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## LINE DRAWING IN CORPORATE RIGHTS DETERMINATIONS

*Elizabeth Pollman\**

### INTRODUCTION

Corporations are extraordinarily diverse and vary along multiple dimensions. An individual can transform her business from a sole proprietorship to a corporation with a simple incorporation filing.<sup>1</sup> Some corporations remain small by all measures, with just a small handful of shareholders, employees, customers, suppliers, and creditors.

If the individual takes on a significant number of employees or outside investments to grow the business, the dynamics of the business organization change. As the corporation grows, it might establish a formal board of directors to manage the corporation.<sup>2</sup> Some corporations have a small number of shareholders but a large social footprint with nationwide business, revenues in the billions, and thousands of employees.<sup>3</sup> Some corporations have a small number of shareholders but are on a pathway to existing as a larger institution, raising capital from national exchanges, and forming an independent board of directors.<sup>4</sup>

Large publicly traded corporations often have thousands of shareholders that are an ever-changing group, employees in numbers that exceed those of small towns or cities, and complex business arrange-

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1. See STEPHEN M. BAINBRIDGE, *CORPORATE LAW* § 2.2 (2d ed. 2009) (“Incorporating a business is an astonishingly simple process.”). See generally 1A WILLIAM MEADE FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 129 (2010) (describing the conditions for incorporation).

2. See generally BRAD FELD & MAHENDRA RAMSINGHANI, *STARTUP BOARDS: GETTING THE MOST OUT OF YOUR BOARD OF DIRECTORS* 81 (2014) (describing the role of the board of directors); Elizabeth Pollman, *Team Production Theory and Private Company Boards*, 38 SEATTLE U. L. REV. 619, 626–34 (2015) (discussing the evolution of private company boards).

3. See Andrea Murphy, *America’s Largest Private Companies 2014*, FORBES (Nov. 5, 2014, 6:16 AM), <http://www.forbes.com/sites/andreamurphy/2014/11/05/americas-largest-private-companies-2014/>.

4. See generally Pollman, *supra* note 2, at 625–35 (discussing the range of private corporations, including startup companies, that may grow significantly over time, and other private corporations, some of which may remain small businesses).

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ments that involve many corporate participants and stakeholders. For example, ExxonMobil Corporation (ExxonMobil) has a market capitalization of over \$350 billion, international operations with annual sales revenue of nearly \$400 billion, over 75,000 employees, several divisions and hundreds of affiliates, and stock traded on the New York Stock Exchange, which enables a rapidly changing group of shareholders.<sup>5</sup> A significant portion of ExxonMobil's stock is held by institutional owners and mutual funds,<sup>6</sup> intermediaries that add another layer of management between the company and the beneficial owners of the stock.<sup>7</sup> Derivatives and other financial instruments have also increased the complexity and potential diversity of interests among shareholders.<sup>8</sup>

Multinational enterprises, or corporate groups, are composed of numerous corporations or other legal entities.<sup>9</sup> For example, Google Inc. previously reported ownership of thirty separate domestic subsidiaries and over fifty international subsidiaries.<sup>10</sup> Google Ireland Holdings is a corporation that receives profits from sales around the world, which it moves through Google Netherlands Holdings BV to another entity, Google Bermuda Unlimited, where the corporate profits are not taxed.<sup>11</sup> These complex groupings are also subject to change, as illustrated by Google's recent announcement that it restructured its multinational enterprise under a new holding company, Alphabet

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5. See # 91 *Exxon Mobil*, FORBES, <http://www.forbes.com/companies/exxon-mobil/> (last updated May 2015). See generally EXXON Mobil Corp., Annual Report (Form 10-K) (Feb. 25, 2015), <https://www.sec.gov/Archives/edgar/data/34088/000003408815000013/xom10k2014.htm> (summarizing ExxonMobil's financial performance in 2014).

6. *Exxon Mobil Corporation (XOM)*, YAHOO! FIN., <https://finance.yahoo.com/q/mh?s=xom+Major+Holders> (last visited Mar. 17, 2015) (indicating that institutional and mutual fund owners own 51% of ExxonMobil's shares).

7. Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 879 (2010) ("[T]he intermediation of the U.S. capital markets exacerbates the traditional separation of ownership and control—as identified by Berle and Means—by adding a second layer of agency issues.").

8. See, e.g., Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 828–30 (2006) (discussing how investors use derivative instruments to engage in empty voting).

9. See generally Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499 (2015) (discussing the governance of multinational enterprises).

10. Google Inc., Annual Report (Form 10-K), at exh. 21.01 (Mar. 1, 2007).

11. This example comes from Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation* (Tobin Project Working Paper (manuscript at 47)) (on file with author); see also Romain Dillet, *Google Is Preparing To Pay a Huge Fine for Tax Noncompliance in France*, TECHCRUNCH (Apr. 25, 2014), <http://techcrunch.com/2014/04/25/google-is-preparing-to-pay-a-huge-fine-for-tax-noncompliance-in-france/>; Vanessa Houlder, *'Dutch Sandwich' Grows as Google Shifts €8.8bn to Bermuda*, FIN. TIMES (Oct. 10, 2013, 7:09 PM), <http://www.ft.com/cms/s/0/89acc832-31cc-11e3-a16d-00144feab7de.html#axzz3lG5CkFWE>.

Inc.<sup>12</sup> And, in some multinational enterprises and corporate groups, a corporation might exist as nothing more than a shell, a “special purpose vehicle” created for the purpose of partitioning assets and liabilities or creating a particular regulatory effect.<sup>13</sup>

The areas of activity of business corporations are also diverse. Many news and media companies are organized in the corporate form. The New York Times Company, Fox News Group, and CNN are each a corporation or are owned by a corporation. In fact, by 2012, just six corporations controlled 90% of the media consumed by Americans.<sup>14</sup> Some corporations operate in heavily regulated areas, such as banks and utilities, whereas some operate in areas closely connected to the government, such as private prison corporations. Thus, there is significant variation within the range of business corporations.

Furthermore, from the perspective of organizational structure, some corporations are barely recognizable as the same species. By definition, nonprofit corporations do not have shareholders.<sup>15</sup> Many nonprofits are granted income tax exemption from the federal government under Section 501(c) of the Internal Revenue Code.<sup>16</sup> Although nonprofits cannot distribute profits to equity owners, they are state-chartered corporations that can earn profits for use in operating the organization, and they can pay salaries and perquisites to employees.<sup>17</sup> The nonprofit sector is an “economic powerhouse that employs millions of people and accounts for a significant portion of the nation’s gross domestic product.”<sup>18</sup>

In addition, a social enterprise movement has recently swept across the states, giving rise to benefit corporations, flexible purpose corpo-

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12. Alistair Barr & Rolfe Winkler, *Google Creates Parent Company Called Alphabet in Restructuring*, WALL ST. J., Aug. 10, 2015, <http://www.wsj.com/articles/google-creates-new-company-alphabet-1439240645>; Larry Page, *G Is for Google*, <https://abc.xyz/> (last visited Sept. 9, 2015).

13. Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1663 (2004); Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 135 (1994). See generally Comm. on Bankr. & Corp. Reorg. of the Ass’n of the Bar N.Y.C., *Structured Financing Techniques*, 50 BUS. LAW. 527, 553–67 (1995) (describing the role of special purpose vehicles).

14. James B. Stewart, *When Media Mergers Limit More than Competition*, N.Y. TIMES, July 25, 2014, <http://www.nytimes.com/2014/07/26/business/a-21st-century-fox-time-warner-merger-would-narrow-already-dwindling-competition.html>.

15. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838, 844 (1980).

16. Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1263 (2011). See generally I.R.C. § 501(c) (2012); BRUCE R. HOPKINS, TAX EXEMPT ORGANIZATIONS AND CONSTITUTIONAL LAW § 1.8 (2012) (discussing the public policy doctrine).

17. Hansmann, *supra* note 15, at 838.

18. PETER FRUMKIN, ON BEING NONPROFIT: A CONCEPTUAL AND POLICY PRIMER 2 (2002).

rations, and social purpose corporations.<sup>19</sup> Underlying these new forms is the notion of enabling corporations to pursue “blended value” and purposes other than shareholder wealth maximization.<sup>20</sup> For example, benefit corporation statutes generally require consideration of nonshareholder stakeholders, the community, and pursuit of a “general public benefit.”<sup>21</sup>

Despite this vast diversity of corporations, the Supreme Court has often treated corporations monolithically when determining corporate rights. From its earliest decision interpreting Article III diversity jurisdiction, in the 1809 case *Bank of the United States v. Deveaux*,<sup>22</sup> to its 2010 campaign finance decision in *Citizens United v. FEC*,<sup>23</sup> the Court ruled as to corporations generally. For example, in *Citizens United*, the Court reasoned that it could not decide the case on narrow grounds as to the nonprofit political advocacy organization at hand and struck down earlier campaign finance precedent as well as the provision of the Bipartisan Campaign Reform Act at issue.<sup>24</sup> In doing so, the Court referred to corporations as “association[s]” and “associations of citizens,”<sup>25</sup> and it explained that “First Amendment protection extends to corporations<sup>26</sup> because “the Government cannot restrict political speech based on the speaker’s corporate identity.”<sup>27</sup> In support of its broad ruling as to all corporations, the Court cited cases decided in the context of nonprofits and the press.<sup>28</sup>

When the Court has tried to draw lines between corporations in its corporate rights determinations, it has often done so in a formalistic, wooden way. *Burwell v. Hobby Lobby Stores, Inc.* is the most recent

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19. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 22–24 (2012); Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 56 (2012).

20. ANTONY BUGG-LEVINE & JED EMERSON, *IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE* 5–7 (2011) (referring to “blended value” as a mix of the economic, social, and environmental values that social enterprises produce); Murray, *supra* note 19, at 4–9.

21. See MODEL BENEFIT CORPORATION LEGISLATION §§ 201(a), 301(a) (2014), [http://benefitcorp.net/sites/default/files/documents/Model\\_Benefit\\_Corp\\_Legislation.pdf](http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf).

22. 9 U.S. 61 (1809), *overruled in part by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497, 529 (1844).

23. 558 U.S. 310 (2010).

24. *Id.* at 320–21, 365–66.

25. *Id.* at *passim*.

26. *Id.* at 342.

27. *Id.* at 346.

28. *Id.* at 342 (noting that the “Court has recognized that First Amendment protection extends to corporations[,]” citing a string of cases involving the press, and explaining that “[t]his protection has been extended by explicit holdings to the context of political speech” (e.g., *NAACP v. Button*, 371 U.S. 415 (1963)); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)).

example of this formalistic line drawing.<sup>29</sup> The case raised the issue of whether a business corporation constitutes a “person” that can “exercise religion” under the Religious Freedom Restoration Act of 1993 (RFRA).<sup>30</sup> The Supreme Court held that RFRA applied to the three business corporations in the case, allowing them to claim a religious exemption from providing certain contraceptive coverage to their employees under the Patient Protection and Affordable Care Act (ACA).<sup>31</sup> In so holding, the Court repeatedly referred to the term “closely held corporation”<sup>32</sup> but provided no definition of the term and did not acknowledge that there is no singular definition under corporate law.<sup>33</sup> Furthermore, despite the Court’s characterization of the shareholders as “owners” and “small-business owners,” one of the corporations in the case, Hobby Lobby, has more than 13,000 employees, \$3.7 billion in sales revenues per year, and over 600 stores nationwide.<sup>34</sup> The Court did not identify which characteristics of the corporations were important for reaching its conclusion and instead left the task of defining eligible organizations to the U.S. Department of Health and Human Services (HHS) with little guidance besides the term “closely held corporation.”<sup>35</sup>

As *Hobby Lobby* reflects, line drawing in corporate rights determinations is exceedingly difficult. A natural temptation arises to adopt lines already drawn in other areas of the law. Such lines might have the appeal of convenience or bringing a certain clarity or bright-line approach because a body of precedent already exists regarding the categorization.

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29. 134 S. Ct. 2751, 2771.

30. *Id.* at 2759–61. See generally Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to bb-4 (2012)).

31. 134 S. Ct. 2751, 2762, 2785.

32. *Hobby Lobby*, 134 S. Ct. at *passim*.

33. Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 150, 163–64 (Micah Schwartzman et al. eds., 2016).

34. # 118 *Hobby Lobby Stores*, FORBES, <http://www.forbes.com/companies/hobby-lobby-stores/> (last visited Dec. 18, 2015). Forbes estimated that Hobby Lobby has 28,000 employees, whereas the Supreme Court’s opinion stated that it has more than 13,000. See *id.*; see also *Hobby Lobby*, 134 S. Ct. at 2765.

35. See Press Release, Administration Takes Steps To Ensure Women’s Continued Access to Contraception Coverage, While Respecting Religious-Based Objections (Aug. 22, 2014), <http://www.hhs.gov/news/press/2014pres/08/20140822a.html>. In July 2015, the U.S. Departments of Labor, Treasury, and HHS published final rules providing for accommodations for closely held corporations that claim religious objection to providing coverage for some or all of the FDA-approved contraceptive methods. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510 and 2590, 45 C.F.R. pt. 147).

This Article argues that existing lines drawn between corporations may be a useful starting place for analysis, but caution must be used because the lines drawn in other areas were done for various policy reasons in different contexts that may not map onto the corporate rights determination. Attention should be paid to the specific characteristics of corporations that are relevant to the right at stake and the basis for extending protection. The key contribution of this Article is to advance the discussion by examining the utility of common lines that the law has already drawn between corporations: the for-profit–nonprofit line, the public–private line, and the closely held category.

This Article, written for 21st Annual Clifford Symposium, proceeds as follows. Part II examines the Supreme Court’s corporate rights jurisprudence. First, the Part reviews how the Supreme Court has often treated corporations monolithically, ruling broadly as to all corporations or without any special consideration of the party’s status as a corporation.<sup>36</sup> Further, it shows that, with limited exception, when the Court has tried to draw lines between corporations in rights determinations, it has done so in a formalistic way.<sup>37</sup> Second, building on previous work, Part II makes the case that the Court needs to draw lines in corporate rights determinations.<sup>38</sup> The Court’s derivative and instrumental rationales for granting rights to corporations do not support broad rulings as to all corporations and all rights.<sup>39</sup>

Part III seeks to advance the debate by critically analyzing the utility of common lines drawn between corporations.<sup>40</sup> Specifically, this Part analyzes the for-profit–nonprofit line, the public–private line, and the closely held category. This discussion highlights that these lines may provide a useful starting point for analysis to the extent that they roughly correspond with characteristics that are relevant to corporate rights determinations but that these lines may not be a perfect fit because they were drawn in other areas of the law for different goals and policy reasons. A more exacting approach would go beyond mere terminology to pinpoint the characteristics that are essential to a determination that extends a right to specific corporations.

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36. See *infra* notes 41–121 and accompanying text.

37. See *infra* notes 122–35 and accompanying text.

38. This Part primarily relies on a recent article, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).

39. *Id.*

40. See *infra* notes 136–233 and accompanying text.

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## II. MONOLITHIC TREATMENT OR LINE DRAWING?

This Part reviews the Supreme Court's corporate rights jurisprudence with a focus on when the Court has and has not been sensitive to the differences between corporations. Although line drawing between corporations is an extremely challenging task, it is one that must be done.

### A. *Supreme Court Corporate Rights Jurisprudence*

The Court's approach to corporate rights has been incremental, case-by-case over time, starting in the early 1800s. It is therefore difficult to generalize its treatment of corporations over two centuries with precision, but in broad strokes we can observe that the Court has often shown little regard for drawing distinctions between corporations and has sometimes relied on cases involving certain types of corporations as precedent in later cases involving the rights of very different corporations.

The Court's first case interpreting how a constitutional provision applies to corporations is *Bank of the United States v. Deveaux*.<sup>41</sup> The case presented the issue of whether corporations were subject to diversity jurisdiction. Article III, Section 2, Clause 1 of the Constitution, together with the Judiciary Act of 1789, provides that the federal courts may hear "cases" or "controversies" between "citizens of different states."<sup>42</sup> The Court held that corporations are not "citizens," but that diversity jurisdiction exists when there is complete diversity between the shareholders of a corporate party and the opposing party. Appearing before the Court was the first Bank of the United States, established under an act of Congress in 1791 and unique in many ways. The Court, however, did not inquire into the nature of that particular corporation apart from its focus on the state citizenship of the corporation's shareholders.<sup>43</sup>

In a 1819 case of *Trustees of Dartmouth College v. Woodward*,<sup>44</sup> the Court held that the corporate charter of Dartmouth College was a contract within the meaning of the Contracts Clause of the Constitu-

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41. 9 U.S. 61 (1809).

42. *Id.* at 86 (quoting U.S. CONST. art. III, § 2, cl. 1), *overruled in part by* *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. 497 (1844); *see also* Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 879 (1943) (discussing diversity jurisdiction).

43. *Deveaux*, 9 U.S. at 87–88 ("Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.")

44. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 590 (1819).

tion.<sup>45</sup> At issue was whether the New Hampshire state legislature's act to unilaterally change the college's charter violated the Contracts Clause. The Court reasoned that the charter was a contract between the people who applied for it and the government body that granted it.<sup>46</sup> Furthermore, it was a private contract in nature because the founder and donors had personally funded the school to promote its religious and educational aims.<sup>47</sup> The Court recognized that because the college was "eleemosynary," the donors no longer had a direct interest in the property, but noted that the corporation stood in their place to distribute the property as they intended.<sup>48</sup> Although *Dartmouth College* involved a charitable institution, the Court's ruling was understood as extending to all private corporations, including business corporations.<sup>49</sup> Shortly after the decision, business corporations brought claims under the Contracts Clause.<sup>50</sup>

When the Court denied constitutional protection to corporations, it did so holistically as well. For example, in the 1839 case *Bank of Augusta v. Earle*,<sup>51</sup> the Court ruled that corporations are not "citizens" for purposes of Article IV's Privileges and Immunities Clause.<sup>52</sup> The Court rejected Privileges and Immunities Clause claims from any corporation, no matter the type; the right was intended only for individuals in their individual capacity.<sup>53</sup>

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45. *Id.* at 590.

46. *Id.* at 652–54.

47. *See id.* at 632–39.

48. *See id.* at 633–34.

49. Private corporations in this context referred to those that were not municipal corporations. *See, e.g.,* JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE § 14 (John Lathrop ed., 9th ed. 1871) (noting that "public" corporation referred to a municipal corporation that "has for its objects the government of a portion of the State . . . endowed with a portion of political power").

50. Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 3 n.2, 7 (1986) (noting that the Contracts Clause was one of the most frequently litigated constitutional provisions in the nineteenth century and "[n]early ninety percent of all contract clause cases involved state-granted franchises, mainly corporate charters"); *see, e.g.,* *Providence Bank v. Billings*, 29 U.S. 514, 559–60 (1830) ("It has been settled that a contract entered into between a state and an individual, is as fully protected by the tenth section of the first article of the constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract.").

51. 38 U.S. 519 (1839).

52. *Id.* at 586–87. The Court reaffirmed *Bank of Augusta* in *Paul v. Virginia*, 75 U.S. 168, 181–82 (1868), and further held in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 187 (1888), that corporations are not "citizens" for purposes of the Fourteenth Amendment's Privileges and Immunities Clause.

53. Blair & Pollman, *supra* note 38, at 1684–85 ("The Court distinguished between rights granted to corporations because the corporation served as a proxy for its members, shareholders, or contributors, and rights that were available only to citizens directly.").

Later in the nineteenth century, *Santa Clara County v. Southern Pacific Railroad*<sup>54</sup> brought to the Supreme Court the question of whether a corporation is a “person” within the meaning of the Fourteenth Amendment.<sup>55</sup> The case represented a group of tax cases involving various railroad corporations, concerning whether a provision of the California constitution violated the Fourteenth Amendment of the U.S. Constitution by allowing all taxpayers except “railroads and other quasi-public corporations” to deduct the value of mortgages from their property tax assessment.<sup>56</sup> Before oral argument, Chief Justice Waite famously disposed of the railroads’ Fourteenth Amendment claims with the following comment, which was reported in the headnotes to the opinion:

The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.<sup>57</sup>

The Court’s opinion took a narrow approach in finding that the tax assessment against the railroads was void and specifically avoided ruling on the constitutional issue.<sup>58</sup>

Not long after the *Santa Clara* decision, however, in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,<sup>59</sup> the Court referred back to the case with approval, stating: “Under the designation of person [in the Fourteenth Amendment] there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution.”<sup>60</sup> Likewise, in *Minneapolis & St. Lewis Railway v. Beckwith*,<sup>61</sup> the Court noted that “corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.”<sup>62</sup> Notably,

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54. 118 U.S. 394 (1886).

55. *Id.* at 396, 409.

56. *Id.* at 404, 409.

57. *Id.* at 396 (opinion of Waite, C.J.).

58. *Id.* at 411 (“If these positions [regarding tax assessment technicalities] are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.”).

59. 5 U.S. 181 (1888).

60. *Id.* at 189.

61. 129 U.S. 26 (1889).

62. *Id.* at 28.

regardless of whether the case involved railroads or mining corporations, the Court was not focused on the nature of the specific corporation in the case or its characteristics in comparison with other corporations, but rather spoke in general terms as to all corporations.

As we have seen thus far, by the late nineteenth century, the Court had recognized corporations as having limited constitutional protections related to corporate property and contracts, with a view toward protecting the persons involved in the corporation.<sup>63</sup> The Court distinguished between the types of rights that corporations could appropriately be understood to hold, but not between corporations, other than those that were governmental in nature, such as municipal corporations.

The early twentieth century brought cases concerning a new area of corporate rights before the Court: criminal liability and related protections concerning trials and searches. Again, the Court treated corporations as a group.

In a 1909 case, *New York Central & Hudson River Railroad Co. v. United States*,<sup>64</sup> the Supreme Court, speaking broadly in terms of corporations, held that corporations could be subject to criminal liability for acts committed by agents.<sup>65</sup> Similarly, *Hale v. Henkel*,<sup>66</sup> decided by the Court in 1906, held that corporations have Fourth Amendment protections against unreasonable searches and seizures but may not claim the Fifth Amendment privilege against self-incrimination.<sup>67</sup>

The Court distinguished between the rights that corporations could claim but not between types of corporations. For example, the Court explained that the Fourth Amendment extended to corporations because “[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity” and that “[i]n organizing itself as a collective body it waives no constitutional immu-

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63. The Court's ruling on the Fourteenth Amendment in the nineteenth century arose in the context of the property rights of corporations; around this time, the Court parsed the Fourteenth Amendment in a way that reflects that understanding. Ruth H. Bloch & Naomi R. Lamoreaux, *Corporations and the Fourteenth Amendment*, (manuscript at 17–19, 23–27); see, e.g., *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (noting that the liberty protected by the Fourteenth Amendment “is the liberty of natural, not artificial persons”).

64. 212 U.S. 481 (1909).

65. *Id.* at 494–95 (“[W]e see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred up on them.”).

66. 201 U.S. 43 (1906), *overruled in part by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

67. *Id.* at 71–77.

nities appropriate to such body.”<sup>68</sup> But corporations do not have a Fifth Amendment privilege against self-incrimination because that protection is designed to be “purely a personal privilege of the witness.”<sup>69</sup> The Court has rigidly adhered to this conception of the privilege, even later holding that “a corporation’s records custodian may not claim a Fifth Amendment privilege no matter how small the corporation may be.”<sup>70</sup> This means that a sole proprietor may claim the privilege against self-incrimination in response to a subpoena for business documents but could not do so if she operated the same business through the corporate form.<sup>71</sup>

Before the 1970s, only a handful of cases raised questions regarding the First Amendment protections for corporations and they involved nonprofit membership associations and the press. These cases represented a significant shift in the Court’s corporate rights jurisprudence in that they moved beyond questions of contract and property rights and those related to corporate criminal liability. However, these cases were also quite narrow because they involved a particular type of corporation related to the First Amendment interest at stake. For example, the Court held that a state license tax imposed on newspaper corporations selling advertising was an impermissible abridgment of speech or of the press.<sup>72</sup> During the Civil Rights Era, the NAACP was recognized as having a right to refuse to reveal its membership list to protect the freedom of association of its individual members.<sup>73</sup> These cases did not focus on the corporate nature of the parties or whether they implied rights for other types of corporations.

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68. *Id.* at 76. The Court did create exceptions to Fourth Amendment protections against warrantless regulatory searches in the case of certain industries, such as liquor and firearms. *See, e.g.,* *Donovan v. Dewey*, 452 U.S. 594 (1981) (“[A] warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme . . . .”); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978) (discussing exceptions for pervasively regulated businesses and holding that a warrant is required for OSHA inspections unless there is consent).

69. *Hale*, 201 U.S. at 69. “The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation.” *Id.* at 70.

70. *Braswell v. United States*, 487 U.S. 99, 102 (1988) (discussing *Bellis v. United States*, 417 U.S. 85 (1974) and the collective entity rule); *see also* *Wilson v. United States*, 221 U.S. 361, 384–85 (1911) (holding that a corporate officer cannot resist a subpoena for corporate records by invoking his personal privilege).

71. *Braswell*, 487 U.S. at 104.

72. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936).

73. *NAACP v. Button*, 371 U.S. 415, 428 (1963) (validating the NAACP’s claim that a state statutory ban on improper solicitation of legal business abridged “the freedoms of the First Amendment, protected against state action by the Fourteenth”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958).

In freedom of association cases that have followed, although the Court has never explicitly distinguished expressive associations from business corporations, this dichotomy has become commonly accepted through concurring opinions and lower court interpretations.<sup>74</sup> For example, in *Roberts v. United States Jaycees*,<sup>75</sup> which concerned an all-male organization's challenge to a state antidiscrimination law, Justice O'Connor concurred with the majority, holding that admitting women into the organization would not significantly undermine the group's expressive message.<sup>76</sup> She wrote separately to argue that, in any event, the all-male organization was entitled to only "minimal constitutional protection" as a predominantly commercial organization.<sup>77</sup> A few years later in *New York State Club Association v. City of New York*,<sup>78</sup> Justice O'Connor again wrote that the right to freedom of association should vary according to the nature of the organization.<sup>79</sup> Although this dichotomy was not at issue in *Boy Scouts of America v. Dale*,<sup>80</sup> the Court implicitly suggested that it viewed the associational interests of expressive associations, like the Boy Scouts, differently from commercial organizations.<sup>81</sup>

Since the 1970s, the Supreme Court has significantly expanded these earlier, limited First Amendment rulings. Through two primary moves, the Court interpreted the First Amendment as protecting corporate speech and political spending. First, the Court added another rationale underlying its corporate rights logic. The Court had previously used a variety of approaches in its corporate rights decisions but had an underlying logic of corporate rights as derivative of the natural persons represented by the corporation.<sup>82</sup> Starting in the 1970s, the Court began additionally relying on an instrumental rationale to accord rights to corporations when doing so would protect the interests of persons outside of the corporation—listeners. Second, the Court relied on cases involving nonprofits and the press, and characteriza-

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74. James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 464–68 (2015); see also Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1564–66 (2001) (discussing *Roberts v. U.S. Jaycees*, 468 U.S. 627 (1984)); Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 657–58 (2001).

75. 468 U.S. 609.

76. *Id.* at 627 (O'Connor, J., concurring in part and concurring in judgment).

77. *Id.* at 635 (O'Connor, J., concurring in part and concurring in judgment).

78. 487 U.S. 1 (1988).

79. *Id.* at 18 (O'Connor, J., concurring).

80. 530 U.S. 640 (2000).

81. *Id.* at 657.

82. Blair & Pollman, *supra* note 38, at 1731–38.

tions of business corporations as associations to broaden First Amendment rulings to corporations generally.

Regarding the instrumental basis for corporate rights, the Court first turned to this new rationale in establishing commercial speech rights. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>83</sup> the Court held that advertising is within the scope of First Amendment protection because of consumers' interest in the free flow of commercial information.<sup>84</sup> Consumer advocates brought the case, challenging an advertising ban that prohibited pharmacists from advertising drug prices. The Court's ruling relied on the idea that these consumers had a right to hear the information and that suppression of truthful speech about lawful activity could hurt consumers' ability to make informed decisions.<sup>85</sup> This case, and the commercial speech cases that followed,<sup>86</sup> were not based on a view of corporations having personhood and speech interests, but rather were focused on protecting speech for listeners.<sup>87</sup>

The Court's jurisprudence on corporate political spending came shortly on the heels of the *Virginia Pharmacy* commercial speech case and its landmark decision in *Buckley v. Valeo*,<sup>88</sup> which interpreted the First Amendment as a limit on campaign finance regulation.<sup>89</sup> In *First National Bank of Boston v. Bellotti*,<sup>90</sup> the Court struck down a state statute that prohibited banks and corporations from spending money to influence referendum ballot initiatives.<sup>91</sup> The Court held that the statute "abridge[d] expression that the First Amendment was meant to protect[.]" and the corporate identity of the speaker did not deprive the speech its protections.<sup>92</sup> This rationale harkened back to *Virginia Pharmacy* and its instrumental rationale.<sup>93</sup>

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83. 425 U.S. 748 (1976).

84. *Id.* at 764.

85. *Id.* at 753–54.

86. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

87. *See* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 867 (2007).

88. 424 U.S. 1 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election. Comm'n*, 540 U.S. 93 (2003).

89. *Id.* at 58–59.

90. 435 U.S. 765 (1978).

91. *Id.* at 767, 776.

92. *See id.* at 776.

93. *Id.* at 783 ("[Our recent commercial speech cases] illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

Furthermore, the Court relied on *Santa Clara County* and precedents regarding the speech rights of the press and media corporations to grant speech rights to corporations broadly. Citing a string of press and media cases, the Court reasoned that free speech is a liberty right safeguarded by the Due Process Clause, and “the Court has not identified a separate source for the right when it has been asserted by corporations.”<sup>94</sup> Additionally, in a footnote, the Court cited *Santa Clara County* for the proposition that “[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment.”<sup>95</sup>

After *Bellotti*, the Court stepped back from corporate free speech protections in several decisions and a framework of campaign finance lines were drawn. In *Federal Election Commission v. Massachusetts Citizens for Life, Inc. (MCFL)*,<sup>96</sup> the Court suggested, in dicta, that restrictions on corporate political spending might be constitutional.<sup>97</sup> The case involved a challenge brought by a nonprofit, ideological membership corporation (MCFL) to the constitutionality of a provision of the Federal Election Campaign Act, which prohibited corporations from using general fund dollars for expenditures “in connection with” federal candidate elections.<sup>98</sup> The provision required corporations to instead use the separately segregated funds of political action committees (PACs) to make expenditures.<sup>99</sup> The membership corporation had used general funds to publish a newsletter that identified pro-life candidates.<sup>100</sup>

The Court ruled that the statutory provision was unconstitutional as applied to MCFL for three reasons, which effectively created a test or line drawn between corporations based on specific characteristics related to the right at stake. First, MCFL “was formed for the express purpose of promoting political ideas, and [could not] engage in business activities.”<sup>101</sup> Second, MCFL had no shareholders, and the people involved with the organization had no economic reason to remain affiliated if they disagreed with its political activity.<sup>102</sup> Third, MCFL’s only source of funds was member contributions from people who sup-

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94. *Id.* at 780.

95. *Id.* at 780 n.15 (citing *Santa Clara Cty. v. S. Pac. R.R.*, 118 U.S. 394 (1896)).

96. 479 U.S. 238 (1986).

97. *Id.* at 254 n.7.

98. *MCFL*, 479 U.S. at 238.

99. 2 U.S.C. § 441b(b)(2)(C) (2000), *declared unconstitutional* by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

100. *MCFL*, 479 U.S. at 243–44.

101. *Id.* at 264.

102. *Id.*

ported its political activities and it did not act as a conduit for for-profit corporate electoral spending.<sup>103</sup> The Court referred to these characteristics as “essential” to its holding.<sup>104</sup> And, by contrast, it suggested that Congress could constitutionally restrict the corporate political spending of business corporations because they have “legal advantages enhancing their ability to accumulate wealth,” which give them an “unfair advantage” for their political speech.<sup>105</sup> Thus, *MCFL* carved out an exemption to the general prohibition on a corporation’s use of general treasury funds for independent expenditures, and it was tailored to the type of corporation that implicates First Amendment values and could support a derivative right for the corporation.

Until *Citizens United*, the *MCFL* exemption stood as a line drawn in the Court’s corporate political spending jurisprudence. This jurisprudence, however, became increasingly in tension with itself as the *Bellotti* reasoning, which disregarded the corporate identity of the speaker, was undermined without being overruled. In three subsequent decisions, the Court held that corporations could be banned from using general funds for independent political expenditures, contributions to candidates, and electioneering communications.<sup>106</sup> For example, in *Austin v. Michigan Chamber of Commerce*,<sup>107</sup> the Court upheld a ban on corporations using general treasury funds to make independent expenditures in elections, recognizing that the state had a compelling interest in preventing the “corrosive and distorting effects” of corporate political spending.<sup>108</sup> The Court considered the “special advantages” that corporations receive under state law, which allow them to use “‘resources amassed in the economic marketplace’ to obtain ‘an unfair advantage in the political marketplace.’”<sup>109</sup> *Bellotti*’s categorical reasoning, which paid no attention to corporate

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103. *See id.*

104. *Id.* at 263–64.

105. *Id.* at 257, 258 n.11.

106. *See* Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 149 (2003); McConnell v. Fed. Election Comm’n, 540 U.S. 93, 105 (2003), *overruled by* Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668–69 (1990), *overruled by* Citizens United, 558 U.S. 310.

107. 494 U.S. 652 (1990), *overruled by* Citizens United, 558 U.S. 310.

108. *See id.* at 659–60.

109. *Id.* at 658–59 (quoting Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)). In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, the Court stepped slightly back from this line of cases and returned to a focus on the speech rather than speaker. 551 U.S. 449 (2007). The Court recognized that earlier decisions had found an antidistortion interest supporting the limiting of corporate speech but ruled such an interest was applicable only to campaign speech (express advocacy and its “functional equivalent”) and not issue advocacy. *Id.* at 481–82.

identity, had left little room for these more nuanced approaches to corporate political spending.

With its expansive ruling as to all corporations, *Citizens United* resolved this tension in campaign finance jurisprudence by tearing down the *MCFL* line and the original framework of corporations using PACs and overruling earlier campaign finance precedent, such as *Austin*. In *Citizens United*, the Court held that corporations of all types can spend unlimited amounts of corporate treasury money on independent political expenditures.<sup>110</sup> Thus, the Court returned to a monolithic treatment of corporations.

In concluding that it could not rule narrowly as to *Citizens United*, which was the nonprofit political advocacy organization at hand, the Court heavily relied on *Bellotti* and its notion that “the Government cannot restrict political speech based on the speaker’s corporate identity.”<sup>111</sup> In doing so, the Court overlooked the distinctions between different corporations, referring generally to corporations as “association[s]” and “associations of citizens”<sup>112</sup> as well as citing cases decided in the context of the press and nonprofits in the civil rights movement in support of its broad grant of First Amendment protection to all corporations.<sup>113</sup>

Following *Citizens United*, the Court had another recent opportunity to determine the scope of corporate rights. *Hobby Lobby* raised the question of whether for-profit business corporations could claim religious liberty protections under RFRA.<sup>114</sup> Although the Court based its decision on statutory grounds, rather than the First Amendment,<sup>115</sup> it nonetheless represented a significant expansion of corporate rights. For the first time, the Court allowed business corporations to opt out of generally applicable federal regulation on the basis of the religious beliefs of shareholders. Specifically, the Court held that the contraceptive coverage requirement under the ACA violated RFRA as applied to three business corporations, each of which had shareholders from a single family with sincerely held beliefs.<sup>116</sup>

Instead of drawing a line focused on the specific characteristics of the corporations and the derivative nature of the right, as the Court

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110. *Citizens United*, 558 U.S. at 365–66.

111. *See id.* at 346.

112. *Id.* at *passim*.

113. *Id.* at 342.

114. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2579 (2014).

115. *Id.* at 2785 (“The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.”).

116. *See id.*

did in *MCFL*, the *Hobby Lobby* majority opinion woodenly relied on the term “closely held” and provided little guidance on how to implement and limit this landmark ruling.<sup>117</sup> For instance, the Court neither discussed the relevance of the family-owned nature of the business corporations in the case nor provided a definition of the term “closely held.”

Moreover, the Court’s conclusion that “[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA,”<sup>118</sup> suggested a line was drawn, but in fact the Court had not ruled out the possibility that a public corporation could assert a RFRA claim. Instead, the Court noted that *Hobby Lobby* did not involve publicly traded corporations and that it was “unlikely” that these “corporate giants” would “often” assert RFRA claims.<sup>119</sup> The Court’s reasoning suggests that it relied on the shareholders’ unanimity of religious belief in extending RFRA protection, but the Court’s treatment of corporate law left this point unclear. Elsewhere in the opinion, the Court pointed to state corporate law as the mechanism for resolving disputes among corporate participants,<sup>120</sup> but it did not specifically identify which rules or corporate participants were relevant for establishing RFRA protection for business corporations.<sup>121</sup>

#### *B. The Need for Line Drawing in Corporate Rights Determinations*

From the period of its earliest jurisprudence, the Court has recognized that corporations are not the same as individual persons and that their constitutional protections should not be co-extensive in scope with individual persons. When people form a corporation, they create a separate entity under the law with its own existence.<sup>122</sup> Yet, as forms of organizing human enterprise, corporations have natural

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117. Pollman, *supra* note 33, at 150.

118. *Hobby Lobby*, 134 S. Ct. at 2785.

119. *Id.* at 2774.

120. *Id.* at 2775 (stating that “the owners of a company might well have a dispute relating to religion” but disposing of this concern by noting that “[s]tate corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure”).

121. Pollman, *supra* note 33, at 165–67.

122. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 *UCLA L. REV.* 387, 423–24 (2003); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 *YALE L.J.* 387, 392–93 (2000); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History* 17 (Harvard John M. Olin Discussion Paper Series, Paper No. 812, 2015), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Strine\\_812.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Strine_812.pdf) (“A business corporation is *not* simply ‘individual men and women’: it is a distinct entity that is legally separate from its stockholders, managers and creditors. This is the whole point of corporate law after all . . .”).

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persons involved in them, and sometimes it is necessary to grant protection to the corporation to protect the interests of natural persons. The Court has long recognized this principle, extending certain constitutional protections to corporations.

Therefore, the focus of the debate regarding corporate rights should be on finding the appropriate scope of protection for corporations to serve the purpose of the right at stake and the interests of natural persons.<sup>123</sup> The Court has a history of attempting to do just that; it has denied rights to corporations when it is the type of right that can be held only in an individual capacity, and it has focused on protecting natural persons when extending rights to corporations. In doing so, however, the Court has often based the extension of protections on a view of corporations as associations of persons.<sup>124</sup> According to the Court's logic, the corporation derivatively holds the right to protect natural persons that have associated through the corporate form.<sup>125</sup>

As Margaret Blair and I have argued elsewhere, this associational view of corporations became increasingly problematic over the course of the nineteenth century.<sup>126</sup> By the early twentieth century, modern business corporations had emerged that could no longer be fairly characterized as an identifiable group of people acting in association.<sup>127</sup> Corporations of unprecedented size emerged, with business spanning the country and even globe, publicly traded stock on national exchanges, professional managers, and branding that identified the corporation as a distinct entity separate from the business people who were involved in the corporation.<sup>128</sup> State corporate laws had liberalized to permit corporations to hold stock in other corporations and to enter into fundamental transactions with majority, rather than unanimous, shareholder approval.<sup>129</sup> Shareholders were more likely

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123. See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1631 (arguing that “[t]he Court should consider the purpose of the constitutional right at issue, and whether it would promote the objectives of that right to provide it to the corporation[.]” with an understanding of the realities and dynamics of different types of business organizations).

124. Blair & Pollman, *supra* note 38, at 1683.

125. *Id.*

126. See *id.* at 1697–1708.

127. *Id.* at 1708–12; see also PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 19–30 (1984) (discussing how some corporations “cannot be identified with the aggregation of the persons who are associated with [them]”); Strine & Walter, *supra* note 122, at 17 n.74 (“Corporations have perpetual existence, are not owned by anyone (stockholders own shares with certain legal rights, not pieces of the corporation), and have a separate legal existence from the stockholders, managers, and creditors. . . . Indeed, it is a stretch to say the modern corporation is an association of individuals, given that most stock is held by institutional investors.”).

128. Blair & Pollman, *supra* note 38, at 1707–08.

129. Blair & Pollman, *supra* note 38, at 1707; see HARLAND N. PRECHEL, *BIG BUSINESS AND THE STATE* 32 (2000) (discussing liberalization of New Jersey corporate laws); Morton J. Hor-

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to be passive investors, or even indirect shareholders through another institution, rather than participants in a “corporate democracy.”

The expanded spectrum of organizations using the corporate form meant that the derivative rights logic no longer applied to all corporations.<sup>130</sup> Some corporations no longer represented an identifiable group of natural persons acting in association and for whom it would be necessary to grant the corporation a right to protect their interests. In some corporations, for example, no natural person’s “autonomy, dignity, or political equality” is at stake when the corporation makes a political expenditure.<sup>131</sup>

Thus, it became imperative for the Court to draw lines between corporations because its derivative rights logic did not support broad rulings as to all corporations. Few people would argue that ExxonMobil or the Coca-Cola Company are expressive associations of citizens coming together to engage in political speech; however, in *Citizens United*, the Court referred to corporations generally as “associations of citizens” rather than acknowledge the meaningful differences between corporations. Allowing all corporations to spend general treasury funds on political independent expenditures, as *Citizens United* did, is unnecessary to protect the First Amendment interests of the corporate participants and impairs the integrity of the electoral process.<sup>132</sup>

The issue of line drawing has become more important over time as the Court has had to address issues of corporate rights in the context of speech, politics, and religion. The Court has turned to another rationale besides the derivative rights framework—an instrumental basis focused on the interests of listeners when speech is involved.<sup>133</sup> Line drawing is no less important in this context. No instrumental basis exists for protecting the speech of ordinary business corporations

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witz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 201–03 (1985); Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, AND CULTURE* 29, 48 (Kenneth Lipartito & David B. Sicilia eds., 2004).

130. Blair & Pollman, *supra* note 38, at 1732.

131. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 467 (2009) (Stevens, J., concurring in part and dissenting in part) (noting that the term corporation includes entities for which it is not clear who is speaking when they place a political advertisement, and that taking away their ability to do this would impinge upon “no one’s autonomy, dignity, or political equality”).

132. See ROBERT C. POST, *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* 68–75 (2014); Rebecca L. Brown & Andrew D. Martin, ‘*Rhetoric and Reality*’: *Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1069–70 (2015).

133. Blair & Pollman, *supra* note 38, at 1735–37.

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apart from their ability to provide useful information that promotes informed decision making; their speech may be regulated to provide such a value to listeners.<sup>134</sup> Furthermore, the fact that they have no original or derivative basis for speech rights suggests that the government should have the ability to regulate speech with less than a compelling interest.<sup>135</sup>

In sum, the vast diversity of corporations necessitates line drawing in corporate rights determinations. Even the Court's own underlying logic of derivative and instrumental rights for corporations fails to support monolithic treatment.

### III. UNDERSTANDING COMMON LINES DRAWN BETWEEN CORPORATIONS

When attempting to distinguish between the wide variety of corporations, one approach in corporate rights decisions is to adopt, or refer to, lines already drawn in the law. This Part examines the most salient lines that the law has drawn between corporations: the for-profit–nonprofit line, the public–private line, and the closely held category of corporations. The aim is to provide, in a collected fashion, critical information for better understanding these distinctions between corporations.

Furthermore, this Part suggests that although existing lines drawn between corporations may be a useful starting point for rights analysis, caution should be used. An existing line drawn between corporations is likely a rough proxy, at best, for the characteristics relevant to granting or denying a constitutional or statutory protection.<sup>136</sup> This is because policy rationales that are different from those underpinning corporate rights determinations have influenced the existing lines between corporations. The following discussion highlights that the for-profit–nonprofit line grew out of the historical practice of state legislatures to provide separate incorporation statutes depending on the activities and motives of the incorporators.<sup>137</sup> Congress enshrined this division in the tax code, and it was categorized by the Internal Revenue Service under the narrower moniker of tax-exempt organizations.

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134. See Post, *supra* note 132, at 72–74.

135. See *id.* at 74 (“Because restrictions on the speech of ordinary commercial corporations potentially impair only the circulation of possibly valuable information, courts should allow the state to regulate such speech on the basis of less pressing interests.”); Blair & Pollman, *supra* note 38, at 1737, 1737 n.310.

136. For an argument that the existing for-profit–nonprofit distinction is a reasonable proxy for the values relevant to the First Amendment freedom of association, see James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015).

137. See *infra* Part III.A.

No clearly formulated rationale explains the special treatment of all of these organizations. The public–private line was developed by federal securities laws primarily with the goal of investor protection. The closely held category developed in state corporate law to address conflicts between shareholders, such as the oppression of minority shareholders, in corporations in which these shareholders had little or no liquidity in their stock.

In addition, besides being aimed at different goals than those that might be at stake in any particular corporate rights determination, the existing lines between corporations are often imprecise and subject to change. For example, as noted below, Congress has recently redrawn the public–private line through changes to securities laws.<sup>138</sup> With this overview, we can now turn to examining the various lines drawn by the law between corporations.

#### A. *The For-Profit–Nonprofit Line*

The category of nonprofit corporations is diverse, including: (1) churches and religious organizations; (2) “commercial” providers of goods and services, such as hospitals and automobile associations; (3) donative organizations, such as private or independent foundations and public charities; (4) trade associations and social clubs, such as chambers of commerce as well as fraternities and sororities; and (5) hybrid organizations that combine functions, such as universities.<sup>139</sup> Some nonprofit corporations operate without government funding, such as religious congregations and private membership organizations, whereas others, such as those serving the elderly and poor, often receive an important part of their funding from federal, state, and local governments.<sup>140</sup>

To understand the for-profit–nonprofit line and how this vast assortment of organizations became more broadly known as nonprofit corporations, it is best to look at the history of corporations in the United States. The line emerged over time, intersected with tax law and policy, and has come to be distinguished simply by its hallmark characteristic of the nondistribution constraint.<sup>141</sup>

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138. See *infra* Part III.B.

139. For a discussion of the range of nonprofit corporations, see FRUMKIN, *supra* note 18, at 2; Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 837, 840–42 (1980); and Rodrigues, *supra* note 16, at 1263.

140. See FRUMKIN, *supra* note 18, at 2.

141. Nonprofits are usually structured as corporations. Hansmann, *supra* note 139, at 838 (“Most nonprofits of any significance are incorporated.”); Dana Brakman Reiser, *Charity Law’s Essentials*, 86 NOTRE DAME L. REV. 1, 6 n.6 (2011) (“Although a nonprofit organization may take the legal form of a charitable trust or an unincorporated association, most U.S. nonprofits

Since the founding of the United States, states provided charters to incorporate private associations and businesses that performed important public purposes and services.<sup>142</sup> During this early period, the concept of a “nonprofit” did not exist; early corporations were “mixed public–private” entities.<sup>143</sup> Before the mid-nineteenth century, many state legislatures granted charters only by a special act on an individual basis.<sup>144</sup> As a special government privilege or concession, states mainly awarded charters for enterprises that would benefit the public good, such as supplying public transport or building public works.<sup>145</sup> In addition to requiring a special charter, states also subjected corporations to various limitations, such as restricting corporate action to formal, delineated powers specified in the charter.<sup>146</sup> Thus, during this period, corporations were organized with a quasi-public function and were understood to be subject to strict government limitations.

According to historian Jonathan Levy, “[o]nly in the latter half of the nineteenth century did anything like a private for profit / nonprofit binary take shape.”<sup>147</sup> This began with the spread of state general incorporation acts, which opened access to corporate charters without the need for a special legislative act. For example, the New York legislature passed piecemeal statutes for educational institutions, libraries, agricultural societies, medical societies, and Bible and common prayer groups, then, in 1848, it passed a general incorporation statute for all classes of charitable organizations to receive a corporate char-

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are formed as nonprofit corporations.”); see Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1124–25 (2007) (noting that “most nonprofit entities are structured as nonprofit corporations” and “[j]ust like their for-profit counterparts, nonprofit corporations may choose their state of incorporation”).

142. RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784–1855*, at 255 (1982). For a discussion of corporations in early America, see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW 120–39* (3d ed. 2005); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 8–9, 13–14 (1970).

143. Levy, *supra* note 11 (manuscript at 7); see also Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403, 413 (“[E]arly business corporations were essentially utilities—road and canal companies, for example—or business entities with similar characteristics—banks and insurance companies. The usual understanding has been that almost all business corporations were thus, to borrow a phrase of later importance, businesses affected with the public interest.”); *id.* at 417 (“While distinctions were drawn between the law governing public and private corporations, they were fewer and narrower than one might expect. Those drawn between charitable and business corporations were almost nonexistent.”).

144. HURST, *supra* note 142, at 15.

145. *Id.*

146. *Id.*

147. Levy, *supra* note 11 (manuscript at 7).

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ter.<sup>148</sup> States also passed general incorporation statutes for business corporations and began to allow businesses to incorporate for purely commercial purposes, such as manufacturing.<sup>149</sup> These different general incorporation statutes evidenced the for-profit–nonprofit dichotomy that began to take shape.

Pennsylvania’s general incorporation law, passed in 1874, introduced the language of “not for profit” corporations.<sup>150</sup> The statute divided corporations into three categories: (1) religious corporations that received property tax exemption; (2) taxable “for profit” corporations; and (3) tax-exempt “not for profit” corporations.<sup>151</sup> The “not for profit” corporations were determined by whether the individual incorporators had a profit motive.<sup>152</sup> This general incorporation act was passed at the urging of the Pennsylvania Railroad, which did not want to be circumscribed in its activities as a “railroad corporation” and preferred to be a “for profit” corporation liberated to pursue wider business activity.<sup>153</sup> During this era, states began to allow business corporations to pursue any lawful business,<sup>154</sup> and “not for profit” corporations were defined by contradistinction when incorporators lacked a profit motive or had an altruistic motive.<sup>155</sup>

This dichotomy was incorporated into the Internal Revenue Code when the Revenue Act of 1894 exempted from taxation “corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”<sup>156</sup> The 1909 Corporate Excise Tax Act incorporated the tax exemption and added the non-profit concept to the specification of purposes, exempting “any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individ-

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148. James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 633–34 (1985). By the late nineteenth century, the New York legislature had enacted separate corporate law statutes for general corporations and membership corporations, which consolidated the laws for charitable corporations. *Id.* at 635.

149. See HURST, *supra* note 142, at 37.

150. Levy, *supra* note 11 (manuscript at 9).

151. *Id.*

152. *Id.*

153. *Id.*

154. Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 106 n.97 (1999).

155. Levy, *supra* note 11 (manuscript at 10–11).

156. Revenue Act of 1894 (Wilson-Gorman Tariff of 1894), ch. 349, § 32, 28 Stat. 509, 556; see also Boris I. Bittker & George K. Rahtert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 302–03 (1976).

ual.”<sup>157</sup> Scholars have noted that “neither upon their initial enactment nor during the ensuing decades have these exemptions elicited more than cursory legislative explanation, save for matters of technical detail.”<sup>158</sup>

Congress overhauled the tax code in 1954 and established the modern framework of granting tax exemptions to nonprofit corporations listed in Section 501(c) of the Internal Revenue Code.<sup>159</sup> No clear formulation exists regarding why special treatment is granted to these organizations.<sup>160</sup> A number of grounds have been cited, including history, morality, politics, and public policy.<sup>161</sup>

As of 2015, there are twenty-nine different 501(c) classifications under the tax code.<sup>162</sup> The benefits of registering for a 501(c) classification are that “the organization pays no federal tax on income [for] activities related to its central purpose,” and it often receives exemption from state taxes as well.<sup>163</sup> One of the main divisions is between those serving the public and those serving members.<sup>164</sup> The public-serving nonprofits fall under Section 501(c)(3), which grants an income tax exemption for the corporation as well as tax deductions for

157. Corporation Excise Tax Act of 1909, ch. 6, § 38, 36 Stat. 112, 113; *see also* Fishman, *supra* note 148, at 638 n.113 (discussing the “private inurement proscription” established in the Corporate Excise Tax Act). This exemption language was incorporated in the Revenue Act of 1913, which permanently established a federal income tax. Revenue Act of 1913, ch. 16, § 2(G), 38 Stat. 114, 172; Bittker & Rahdert, *supra* note 156, at 301.

158. Bittker & Rahdert, *supra* note 156, at 301–02 (“Perhaps because the distinction between profitmaking corporations and nonprofit institutions was thought obvious, Congress devoted little discussion to a separate section of the Act exempting various charitable, religious, educational, and fraternal benefit organizations from income taxation.”); *see also* MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 377–78 (2004) (“The fact that the federal role has evolved within the tax policing system is a matter of historical accident rather than a conscious assignment of responsibility to the tax authorities.”).

159. Levy, *supra* note 11 (manuscript at 13).

160. Hansmann, *supra* note 139, at 836–37 (“Large classes of nonprofits receive special treatment in almost all areas in which federal legislation impinges upon them significantly, including corporate income taxation, Social Security, unemployment insurance, the minimum wage, securities regulation, bankruptcy, antitrust, unfair competition, copyright, and postal rates. Yet the principles on which such special treatment is based are nowhere clearly formulated.” (footnotes omitted)); *see also* Eric M. Zolt, *Tax Deductions for Charitable Contributions: Domestic Activities, Foreign Activities, or None of the Above*, 63 HASTINGS L.J. 361, 381, 399, 401–04 (2012) (discussing the inadequacies in theories justifying tax benefits for charitable activities).

161. Fishman, *supra* note 148, at 637–38; *Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations: Hearing Before the H. Comm. on Ways & Means*, 109th Cong. 27–30 (2005), <http://www.jct.gov/x-29-05.pdf>.

162. I.R.C. § 501(c) (2012).

163. Rodrigues, *supra* note 16, at 1263; *see also* Bittker & Rahdert, *supra* note 156, at 316–30 (discussing the tax on unrelated business income and other limitations).

164. FRUMKIN, *supra* note 18, at 8.

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donors.<sup>165</sup> Section 501(c) also lists many noncharitable classes of tax-exempt organizations, such as trade associations, credit unions, business leagues, service clubs, veterans' organizations, and social clubs.<sup>166</sup> Another distinction is between the level of restrictions on political activity. For example, Section 501(c)(3) limits the amount of lobbying the organization can engage in and prohibits the organization from participating or intervening in political campaigns for or against any candidate for public office.<sup>167</sup> By contrast, Section 501(c)(4) allows an organization to lobby and electioneer as long as electioneering is not the organization's primary purpose or activity.<sup>168</sup>

But, even with its numerous categorizations and rules, the tax code does not provide the universal definition or dividing line for nonprofits; in fact, not all nonprofits are tax-exempt organizations.<sup>169</sup> Some clubs, associations, and groups have never been formally registered with the Internal Revenue Service.<sup>170</sup> Yet each state has its own separate nonprofit corporation statute that is a modern day version of the old general incorporation statutes, and so the organization could exist as a nonprofit corporation.<sup>171</sup>

Although there is not a singular definition of a nonprofit corporation, there is a hallmark characteristic of this form: the nondistribution constraint.<sup>172</sup> As Professor Henry Hansmann explained: "A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees."<sup>173</sup> That is, the

165. FREMONT-SMITH, *supra* note 158, at 58; FRUMKIN, *supra* note 18, at 8; Rodrigues, *supra* note 16, at 1263.

166. FRUMKIN, *supra* note 18, at 8; Rodrigues, *supra* note 16, at 1263.

167. I.R.C. § 501(c)(3); Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561, 1569 (2013).

168. I.R.C. § 501(c)(4); 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2012); *see also* Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention Under Federal Tax Law*, 63 DUKE L.J. 1635, 1637 (2014); Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 375 (2011); Galle, *supra* note 167, at 1569.

169. *See* Rodrigues, *supra* note 16, at 1263.

170. FRUMKIN, *supra* note 18, at 11 ("For a time, the moniker 'tax-exempt organizations' was widely used inside government and within the legal community because it pointed—or at least appeared to point—to the black letter of government regulation. Yet because this approach did not capture the huge number of clubs, associations, and groups that have never been formally registered with the IRS, it fell out of favor . . .").

171. Rodrigues, *supra* note 16, at 1262.

172. Fishman, *supra* note 148, at 619 ("There is no uniform or standard definition for a nonprofit organization. We use the term 'nonprofit' to refer to an organization that is barred from distributing profits or net earnings to individuals who exercise control over it, such as directors, officers, or members.")

173. Hansmann, *supra* note 139, at 838.

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primary distinction between a nonprofit corporation and a for-profit (or business) corporation is that the nonprofit does not have stock or other indicia of ownership that would give individuals a share in profits and control.<sup>174</sup>

To be clear, nonprofits are not prohibited from earning profits; they must simply retain any profits and devote them to further operating in pursuit of the goals for which the organization was formed.<sup>175</sup> Some nonprofit corporations are in fact highly profitable. For example, one nonprofit hospital reported \$1.2 billion in net income during the 2007 fiscal year and \$7.4 billion in cash and investments—faring even better than its average for-profit counterpart.<sup>176</sup> Further, the nonprofit sector represents a significant percentage of gross domestic product (GDP), with estimates between 5–12%.<sup>177</sup> Also, nonprofits are free to pay reasonable salary or compensation to employees and persons who provide labor or capital.<sup>178</sup>

Because the nonprofit category is distinguished from business corporations simply by the nondistribution constraint and otherwise captures a wide-ranging assortment of organizations, it does not, on its own, provide a clear, meaningful line between corporations for corporate rights determinations. Some nonprofit organizations are rooted in civic and political engagement and focus on pursuing expressive, associational activity,<sup>179</sup> whereas some nonprofit organizations are rooted in the expression of faith and religious values.<sup>180</sup> But it is not

174. *Id.*; see David Easley & Maureen O’Hara, *Optimal Nonprofit Firms*, in THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 85, 86 (Susan Rose-Ackerman ed., 1986). Although nonprofits have no shareholders because of the nondistribution constraint, they do have a variety of other participants: donors, clients, board members, and employees. FRUMKIN, *supra* note 18, at 5. Nonprofits may be run by a board of directors that is elected by members or is self-perpetuating. Hansmann, *supra* note 139, at 840.

175. Hansmann, *supra* note 139, at 838.

176. Rodrigues, *supra* note 16, at 1261 (citing John Carreyrou & Barbara Martinez, *Nonprofit Hospitals, Once for the Poor, Strike It Rich*, WALL ST. J., Apr. 4, 2008, at A1).

177. See JAMES J. FISHMAN ET AL., NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 13 (5th ed. 2015) (citing BRICE S. MCKEEVER & SARAH L. PETTIJOHN, URBAN INSTITUTE, THE NONPROFIT SECTOR IN BRIEF: PUBLIC CHARITIES, GIVING, AND VOLUNTEERING 1 (2014), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/413277-The-Nonprofit-Sector-in-Brief-.PDF>) (“Nonprofit organizations accounted for 5.4 percent of the gross domestic product in 2012.”); Rodrigues, *supra* note 16, at 1266 (noting the estimates from a 2007 report for the percentage of GDP attributable to the nonprofit sector as ranging between 7–12%).

178. FISHMAN ET AL., *supra* note 177, at 13 (“In 2010, the last year for which reliable data is available, nonprofits had 13.7 million paid employees, representing 10 percent of the U.S. economy and an additional 4.8 million full-time equivalent volunteer workers were employed by charitable institutions.”); Hansmann, *supra* note 139, at 838.

179. FRUMKIN, *supra* note 18, at 29–31.

180. *Id.* at 96, 115. The degree to which religious belief shapes the activities of these nonprofits widely varies, from serving as the critical organizing principle to religious-affiliated nonprofits that do not explicitly bring faith into their activity. *Id.* at 115.

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obvious that all nonprofit corporations represent an identifiable group of people associating for these expressive or religious purposes, and so the line is likely little more than a rough starting point for analysis.

Some nonprofit corporations, such as chambers of commerce, are primarily operated for the economic benefit of their members.<sup>181</sup> Further, many nonprofits provide services and goods, have become commercialized, and compete with for-profit corporations in their industries.<sup>182</sup> Over the past few decades, funding patterns of nonprofits have dramatically shifted, with a decrease in private contributions and the growing importance of earned income as a source of funding. Professor Peter Frumkin observed:

The substitution of earned income, complemented by rising public sector contracts, for charitable contributions is a clear sign of more than just a change in the balance sheet of nonprofit organizations. It is evidence of a new vision of the function of nonprofits, one that emphasizes the entrepreneurial side of the sector.<sup>183</sup>

Other scholars have also taken notice of the “blurring” distinction between nonprofit and business corporations.<sup>184</sup>

### *B. The Public–Private Line*

The discussion above focused on the line between for-profit (business) corporations and nonprofit corporations. Within the world of business corporations, there are public corporations and private corporations. This Section examines that line between public and private business corporations and its potential utility for corporate rights determinations.

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181. Bittker & Rahtert, *supra* note 156, at 302 (“[These corporations] are ‘nonprofit’ groups only in the limited sense that they do not engage in business with the general public for the benefit of investors.”). R

182. FRUMKIN, *supra* note 18, at 84, 102. R

183. *Id.* at 144.

184. See, e.g., FREMONT-SMITH, *supra* note 158, at 15–18; Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2019–20 (2007) (discussing Google’s “for-profit charity” and “other examples of organizations devoted to charitable goals that skirt the line between for-profit and nonprofit”); Brakman Reiser, *supra* note 141, at 1 (abstract) (“The boundary between charity and business has become a moving target. Social enterprises, philanthropy divisions of for-profit companies (most notably at Google), and legislation creating hybrid nonprofit/for-profit forms all use business models and practices to mold and pursue charitable objectives.”); Rodrigues, *supra* note 16, at 1259 (“The distinction between nonprofit organizations and for-profit firms is blurring before our eyes. Corporate social responsibility, sustainability, and green movements have made doing good an important component of many products offered not only by nonprofits, but also by for-profit firms.”); Zolt, *supra* note 160, at 396 (noting that “there has been a substantial increase in entities that blur the traditional boundaries between for-profit and nonprofit entities,” such as nonprofits adopting profit-oriented approaches, for-profit companies adopting charitable missions, and joint ventures between nonprofit and for-profit organizations). R

Federal securities laws define which business corporations are public, and, by negative implication, the rest are private. One basic consequence of being a public company is that the corporation must register its stock and provide periodic public disclosures.<sup>185</sup>

The primary goal of federal securities regulation is to protect investors.<sup>186</sup> Specifically, the four harms from which securities regulation aims to protect investors are: (1) “fraud”; (2) “an unlevel informational playing field”; (3) “the extraction of private benefits from the firm by firm insiders”; and (4) “investors’ propensity to make unwise investment decisions.”<sup>187</sup> Federal securities law also established the Securities and Exchange Commission (SEC) to oversee and implement this area of law. The SEC’s mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>188</sup>

This public–private line has existed since the 1930s when Congress put in place the architecture of our federal securities regulations.<sup>189</sup> The public trading of securities began much earlier in the United States around the end of the eighteenth century.<sup>190</sup> However, it was not until the early twentieth century that periodic disclosure require-

185. STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: THE ESSENTIALS* 85–92 (2008).

186. STEPHEN J. CHOI & A.C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* 1 (3d ed. 2012) (“Congress enacted the federal securities laws in the 1930s in the midst of the Great Depression. Congress’ primary goal was to protect investors who were considering putting capital in the country’s financial markets.”); Michael D. Guttentag, *Protection from What? Investor Protection and the JOBS Act*, 13 U.C. DAVIS BUS. L.J. 207, 212–18 (2013). Scholars have also cited allocative efficiency as another purpose of federal securities regulation. See, e.g., Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 239 (2009) (“[T]he primary way that mandatory disclosure increases social welfare is by enhancing economic efficiency through better corporate governance and increased liquidity . . .”).

187. Guttentag, *supra* note 186, at 207.

188. E.g., *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC.GOV, [https://www.sec.gov/about/whatwedo.shtml#VRbh\\_TvF8\\_8](https://www.sec.gov/about/whatwedo.shtml#VRbh_TvF8_8) (last visited Aug. 20, 2015). In 1996, Congress passed the National Securities Market Improvement Act, which provided that when the SEC is engaged in rulemaking, “in addition to the protection of investors,” the Commission shall consider “whether the action will promote efficiency, competition, and capital formation.” National Securities Market Improvement Act of 1996, Pub. L. No. 104-290, § 106(b), 110 Stat. 3416, 3424 (codified as amended at 15 U.S.C. § 77b(b) (2012)); see also Guttentag, *supra* note 186, at 213–14.

189. Note that this terminology differed from previous eras. In earlier times, a “public” corporation was understood to refer to a municipal corporation and all other corporations were “private.” ANGELL & AMES, *supra* note 49, § 14. The federal securities laws of the 1930s gave new meaning to the term “public” as it came to be understood to generally refer to business corporations that were publicly reporting to the SEC, and all other business corporations that were not publicly reporting to be “private.”

190. Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why To Rewrite the Rules that Require Firms To Make Periodic Disclosures*, 88 IND. L.J. 151, 158 (2013).

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ments became a viable tool for securities regulation. For example, there was an emergence of the accounting profession and voluntary disclosures by issuers trying to lower their cost of capital by credibly committing to make periodic disclosures.<sup>191</sup>

After the stock market crash of 1929 and the onset of the Great Depression, President Roosevelt urged Congress to regulate securities offerings as “one step in our broad purpose of protecting investors and depositors.”<sup>192</sup> Congress passed the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act), which created three pathways to subject a company to public reporting requirements: (1) listing securities on a national securities exchange; (2) making a registered public offering under the Securities Act; or (3) triggering registration requirements under Section 12(g) of the Exchange Act.<sup>193</sup>

The latter provision, the Section 12(g) trigger, was passed by Congress in 1964 to mandate disclosures from companies with “sufficiently active trading markets and public interest.”<sup>194</sup> Motivated by the policy goal of protecting investors, Congress used company assets and the number of shareholders of record as a proxy for determining which companies were of a sufficient size to require public status.<sup>195</sup> The standard chosen was a rough calculation, which has been called “educated guesswork” and “arbitrary.”<sup>196</sup> Congress recently raised this threshold in the JOBS Act, such that a company with total assets exceeding \$10 million and a class of equity security held by 2,000 or more shareholders of record must register under the Exchange Act.<sup>197</sup>

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191. *Id.* at 160–61; see also Gregory Mark, *On Limited Liability: A Speculative Essay on Evolution and Justification*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY* 169, 182 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009) (discussing the development of third party information about credit, the financial press, and securities exchange listing requirements).

192. 2 FRANKLIN DELANO ROOSEVELT, *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 93 (1938).

193. See 15 U.S.C. §§ 781(a), (f); Securities Exchange Act of 1934, Pub. L. No. 112-158, § 12(g), 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–pp).

194. Reporting by Small Issuers, Exchange Act Release No. 23,407, 1986 WL 703825 at \*2 (July 8, 1986).

195. Guttentag, *supra* note 190, at 166–68.

196. See, e.g., Donald C. Langevoort & Robert B. Thompson, “Publicness” in *Contemporary Securities Regulation After the JOBS Act*, 101 *GEO. L.J.* 337, 361 (2013).

197. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 501, 126 Stat. 306, 325 (2012) (codified as amended at 15 U.S.C. § 781(g)(1)(A)). To be precise, the JOBS Act increased Section 12(g)’s threshold to 2,000 shareholders of record, provided that no more than 499 of those shareholders are unaccredited investors. *Id.* The Act refers to accredited status as a term defined by the SEC. See generally Securities Act of 1993, 17 C.F.R. § 230.501(a) (2014) (defining an accredited investor). For a discussion of the term “shareholder of record,” see Langevoort & Thompson, *supra* note 196, at 355–57.

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Private corporations are those that have not become public by one of these three paths established by federal securities laws. The distinction is drawn simply by those securities laws mechanics: if a corporation does not need to access public markets for capital or liquidity and can manage its shareholder base to stay below the 2,000 shareholders of record threshold, then a corporation can remain private and avoid the additional cost and scrutiny of public reporting.<sup>198</sup>

For example, Facebook, Inc. was effectively forced to become a publicly reporting corporation because it hit the pre-JOBS Act shareholder threshold for Section 12(g), which was then 500 shareholders of record. Facebook could have chosen to stay private, however, if not for “two extraordinary events” that pushed it over the line: (1) it allowed employees to sell large quantities of shares on private secondary markets to new shareholders and (2) it sold \$1.5 billion in shares through Goldman Sachs to new investors.<sup>199</sup> Many companies are choosing to stay private by more tightly managing their shareholders of record than Facebook did; as a result, mature private companies rival or exceed the size of many public companies as measured by metrics such as valuation, assets, and number of employees.<sup>200</sup>

Thus, the public–private line is not a perfect proxy for large corporations, in which investor protection might be a concern, or for corporations that are the subject of public interest with a significant social footprint.<sup>201</sup> It is underinclusive. It is also subject to congressional change, as evidenced by the JOBS Act, which recently increased one of the key thresholds to public status and made it easier for private corporations that wish to stay private to do so. The policy goals un-

198. CHOI & PRITCHARD, *supra* note 185, at 87–89; *see also* Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. PA. L. REV. 179, 224, 235–36 (2012). R

199. Steven Davidoff Solomon, *Facebook May Be Forced To Go Public Amid Market Gloom*, N.Y. TIMES, Nov. 29, 2011, [http://dealbook.nytimes.com/2011/11/29/facebook-may-be-forced-to-go-public-amid-market-gloom/\\_r=0](http://dealbook.nytimes.com/2011/11/29/facebook-may-be-forced-to-go-public-amid-market-gloom/_r=0). For discussions of regulatory and technological changes that have facilitated liquidity and capital formation outside of an exchange listing or public offering, *see* Langevoort & Thompson, *supra* note 196, at 346–51, 384–85; Pollman, *supra* note 198. R

200. *See America's Largest Private Companies List*, FORBES, <http://www.forbes.com/largest-private-companies/list/> (last visited Mar. 28, 2015).

201. For a discussion of “publicness” as a concept in securities law, *see* Hillary A. Sale, *The New “Public” Corporation*, LAW & CONTEMP. PROBS., Winter 2011, at 137, 137–40 (arguing that the definition of a corporation as public by reference to whether it trades on a public market is “impoverished” and that “the government and the media have increasing influence over public corporations and their governance.”); *see also* Guttentag, *supra* note 190 (arguing that firms with a market capitalization of less than \$35 million or fewer than 100 beneficial shareholders should be exempted from public reporting requirements); Langevoort & Thompson, *supra* note 196, at 375, 379–80 (exploring the public–private line and arguing that a “distinct class of systemically significant public issuers” should be created that receives a different level of regulation than other issuers); Pollman, *supra* note 198, at 235–41 (discussing the public–private line). R

derpinning this line are economic in nature—investor protection, market integrity, and capital formation.

However imperfect the public–private line is for purposes of securities law goals, it does serve as a rough guide to certain characteristics, which may be useful for preliminary analysis in corporate rights line drawing. For example, publicly traded stock typically means that shareholders in the corporation are constantly changing.<sup>202</sup> They are dispersed, passive investors.<sup>203</sup> Shareholders in public corporations are not an identifiable group of any lasting permanence.

Furthermore, many individuals indirectly own stock in public corporations through mutual funds, 401(k) accounts, or other pension or retirement plans.<sup>204</sup> In fact, “[n]inety percent of equity-owning [U.S.] households invest in stock mutual funds.”<sup>205</sup> The beneficial owners of the stock often do not know which particular companies they are invested in; they often do not have access to information about the corporations such as about their political spending; and, they do not have the ability to sell the stock of a particular corporation when their money is managed by an institution.<sup>206</sup> Because shareholders are not a stable, identifiable group over time, and because many are institutions with indirect beneficial owners, there is not an associational dynamic among shareholders.

Public corporations also have a changing body of employees, which typically number in the thousands, or even hundreds of thousands. Creditors, suppliers, and consumers are also important stakeholders in public corporations and their relationships are contract or market-based. Top executives and board members represent the most identifiable and stable group of corporate participants in public corporations. They often stay in their respective posts for at least a year or more, serving as fiduciaries for the corporation and its shareholders.

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202. *E.g.*, Usha Rodrigues, *Corporate Governance in an Age of Separation of Ownership from Ownership*, 95 MINN. L. REV. 1822, 1823, 1828 (2011) (noting that “the direct holders of shares predominantly are institutional investors” and that they “have short-term investment horizons that can be measured in months, or even days”).

203. For a classic work documenting the separation of ownership and control, see ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1948). *See also* WILLIAM A. KLEIN ET AL., *BUSINESS ORGANIZATION AND FINANCE* 106 (11th ed. 2010) (“The shareholders in [public] corporations do not expect to participate actively in the operation of the business. They are passive investors.”).

204. *See* Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership from Control*, 33 SEATTLE U. L. REV. 877, 879, 879 n.13 (2010) (noting that, as of 2009, “institutional investors owned 50% of total U.S. equities”).

205. INV. CO. INST. & SEC. INDUS. ASS’N, *EQUITY OWNERSHIP IN AMERICA* 1 (2005), <http://www.sifma.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=21625&libID=5791>.

206. *See* Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 56 (2009).

They are stewards for the corporation itself and the entity status of the corporation under the law allows for this complex set of relationships to constantly evolve and change and for the corporation to function as a lasting institution.

In addition, public corporations have a business purpose. A more precise articulation of this point is not possible without invoking challenge. The question of corporate purpose has divided corporate law scholars for nearly a century, and of particular controversy is whether the law requires shareholder wealth maximization as a default rule.<sup>207</sup> Setting aside these particulars, we can observe that public corporations are business corporations—they are businesses operated through the for-profit corporate form for which equity holders can receive distributions.

In light of these characteristics of public corporations, it would be hard to justify extending a derivative right to a public corporation, especially with regard to rights that extend beyond contract and property interests incidental to the corporate form. The participants in a public corporation generally do not constitute a relatively stable, identifiable group of persons, and their organization and relationships with each other are not associational.<sup>208</sup>

Thus the line drawn by securities laws regarding “public” corporations has some, albeit rough, explanatory power for corporate rights determinations. It could be a starting point in analysis, which confirms that a derivative right is not at stake.<sup>209</sup> We could also observe that any decision to extend rights to public corporations would be limited and would require an instrumental justification if, for example, the interests of third parties necessitated extending certain limited protection for the speech of public corporations.<sup>210</sup>

The Supreme Court’s dicta in *Hobby Lobby* regarding public corporations did not reflect such a nuanced understanding. Not only is it “unlikely” that these “corporate giants” would “often assert RFRA claims[,]” as the Court stated,<sup>211</sup> the derivative basis on which the

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207. See Pollman, *supra* note 33, at 159–62 (discussing the corporate purpose debate).

208. Blair & Pollman, *supra* note 38, at 1739; see Nelson, *supra* note 74, at 510.

209. In other work, I have shown how we could use the public corporation line as a rough way of starting analysis regarding whether various corporations have, or should have, a constitutional right to privacy, a novel question. Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 63–64 (2014).

210. Blair & Pollman, *supra* note 38, at 1740; see also Post, *supra* note 132, at 70 (“Ordinary commercial corporations are not expressive associations, and for this reason they may not assert the First Amendment rights of persons who make up ordinary commercial corporations. . . . If ordinary commercial corporations possess First Amendment rights, therefore, it must be as proxies for the rights of persons who are strangers to the corporation.”).

211. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

Court accorded RFRA protections to the closely held corporations would be insupportable. The Court grounded its analysis on the sincerely held religious beliefs of the shareholders of the closely held corporations:

An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. . . . [P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.<sup>212</sup>

And, with regard to public corporations, the Court added: “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”<sup>213</sup> Not only is this agreement improbable, but in publicly traded corporations the stock is liquid and trades frequently—there is rarely a stable, identifiable group of people “who own and control” the corporation. Further, a corporation could have a provision in its corporate charter regarding operation in accordance with religious dictates, but when stock trades on a public exchange, there is no mechanism to ensure that the shareholders actually have sincerely held religious beliefs, which was also essential to the Court’s holding. Finally, as previously discussed, shareholders in public corporations are dispersed passive and institutional investors, so the notions of complicity and burdening of religious exercise could also be called into question.<sup>214</sup>

### C. *The Closely Held Category*

There is no singular definition of a closely held corporation. State corporate law does not draw a clear line between corporations considered closely held and those that are not. Instead, the public–private line exists from federal securities laws, as discussed above, and then within the realm of private business corporations, there is the notion of closely held corporations as a loose subset.<sup>215</sup> The term “closely

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212. *Id.* at 2768.

213. *Id.* at 2774.

214. For a discussion of the concept of complicity in *Hobby Lobby*, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2518–22 (2015); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 *U. CHI. L. REV.* 1897 (2015).

215. One way of thinking about categories of private corporations is as

(1) ‘startup’ corporations, founded with the goal of creating innovative products or services and a relatively quick financial pay off for the founders, employees, and

held” is typically understood to refer to a corporation with a small number of shareholders whose shares are not readily transferable and who are often involved in managing the corporation.<sup>216</sup> Sometimes closely held corporations are compared with partnerships in their dynamics.<sup>217</sup>

The American Bar Association (ABA) Committee on Corporate Laws listed several attributes of closely held corporations in addition to having a relatively small number of shareholders: (1) shareholders are frequently involved in managing or operating the business; (2) management structure and corporate governance rules may be customized; (3) little liquidity exists in the corporate stock; (4) no readily observable market price is available for the corporate stock; (5) financial and other information is generally not publicly available; (6) deadlocks may arise; and (7) limited resources may result in inattention to corporate formalities and recordkeeping.<sup>218</sup> According to the ABA Committee, the closely held corporation is “the most common form of business organization in the United States.”<sup>219</sup>

Notably, the small number of shareholders is an essential feature of the closely held corporation, but the size of the business is not determinative.<sup>220</sup> Closely held corporations range from very small to very

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investors who are typically angel investors and venture capitalists; and (2) businesses that operate through the corporate form for the various advantages that it offers, while not triggering the thresholds for becoming a publicly reporting corporation.

Pollman, *supra* note 2, at 626.

216. *E.g.*, Donahue v. Rodd Electrottype Co. of N. Eng., Inc., 328 N.E.2d 505, 511 (Mass. 1975) (“We deem a close corporation to be typified by: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation.”); BAINBRIDGE, *supra* note 1, § 14.1; MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 307–13 (8th ed. 2000). Some corporate law scholars have focused not on the number of shareholders but rather on “the owners’ desire to control the identity of the ‘partners’ and keep ownership ‘close.’” *See, e.g.*, ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW § 11.01 (3d ed. 2009) (“The owners may wish to limit shareholding to family members, employees, persons who live in the vicinity of the corporation’s business, and the like.”).

217. *E.g.*, Donahue, 328 N.E.2d at 512 (noting the “striking resemblance” of a closely held corporation to a partnership and that commentators and courts have described the closely held corporation as “little more than an ‘incorporated’ or ‘chartered’ partnership”); SHAWN J. BAYERN, CLOSELY HELD ORGANIZATIONS 193 (2014) (referring to closely held corporations as “those with few owners, whose structure and function are ordinarily not that different, in substantive terms, from that of a partnership”).

218. Comm. on Corporate Laws, ABA Section of Bus. Law, *Managing Closely Held Corporations: A Legal Guidebook*, 58 BUS. LAW. 1077, 1081–85 (2003) [hereinafter, ABA Comm.].

219. *Id.* at 1077.

220. BAINBRIDGE, *supra* note 1, § 14.1; ABA Comm., *supra* note 218, at 1081 (“Although closely held corporations are often small businesses, closely held status has nothing to do with

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large businesses.<sup>221</sup> For example, Hobby Lobby would be considered a closely held corporation because it has only five shareholders (held through a trust), its shares are not publicly traded, and its shareholders are involved in the management of the corporation. But Hobby Lobby is not a small business by any stretch of the imagination: it is a nationwide chain with over 600 stores, more than 13,000 employees, and \$3.3 billion in sales revenues annually.<sup>222</sup> The Hobby Lobby example underscores the fact that the term “closely held” does not mean small business.<sup>223</sup>

The concept of the closely held corporation was born from concerns in state corporate law about illiquidity and the potential exploitation of minority shareholders.<sup>224</sup> These concerns stem directly from the fact that the hallmark characteristics of a closely held corporation are the small number of shareholders and lack of a public trading market. If shareholders cannot protect themselves by selling their shares, their voices in the corporation and the rules of conduct for the majority shareholders become more important. Anticipating exploitation issues and a lack of exit options, minority shareholders have attempted to address their concerns with contractual provisions that vary the normal corporate governance rules.<sup>225</sup> In addition, courts in a number of jurisdictions have created heightened fiduciary duties in the closely

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size. A number of the largest corporations in the world, in terms of assets and revenues, are closely held.”).

221. ABA Comm., *supra* note 218, at 1081 (“Closely held corporations include a very diverse range of business associations from one-shareholder corporations to family-owned businesses to wholly owned subsidiaries to corporate joint ventures.”).

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222. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765 (2014); #118 *Hobby Lobby Stores*, *supra* note 34. As noted *supra*, Forbes estimated that Hobby Lobby has 23,000 employees. *Id.* Notable examples of other economically large private corporations include Cargill and Koch Industries, which each have annual revenues over \$100 billion and 100,000 or more employees. See *America's Largest Private Companies List*, *supra* note 200. Examples also include companies that have once been public but were taken private again, such as computer manufacturer Dell, which has annual revenues over \$50 billion and more than 100,000 employees. *Id.*

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223. Justice Ginsburg made this point in her *Hobby Lobby* dissent. *Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting) (“[A]s Hobby Lobby’s case demonstrates, such [RFRA] claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. ‘Closely held’ is not synonymous with ‘small.’”); see also Sarah Barringer Gordon & Nomi Stolzenberg, *Hobby Lobby, Wheaton College, and a New Religious Order*, RELIGION & POL. (July 14, 2014), <http://religionandpolitics.org/2014/07/14/hobby-lobby-wheaton-college-and-a-new-religious-order/> (“The scale and nature of Hobby Lobby and Conestoga Wood make it hard to see any meaningful distinction between the closely held and publicly traded corporate forms.”).

224. See BAINBRIDGE, *supra* note 1, § 14.1; PINTO & BRANSON, *supra* note 216, § 11.01.

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225. PINTO & BRANSON, *supra* note 216, § 11.01 (discussing contractual responses in closely held corporations, such as supermajority quorum and voting, and minority protections in shareholder agreements).

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held context.<sup>226</sup> The relevance of being closely held in corporate law is therefore the applicability of doctrines concerning shareholder private ordering (such as shareholder management agreements, voting trusts, voting pools, buyout agreements) as well as potentially more expansive fiduciary duties.

More than a dozen states have enacted special “close” corporation statutes to make clear that participants can provide for special remedies, such as mandatory share repurchases or dissolution for deadlock or oppression.<sup>227</sup> Requirements for the statutorily created “closely held” business form vary state to state,<sup>228</sup> for example, with limits on the number of shareholders ranging from ten to fifty.<sup>229</sup> These statutory forms are not commonly used, however, and they are not available in all states, so they do not act as a constraint on how the more general term “closely held” is understood.<sup>230</sup>

Because the closely held category is only loosely created by state corporate law doctrines regarding shareholder minority oppression and heightened fiduciary duties, it does not, on its own, provide a clear, meaningful line between corporations for corporate rights determinations. However, like the nonprofit–profit and public–private lines discussed above, it may be a useful, yet rough, starting point for analysis.

For example, because of their hallmark characteristics, closely held corporations are more likely than public corporations and other types of private corporations to represent an identifiable group of shareholders who may have come together in an associational dynamic to pursue a business venture and, perhaps, other social, political, or religious goals. Many closely held corporations are family owned and operated, which arguably assures an intimacy or associational dynamic

226. *Id.* § 11.02; *see, e.g.*, *Donahue v. Rodd Electrotype Co. of N. Eng. Inc.*, 328 N.E.2d 505, 515 (Mass. 1975); 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S CLOSE CORPORATIONS § 7.20 (3d ed. 2002); 1 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL’S OPPRESSION OF MINORITY SHAREHOLDERS § 7.04 (2d ed. 2003) (citing *Donahue*, 328 N.E.2d 505).

227. PINTO & BRANSON, *supra* note 216, §§ 11.06–.07. The terms “close corporation” and “closely held corporation” are sometimes used interchangeably, but close corporation can refer more specifically to closely held corporations that have made a special statutory election in their articles of incorporation for close corporation status. ABA Comm., *supra* note 218, at 1081 n.3.

228. 1A FLETCHER, *supra* note 1, § 70.10.

229. *See, e.g.*, AZ. REV. STAT ANN. § 10-1083 (2014); GA. CODE ANN. § 14-2-902 (2003); MO. REV. STAT. § 351.755 (2014).

230. BAINBRIDGE, *supra* note 1, § 14.1 (“[T]hese statutes are little used.”); Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 314 (2008) (“While fifteen states eventually adopted integrated statutes, remarkably few close corporations chose to take advantage of them. Empirical studies show that only a very small percentage of corporations ever registered as statutory close corporations.”).

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among the shareholders, as might ownership and control being more generally united in a small number of shareholders.

But closely held corporations can be big business—they can have huge numbers of employees and independent boards of directors—and having a small number of shareholders does not ensure that the dynamic in the corporation is associational, unanimous, or related to anything other than economics. Therefore, further analysis is needed beyond simply using the term “closely held” to determine whether a derivative basis exists to justify extending a constitutional or statutory protection to the corporation.

In *Hobby Lobby*, the Court used the closely held category in a formalistic way without going beyond the mere starting point that this concept provides. As previously noted, the term “closely held” pervaded the majority opinion,<sup>231</sup> but the Court neither provided a definition nor pinpointed which characteristics were required for its ruling. For example, it did not explain the relevance for RFRA purposes of family ownership or the involvement of the shareholders in the management of the corporations. And, as noted above, the Court expressed doubt that a public corporation would bring a RFRA claim, but its language did not impose such a limit or acknowledge that a derivative basis for religious liberty rights would be absent in public corporations. Moreover, the Court did not explain why only the shareholders who own and control the corporation are the subject of focus for its derivative rights rationale.<sup>232</sup> As a result, the U.S. Departments of Labor, Treasury, and HHS had little guidance for their rulemaking on eligible organizations for exemption from the ACA’s contraception coverage requirement. After significant public debate, reflected in more than 75,000 comments to proposed regulations, the Departments published final regulations defining the term “closely held” corporation for the purpose of implementing *Hobby Lobby*.<sup>233</sup> Thus, in one of the most important recent cases concerning the rights of corporations, the Court pushed much of the difficult line-drawing work to other institutions.

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

232. Pollman, *supra* note 33, at 157–58.

233. Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318 (July 14, 2015) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510 and 2590, 45 C.F.R. pt. 147). The regulations extend the *Hobby Lobby* accommodation “to a for-profit 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.” *Id.* at 41,324. The 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.” *Id.*

## IV. CONCLUSION

One of the most important tasks facing the Supreme Court in its decisions concerning the scope of corporate rights is to appropriately distinguish between different corporations. Failing at this task has significant consequences; it impairs the integrity of our elections and the ability of our legislatures to regulate corporations in the interest of society.

This Article has underscored the need for the Court to better understand the diversity of corporations in existence and the need for line drawing between corporations in rights determinations. The Court's own derivative rights logic does not support granting protections to all corporations. Further, this Article advanced the discussion by examining the utility of lines that the law has already drawn: the for-profit–nonprofit line, the public–private line, and the closely held category. This Article showed that these constructs may be a useful starting point for analysis, but they are not a straightforward solution to the line drawing issue because they were developed in other areas of law to serve different values and goals than may be at stake in corporate rights determinations.