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Kent Greenfield
Boston College Law School, kent.greenfield@bc.edu

Daniel A. Rubens
Orrick, Herrington, & Sutcliffe LLP

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Corporate Personhood and the

Putative First Amendment Right to Discriminate

Kent Greenfield

Daniel A. Rubens

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Abstract: Corporations increasingly assert the right to discriminate, based either on free speech claims, religious freedom claims, or statutory claims arising from the Religious Freedom Restoration Act. Such claims have been considered by the Supreme Court in *Hobby Lobby* (RFRA) and *Masterpiece Cakeshop* (First Amendment), and in both cases the Court held in favor of the business.

In neither case, however, did the Court address a fundamental flaw with the arguments of the company asserting the speech and religion claims: that the claims depend on the rejection of corporate personhood. The putative religious and speech claims arose not from the beliefs of the companies but of their dominant shareholders. But corporate "personhood" means the interests of the firm are distinct from those of the shareholders. Allowing companies to assert the beliefs of shareholders as their own contradicts established doctrine and risks corporate manipulation of regulations designed to be generally applicable.

The authors have been active as *amici* in various cases in which corporations have asserted right to discriminate. This chapter marks the first time that these arguments have appeared in a scholarly format.

Corporate Personhood and the Putative First Amendment Right to Discriminate

Kent Greenfield[*]
Daniel A. Rubens[**]

I. Introduction

For decades, the Supreme Court has grappled with cases that pit democratic commitments to end discrimination with constitutional commitments to free speech and free exercise of religion. A private civic organization wants to maintain its all-male organizational personality, but state regulation forces it to admit women into membership. Do the organization's free speech rights — which include the right to associate — allow it to exclude women notwithstanding the state requirement?[1] The organizer of a St. Patrick's Day parade wishes to exclude a LGBTQ group that wants to march, and state regulation says the parade must invite the group. Does the First Amendment allow the parade organizer to exclude the marchers he dislikes?[2] The Boy Scouts' leadership finds out a scout master is gay. Do the Scouts have a constitutional right to kick him out of the organization, even if state law says they cannot?[3]

These cases have proven difficult enough. In the first case, *Roberts v. U.S. Jaycees*, the Court ruled against the organization. In the second and third, *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* and *Boy Scouts v. Dale*, the Court ruled in favor of the organizer and the organization.

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[*] Professor of Law and Dean's Distinguished Scholar, Boston College Law School. The authors thank the editors of this volume, Elizabeth Pollman and Robert Thompson, for the invitation to participate and their helpful comments on earlier drafts of this chapter. The authors also thank Indigo Harris and Leigha Henson for excellent research assistance.
[**] Partner, Orrick, Herrington, & Sutcliffe LLP. The views expressed in this chapter are those of Mr. Rubens and not necessarily those of Orrick or its clients. Mr. Rubens served as a law clerk at the Supreme Court during the 2013 Term. This chapter's discussion of cases decided during that term relies solely on publicly available materials.
[1] *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).
[2] *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston*, 515 U.S. 557 (1995).
[3] *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Newer cases add a wrinkle that significantly complicates matters. In the older cases, the organizations asserting the right to exclude unwanted members were organized as non-profits. Increasingly, however, for-profit businesses are asserting First Amendment-based rights to be exempted from otherwise applicable regulations, most prominently prohibitions on discrimination against LGBTQ customers. Does the fact that the constitutional claimant is a for-profit corporation change the analysis?[4] This chapter argues that it should.

The best-known example of a for-profit corporation asserting a constitutional right to discriminate arose in Colorado, where a bakery called Masterpiece Cakeshop, Ltd. refused to sell a wedding cake to a same-sex couple.[5] But Masterpiece Cakeshop was only one of a burgeoning number of profit-seeking businesses asserting constitutional rights to discriminate. A florist in Washington State doing business as Arlene's Flowers, Inc. refused to sell floral arrangements to a gay couple wishing to celebrate their wedding.[6] A tax preparer in Indiana refused to help a same-sex couple file their taxes.[7] A Kentucky printing company refused to print pro-LGBTQ messages on t-shirts.[8] An art studio in Arizona refused to design custom wedding invitations for same-sex ceremonies.[9]

The constitutional questions embedded in these cases will continue to be debated. They are complex. Companies rest their arguments on principles of both free speech and religious freedom. Although the Supreme Court ultimately resolved *Masterpiece Cakeshop* on other grounds, the business there argued that its production of a wedding cake was speech, and that the state anti-discrimination laws forcing it to sell it to a gay couple acted as an unconstitutional coercion of speech.[10] The bakery also argued that the state regulation amounted to an infringement of the bakery's religious freedom contrary to the Free Exercise clause.

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[4] For the purpose of this article, unless the text indicates otherwise, "corporation" should be assumed to mean "for-profit corporation."
[5] *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018).
[6] *Washington v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).
[7] *See* Kayla Epstein, *Christian tax preparer turns away lesbian couple on religious grounds*, WASH. POST, (Feb. 20, 2019, 7:57 PM), https://www.washingtonpost.com/nation/2019/02/21/christian-accountant-refuses-prepare-lesbian-couples-taxes-religious-grounds.
[8] *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands on Originals*, 592 S.W.3d 291 (Ky. 2019).
[9] *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019).
[10] *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

This latter contention tracks the form of arguments made in a related case worthy of mention — *Burwell v Hobby Lobby Stores, Inc*.[11] In that case, a company asserted a religious right to be exempted from the Affordable Care Act's requirement that employers provide health insurance covering contraceptive care at no cost to the employee. The asserted exemption was statutory, arising from the Religious Freedom Restoration Act's protections for religious people who are substantially burdened by the requirements of a federal law.[12] Hobby Lobby, Inc., argued that the ACA burdened its religious freedom, and that RFRA gave it an exemption from otherwise applicable law.[13] Though *Hobby Lobby* was a statutory case, and the law the company wanted to be exempted from was the ACA rather than state anti-discrimination law, the framework of the case was quite similar to *Masterpiece Cakeshop*. A company asserted a right to be exempted from otherwise applicable regulatory provisions, claiming that those requirements burdened the company's protected speech or religious interests.

These cases reverberate with classical constitutional conflicts. States and the federal government assert regulatory control over a corporation's behavior in the marketplace; corporations assert rights-based claims that would exempt them from that regulatory control.

Notice, however, that while all of these cases present as constitutional cases (or statutory cases applying constitutional doctrines) they all have embedded in them, and indeed depend on, matters of corporate law and principle. In each case, the arguments asserted by the corporation arise not from the free speech or religious freedom interests of the company itself but of a dominant shareholder.[14] In *Masterpiece*

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[11] *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

[12] RFRA originally applied to state burdens as well, but the Supreme Court struck down its application to states in *City of Boerne v. Flores*. *See* 521 U.S. 507, 533-34 (1997). In enacting RFRA, Congress adopted "a statutory rule comparable to the constitutional rule rejected in [*Employment Div. v.*] *Smith*," providing that the government "may not .... substantially burden a person's exercise of religion," even if that burden is imposed by a generally applicable law. 494 U.S. 872 (1990); *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 (2006).

[13] The case also included the consolidated claims of another company, Conestoga Wood Specialties Corporation, which sought a similar exemption based on the religious beliefs of its owners . *See Burwell v. Hobby Lobby*, 573 U.S. at 700-03.

[14] Individuals who own and operate businesses do often appear as named parties in these cases. As we discuss below, however, courts adjudicating discrimination claims and evaluating First Amendment defenses to those claims should take care to distinguish between individuals' roles as shareholders of the discriminating

Cakeshop, for example, the bakery's dominant shareholder was a man named Jack Phillips, and it was his religious and political beliefs that were allegedly burdened by the state's anti-discrimination statute. Implicit in the company's constitutional arguments was a claim that Phillips's constitutional interests should be projected onto the company. That is, the arguments in *Masterpiece Cakeshop* — and *Hobby Lobby*, *Arlene's Flowers*, and the other cases — depend on the premise that the corporation can assert the shareholders' speech and religion interests. That asserted unity is contrary to centuries of corporate law principles that establish corporations as their own legal and constitutional entities, distinct from their shareholders.

Under those longstanding corporate-law principles, corporations are distinct legal persons, separate from their investors. Thus in cases like *Masterpiece Cakeshop*, corporate "personhood" represents a reason to *deny* corporations' rights-based claims to avoid regulatory obligations.[15] To be clear, we recognize that corporations have constitutional rights that can be asserted in litigation. But those rights must belong to the corporation itself and not be mere projections of the interests of shareholders. Corporate law must inform the constitutional analysis.[16]

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corporation and as agents, managers, or employees of the discriminating entity. *See infra* at note 65.

[15] For a more robust articulation of this point, see KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018). For a comprehensive historical account of the development of corporate constitutional rights that describes how corporate personhood tends to reduce corporate constitutional rights claims, see ADAM WINKLER, WE THE CORPORATIONS, HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018); and Adam Winkler, *Corporate Personhood and Constitutional Rights for Corporations*, 42 NEW ENG. L. REV. (forthcoming 2021).

[16] The authors of this chapter filed an amicus brief in both *Masterpiece Cakeshop* and *Arlene's Flowers*. *See* Brief of Amici Curiae Corporate Law Professors in Support of Respondents, *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127303; Brief for Professor Kent Greenfield as Amicus Curiae in Support of Respondents, *Washington v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019) (No. 91615-2). In both cases, we argued that the free speech and religious interests of the shareholders should not be automatically projected onto the corporation. In addition, we argued that courts should be particularly skeptical of claims asserted by corporations that would exempt them from otherwise applicable laws and regulations, especially when such exemptions would give them a competitive advantage in the marketplace. (In both cases, the court ruled on different grounds and did not address our corporate law arguments.) One of us — Greenfield — also helped write an amicus brief in *Hobby Lobby*, in which some of these arguments were set out. *See* Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *Sebelius v. Hobby Lobby*, 572 U.S. 1011 (2014) (Nos. 13-

The structure of this chapter is as follows. In Part II, we set out the longstanding principle of corporate separateness and explain why it is important. In Part III, we argue why this notion should not be ignored in constitutional law, particularly where a for-profit corporation seeks an exemption from general law based on the asserted religious or political beliefs of its owners. In Part IV, we argue that in measuring the constitutional claims of corporations, courts should not reflexively presume the sincerity of political or religious beliefs asserted by corporations, especially when such the recognition of those beliefs would exempt the businesses from regulatory constraints applicable to their competitors.

II. Corporate Separateness as Core Principle

In the increasingly frequent cases in which corporations claim a constitutional right to be exempted from laws prohibiting discrimination, the facts follow a typical pattern. *Masterpiece Cakeshop* is paradigmatic. There, a gay couple asked the bakery to create a cake for their wedding celebration. Jack Phillips, the principal owner of the bakery, refused, maintaining that his religious beliefs were inconsistent with participating in a celebration of a same-sex marriage. The state brought an administrative action against the store, and the bakery asserted constitutional free speech and free exercise arguments as defenses to the state's action. The argument was that to force the bakery to create a cake for the couple would amount to compelled speech and would violate Phillips' religious freedom to not be forced to engage in activities he believed were sinful.[17]

In these types of cases, the constitutional claims are brought by the company rather than the shareholder. It is the *company* — not its shareholders — that is subject to regulatory requirements not to discriminate.[18] So the viability of the constitutional claims of companies

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354, -356) 2014 U.S. S. Ct. Briefs LEXIS 407. This chapter marks the first time that these arguments have appeared in a scholarly format.

[17] *See Masterpiece Caskeshop*, 138 S. Ct. at 1726-27.
This framework was similar in *Arlene's Flowers*. There, a florist refused to provide flower arrangements for a wedding ceremony of same-sex couple. The florist defended against the state administrative action against it, arguing that the state anti-discrimination law operated so as to force the florist's principal owner, Barronelle Stutzman, to violate her political and religious beliefs. 441 P.3d at 1203

[18] The obligations to refrain from discrimination typically attach to the business. In Colorado, for example, the anti-discrimination statute applied to public accommodations, which must be a "place of business." COLO. REV. STAT. § 24-34-601(1) (2016). To the extent that Phillips had a duty not to discriminate, it was as

such as Masterpiece Cakeshop, Ltd. depends on the Court's willingness to assume the corporation holds sincere political or religious beliefs that operate to exempt it from otherwise applicable law.[19] But in these cases it is not typically the corporation that holds any such beliefs. In *Masterpiece Cakeshop* itself, it was Phillips who was the "cake artist" and who refused to sell a wedding cake to a same-sex couple because of — in the words of the petition for certiorari — "his" religious beliefs.[20] In fact, Phillips characterized the question before the Court to be whether Colorado could compel "him" to violate "his" sincere religious beliefs, not the beliefs of the corporation in which he owned shares.[21]

It was Phillips, not the company, who asserted a "deep religious faith,"[22] and it was "Phillips's voice"[23] that was allegedly being compelled in violation of the "core tenets of his faith."[24] He did not assert a compelled speech claim on behalf of the company but stated it was "his artistic expression" at issue.[25] Cakes were "his" expression because "he intends to, and does in fact, communicate through them."[26] He staked his coerced speech claim on the notion that the cakes embody "great religious meaning for him."[27]

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an employee of a place of business, not as a shareholder. As discussed below, this distinction makes a difference for purposes of constitutional analysis.

[19] In *Hobby Lobby*, the Court considered the distinct statutory question of whether for-profit corporations qualify as "person[s]" that could "exercise … religion" within the meaning of RFRA. 573 U.S. at 707. A divided Court concluded that closely held corporations are protected under that statute. *Id.* at 705-06. That holding, in turn, depended on Congress's instruction that the statutory term "exercise of religion" "be construed in favor of a broad protection of religious exercise," which the Court viewed as "an obvious effort to effect a complete separation from First Amendment case law." *Id.* at 694-96. The Court's decision did not address claims under the First Amendment or the question discussed in this chapter: whether for-profit corporations should be entitled to obtain exemptions from general law based on the beliefs of their shareholders. *See id.* at 735.

[20] Petition for a Writ of Certiorari, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2016 WL 3971309, at *1 (July 22, 2016).

[21] *Id.*

[22] Brief for Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762, at *1 (Aug. 31, 2017).

[23] *Id.* at 2.

[24] *Id.* at 9.

[25] *Id.* at 17.

[26] *Id.* at 19 (emphasis added).

[27] *Id.* at 22 (emphasis added).

So in *Masterpiece Cakeshop* and in other cases like it, the constitutional claims of a corporation to be exempted from anti-discrimination law can only succeed if the company can claim the shareholders' religious beliefs as its own. But Phillips and Masterpiece Cakeshop were not the same in that case, and shareholders and the companies in which they hold stock are not the same more generally. Shareholders and companies are not identical for purposes of corporate law, and they cannot be deemed identical for purposes of First Amendment law.

Indeed, it is fair to say that the first principle of corporate law is that for-profit corporations are entities that possess legal interests of their own and a legal identity separate and distinct from their shareholders. This legal "personhood" holds true whether the for-profit corporation has two, two hundred, or two million shareholders. In each scenario, the corporate entity is distinct in its legal interests and existence from those who contribute capital to it.

This separation is not an ancillary part of corporate law and governance but "a general principle of corporate law deeply 'ingrained in our economic and legal systems.'"[28] It is the *sine qua non* of the wealth-creating legal innovation of the corporate form. The rationale behind corporate separateness is to encourage entrepreneurial activity by founders, investment by passive investors, and risk-taking by corporate managers.[29] The corporate veil is a profound but simple device helping to achieve all three of these goals. Indeed, it is impossible to imagine a workable legal framework for corporate governance without such separation. "[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[30] The corporation is separate from its shareholders not only for

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[28] *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929)).
[29] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93-97 (1985).
[30] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The centrality of corporate separateness is well established and longstanding. *See Burnet v. Clark*, 287 U.S. 410, 415 (1932) (a "corporation and its stockholders are generally to be treated as separate entities"); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934) ("As a general rule a corporation and its stockholders are deemed separate entities ...."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 455 (U. Chicago Press 1979) ("[I]t has been found necessary ... to constitute artificial persons, who may maintain a perpetual

purposes of asset partitioning but also for purposes of regulatory partitioning. As Mariana Pargendler explains in another chapter in this volume, corporations and their shareholders derive significant benefits from their treatment as distinct entities for purposes of regulation and legal oversight.[31]

Because the corporation is a separate entity, its shareholders are not responsible for its debts. This "privilege of limited liability," as protected by the corporate veil, is "the corporation's most precious characteristic."[32] The advantages of that separation redound to corporations of all sizes. Although the term "corporation" sometimes calls to mind large, publicly-traded enterprises, incorporation provides equally critical benefits to smaller businesses even when their shares are not publicly traded. One of the most compelling reasons for a small business to incorporate is so that its shareholders can acquire the protection of the corporate veil. By incorporating a business, the founders and investors insulate their personal assets from risk. Absent significant misconduct and fraud, shareholders in a corporation cannot lose any more than their original investment. If the corporation cannot pay its bills, the creditors—not the shareholders—bear the loss, with only very narrow exceptions.[33]

Even where a single shareholder owns all the corporation's shares, the corporate veil cannot be pierced absent significant misconduct or fraud on the part of the shareholder. This presumptive impermeability of the corporate veil has been confirmed by "thousands of instances where a sole

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succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, ... or corporations ....").

[31] *See* Mariana Pargendler, *Regulatory Partitioning as a Key Function of Corporate Personality*, Handbook On Corporate Purpose And Personhood [Page Number] (Elizabeth Pollman & Robert Thompson, eds.) ("In dissociating the regulatory status of the corporation from its shareholder composition, regulatory partitioning provides important benefits.")

[32] WILLIAM W. COOK, THE PRINCIPLES OF CORPORATION LAW 19 (1925).

[33] The leading treatise on closely-held corporations notes that, in addition to limited liability,"[t]here may [be other benefits] from the recognition of the separate entity[:] the participants in the enterprise may be entitled to claim benefits as an employee for purposes of workers' compensation, social security, unemployment compensation or other entitlement statutes. A corporate officer or employee who is also the sole or controlling shareholder of the corporation has sometimes been able to successfully assert a claim as an employee for workers' compensation. Similarly, some courts respect the separate entity of a close corporation so that shareholder-employees qualify for social security benefits for which they would not be eligible if self-employed." 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1:15 (rev. 3d ed. 2017) (footnotes omitted).

shareholder was held not liable for either tort or contract obligation of his wholly owned corporation."[34]

Because of these benefits, founders of even small businesses routinely choose the corporate form or another limited liability business form for the organization of their enterprise. If entrepreneurs want to remain legally identified with their businesses, they can organize them as sole proprietorships or partnerships. But the cost of doing so is the exposure to much greater financial and legal risks.

The corporate form insulates entrepreneurs from those risks and acts as a subsidy to entrepreneurs and business development by offering a way to shift those risks to creditors, tort victims, and the public at large. As David Millon has argued, "the best way to understand the purpose of limited liability is as a subsidy designed to encourage business investment. The subsidy comes at the expense of corporate creditors."[35] Indeed, "[b]y allowing entrepreneurs to externalize these costs of doing business, limited liability provides a subsidy paid for by uncompensated tort victims."[36]

In *Masterpiece Cakeshop,* the company argued it should be exempt from state anti-discrimination laws because of the religious values of its controlling shareholder,[37] while seeking to maintain the benefits of

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[34] GEORGE D. HORNSTEIN, CORPORATION LAW AND PRACTICE § 751 (1959); *see generally* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1.1 (2017) ("It is now accepted as one of the first principles of American law that those who own shares in corporations, whether such shareholders are individuals or are themselves corporations, normally are not liable for the debts of their corporations."); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991). The Supreme Court has recognized the distinction between the company and its shareholders even when there was only a sole shareholder. *See Braswell v. United States*, 487 U.S. 99 (1988) (sole shareholder has no Fifth Amendment right to resist a subpoena to the corporation for corporate documents that personally incriminate him).

[35] *See* DAVID K. MILLON, PIERCING THE CORPORATE VEIL, FINANCIAL RESPONSIBILITY, AND THE LIMITS OF LIMITED LIABILITY, 56 EMORY L.J. 1305, 1307 (2007).

[36] *Id.* at 1324.

[37] Throughout the litigation, it was presumed that Phillips was the dominant shareholder, and he stated in his Supreme Court briefs that he and his wife were the only shareholders. But he did not specify his percentage of share ownership nor did he state explicitly that he was the majority owner. *See supra*, note 24 at ii. Colorado does not require private companies to disclose their ownership structure, see COLO. REV. STAT. §§ 7-102-102, -90-501, and it was not apparent in the record whether the shareholding percentages had changed over time.

corporate separateness for all other purposes. The corporation had benefited from its separateness in countless ways, and Phillips had been insulated from actual and potential corporate liabilities since inception. Yet once the company was required to sell a wedding cake to a couple whose union Phillips did not want to support, the company and its shareholder asked the Supreme Court to disregard that separateness in order to avoid a regulation they would rather not obey. In effect, Phillips argued that the corporate veil was only a one-way ratchet: its shareholders can get protection from tort or contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil whenever the company is required by law to act in a way that offends a shareholder's beliefs.

But shareholders cannot have their cake and eat it too. As the Supreme Court had previously held, "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."[38]

Federal and state courts do pierce the corporate veil occasionally as an equitable remedy. Usually this occurs when corporate formalities are disregarded, when shareholders have used the veil to commit fraud, or when the corporate entity was created for the transparent purpose of

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Originally chartered in 1992, the company had gone through at least three business forms: it began as a corporation, became a non-profit corporation after the couple who were refused service filed charges of discrimination, and ultimately changed to a limited liability company before the Supreme Court proceedings. *See* Masterpiece Cakeshop Incorporated, Certificate and Articles of Incorporation of Masterpiece Cakeshop Incorporated (Dec. 2, 1992), available at http://tinyurl.com/yac5ol43; Masterpiece Cakeshop Ltd, Articles of Incorporation for a Nonprofit Corporation (Nov. 1, 2012), available at http://tinyurl.com/ycvhupdf; Masterpiece Cakeshop, Ltd., Articles of Organization (July 5, 2017), available at http://tinyurl.com/ybkn9ksx. While Phillips repeatedly equated his interests with those of the corporation, Phillips did not appear in its chartering documents of the latter iteration. The sole incorporator was an attorney, and the company's "initial principal office" was a law firm. *See* Masterpiece Cakeshop, Ltd., Articles of Organization (July 5, 2017), available at http://tinyurl.com/ybkn9ksx.

[38] *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946); *see Moline Props. v. Comm'r*, 319 U.S. 436 (1943) (holding that even a sole shareholder cannot seek to sidestep a corporation's separateness to gain a personal tax advantage).

evading state or federal policy.[39] But the "doctrine of piercing the corporate veil" remains "the rare exception, applied in the case of fraud or certain other exceptional circumstances."[40] In *Masterpiece Cakeshop*, as in most of the other similar cases, there was no indication that corporate formalities had been disregarded or that fraud had been committed. On the contrary, the company did not ask that the corporate veil be disregarded on any basis other than religious belief. When a corporation is created to circumvent state policy, veil piercing allows state policy to be effectuated. But in *Masterpiece Cakeshop*, exactly the opposite was occurring. Piercing the veil allowed for the circumvention of the state policy against discrimination.

To disregard corporate separateness in constitutional cases would create significant doctrinal uncertainty. Corporate separateness offers certainty in both corporate law and constitutional law; to relax that notion on the constitutional side would create the difficulties avoided on the corporate side by clear rules of separateness. If, for example, controlling shareholders can project their political and religious views onto the enterprise, courts will be forced to resolve questions about what degree and type of ownership constitutes control—a question to which corporate law provides no ready answer.[41] Would the religious shareholder have to own all the company's shares, a majority of shares, or simply be sufficiently dominant to control the company's management? Similarly, courts will have to determine the degree of unanimity among shareholders that would allow them to project their views onto the corporate entity. Even among family companies and closely-held enterprises, shareholders will have a variety of views as to religion, politics, and whether the company should discriminate. (Even in *Masterpiece*, it was not clear from the record whether Phillips was the majority or minority shareholder, and the religious beliefs of his shareholding spouse were only presumed.)

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[39] *See, e.g.*, *Anderson v. Abbott*, 321 U.S. 349, 362-63 (1944); *Ill. Bell Tel. Co. v. Glob. NAPS Ill., Inc.*, 551 F.3d 587, 598 (7th Cir. 2008); *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26-27 (1st Cir. 2000); *see also* Peter B. Oh, *Veil-Piercing*, 89 Texas L. Rev. 81 (2010); David Millon, *The Still-Elusive Quest to Make Sense of Veil-Piercing*, 89 TEXAS L. REV. 15 (2010); Thompson, *supra*, note 35.

[40] *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003).

[41] *See, e.g.*, Alex Poor & Michelle Reed, *The "Control" Quagmire: The Cumbersome Concept of "Control" for the Corporate Attorney*, 44 SEC. REG. L.J. ART. 1 (2016); *Hobby Lobby*, 573 U.S. at 757 n.19 (Ginsburg, J., dissenting). For a description of how these definitional difficulties were glossed over in the *Hobby Lobby* case, see Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, in *The Rise Of Corporate Religious Liberty* (Micah Schwartzman, Chad Flanders, & Zoë Robinson, eds., 2016).

Other difficulties abound. For example, it is standard for privately-held companies to have common shares and several series of preferred shares. How would courts determine which shareholder class's views and beliefs are to be projected onto the company? Another quandary would arise when a corporation is in the vicinity of insolvency. In such a situation, Delaware corporate law says that creditors become "the principal constituency injured by any fiduciary breaches that diminish the firm's value."[42] In that context, would creditors' beliefs be thus projected onto the corporation? Consider also the difficulties that would arise in the context of a transfer of control from one shareholder or group of shareholders to another. If a majority shareholder without religious beliefs wishes to sell to a buyer who does, would such a difference be material to regulators and providers of capital and thus a proper subject of required disclosure under federal securities law? Or could a religious seller mandate by contract that the sold enterprise maintain its religious personality after a sale?[43] Additional difficulties would arise when the enterprises asserting religious beliefs are limited liability companies. Should courts distinguish between manager-managed LLCs (such as Masterpiece Cakeshop) and member-managed LLCs? If so, should courts inquire into the degree of manager involvement? Finally, it is routine for companies to incorporate in Delaware when they in fact operate elsewhere.[44] Should that matter in the analysis?

These corporate law difficulties are inherent in any doctrinal effort to expand constitutional protections to corporations based on the views of shareholders. These difficulties do not vanish if constitutional veil piercing is restricted to closely-held corporations or even family-run enterprises. As Justice Ruth Bader Ginsburg emphasized in *Hobby Lobby*, "'[c]losely held' is not synonymous with 'small.'"[45] Some large and prominent corporations—Cargill ($113.5 billion in revenues, 160,000 employees), Koch Industries ($110 billion in revenues, 130,000 employees), Albertsons ($60.5 billion in revenues, 267,000 employees), Deloitte ($46.2 billion in revenues, 310,000 employees), and PricewaterhouseCoopers ($42.4

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[42] *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 102 (Del. 2007).
[43] *See* Elizabeth Sepper, *Zombie Religious Institutions*, 112 Nw. U. L. Rev. 929 (2018) (describing the rise of "zombie religious institutions" that have contractual commitments to religious identity but lack actual attachments to churches or associations of religious people).
[44] *See* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33 (2006-07); Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONT. PROB. 135 (2004).
[45] *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. at 757 n.19 (2014) (Ginsburg, J., dissenting).

billion in revenues, 276,000 employees), for example—are privately held.[46] To complicate matters further, some "family owned" companies are gigantic: Walmart and Ford are both examples of corporations with major share ownership retained in one family.[47]

Finally, it is worth noting that the fundamental principle of separateness is not undermined by any notion of shareholder primacy—i.e., the theory that shareholder interests should be prioritized over those of other corporate stakeholders. A mainstream view in corporate law holds corporations should be managed with the financial interests of shareholders utmost in management's mind.[48] But most states explicitly allow management to take into account non-shareholder interests,[49] and the notion of shareholder primacy has been and continues to be widely contested within the field as both a descriptive and normative matter.[50] In any event, these different views on shareholder primacy do not undermine the principle of corporate separateness. Shareholder primacy is simply a description of one view of the fiduciary duties of management. It does not mean that shareholders and the corporation are identical as a matter of legal rights and obligations.

III. The Implications of Separateness for Right-to-Discriminate Claims

There is no doubt that existing doctrine allows for corporations to bring constitutional claims and to assert constitutional rights, including

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[46] *See* Forbes, America's Largest Private Companies 2019, available at https://www.forbes.com/largest-private-companies/list/.

[47] *See Wal-Mart Says Walton Family To Sell Shares To Keep Lid on Stake*, Reuters (April 10, 2015), available at http://tinyurl.com/z; Christina Rogers, *Shareholders Again Back Ford Family*, WALL ST. J. (May 12, 2016), available at http://tinyurl.com/ybdhv97n.

[48] *See* Leo E. Strine, *The Dangers of Denial: The Need for a Clear-eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 776-77 (2015) (executives who take care of an "interest other than stockholder wealth" breach their fiduciary duties); Lucian Ayre Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

[49] *See* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEXAS L. REV. 579 (1992).

[50] *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); *see also* LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW (2006); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003); David K. Millon, *New Directions In Corporate Law: Communitarians, Contractarians, And The Crisis In Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

free speech[51] and, we will assume, even religious rights.[52] While we do not agree with all aspects of current doctrine in this respect, we do believe that corporations and other business entities can be proper constitutional claimants.[53] But the constitutional claims corporations assert must be those of the entity itself, not its shareholders.

In the iconic Pentagon Papers case, for example, the New York Times and the Washington Post claimed a First Amendment right to release secret documents the Nixon administration sought to keep hidden.[54] Both papers were for-profit, corporate entities. The Court validated the rights of the papers to publish the documents, and rightly so. The constitutional rights in question were those of the newspapers themselves (and by extension the readers of the newspapers), not the shareholders of the companies. The constitutional right of newspapers to publish material critical of the government is a function of the importance of such material to democracy and public discourse. The desires and interests of the shareholders of the companies publishing the papers were completely immaterial to the constitutional analysis. If anything, the shareholders of the companies could have been injured by the decision to publish because of fines, litigation costs, and the risk of retaliation.[55] But their objections, if any, were a matter of internal corporate governance and had no effect whatsoever on the standing of the corporations to claim the rights of free press and speech. The Court did not inquire whether the shareholders approved or disapproved of the newspapers' asserted rights; indeed it would have been bizarre if it had.

In this respect, for-profit corporations are distinct from membership associations, in that the latter represent and embody the legal

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[51] *See New York Times Co. v. United States*, 403 U.S. 713 (1971); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *see also Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down limits on independent political expenditures by nonprofit and for-profit corporations).

[52] While no case prior to *Masterpiece Cakeshop* stands for the proposition that for-profit corporations can be proper claimants under the religion clauses, we do not rest our argument on the notion that a for-profit company can never have such interests. For an expanded treatment of this question, see GREENFIELD, CORPORATIONS ARE PEOPLE TOO, *supra*, note 17 at 95-100. Here, we make the lesser point that corporations' religious claims, if they exist at all, cannot be mere projections of shareholders' religious views.

[53] *See* GREENFIELD, CORPORATIONS ARE PEOPLE TOO, *supra,* note 17 ; Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMM. 309 (2015).

[54] *New York Times Co.*, 403 U.S. 713.

[55] The movie The Post made these risks clear. *See* THE POST (Twentieth Century Fox 2017).

interests of their members, are deemed to share the values of their members, and have standing to sue on their members' behalf.[56] Corporations, in contrast, are legally distinct entities; they are legal persons in their own right. Their shareholders may have idiosyncratic investment objectives, distinctive and variable economic needs, and a diversity of political and religious beliefs. ExxonMobil and Masterpiece Cakeshop are not the Boy Scouts or the NAACP.[57] Though the Supreme Court may have once theorized corporations as akin to membership associations in some cases, that characterization no longer fits modern corporations, modern shareholding, or modern corporate law.[58]

Corporations stand in their own shoes as a matter of free speech law. Corporations, to be sure, can have a role to play in public discourse,[59] but they should not be presumed to act as conduits for the shareholders' points of view or to have standing to assert their shareholders' constitutional interests.

Having said that, we can imagine situations in which corporations' constitutional arguments do depend (at least in part) on characteristics of their shareholders. Consider, for example, the case of *Adarand Constructors, Inc. v. Peña*,[60] which challenged the federal government practice of giving preferential treatment, including additional compensation, to private contractors who subcontracted with companies controlled by racial minorities. The case concerned the government's award of such additional compensation to a contractor that awarded a subcontract to Gonzales Construction Company, which the government had certified as a "disadvantaged business enterprise." Under federal law, companies could receive that certification if they were "owned and controlled" by individuals who were considered "socially and economically disadvantaged," including individuals who are "Black, Hispanic, Asian Pacific, Subcontinent Asian, [or] Native American." Another contractor, Adarand Constructors, Inc., not so certified, sued to stop the government from offering advantages to contractors that subcontracted with minority businesses. Adarand claimed the law violated its right to equal protection.

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[56] *See Hunt v. Wash. St. Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).
[57] *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *NAACP v. Button*, 371 U.S. 415 (1963).
[58] *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1707 (2015) (describing changes in corporations in the late nineteenth century that were "at odds" with associational view).
[59] *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).
[60] 515 U.S. 200 (1995).

In effect, Adarand was saying that the winner of the contract, Gonzales Construction, had a race, and its race worked to Adarand's disadvantage. This was a paradigmatic equal protection claim: the claimant alleges that the government is imposing burdens and bestowing benefits on the basis of a suspect racial classification. The only oddity was that the claim was brought by a for-profit corporation. The federal statute classified the subcontractors according to criteria that included the racial composition of those who "owned or controlled" them. Some corporations benefited from the classification and some were hurt by it. One way to read the Court's ruling striking down the classification would be that a corporation should be considered to have a race, and it should be presumed to have the race of its shareholders.

This case is relevant to our discussion of speech and religious rights in the discrimination cases because the analogy is tempting.[61] If a corporation can have a race, based on the race of its shareholders, why should it not have a religion based on the religion of its shareholders?

But that is not the correct way to understand *Adarand*. The Court in *Adarand* did not hold that corporations have the race of their shareholders.[62] The better way to understand *Adarand* is as support for the corporation's standing to bring a constitutional equal protection claim if it is being regulated to its disadvantage on the basis of the race of its shareholders (or the race of *another* corporation's shareholders). This makes constitutional sense. We believe *Adarand* was wrongly decided in that it subjected remedial racial classifications to strict scrutiny, but the Court was not incorrect in assuming the corporation was a proper plaintiff to bring the constitutional claim. That does not mean the corporation has the race of its shareholders, however. It means, instead, that the corporation has standing to bring an equal protection claim if it is disadvantaged by a law that classifies it according to the race of its shareholders. The same would be true if the corporation was being classified according to the race of its employees or customers.[63] The

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[61] During oral argument in *Hobby Lobby*, Chief Justice John Roberts asked the government lawyer a pointed question as to whether corporations could have a race. Transcript of Oral Argument at 53, *Burwell v Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354).

[62] See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (reasoning that corporations "ha[ve] no racial identity and cannot be the direct target of ... alleged [racial] discrimination")

[63] Cf. Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2077 (2006) ("when characterizing the corporation's race, the relevant decisionmaker may also look beyond the shareholders' race. There are a number of plausible nonshareholder bases from which corporate racial identity may be derived. The relevant decisionmaker might look to the corporation's customers, managers,

problem is the classification based on race plus the disparate treatment of corporations based on the classification. The corporation has standing to bring the claim because it is the *corporation* that suffers the injury from the classification.

Here again, we should resist importing into constitutional doctrine unconsidered or contested notions about corporate law. Shareholders and corporations are not the same, and constitutional law should not assume they are. Courts can respect corporate "personhood" — they can consider corporations distinct from their shareholders — while simultaneously believing it to be constitutionally illegitimate for the government to distinguish among corporations on the basis of the race of their shareholders.[64] The classification itself is constitutionally problematic, regardless of whether the classification is on the basis of the race of the shareholders, employees, or customers. It is the *corporation* that is injured by the classification, and the corporation is a proper constitutional claimant in such a case.

One could imagine an *Adarand*-type case that would arise on the basis of a religious classification. A jurisdiction that purposely imposed a burden of some kind on a corporation because the company had a dominant shareholder who was religious would violate the Exercise Clause.[65] The same would be true if a burden were imposed because a corporation's typical customers or employees were of a certain religion. In either case a corporation hurt by those laws would be a proper constitutional claimant. But that would *not* mean that the company's constitutional interests were the mere projection of the interests of its shareholder or employees. Instead, the classification itself was the problem, and the harmed party was a corporation, and the corporation can bring its own claim.

But it is inapt to draw an analogy between cases like *Masterpiece Cakeshop* and *Adarand*. In the latter, the law at issue made distinctions among corporations based on a suspect racial classifications. The law was by definition non-neutral. Compare this with the claims typically made when corporations assert a constitutional right to discriminate. The regulations at issue — anti-discrimination laws that apply to companies

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employees, or other agents, in addition to where the business is located, the communities it serves, and its principal activities and purposes.").

[64] For a more comprehensive discussion of this point, see GREENFIELD, CORPORATIONS ARE PEOPLE TOO, *supra*, note 17 at xxx.

[65] *Church of the Lukumi Babalu Aye, Inc. and Ernesto Pichardo v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017).

doing business as public accommodations — do not target companies whose shareholders (or employees or customers) are members of a given religion or hold certain political beliefs. The regulations are generally applicable, and no corporation is disadvantaged by a classification of its shareholders (or employees or customers). The companies are not disadvantaged vis-a-vis other companies at all, and the companies themselves do not suffer any market disadvantage or constitutional harm. On the contrary, in these cases the corporations are asserting a right that would give them a comparative advantage vis-a-vis other companies — a waiver of regulations that apply to every other company. (More on this in Part IV.)

In cases such as *Masterpiece Cakeshop*, the shareholders do not suffer as shareholders in any way. Of all the corporate stakeholders, it is only religious employees who are even arguably burdened by an anti-discrimination law since they are the ones who must act in the workplace in a way that (according to them) is inconsistent with their religious or political views. Here again, constitutional doctrine needs to be aware of distinctions long made in corporate law. Shareholders are not the company, and the roles, rights, and obligations of shareholders are different from the roles, rights, and obligations of employees. This is true even when a given individual is both an employee and a shareholder. In *Masterpiece Cakeshop*, for example, Jack Phillips was both a shareholder of the company and its employee, and it is crucial to make a distinction in the analysis as to what he was required to do as a shareholder and as an employee. Colorado law did not require him to do, say, or create anything *as a shareholder* that even arguably violated his political and religious beliefs. To the extent state law required him to act contrary to his beliefs, it did so in his role *as an employee* of a company designated as a public accommodation under Colorado law.

But the company did not assert a constitutional claim on behalf of its employees. The rights of employees to assert a religious objection to a work requirement of an employer or to a requirement of state or federal anti-discrimination law is a separate question. If Masterpiece had a *corporate* speech interest at issue, it was not because it had an employee who disagreed with Colorado law. For the company to have a claim, it would have to allege that the company *qua* company has been coerced into saying or doing something contrary to "those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[66] There is nothing inherent in the operation of Masterpiece Cakeshop or in its chartering documents that would make obedience to state anti-discrimination law inconsistent with "its very existence."

[66] *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

This is not to say that corporations cannot assert First Amendment interests, but merely that courts should take care that the rights asserted belong to the corporation and not to someone else. If Phillips — or a religious employee of any company — had an individual First Amendment interest here, it cannot be used as the basis for a regulatory waiver for the company. Even if the individual employee could assert a constitutional right to be exempted from state law obligations, the company cannot leverage a solitary employee's objections as the basis for a company-wide exemption from those obligations. Nor can a company present the religious or political beliefs of a single shareholder, a group of shareholders, or even the majority of shareholders, as its own. Corporations are legal persons distinct from their shareholders; a company's constitutional claims are its own and cannot be derived from mere projections of alleged burdens on the shareholders.

IV. Skepticism of Corporate Claims of Regulatory Exemptions

The corporate status of a party asserting a constitutional defense to a claim of discrimination matters not only in evaluating who "owns" the claim but also in evaluating its sincerity. In both free speech and free exercise cases, courts typically do not inquire deeply into the sincerity of the beliefs asserted.[67] But when corporations are the constitutional claimants, there is reason to be less sanguine about the sincerity of the asserted beliefs, especially when the asserted interest would operate to exempt for-profit entities from regulations applicable to competitors.

Cases that turn on the sincerity of political and religious beliefs are examples of situations in which the economic nature of corporations should make a difference in constitutional analysis. We say this even though in most First Amendment cases the economic nature of the corporation should not affect the constitutional analysis. Economic motivations for speech should not necessarily receive a lower level of constitutional respect than non-pecuniary motivations. There is no intrinsic reason why economic arguments and values are constitutionally different from the charitable, and democratic debate often depends on economic matters and benefits from the views and expertise of those involved in the market.[68] For example, in the public debate over increases in the minimum wage, speakers on both sides of the question may be motivated in whole or in part by financial and economic concerns. But that does not mean that the arguments either for or again a wage increase

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[67] *See Dale*, 530 U.S. 640; *Hurley*, 515 U.S. at 573-74.

[68] *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

should receive lower levels of protection than if they were motivated by altruism or public spiritedness.

This general rule needs adjustment, however, in situations in which an assertion of belief would operate to give a for-profit entity an exemption from regulations applicable to competitors. Because of their economic nature, corporations tend to seek market advantages wherever and however they can. Human beings are of course motivated by self-interest, but it is the rare human who reduces all decisions to the economic. And though it is possible for for-profit corporations to care about the non-economic – just as humans can care about the economic – the nature of corporations is that they are uniquely and particularly focused on gaining competitive advantage. Such is their essence and purpose, and if they fail to achieve it, they will cease to exist.

But marketplace success can come by way of regulatory advantage as well as competitive advantage. If a company is able to avoid regulatory requirements applicable to competitors, it will gain a competitive advantage that will flow financially to its bottom line. Because for-profit corporations exist to seek out economic advantage, when they can gain competitive advantage over other market participants by asserting political beliefs, they will have a tendency to overstate or manufacture such beliefs. Companies that do not assert constitutionally protected beliefs will find themselves competing at a disadvantage on grounds that have nothing to do with efficiency.[69]

In cases like *Masterpiece Cakeshop*, the corporation asserts religious and political beliefs to obtain an exemption from anti-discrimination law its competitors are required to obey. The religious companies win a competitive advantage not from the quality of their products or services but from their assertion of religious beliefs. It is no answer to this concern to assert that discriminatory companies suffer a competitive disadvantage by refusing service to certain customers. For one thing, it is hardly clear that denial of service to a politically disfavored group imposes costs on a business. The opposite may be true if the business can seize upon their discriminatory purpose as a way to create a

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[69] *See* Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 79 (2013)("the religiously structured business exempted from a regulatory requirement does have a competitive advantage over businesses that compete within that niche for purely commercial reasons... the existence of that competitive advantage provides an incentive to represent that one has religious objections to compliance with some regulatory requirement.").

market niche of like-minded customers.[70] Moreover, in an efficient marketplace, the denial of service to a segment of the population raises costs to that population by narrowing their choices. And it is often costly to comply with laws requiring companies to enact and follow policies and practices to guard against discrimination. For these reasons, corporations should not be empowered to invoke at will the political or religious views of their shareholders in order to obtain exemptions from generally applicable laws and regulations that the corporation finds too costly.

It is worth remembering that anti-discrimination protections are not the only laws that corporations could attack on the basis of putative religious or political beliefs. Corporations' claims to be exempt from anti-discrimination laws may serve as a template for claims to be released from other regulatory obligations. Some corporate directors might in fact consider themselves duty-bound to adopt the political views of some subset of the company's shareholders in order to claim exemptions from the greatest numbers of applicable laws and regulations. A corporate claim to be exempted from minimum wage laws or pollution limits could result from a shareholder's sincerely-held belief in laissez faire economics.[71] A corporation whose dominant shareholder believes a woman's place is in the home could sue to be exempted from state or federal parental leave mandates.[72] A corporation with a religiously devout shareholder could assert the right to require employees to attend devotional services as a condition of employment, in contravention of Title VII of the Civil Rights Act.[73]

Recognizing or allowing corporations to assert the political and religious views of their shareholders would create a slippery slope that is unnecessary and easily avoidable. Without rigorous judicial scrutiny of the sincerity and good faith of a corporation's putative political and religious

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[70] *See* Amanda Holpuch, *Chick-fil-A Appreciation Day Brings Huge Crowds to Fast-Food Chain*, THE GUARDIAN (Aug. 1, 2012), available at http://tinyurl.com/y8veq28m (describing how eating at fast food chain Chick-fil-a became an act of resistance by opponents of LGBTQ+ rights).

[71] *Cf. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (considering nonprofit organization's claim that minimum wage laws infringed its free exercise rights).

[72] *Cf. Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (considering religious school's claim for an exemption from the Fair Labor Standards Act so that it could pay female teachers less than male teachers and below the minimum wage).

[73] *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (holding that, notwithstanding the deeply held beliefs of the shareholders, a manufacturing company could not require a non-religious employee to attend a mandatory "devotional service" each week).

beliefs, companies can claim a "Road to Damascus" conversion on any number of political or religious concepts. The risk of subterfuge and puffery would be significant.

V. Conclusion

Corporate "personhood" has long been controversial. The concept became even more so after the Supreme Court expanded corporate speech rights in *Citizens United* in 2010 and recognized corporate religious interests in *Hobby Lobby* in 2014.[74] Both cases were roundly criticized as inappropriately expanding corporate "personhood."

Perhaps ironically, however, a proper understanding of corporate personhood should result in a *restriction* of corporate rights in cases in which a corporation claims exemption from otherwise applicable laws on the basis of the political views or religious beliefs of its shareholders. One aspect of corporate personhood is that the corporation is its own legal entity, with its own legal claims, and with its own constitutional interests. The corporation is not the same as its shareholders, and corporate law has long insisted on the distinction between the two. Indeed, shareholders themselves have long enjoyed protections and benefits arising from this longstanding distinction. The constitutional claims of corporations, then, must be based on something more than a mere projection of their shareholders' interests or beliefs.

In discrimination cases such as *Masterpiece Cakeshop* and others percolating through the lower courts, it is pivotal that this distinctions between corporation and shareholders be maintained. Corporations should not be allowed to defend against discrimination actions brought against them by asserting the religious or political interests of their shareholders. The corporate tub must sit on its own bottom. If shareholders and corporations are distinct as a matter of corporate law, they should be distinct as a matter of constitutional law.

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[74] *See Citizens United*, 558 U.S. 310; *Hobby Lobby*, 573 U.S. 682.