since that time, however, the idea that a corporation is an entity unto itself (unlike a partnership, which is considered the aggregate of the partners) has grown in strength dramatically.<sup>51</sup>

Even for closely held organizations, the corporation is not its owners, and its interests are not theirs.<sup>52</sup> The corporation's attractiveness as an organizational option for the conduct of business stems to a great extent from this characteristic. Its status as a legal person is dependent upon the differentiation of the corporation's assets and liabilities from the assets and liabilities of its shareholders.<sup>53</sup> The obvious justification for the doctrine of limited liability in the event of the corporation's failure is the shareholder's acceptance of limited control in the corporation's behavior. Supporting this view is that in virtually every case in which the question of limited liability arose for publicly held corporations, the doctrine was mostly ironclad.<sup>54</sup> But, while (at least in theory) the chance of veil piercing becomes more likely the smaller (in terms of both number of equity owners and number of employees) the corporation at issue, the doctrine of limited liability applieseven for corporations owned and operated by a sin-

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48. Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 *CAMBRIDGE L.J.* 456, 456-506 (2004).

49. David K. Millon, *Theories of the Corporation*, 201 *DUKE L.J.* 201, 205-206; 214-15 (1990).

50. *See id.* at 215. This is especially clear, David Millon has argued, in the decline of the unanimity requirement in voting and the reconceptualization of the sources from which managers received their powers from actual delegation by the shareholders to powers as a matter of law.

51. *Id.*

52. *But see* Amy Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, *HARV. BUS. L. REV.* 173, 192 (2015) ("The fact that some of the corporation's obligations, powers, and privileges are different from those of its owners need not entail that all must be. . . . [T]he veil, just like the corporation, is, to paraphrase John Marshall, 'an artificial' construct, 'existing only in contemplation of law.' As such, the extent of the veil's coverage or porosity is a matter for the law to decide.") (citations omitted).

53. It should be noted that the inverse is not necessarily the case; the organization's status as limited in liability depends neither upon the personhood metaphor nor even upon its status as a corporation. Further, the Greens of *Hobby Lobby* and the Hahns of *Conestoga*, for instance, did not need to establish their businesses as corporations to gain the protections of limited liability. *See generally*, *Hobby Lobby*, 134 S. Ct. 2751; *Conestoga*, 724 F.3d 377, 385 (3d Cir. 2013)

54. *ORTS*, *supra* note 11 at 160.

gle individual.<sup>55</sup> The result is that our existing view of corporate personhood cannot satisfactorily explain the strength of the limited liability doctrine.

*Hobby Lobby* lends credence to an imagining of the corporate person neither as a mere aggregate of the persons involved in the undertaking nor as separate entity from its shareholders, but as an entity whose personal characteristics arise directly from them.<sup>56</sup> In none of these views of the corporation were the shareholders at risk of personal liability for the behavior of the corporation. Instead, what was at risk was a benefit to the corporation: its ability to avoid insurance payments. In each case, the personal interests of the shareholders came to justify the extension to the corporation-as-entity these rights and benefits—a process that might be described as “reverse veil piercing.”<sup>57</sup>

Although an empirical examination of the question is beyond the scope of this piece, one might conjecture that, at least in *Hobby Lobby*, the reverse veil piercing of Hobby Lobby Stores and Conestoga Wood worked in the eyes of the court, where it would not have with a different set of organizations, because of this same elision of differences between shareholder and corporate personalities. The courts’ notions of the suitability of both veil piercing and reverse veil piercing in a particular circumstance might, in turn, come down to the tendency to imagine small or closely-held organizations as more closely resembling the imagined homogenous people holding them.

The assumptions underpinning conceptions that more closely held corporations are able to “have” singular “culture,” race, or political opinions thus appear to be related to an idea of numerically smaller groups as more homogenous in terms of values and more stable in terms of preferences—and with a greater connection between the personalities and preferences of the individuals associated with the corporation and the organization’s actions. As Justice Ginsburg notes in her *Hobby Lobby* dissent, however,

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55. ORTS, *supra* note 11, at 158 (“The economic and ethical arguments that support limited liability for equity owners of very large corporate enterprises become less convincing for smaller firms (or large firms in economic size with only a few equity owners). These firms do not depend on large numbers of investors who participate in public stock markets. And management responsibility tends to coincide with ownership interests much more directly than in large firms. The organizational distance between owners and managers in smaller firms is considerably lessened and sometimes completely eliminated. In other words, there is often no ‘separation of ownership and control.’”).

56. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

57. See generally, Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 235, 235- (2013) (reverse veil-piercing defined as a doctrine by which a court will disregard a corporation’s separate legal personality in the interests of its controlling insiders); Elizabeth Sepper, *Religion, Inc., A Reply to Bainbridge*, THE CLS BLUE SKY BLOG (Aug. 2, 2013), <http://clsbluesky.law.columbia.edu/2013/08/02/religion-inc-a-reply-to-bainbridge/comment-page-1/>.

“close” does not mean “small.”<sup>58</sup> Ginsburg directs her colleagues to note that the majority’s reasoning renders plausible RFRA claims by public or private corporations “of any size.”<sup>59</sup> Hobby Lobby Stores, for one, is not diffusely owned, but it has thousands of employees (of diverse faiths, as Justice Ginsburg points out).

But if “closely held” is not coterminous with “small,” neither is either coterminous with “homogenous in shareholder characteristics.” The Court, failing to delimit what, precisely, it meant in using the term “closely held,” left it open to interpretation and resistant to bounds—was the simple legal characteristic of “closeness” (however that may be defined) sufficient to validate a vision of the characteristics of the corporation as directly coterminous with its controlling shareholders?

While the Court professed its confidence that its analytic focus upon the closely held nature of Hobby Lobby and Conestoga Wood would serve to limit to the opinion’s broad application, the opinion held little discussion of the characteristics that make a corporation “closely held” in such a way as to enable the Court to confidently state that it seemed “unlikely that the sort of [publicly traded] corporate giants to which HHS [U.S. Department of Health and Human Services] refers will often assert RFRA claims.”<sup>60</sup>

Since the way the Court uses the phrase is so loose, there is clearly some unstated set of characteristics that is motivating the Court’s analysis—beyond the characteristics in the applicable legal concept—that might distinguish a corporation’s status as what we might call “*Hobby Lobby* close” versus close in a way that would make the result in the case inappropriate to it.

Something must motivate the assumption that the rule articulated in *Hobby Lobby* will transform when extended to the depersonalized behemoths (Wal-Mart, say) that are closely held in ways that may be legally indistinguishable from Hobby Lobby Stores and Conestoga Wood—even while they bear no trace of the characteristics motivating the Court’s sympathy in the initial case. The implication is that the Justices, while not articulating it, must assume some sort of dividing line between these different iterations of what are, definitionally, “close companies.”

Even as we acknowledge the presence of and the importance of diversity in the goals, values, and preferences of close corporation shareholders, the corporation more amenable to *Hobby Lobby*-style closeness would still seem somehow to be (putatively, at least) more closely linked with homogenous social norms. The smallness of and homogeneity within the shareholder group—presumed, as they were, to flow with the (again, un-

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58. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 n.19 (2014) (Ginsburg, J., dissenting).

59. *Id.* at 2797

60. *Hobby Lobby* at 2774.



defined) “closely held corporation”—allowed the Court to imagine the corporation as more properly due “personal” considerations.

Commentators on the 2014 *Hobby Lobby* decision noted that, in leaving the particular legal usage of the term “closely-held” unspecified—in using the term as if colloquially, while depending heavily upon it as a descriptor of what types of corporations were at issue in the case—the Supreme Court left little guidance as to the nature and limits of the rules enunciated in the opinion.<sup>61</sup>

Federal lawmakers stepped into the breach soon after with proposed rules describing the nature of the closely held for-profit corporations that would be able to claim the *Hobby Lobby*-generated exception to the ACA.<sup>62</sup> The final rule echoes the Court’s intuitions regarding the more homogeneous and human-like nature of certain corporations,<sup>63</sup> specifying that the type of for-profit corporation it protected would be an entity that “is not publicly traded, is majority-owned by a relatively small number of individuals, and objects to providing contraceptive coverage based on its owners’ religious beliefs.”<sup>64</sup>

Closeness as imagined in *Hobby Lobby* seems thus to have something to do with a corporation that seems somehow more accountable to – more organically bound up with – some set of human norms – making it more easily and seemingly unproblematically assigned the relationships to that set of norms that one might more properly attach to the (putatively homogeneous) individuals affiliated with it.<sup>65</sup> This is the contingent corporation.

But if we value religious freedom, ought we not take seriously diverse shareholder belief-preferences within corporate law? In the next section, I will describe the ways in which the diverse voices of the shareholding majority *and* the minority matter. And in closely held corporations, they matter *differently*.

61. See, e.g., Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149, 150 (Micah Schwartzman, Chad Flanders & Zoe Robinson, eds., 2016) (“[T]he Court’s anemic treatment of corporate law in *Hobby Lobby* provides little guidance on how to implement and limit this landmark ruling. . . . As a result, the *Hobby Lobby* opinion recognizes the religious liberty of business corporations but leaves quite murky the corporate law mechanics of establishing and limiting this liberty.”).

62. See generally Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 134 (July 14, 2015) (to be codified at 45 C.F.R. pt. 147).

63. *Id.* (“This definition includes for-profit entities that are controlled and operated by individual owners who are likely to have associational ties, are personally identified with the entity, and can be regarded as conducting personal business affairs through the entity. These entities appear to be the types of closely held for-profit entities contemplated by *Hobby Lobby*. . . .”).

64. *Id.*

65. *Culture in Corporate Law*, *supra* note 47, at 375.

### III. PERSPECTIVES ON TAKING DIVERSE SHAREHOLDER PREFERENCES SERIOUSLY

Hidden within the seeming homogeneity of shareholder preferences is a productive tension. Shareholders are much more diverse in their preferences than was visible to classical assumption and inquiry.<sup>66</sup> Perhaps it is in this acknowledgement that we might find the roots for a solution to the “who speaks the culture” question—perhaps a solution already extant in the law of corporations.

#### A. Where Corporate Law Disdains Majority Rule: Oppression Doctrine, Appraisal, Fiduciary Duties

Corporate law already recognizes diverse shareholder preferences, supporting some sets of claims by minority shareholders over and against the majority—and sometimes over and against the profit motive of the corporation outright.

Minority shareholders may make claims that they were “oppressed” by the actions of the corporation’s insiders. What counts as oppression? Oppression may variously mean unfair, wrongful behavior inimical to the trust shareholders must put into the companies in which they invest; breaches of fiduciary duties between the shareholders of close corporations; and conduct disappointing the “reasonable expectations” of minority shareholders.<sup>67</sup>

Oppression doctrine may be seen to involve two different perspectives, each of which yields dramatically different outcomes for oppression claims.<sup>68</sup> Courts understanding oppression to be about wrongful majority behavior or about derogation of fiduciary duties to the minority read the

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66. See, e.g., Stephen M. Bainbridge, *Competing Concepts of the Corporation (a.k.a. Criteria? Just Say No)*, 2 BERKELEY BUS. L.J. 77, 91 (2005) (“Although neoclassical economics assumes that shareholders come to the corporation with wealth maximization as their goal, and most presumably do so, once uncertainty is introduced it would be surprising if shareholder opinions did not differ on which course maximizes share value.”); *Shareholder Democracy And The Curious Turn Toward Board Primacy*, *supra* note 29; Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote And The False Promise Of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445 (2008) [hereinafter *One Share, One Vote And The False Promise Of Shareholder Homogeneity*]; Marina Welker & David Wood, *Shareholder Activism and Alienation*, 52 CURRENT ANTHROPOLOGY S57 (2011);

67. See Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 36-39 (1987); *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984); , *supra* note 15, at 761-62 (citing Robert B. Thompson, *The Shareholder’s Cause of Action for Oppression*, 48 BUS. LAW. 699, 711-12 (1994)).

68. Moll, *supra* note 16, at 753 (countering commentary to the effect that the difference in perspective makes little practical difference (citing 2 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 9.29 (3d ed. 1994))); see F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S OPPRESSION OF MINORITY SHAREHOLDERS § 7:13 (2d ed. 1985); see Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 322 (1990).

doctrine from a “majority” perspective.<sup>69</sup> When a court views oppression doctrine from this perspective, Douglas Moll says, oppression is found only where “the majority’s actions are not justified by a legitimate business purpose.”<sup>70</sup> When a court views the doctrine from the perspective of the minority, on the other hand, it “generally finds oppression liability when majority actions, whether justified or not, harm the interests of a minority shareholder.”<sup>71</sup>

Utilization of a “reasonable expectations” test is one marker of a court that is viewing oppression from a minority viewpoint.<sup>72</sup> Moll quotes the New York Court of Appeals for one statement of this view:

A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.<sup>73</sup>

Note the difference in indicators here: a reasonable expectations test seems more amenable to the tallying up of non-monetary wrongs. Claims based on breaches of expectations in regard to close concerns would fall under this category.

If oppression doctrine were to be the mechanism by which minority shareholders in close corporations would press their claims regarding religious or other personal preferences, it might be expected that this view of the test, more than the majority-focused takes on the doctrine, would provide some scope.

Beyond these obvious practical uses to which the doctrine might be put, it may be argued that it also evinces space within corporate law for further expansion of protection of minority shareholder concerns in closely held corporations. Chander takes oppression doctrine to be one very direct expression of the central importance in corporate law of the protection of minority shareholders.<sup>74</sup> The doctrine, Chander argues, is pointedly resistant to the “ruthless efficiency of the marketplace” assumed in contractual analysis of corporate law.<sup>75</sup> This is an especial concern in

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69. Moll, *supra* note 16, at 762.

70. *Id.* at 752.

71. *Id.*

72. *Id.* at 764.

73. *Id.* (citing *In re Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984)).

74. See Chander, *supra* note 34, at 121-23 (“Corporate law. . . routinely intrudes into the corporation to secure the protection of minority shareholders against controlling persons within corporations”; “much of corporate law can be explained as protective of minority shareholders.”). Moll’s view might be seen as more cautious, emphasizing the ways in which minority oppression doctrine can, and should, properly weight minority and majority interests. See Moll, *supra* note 16, at 754 (“[T]he shareholder oppression doctrine should operate to protect the minority’s investment and to preserve, at least to some extent, the majority’s decision-making discretion.”).

75. Chander, *supra* note 34, at 123, 144 (citing Frank H. Easterbrook & Daniel R. Fischel, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 22-35 (1991)). Chander applies to

close corporations because of the likely presence in this context of shareholder concerns that are not profit focused.<sup>76</sup>

Minority oppression doctrine evolved significantly beyond a previous focus on involuntary dissolution as remedy,<sup>77</sup> becoming instead “a statutory ground for a wide variety of relief.”<sup>78</sup> This development is important because of the diversity of concerns and values motivating minority shareholder claims within closely held corporations. As close shareholder concerns are unlikely to be quantifiable in terms of a money amount in the same way as might profit concerns, remedies other than dissolution may be more suited to them.

Another form of protection for minority shareholders lies in fiduciary duties reaching from corporate insiders to outsiders. In the face of the limits of majority rule, directors and officers hold certain duties to minority shareholders. Fiduciary duty—“[t]he standby rule of corporate law”<sup>79</sup>—has been defined to require “actors to behave in the way that they would have agreed to do by contract, if detailed contracts could be reached and enforced at no cost.”<sup>80</sup>

In keeping with the anti-formalist theme that characterizes corporate law, it is not only directors and officers that owe such duties to the minority: when a majority shareholder comes to take on the practical role of the directors and officers—that is to say, when they come to have control over

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close corporations a contractual approach to voting earlier articulated by Easterbrook and Fischel: “We argue that the states’ legal rules generally provide investors with the sort of voting arrangements they would find desirable if contracts could be arranged and enforced at lose cost.” (quoting *Voting in Corporate Law*, *supra* note 24, at 398). In the 1983 work, Easterbrook and Fischel explicitly distinguished this discussion from their own, noting that “the free-riding problems that make the understanding of voting such a challenge do not apply with the same force to closely held firms.” (*Voting in Corporate Law*, *supra* note 24, at 399 n.8.).

76. *Control in Corporate Law*, *supra* note 35, at 1214; Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 WM. MITCHELL L. REV. 1143, 1148 (1990); Chander, *supra* note 34, at 143 (“The cause of action for oppression developed out of the growing recognition that minority shareholders in close corporations were susceptible to abuse by the majority, through non-pro rata distributions and other forms of self-dealing. The close corporation context, in which personal emoluments such as employment form a significant part of the return on investment and in which ownership shares are relatively illiquid, leaves the minority at heightened risk of exploitation.”). *See also* Moll, *supra* note 16, at 754, 758 n.44. Because of these diverse priorities of close corporation shareholders, Moll argues, “reasonable close corporation shareholders would not reach an understanding that *any* majority conduct benefiting the corporation is permissible.” Moll’s approach is thus contractually oriented, seeking the enforcement of “the likely understandings that reasonable investors would have reached if, at the venture’s inception, they had bargained over the protection of their investments and the prerogatives of the majority.

77. Haynsworth, *supra* note 67, at 26 (“historically such suits have been the most common litigation remedy used by aggrieved shareholders”).

78. Moll, *supra* note 16, at 760.

79. *Voting in Corporate Law*, *supra* note 24, at 401.

80. *Id.* *See also* Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982) [hereinafter *Corporate Control Transactions*].

specific action by the corporation—they too take on certain duties to the minority.<sup>81</sup> Thus, the majority is limited both in the extent of the control that “control” provides and in the ways in which this control may be exercised. As Adolf Berle noted, “[t]he function of control is to choose a management. This choice must be responsibly exercised.”<sup>82</sup> The notion of fiduciary duty hinges to a large extent upon ideas of fairness, responsibility, and differentials of power.<sup>83</sup>

As it turns out, then, while majority rule is central to corporate law, corporate law is actually remarkably sensitive to the protection of minority shareholding.<sup>84</sup> Chander has argued (albeit not without pushback) that the protection of dissenting minority shareholder is a, if not *the*, central edifice of corporate law.<sup>85</sup>

Chander makes his point by way of comparison of the treatment of minority interests in corporate as against constitutional law: “Where constitutional law sees only one race—‘American’—corporate law recognizes minority status as a central datum for legal decision.”<sup>86</sup> For example, while *Dodge v. Ford Motor Co.*<sup>87</sup> has come to be seen to be about shareholder wealth maximization, the true concern of the court “was with Henry Ford’s minority co-owners; any effect on Henry Ford’s own finances was incidental.” Indeed, “[t]he court held not that insiders must simply maximize shareholder wealth, but that they must do so equitably.”<sup>88</sup>

A further point of contrast with constitutional law may be found in corporate law’s attention to granular context, to “relations of power within

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81. *Control in Corporate Law*, *supra* note 35, at 1222 (“[T]he law has long recognized and imposed certain liabilities on the holders of control if they use their influence over directors to cause specific corporate action. . . . [W]here holders of control, without assuming the title of directors, move into the directors’ room or the managerial offices and specifically direct corporate action, they are held to the same standards of conduct which apply to directors.”); Chander, *supra* note 35, at 138 (quoting *Pepper v. Litton*, 308 U.S. 295, 306 (1939) (“A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders.”)).

82. *Control in Corporate Law*, *supra* note 35, at 1220.

83. Chander, *supra* note 34, at 157 (“the fiduciary duties that make up much of the law of corporate governance rely centrally on notions of ‘fairness.’ In interested shareholder transactions, for example, the controlling shareholder bears the burden under Delaware law of proving ‘inherent fairness.’”) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983)). Chander claims that *Joy v. North* “can only be understood as a case dissecting power relations, even if such dissection is in the service of shareholder wealth. The court’s decision to intervene, over the dissent’s objection of ‘overregulation,’ resulted from the court’s concern with power relations in the corporate sphere. The court was concerned about the absence of power in the shareholder class.” *Id.* at 133.

84. *See generally* Chander, *supra* note 34.

85. *Id.* at 119.

86. *Id.* at 120 (citations omitted).

87. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

88. Chander, *supra* note 34, at 126.

the corporation.”<sup>89</sup> It is not mere numerical majority of shareholding that concerns corporate law. Instead, “[c]orporate law does not define ‘minority’ shareholders on the basis of numbers alone . . . Even minority holders can exercise control of the corporation.”<sup>90</sup>

Stephen Bainbridge cautions us against wholesale acceptance of Chander’s insistence upon the protection of minority interests as a central, even constitutive concern in corporate law.<sup>91</sup> Bainbridge acknowledges that to the extent that minority shareholder protection is central to corporate law, however, it is likely to be important in the context of close corporations.<sup>92</sup>

Whether or not one buys into the rest of Chander’s argument, it is clear that protection of minority shareholders is and has long been important in corporate law.<sup>93</sup> In Chander’s words, “Corporate law springs into action—becomes nontrivial—on behalf of minority shareholders.”<sup>94</sup>

Berle wrote that “control” in corporate law may be viewed to be of two different flavors – “absolute” control (control outright) and “working control.”<sup>95</sup> In the first, control is established by means of a majority of stock held by one or more shareholders who act in concert, or in some cases where such an individual or group holds a substantial minority of the shares while the remainder of shareholding is splintered among many small, diversely oriented shareholdings.<sup>96</sup> Working control, however, “involves an additional element which is in fact a quasi-political process. This element is the capacity to mobilize other shareholders.”<sup>97</sup>

The wider point here is that corporate law concerns itself with more than formalism and bright-line rules. What is on display here is precisely not the formalistic equality that Stephen Bainbridge remarks upon in Chander’s argument.<sup>98</sup> Instead, corporate law is concerned with context

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89. *Id.* at 163.

90. *Id.*

91. Stephen M. Bainbridge, *There is No Affirmative Action for Minorities, Shareholder or Otherwise*, in *Corporate Law*, 118 YALE L.J. POCKET PART 71 (2008), <http://yalelawjournal.org/forum/there-is-no-affirmative-action-for-minorities-shareholder-and-otherwise-in-corporate-law>.

92. *Id.* at 71-72.

93. *Control in Corporate Law*, *supra* note 35, at 1212 (“the rules derive chiefly from a time when corporations were still truly private and relatively small, and they were and still are directed primarily toward the protection of the property interests of minority stockholders”).

94. Chander, *supra* note 34, at 127.

95. *Control in Corporate Law*, *supra* note 35, at 1213.

96. *Id.*

97. *Id.* Alternately, *management* working control may be at work where, since “there is no substantial minority and the stock is widely scattered among a large number of stockholders, capacity to direct the proxy machinery is all that is necessary.” *Id.*

98. Bainbridge, *supra* note 91 (“Chander overstates the extent to which corporate law values principles like equal treatment. To the contrary, corporate law explicitly permits discrimination among shareholders.”).

in a way that reflects law's own flexibility: "[t]he constant need to assess power dynamics," Chander notes, "reflects the contingent nature of law itself."<sup>99</sup> Corporate law concerns itself with the real world of corporate power relations in a way that constitutional law has not seemed to do.<sup>100</sup> It is for this reason that corporate law demands constant re-theorization, constant evaluation of the suitability of its norms and precepts to the lived world of corporations.

### B. Arguments from Constitutional Rights

Political speech and religious rights are so important that their infringement can give rise to constitutional claims—another way in which the voices of dissenting shareholders might be recognized.

In light of the ineffectiveness of corporate democracy for shareholder voice and agency, a number of commentators have argued that *Citizens United* gives rise to forced speech issues. Justice Stevens led this charge in *Citizens United* itself, noting that "[i]nterwoven with *Austin's* concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech."<sup>101</sup> Yet there are long-standing critiques of the forced speech argument.

Howard Wasserman argued before the advent of the *Citizens United* era that forced speech is faulty as a rationale for limiting corporate speech because:

First, a parallel standard is not followed when it comes to associations other than profitmaking corporations even though a similar problem [regarding member-dissent] could arise. Second, it is by no means obvious that the shareholders realistically can be deemed to have been forced to speak. Third, even assuming one can make such an identification, the relative cost of exit is not so high as to lead to the conclusion that the shareholder's expression actually has been forced.<sup>102</sup>

More recently, however, many of these critiques have not been borne out.

Scholars of labor and corporate law have noted that "a parallel standard" is not followed for unions—instead unions are much more harshly

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99. Chander, *supra* note 34, at 164.

100. *Id.* at 174 ("[C]orporate law does not adopt an approach of formal equality, refusing to recognize differences among shareholders. Corporate law does not confuse equality with sameness. Indeed, corporate law even goes so far as to impose special duties on controlling shareholders and managers that are not borne by minority shareholders. Corporate law recognizes what this initiative would deny: In order to do justice, law must keep in mind the identity of the individuals involved—specifically, whether they are controlling or minority members of the relevant group.")

101. *Citizens United v. FEC*, 130 S. Ct. 876, 977 (2010) (Stevens, J., concurring in part and dissenting in part).

102. Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 271-281 (1998).

controlled than corporations as regards dissenters' forced speech claims.<sup>103</sup>

The question of state action may be approached directly;<sup>104</sup> it has also been argued by reference to union cases.<sup>105</sup> The actions of private sector organizations have been seen as state action because of the cost or difficulty of exit, but the cases finding state action in private unions have been distinguished by the argument that it is easy to disentangle oneself from investment in a corporation, but burdensome to leave a union.<sup>106</sup>

In fact, many of the concerns articulated in regard to forced speech take on a particular salience in the case of close corporations. The combination of two central norms in corporate law—majority rule and centralized control—present a particular set of difficulties for the minority shareholder in this context. In the close corporation case the selling option is practically moot: by definition, it is difficult and costly to withdraw from a close corporation. The project of disentangling oneself will often necessitate having to find new employment.<sup>107</sup>

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103. See, e.g., Charlotte Garden, *Citizens, United and Citizens United: The future of Labor Speech Rights?* 53 WM. & MARY L. REV. 1 (2011); Eric John Finseth, *Shareholder Activism by Public Pension Funds and the Rights of Dissenting Employees Under the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 289 (2010); Reza Dibadj, *Expressive Rights for Shareholders After Citizens United?*, 46 U.S.F. L. REV. 459, 467 (2011); Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After Knox v. SEIU Local 1000*, 98 CORNELL L. REV. 1023, 1025 (2013).

104. See, e.g., *Int'l Ass'n of Machinists v. S.B. Street*, 367 U.S. 740, 777 (1961) (Douglas, J., concurring) ("Since neither Congress nor the state legislatures can abridge those rights, they cannot grant the power to private groups to abridge them."); Adolf Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 952 (1952) ("Implicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself.").

105. Fisk & Chemerinsky, *supra* note 103 at 1025-26 ("The law has long been that both public sector and private sector unions violate the First Amendment rights or statutory rights of dissenting employees when they spend money from the organization's general treasury to advance a political message without giving the employees the chance to opt out of having their fees support political activity."); Finseth, *supra* note 103, at 347. Finseth notes that the Second, Tenth, and D.C. Circuits have declined to see state action in private sector actors, while the First, Sixth, and Ninth Circuits have done so. *Id.* at 348-49.

106. See, e.g., Wasserman, *supra* note 102, at 275-76 ("the shareholder probably will lose nothing in the transaction. To the extent that the corporate speech somehow causes the stock's price to fall, the shareholder has other remedies, such as shareholder suit for breach of fiduciary duty. . . . Having to forego a particular investment opportunity. . . simply is not of the same magnitude as the obligation to find new employment."); Fisk & Chemerinsky, *supra* note 103, at 1060-61 ("The real reason why the Court thinks corporate political spending is not compelled speech and union political spending is was the one stated in an earlier campaign finance case, *First National Bank of Boston v. Belotti*: workers are compelled to fund union political speech but shareholders are not because the latter can simply sell their shares in the corporation but the former would have to quit their job.").

107. Moll, *supra* note 16, at 757, 759 ("In the public corporation, the minority shareholder can escape . . . abuses of power by simply selling his shares on the market. By definition, however, there is no ready market for the stock of a close corporation.").



The closely held corporation thus seems an especially ripe context for forced speech claims.

Speech and religion are rights that are so important that they give rise to constitutional claims. This seems to indicate that they are rights that should be protected at a more quotidian level, too; at the level of the structure of corporate governance, rather than after things have gone wrong.

Thus it is that the more complex answer to the question of the corporation's cultural voice requires that we rethink the very nature of corporate democracy.

#### IV. RETHINKING CORPORATE DEMOCRACY

Do current doctrines regarding minority oppression, fiduciary relationships, and appraisal rights have the capacity to accommodate shareholder claims based on corporate religious rights? The notions of investor expectations and of fairness have a great deal of stretch to them. If these concerns were now to take the shape of the voice, belief, representation, and identity issues signaled by *Hobby Lobby*, these and other remedies might provide useful courses of action. In this section, I will consider the usefulness of the arguments for recognition of minority dissent that I have surveyed in the context of religious dissent post-*Hobby Lobby*.

Corporate law can and does take minority preferences into account. But how might it take these preferences into account regarding matters such as "belief"? Are the mechanisms of corporate democracy sufficient where what is at stake is the question of what is to be the "deeply held belief" of the closely held corporation with which you, a human individual with your own deeply held beliefs, identify? The question is difficult partly because of the role an idealized, standardized, homogenized role that the shareholder classically has played in corporate theory.<sup>108</sup> The shareholders to whom the fictive corporate person is accountable are fictive, too.<sup>109</sup>

By way of illustration, I think here of anthropologist Marilyn Strathern's conception of audit cultures.<sup>110</sup> Audit practices, bureaucratic assessment procedures grown near-ubiquitous in the neoliberal era, have as a concept "broken loose from [their] moorings in finance and accounting," spreading to "all kinds of reckonings, evaluations, and measurements." According to Strathern they now become "a distinct cultural artifact."<sup>111</sup>

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108. Moll, *supra* note 16, at 756-62 and accompanying text.

109. See Daniel Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996).

110. Marilyn Strathern, *Improving Ratings: Audit in the British University System*, 5 EUR. REV. 305 (1997).

111. Marilyn Strathern, *Introduction: New Accountabilities*, in *AUDIT CULTURES: ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY ETHICS* 1, 2 (Marilyn Strathern, ed., 2000).

The “self” described and thus the self that is monitored in an audit will be an approximation toward a prescribed version of self—and this construction of a self for audit resembles the same process for the constitution of a “self” for an internal constituency. In each case the act of making-legible is a prime site for mistranslation, exacerbated by recursive re-translations of that self. Mistranslations, of course, can be wildly and uniquely productive. Having examined oneself and manufactured one’s “mission statement,” it is possible to shape oneself in increasing orientation to that desired goal. One artifact this audit-self reproduces, then, is itself. Or a reasonable facsimile: a new, different, prescribed self which in turn shapes one’s *self* self.

The institution’s holding itself to “best value” standards (for example) in order to render an account of itself to a constituency thus requires also an attempt at an accounting of constituents. The constituency must be made to appear “an entity with which communication can take place”<sup>112</sup>—an operation necessarily involving some schematization of both the institution and its putative constituency. The success of this move will involve the institution’s representation *of* the constituency *for* the constituency in a way that aims to make the constituency visible to itself, legible to itself, which implies the necessity of the institution’s careful management of the recognition and the elision of difference.<sup>113</sup>

The proposed rules for for-profit religious exemptions to contraceptive coverage will generate similar alignments. Audit, Strathern noted, creates performing subjects who shape their behavior toward the strictures of audit in interesting ways. Post-*Hobby Lobby*, and in the wake of the proposed rules, questions remain open regarding how companies will behave as for-profit religious entities, and how *Hobby Lobby* and its progeny will come to shape these behaviors.

Since—even outside of constitutional claims—religion is special, in recognizing for-profit corporate rights to it we need to put in place stronger-than-usual protections for individual rights to and from religion. This means that we ought only defer to corporate demands for religious exemptions where the integral nature of the religious character of the organization makes it so clear, so important, and so obvious as to justify the silencing of the rights of the individual. We do not want Wal-Mart claiming this exemption and being treated as Christian (or any other religion) just because they say they are, or switch a couple of marketing phrases around, or check a couple of boxes.

This requirement for a dyed-in-the-wool religiosity was arguably present even in *Hobby Lobby*’s vague wording. Justice Alito’s seemingly glancing mention of directors/officers/employees was an acknowledgement that these are decisions necessarily far messier than your average corpo-

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112. Marilyn Strathern, *Robust Knowledge and Fragile Futures*, in GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS 464, 468 (Aihwa Ong & Stephen J. Collier, eds., 2008).

113. *Id.*

rate governance issue. Other constituencies will matter in this determination.

Yet we know that we may not inquire into the guts (sincerity, intensity) of religious faith in these circumstances—we are barred from looking at the specifics—so how should we think about that kind of religious company versus a dyed-in-the-wool religious company? Is there some sort of difference, or are we satisfied to let the simple box-checking claim (“This is a religious company because we said so!”) trump possible internal dissent, a conflict likely to be gravely injurious to very important individual rights?

If we are to be able to distinguish Hobby Lobby Stores and Conestoga Wood from any old closely held corporation that claims these rights, we should have that as a factor: context, character, dyed-in-the-wool-ness of the close concern characteristic the corporation is claiming.

Thus in theorizing closely held corporations and minority dissent, trust, community, and solidarity become tools to leaven otherwise stridently standardized aspects of corporate law.

To use such tools is to put into practice Hayden and Bodie’s insistence that what I earlier characterized as “lumpy” decision-making might in some circumstances enable better, not worse decisions.<sup>114</sup> “Better” will here mean decisions that capture “what the people want” while properly taking into account their ethical and cultural commitments to, or aversions to, the proposed corporate action.

After all, if shareholders are more diverse than assumed in classical theory,<sup>115</sup> and if, post-*Hobby Lobby*, shareholder value is de-legitimized as all-consuming concern, then Easterbrook and Fischel’s arguments from Arrow’s theorem lose a fair measure of their force. The weakened legitimacy both of the attribution of an overarching profit-preference to an imagined standardized shareholder, and of the overweening importance of agency cost-reduction (a concern frequently, albeit not necessarily, framed in terms of the centrality of maximizing share value) brings with it further changes. To wit: other values that are held to be similarly important—like those types of beliefs made important in *Hobby Lobby*—become qualified to stand toe-to-toe with profit maximization.

I have called these “close concerns”: those with regard to a subset of expressive rights based in personal attributes, and traditionally considered applicable only to natural persons. These concerns are for things—like free exercise, like religious belief, like racial or cultural background—newly extendable to corporations and newly treated as indistinguishable in any relevant sense from the way in which it is protected for human persons. Share value becomes, here, just another value among many that might legitimately fall under the purview of corporate law. Justifications

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114. See Hayden and Bodie, *supra* note 33.

115. *Id.*

for the prioritization of efficiency must now contend with a newly legitimized need to take such strongly held preferences seriously.

This set of changes necessitates decision-making processes that take into account the special nature of these close concerns, and takes seriously the idea that this special nature justifies the potential decrease in efficiency or processual elegance—while also avoiding the specter of immobility. While some “lumpiness” is good for decision-making, however, clots are not. Thus it must be acknowledged that, regardless of the import of these “close concerns,” minority belief-preferences will need to be disregarded to some extent if business is to be done. A remaining issue, then, is the formulation of some balancing mechanism by which we may determine the extent to which we should be comfortable allowing minority close concerns to be discounted or ignored.

Recognizing in *Citizens United* the first few frames of the shifts outlined above, Lucian Bebchuk and Robert Jackson offer a number of practical suggestions regarding the structure of corporate political speech decision-making.<sup>116</sup> Because the decision-making processes regarding corporate political speech are undifferentiated from those regarding ordinary business decisions, note Bebchuk and Jackson, they lack shareholder input, a role for independent directors, or disclosure requirements— “the safeguards that corporate law rules establish for special corporate decisions.”<sup>117</sup> The provision of safeguards such as these for political speech decision-making is sensible, the authors argue.

Not only may the decisions of management regarding the corporation’s political speech diverge significantly from shareholder preferences, and not only might these divergences have real financial implications; to the impact of these two factors is added the force multiplier of the “special expressive significance” speech decisions hold.<sup>118</sup> This significance renders speech decisions materially different from the ordinary business decisions with which they are currently classed.

But the improvements suggested by Bebchuk and Jackson cannot address the close concerns that become important post-*Hobby Lobby* for two primary reasons. First, *Hobby Lobby* de-centered the primacy of profit; the opinion gave the Supreme Court’s imprimatur to arguments that values outside of profit are proper foci for for-profit businesses. Second, political speech rights and rights to religious exercise tend to be framed in different rhetorical terms; these differences become very sharp in the wake of *Hobby Lobby*.

Bebchuk and Jackson’s approach to dissent from corporate political speech stems from concerns for shareholder wealth maximization, and is built on related assumptions that become problematic post-*Hobby*

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116. See generally, *Corporate Political Speech: Who Decides?*, *supra* note 6.

117. *Id.* at 84.

118. *Id.*

*Lobby*.<sup>119</sup> We are in need of an account that does not depend so heavily on an assumption of shareholder wealth maximization as its primary concern.

Further, post-*Citizens United*, the issues, and their solutions, could quite properly be framed as procedural—the manner in which Bechuk and Jackson frame them. Post-*Hobby Lobby*, however, we do not speak only of political speechmaking by the corporation, and its possible collisions with shareholders political preferences. Political speech rights may legitimately be framed in terms of the rights of listeners to hear (and, as *Citizens United* made clear, they have come to be so framed) rather than those of some thought-bearing speaker to speak. Free exercise rights, and other rights like them, are much more incontrovertibly *personal*.

Conceptions of the behavior of the corporation have long evinced an individualistic and atomistic stance. Indeed, one popular film on the corporation worked to diagnose – psychologically—the corporation’s failings—as an individual.<sup>120</sup> It is a familiar trope, this imagining of the corporate person as some individual whose behavior may be analyzed as might that of a human individual. We might thus speak in terms of the (singular, unitary) corporation’s (singular, unitary) identity or belief. According to both to lay understandings and to legal ones, the corporation can speak with one voice.<sup>121</sup>

Yet we must think of the corporation not as a bounded object but instead in terms of the interaction of multiple, diffuse tensions and forces—its various parts marked by and allotted with powers of agentive action and the disavowal of agentive action; with responsibility and lack of responsibility.<sup>122</sup> *Hobby Lobby* appears to indicate that the law sees the corporation as simultaneously “simply a bunch of people” and something separate from the individuals involved with it. This means that the individual—and the close concern preferences of minority shareholders—ought not be imagined to disappear, to be subsumed within the corporate totality. Corporate personal attributes (the belief underpinning a free exercise claim; the “intellect and conscience” underpinning an act of political speech) and the nature of the rights arising out of them can only be understood in relational terms.

Supermajorities, shareholder input, independent directors, and disclosure requirements thus provide no solution, because none avoids the fundamental conundrum of belief, identity, or religious exercise by fiat.

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119. See *Voting in Corporate Law*, *supra* note 24, at 408-10; *Arrow’s Theorem and the Exclusive Shareholder Franchise*, *supra* note 33, at 2071, 2081-82; Grofman, *supra* note 33, at 1549, and accompanying text.

120. THE CORPORATION (Big Picture Media Corporation 2003).

121. We might consider newspapers, “official statements” of sports teams, or political preferences of the Boy Scouts as an organization.

122. See Lawrence Rosen, *The Cultural Analysis of Others’ Interior States*, in OTHER INTENTIONS: CULTURAL CONTEXTS AND THE ATTRIBUTION OF INNER STATES 3, 3 (Lawrence Rosen, ed., 1995).

Yet no church, no tribe, no nation may be imagined to be a homogeneous monolith—in other arenas some trampling of the minority opinion will occur as a matter of course. The concern here is not, however, that no minority political opinion, religious belief, exercise claim, or other close preference should ever be overwhelmed by that of the corporation. Instead, the concern is for the acquisition of some mechanism by which we may be sure that the close concern that the corporation enacts is not top-down—that it is instead “baked-in,” cultural, deeply seeded.

The central questions and concerns undergirding the Supreme Court’s contingent understanding of the nature of the corporation and its place in society in many ways resemble—yet also materially contrast with—those that undergirded early twentieth-century corporatist thought.

Both of the most prominent American versions of corporatism center on an idea of the corporation or group as wound into and responsible for things that we in the twenty-first century will tend to think of as entirely social.<sup>123</sup> And the way this made sense is interesting: in each of these iterations of the concept the idea was that taking care of the *social weal* was *necessary* to the economic success of the country. That is was a factor in it and would necessarily lead to it. And this again is around the edge of the Great Depression, with all of these minds at work desperately figuring out how to do capitalism right; how to make a capitalism that does not cannibalize itself. What they came up with were versions of corporate law wherein these deeply felt social or community preferences were not out of place in business judgments but instead were at their center.

Central to Adolf Berle’s version of corporatism was a recognition of the diverse values that needed to be held aloft, in tension, for it all to work.<sup>124</sup> The idea that what you were doing was not creating a homogeneous community but instead a community that gained its “selfness” out of these various tensions—the corporation acting as “systemic glue” for these varied parts.<sup>125</sup>

Merrick Dodd’s corporatism took to heart the notion that the business community knows best, that those in control of these powerful, successful corporations likely have a better-than-most notion of what we ought to do

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123. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 936 (1984) (referencing ADOLF BERLE, *THE THREE FACES OF POWER* 157-216 (1967)); *Voting in Corporate Law*, *supra* note 24, at 397 (“Berle and Means prescribed not reform of the election machinery, the better to have investors rule managers, but social control of corporations. . . . [P]ublic policy rather than private cupidity’ would make important corporate decisions and decree what to do with the profits.”).

124. See Romano, *supra* note 120, at 936-37 (referencing ADOLF A. BERLE, *POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* 2-3, 8 (1959); ADOLF A. BERLE & GARDNER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 356 (1932)).

125. *Id.*, (quoting ADOLF A. BERLE, *THE TWENTIETH-CENTURY CAPITALIST REVOLUTION* 148 (1955)).

to make our economy shine and to watch over human welfare.<sup>126</sup> This idea was not necessarily far-fetched: Dodd was looking to the sincerely pro-social behaviors of the philanthropy-minded business magnates of his time, looking at the way the most successful of these seemed also to be the ones committed to including in the role duties as trustees of social welfare.<sup>127</sup>

While for Adolf Berle there was a difference between social engineering and behaving in a way that mitigates or prevents the corporation's working harm in the world,<sup>128</sup> Dodd's version of corporatism took this as a uselessly blurry line—accordingly, his version did not hold within it this particular type of nuance.<sup>129</sup> There appeared to exist, at least in 1932, trust that socially responsive behavior by managers will be socially *responsible* behavior.

And this appears to be the logic that holds in *Hobby Lobby*—the stymying of access to birth control that is the result of these corporations' protection of their assets becomes merely these families' action to make the world better, no different from, for example, Starbucks' process of moving to renewable energy sources.<sup>130</sup>

Following the Court's reasoning one sees something right about this—something sympathetic, something almost human-like in the corporation's attentiveness to these social mores. It is this intuition that appeared to motivate the Court. It was responding to this feeling that in this case, and specifically in this case with a corporation they could characterize as closely held, there was a deeper connection between what the aggregate of human beings who are involved in the corporation are doing and what the corporation-as-entity does.

The mechanism by which this works might be that it becomes easier to imagine the corporation as an agent of its shareholders and managers' complicity in some activity when one can imagine the corporation *as* a social being. The anthropologist Clifford Geertz described the human being as “an animal suspended in webs of significance he himself has spun.”<sup>131</sup> We might imagine the corporation to be wrapped up in vines of social norms and social restraint—these webs of significance woven who knows how.

What, then, is the difference when you have persons unbound by the type of moral and social constraints and expectations that the individual has (and to which Geertz referred) —constraints that attend and modify

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126. See William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 123-27 (2008).

127. See generally *id.* at 124-27.

128. See generally Adolf A. Berle, *Corporate Decision-Making and Social Control*, 24 BUS. L. 149 (1968).

129. See generally Bratton & Wachter, *supra* note 126, at 123-24.

130. STARBUCKS COFFEE COMPANY, STARBUCKS GLOBAL RESPONSIBILITY REPORT 7-8 (2015), <http://globalassets.starbucks.com/assets/ee8121c1a6554399b554d126228d52ed.pdf>.

131. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973).

the rights when they are pinned to individuals? And is the answer to this question different in the case of a corporation that *does* become suffused with these ties, with some particular social personality?

In *Hobby Lobby*, the Court employed not only an image of the corporation as an aggregate of human people, but also added to it a type of folk transcendentalism whereby out of the beliefs and preferences of these people sprung an organizational unity—the Court’s conception of the corporation as holding or (if you like) exercising or (if you like) being constrained by Christian beliefs.

For an anthropologist, state corporate law, with its commitment to majority rule, is problematic as a tool in imagining the cultural norms of the corporation as an entity. But it also presents problems when what is employed is a folk or an instrumental notion of culture. This is counterintuitive—on these views, corporate culture is something that may (and likely will) come “from the top down,” and might be established by vote or company guidelines. But even here, issues abound.

Majority rule is problematic as a practical matter for anthropologists (with our insistence that is just not the way culture, religion, racial identity, and the like work). Culture is never only top-down.

Further, taking majority rule to determine not merely corporate behavior, but also of corporate interior lives fails as a matter of policy: “religious belief by majority rule” sounds in any case like a notion of which we ought to be deeply suspicious.

Even were majority rule a proper determinant of the organization’s cultural, religious, or racial categories, the way shareholding has evolved over the years means that in most corporations, actual human individuals are not making these decisions—shareholding switches quickly, is diffuse, is often institutionally based.<sup>132</sup> Finally, as many have argued, other constituencies matter too for the question of the character of the corporation.<sup>133</sup>

To the extent that the contingent corporation may meaningfully said to possess close concern attributes, it is made so not merely by courts’ imprimatur or by a unilateral decision from its controlling shareholders, but by processes such as those upon which the corporatism of Berle focused. Personal attributes of controlling stockholders or managers may factor in, but so will the norms and expectations of workers, lenders, customers, the relevant community and other constituencies. Law will matter, too. The specifics of state corporate law will be one of many factors, held in tension. Law will shape the social characteristics of the corporation—but the

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132. For studies advancing alternate versions of the thesis that shareholders are less powerful than the “ownership” trope has them appear, see, e.g., *One Share, One Vote And The False Promise of Shareholder Primacy*, *supra* note 66; Marina Welker & David Wood, *Shareholder Activism and Alienation*, 52 CURRENT ANTHROPOLOGY S57, S57-S69 (2011).

133. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280 (1999); Bratton & Wachter, *supra* note 126, at 146.



meaning of corporate personal characteristics for the law will come from these contextual factors.

#### V. CONCLUSION: HOW SHOULD CLOSE CONCERNS MATTER?

Minority dissent regarding corporate religious issues in closely held corporations may be legitimately protected along lines of oppression, along lines of forced speech, and along lines of the establishment of religion. Thus this dissent is something worth paying attention to—and protecting. This is the case, however, even outside of oppression or constitutional claims. Minority shareholders dissenting from corporate religious decisions ought to be accorded protection not after things have gone so wrong as to result in oppression or constitutional claims but on a quotidian basis, as a matter of plain old corporate governance.

In *Hobby Lobby* the Supreme Court left it to the rules of group decision-making articulated within state corporate law—majority rule—to discern the character of the religious belief and exercise of the corporations at issue. Because of the importance of individual conscience in American law and culture, majority rule is insufficient here: this is an issue deserving of much more thoughtful consideration.

Because religious belief is a uniquely human characteristic, even if we respect rights of corporations for it we should weight effects upon and dissent by human persons more. Just as the law applies specifically and differentially to parents versus their children, to minors versus adults, context will be important to make sure things are done properly here.

The undertaking is an important one because these are rights conceived to go particularly with a conception of a person that has attachments to a community that will hold it accountable, that it will be a person interlaced, for good or for ill, with the norms of that community. It is just this sort of community norm—this accountability to some web of social relationships ingrained in the corporation—that is exemplified in both the American versions and the European versions of corporatism that were prominent in the last century.

One solution may lie in the normalization of cumulative voting for closely held corporations. Cumulative voting became extinct for public firms because of its “lumpiness” and because efficiency was such an incredibly (and rationally) central value. Cumulative voting caused holdup power to be “distributed widely.”<sup>134</sup> But in the closely held corporation, and on close issues, this lumpiness and even its attendant holdup problem are likely a good thing. Religious freedom is not something we want trumped by efficiency considerations.

Whatever their solutions in practice, these broader concerns require broader bases of analysis. What is necessary is some mechanism ensuring that the close concerns a corporation puts into play are not merely top-

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134. *Voting in Corporate Law*, *supra* note 24, at 409.

down edicts, but instead arise organically from the “community” of the corporation.

Where corporate law sees fit to disentangle personal rights for corporations from shareholders’ characteristics, it becomes imperative that the law take special care not to trample the personal characteristics of individuals in attempting to respect the personal characteristics of corporations. While the mechanisms of corporate democracy may be modified to this end, such modifications will require just the type of context-sensitive inquiry for which the proposed rules call—and that *Hobby Lobby* left undone.