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Schrödinger's Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations

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SCHRÖDINGER’S CORPORATION: THE PARADOX OF RELIGIOUS SINCERITY IN HETEROGENEOUS CORPORATIONS

CATHERINE A. HARDEE

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SCHRÖDINGER'S CORPORATION: THE PARADOX OF RELIGIOUS SINCERITY IN HETEROGENEOUS CORPORATIONS

CATHERINE A. HARDEE*

Abstract: Consider a corporation where one group of shareholders holds sincere religious beliefs and another group of shareholders does not share those beliefs but, for a price, will allow the religious shareholders to request a religious exemption to a neutrally applicable law on behalf of the corporation. The corporation is potentially both religiously sincere and insincere at the same time. A claim by the corporation for a religious accommodation requires the court to solve the paradox created by this duality and to declare the corporation, as a whole, either sincere or insincere in its beliefs. Although the Supreme Court and scholars have noted some of the particular issues raised when determining the religious sincerity of shareholders' claims, to date, no one has engaged systematically with the question of whose religious sincerity should be attributed to the corporation when shareholders hold heterogeneous, or diverse, religious beliefs.

This Article provides a framework for determining the sincerity of corporations with religiously heterogeneous shareholders. It proposes an attribution inquiry that engages in a meaningful dialog between state corporate law and theories of religious sincerity. What little attention attribution has received tends to suggest that state law regarding corporate control provides an easy corollary. It does not. Corporate law is designed to enable contracting in pursuit of economic efficiency. Allowing control to stand in for attribution would lead to the monetization of religious sincerity, harming third parties and diminishing the value of religious liberty both in the courts and in the public eye. This Article considers alternative ways in which principles of state corporate law can shape the attribution inquiry to better delimit exemptions while still protecting the value of religious liberty. Ultimately, it concludes that meaningful restrictions should be placed on the ability of shareholders with heterogeneous religious beliefs to contract among themselves for corporate religious sincerity.

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INTRODUCTION

Despite the robust scholarly debate surrounding the Supreme Court's controversial decision in *Burwell v. Hobby Lobby Stores, Inc.* and the future of corporate free exercise claims, at least one important component of corporate religious accommodation claims has remained undertheorized: How should courts evaluate the religious sincerity of corporations whose shareholders do not hold the same religious beliefs?¹ Religiously heterogeneous shareholders within a single corporation create a paradox, as some shareholders are sincere in their religious beliefs, whereas other shareholders disavow any religious sincerity. The Supreme Court determines whether a corporation is entitled to a religious exemption to neutrally applicable laws not by determining the religious nature of the corporation itself, but by examining the religious sincerity of corporate shareholders. Like Schrödinger's famous thought experiment, the religiously heterogeneous corporation can, thus, be conceived of as simultaneously sincere and insincere.² This duality must be resolved, however, when the corporation requests a religious exemption—the court must “open the box” to peer inside the corporation and declare it either sincere or insincere.

This Article identifies a gap in the theory underpinning the Supreme Court's analysis of corporate religious sincerity and provides a solution: a two-part inquiry into both the veracity of the shareholders' claimed religious beliefs *and* an additional attribution inquiry into whose religious beliefs should be considered in determining the sincerity of the corporation. The attribution question is not as simple as asking who within the corporation has the power to decide to seek an exemption.³ State corporate law is not structured to consider shareholders' motives, other than profit motives.⁴ Thus, a control test will in-

¹ See 573 U.S. 682 (2014).

² Schrödinger's thought experiment was this: A cat sits in a box with a poison that can be “triggered by the radioactive decay of a subatomic particle,” which is “capable of being in multiple states at once—meaning that a particle could be decaying or not decaying at the same time.” Therefore, the poison could be released and not released, and the cat could be dead and not dead. It is not until the box is opened that the cat's actual state is determined. Rachel Feltman, *Schrödinger's Cat Just Got Even Weirder (and Even More Confusing)*, WASH. POST (May 27, 2016, 10:43 AM), https://www.washingtonpost.com/news/speaking-of-science/wp/2016/05/27/schrodingers-cat-just-got-even-weirder-and-even-more-confusing/?utm_term=.0fc8b0172c06 [<https://perma.cc/DK5R-WXL4>].

³ See *infra* Part II.B.

⁴ Although there is great debate regarding whether corporations may *only* be motivated by profit, it is much less controversial to acknowledge that profit is the only motive that the law can be certain all shareholders have in common. See George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1321 (advocating for allowing broader corporate purpose but still recognizing profit as a universal motivation); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 346–47 (2015) (listing prominent scholars who have endorsed the view that profit is the only appropriate end for corporations).

evitably lead to the monetization of religious sincerity, which is detrimental to third parties and diminishes the value of religious liberty both in the doctrine and public perception.⁵ A framework is needed to determine attribution that harmonizes the conflicting value systems behind religious liberty and state corporate law. This Article evaluates the potential factors that courts should consider in creating such a framework when they are inevitably faced with a claim for accommodation on behalf of a religiously heterogeneous corporation. Ultimately, it concludes that the law should limit the ability of corporate participants to contract for the religious sincerity of the corporation.

The Supreme Court's recent recognition that at least certain corporations may qualify for religious exemptions to neutrally applicable laws has fueled an intense debate among constitutional and corporate scholars. Scholars of law and religion have given significant attention to a variety of issues raised by the Supreme Court's rapidly evolving religious accommodations jurisprudence.⁶ Corporate law scholars, on the other hand, have largely focused on how granting corporations the right to exercise religion impacts state corporate law and the balance of power between corporations and the state.⁷ Although a few scholars have analyzed the impact of corporate religious rights on the question of religious sincerity, little attention has been paid to the theoretical complexity caused by the interplay between religious sincerity and the practical realities of corporate law.⁸

⁵ See *infra* Part II.C.

⁶ See, e.g., Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. 121, 122 (2018) (describing the shift in free exercise jurisprudence from "dynamic" to "prophylactic free exercise"). See generally Kent Greenawalt, *Individual Conscience and How It Should Be Treated*, 31 J.L. & RELIGION 306 (2016) (surveying current literature on religious exemptions); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018) (critiquing the Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* as failing to meaningfully engage with the conflict between LGBT rights and religious liberty).

⁷ See generally Vincent S.J. Buccola, *States' Rights Against Corporate Rights*, 2016 COLUM. BUS. L. REV. 595 (considering the evolving jurisprudence's effect on states' traditional powers to define corporations); Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777 (2015) (arguing that *Hobby Lobby* in fact embodies a progressive view of the corporation); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016) (describing the mismatch between existing corporate law and the burden placed on it by religious rights for corporations); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015) (arguing corporate rights constitute an end run around the democratic process). See also generally Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 109–10 (2015) (criticizing *Hobby Lobby* as inconsistent with state corporate law).

⁸ See generally Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185 (2017) (focusing on *Hobby Lobby*'s impact on traditional religious-sincerity doctrine and assuming the control test will apply for attribution); Richard Carlson, *The Sincerely Religious Corporation*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 165 (2018) (comparing religious sincerity tests between for-profit and nonprofit organizations and noting that complexity will grow when the Court faces

In adjudicating the religious sincerity requirement of accommodation claims, courts have long recognized that it is appropriate to judge the sincerity, or truthfulness, of the claimant's beliefs but not the accuracy or centrality of such beliefs.⁹ Given this relatively settled doctrine, it is perhaps not surprising that the majority in *Hobby Lobby* summarily dismissed the government's concern about the difficulty in determining the religious sincerity of a corporation based on the sincerity of its shareholders.¹⁰ Focusing on the familiar question of whether the shareholders were truthful in their claim that they hold certain religious beliefs, the Court stated that corporate religious sincerity claims are "seemingly less difficult" than some individual religious sincerity claims, such as claims made by prisoners, whose veracity is more dubious.¹¹ It is true that courts can determine shareholder veracity under the same rubric as individual religious sincerity, with only a slight modification to include the claimant's sincere belief that their religion commands them to run their corporation in accordance with their religious beliefs.¹²

In focusing solely on veracity, however, the Court greatly underestimated the complexity of evaluating a request for a religious exemption by a single entity—a corporation—when that request is based on the divergent beliefs of numerous individual shareholders under a virtually infinite set of business structures and contracts. A partial explanation of the Court's oversight is that corporations that have come before the Court thus far have all had shareholders with homogenous religious beliefs.¹³ In *Hobby Lobby*, however, the Court strongly signaled a willingness to consider religious exemption claims by corporations with shareholders who hold heterogeneous religious beliefs.¹⁴ When one group of shareholders shares a sincerely held religious belief and another group of shareholders does not share those beliefs but either acquiesces to, or opposes the religious exemption, a corporation is conceivably both religiously

shareholder disagreement); Ben Adams & Cynthia Barmore, Recent Decision, *Questioning Sincerity: The Role of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2014/11/67_Stan_L_Rev_Online_59_AdamsBarmore.pdf [<https://perma.cc/MJ85-YXS9>] (reviewing *Hobby Lobby's* treatment of religious sincerity but only noting that religiously heterogeneous corporations create a difficult question).

⁹ See *infra* Part I.A.

¹⁰ 573 U.S. at 717–18.

¹¹ *Id.* at 718.

¹² See *infra* Part II.B.

¹³ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1720 (2018) (focusing only on Jack Phillips' religious beliefs); *Hobby Lobby*, 573 U.S. at 720 (noting that the claimants all share "a sincere religious belief that life begins at conception").

¹⁴ See *Hobby Lobby*, 573 U.S. at 718–19 (allowing for the possibility of religious exemption claims when shareholders disagree and refusing to rule out public corporations claiming exemptions); see also Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 26–27 (2015) (arguing shareholder unanimity is not required under *Hobby Lobby*).

sincere and insincere at the same time. Although it is interesting to ponder this duality in the abstract, the reality of corporate exemptions must produce a single answer—the corporation is either allowed to claim the exemption or it is not.

Once religiously heterogeneous corporations are introduced, religious sincerity takes on a new dimension. The courts must determine whose sincerity should be attributed to the corporation for purposes of the exemption. It may be tempting to simply apply existing state corporate law rules regarding corporate control to the question of attribution.¹⁵ Although this solution avoids any claim that states are discriminating against religious exercise, mechanically applying state law and attributing to the corporation the beliefs of the shareholder who has control over the underlying religious practice leads to unsatisfactory results.¹⁶ State corporate law is largely defined by permissive private ordering that allows shareholders to customize their business through contracting to optimize the value of the enterprise for all participants.¹⁷ Corporate law's commitment to the freedom to contract has implications both for corporations where (1) a dissenting shareholder wishes to prevent the controlling shareholder from claiming an exemption on behalf of the corporation, and (2) assenting agnostic shareholders are willing to bargain with religious shareholders to allow the latter to claim an exemption.¹⁸

In cases involving dissenting shareholders, corporate law is generally reluctant to step in to mediate claims of unfairness by minority shareholders, unless the controlling shareholder is thwarting the minority's reasonable expectations of profit.¹⁹ In certain circumstances, because corporate law locks the dissenting shareholders' capital investment in the company, this reluctance could force dissenting shareholders to practice the majority's religion via their investment in the corporation, even if it conflicts with their own religious be-

¹⁵ The majority in *Hobby Lobby* suggested that applying state corporate law would be the appropriate course of action. 573 U.S. at 719 (noting that courts should look to the corporation's governing structure and "underlying state law" to resolve disputes between shareholders). Some scholars have echoed this language. See Chapman, *supra* note 8, at 1240 ("[R]esponsibility for sincerity would seem to belong to whomever the law assigns authority to determine the institution's religious 'beliefs.'").

¹⁶ See *infra* Part II.C (describing the harm to third parties from greatly increased exemptions and the damage that monetizing religious sincerity could do to religious liberty in the courts and the public's perception).

¹⁷ See Pollman, *supra* note 7, at 651 (describing the development of corporate law and permissive contracting).

¹⁸ This Article uses the term "assenting agnostic shareholder" to refer to a shareholder who does not share the other shareholders' religious convictions but sees the corporation's religion as simply another bargaining chip to be used in negotiating for corporate benefits and control.

¹⁹ See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 318–22 (1998) (discussing the shareholder primacy norm in the context of minority-oppression cases). Because corporate law is largely a matter of state law, the protections afforded to minority shareholders vary by state. See *infra* Part III.A.

liefs.²⁰ To avoid this dilemma, the law should either require unanimous shareholder agreement to claim a religious exemption or provide an exit mechanism for dissenting shareholders to remove their capital investment from the corporation.²¹

Using corporate control to determine attribution for corporations with assenting agnostic shareholders is even more problematic. Corporate law's commitment to the freedom of contract would allow parties to monetize religious sincerity in ways that undermine religious liberty. Take, for example, a religious investor with a sincere belief that his religion compels him to use his investments in startups to prevent as many corporations as possible from engaging in practices his religion deems sinful—such as providing contraceptive coverage.²² This religious investor could offer an entrepreneur seed funding in exchange for a class of shares amounting to a small equity interest in the company. The equity interest could provide him the contractual right to determine whether the employees of the corporation receive contraceptive coverage in their health plan. As the company grows, the religious investor's share of the company shrinks even more, but he retains control over the religious practice at issue for the exemption. If control equates to attribution, the religious shareholder would be the only shareholder required to demonstrate religious sincerity—a burden he could meet. The entrepreneur will have received funding, and the religious shareholder will have successfully fulfilled his religious mission by purchasing the right to prevent a corporation from engaging in what he believes to be sinful behavior.

Corporate law would not take umbrage, but rather, it would celebrate such a bargain, as this contracting allows the parties to monetize a new feature of corporate control—religious sincerity.²³ This result, however, is less in keeping with the value of religious liberty. It could lead to widespread exemptions, re-

²⁰ See *infra* Part III.A.1.

²¹ See *infra* Part III.A.2.

²² This scenario is not farfetched. Two major Christian denominations have actively encouraged their parishioners to run their businesses in accordance with their faith, including seeking religious exemptions to change cultural norms. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2548 (2015) (documenting movement by certain churches “to enforce traditional morality in the law of abortion and marriage and to seek conscience-based exemptions from laws that depart from traditional morality”). This movement is already in the venture financing space. See *infra* note 178 and accompanying text. In addition, the Catholic Church routinely contracts to ensure its religious practices are continued in the healthcare corporations with which it affiliates, oftentimes even long after the religious affiliation ends. See generally Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929 (2018).

²³ See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1432 (1989) (“It turns out to be hard to find any interesting item [of corporate control] that does not have an influence on price.”).

sulting in increased harm to third parties. Perhaps even more troubling, the monetizing of religious sincerity would likely lead to the perception that religious beliefs are a commodity like any other, diminishing the value of religious liberty both in the eyes of the courts and the public at large.²⁴

A different test for attribution is needed. Given the virtually infinite set of combinations of corporate ownership and control, the question of attribution is necessarily a multifaceted inquiry into not just the number of religious versus agnostic shareholders, but also into each shareholder's ownership and control interests, and the religious practices of the corporation itself.²⁵ The stunning diversity of corporate structures makes bright-line rules difficult to draw without being both over- and under-inclusive.²⁶ The alternative is a balancing test that weighs the factors of shareholder number, ownership, control, and corporate practice to determine whether the corporation should be considered sincere given the relative interest of the religious shareholders on each metric. Determining how to balance these factors for attribution requires more thoughtful consideration than the Supreme Court has yet given to the ultimate question of what exactly gives a corporation the right to exercise religion. The contours of any eventual tests for attribution may depend largely on whether the doctrine for attribution is developed by the federal courts, the states, or both. The question of proper attribution combines the determination of religious sincerity with the secular realities of private contracting in corporate law. Although the former is generally the province of the federal courts, the latter falls squarely within the power of states to define corporate purpose and structure.²⁷

This Article proceeds in three Parts. Part I reviews the existing law and literature on religious sincerity for individuals and details how the process of determining the veracity of shareholders' religious beliefs largely tracks the preexisting doctrine.²⁸ Part II identifies the additional attribution inquiry necessary to determine corporate sincerity and explores why a mechanical application of corporate law's control rules is a poor fit with the values underlying religious sincerity.²⁹ Part III provides a framework for determining questions of corporate attribution for corporations with religiously heterogeneous shareholders. It considers the question of attribution for both corporations with dissenting shareholders and corporations with assenting agnostic shareholders and

²⁴ See *infra* Part II.C.

²⁵ See *infra* Part III.B.2.

²⁶ In addition, bright-line rules have the potential to provide a roadmap for monetizing religious sincerity by alerting parties to the minimum contracting necessary to guarantee a finding of religious sincerity. See *infra* note 270 and accompanying text.

²⁷ See *infra* Part III.C.

²⁸ See *infra* Part I.

²⁹ See *infra* Part II.

lays out a series of factors for courts to consider, including control, financial interest, number of shareholders, and corporate action. After considering the merits of crafting bright-line rules or a balancing test using these factors, it reaches the conclusion that the ability to contract for religious exemptions should be greatly limited. Finally, Part III concludes with a discussion on whether states or the federal courts should define the test for attribution.³⁰

I. VERACITY AND CORPORATE RELIGIOUS SINCERITY

Determining whether a party claiming a religious accommodation is sincere in their religious beliefs has long been a fraught endeavor for academics and courts.³¹ Although some scholars argue that courts should simply avoid the question, the law has developed a framework to analyze religious sincerity focused on the veracity with which the claimant holds their beliefs rather than the accuracy of such beliefs.³² The introduction of religious exemptions for corporate entities did not require great changes to the existing doctrine regarding veracity, in large part because the petitioners' religious sincerity was not questioned.³³ The Court still discussed sincerity, but rather than focusing on the corporation, the Court evaluated the sincerity of the shareholders' religious beliefs, including the religious imperative to run one's business in accordance with one's religious beliefs.³⁴

A. Individual Religious Sincerity

Defining the nature of religion and, in turn, what constitutes religious sincerity within a legal framework has long challenged scholars.³⁵ Religion is

³⁰ See *infra* Part III.

³¹ See Chapman, *supra* note 8, at 1188–89 (describing the history of doctrinal and scholarly work relating to adjudicating religious sincerity).

³² See Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1645 (2018) (differentiating freedom of religion from freedom of speech in that religious objectors must prove their religious sincerity to receive protection, whereas speakers do not have to prove that they actually believe what they say); Chapman, *supra* note 8, at 1201–02 (describing the doctrine but noting “many scholars remain uneasy with the Court’s conclusion”); *infra* Part I.A.

³³ *Hobby Lobby*, 573 U.S. at 717 (noting that “no one has disputed the sincerity of [petitioners’] religious beliefs”); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (noting that the baker was motivated by “his sincere religious beliefs”).

³⁴ *Hobby Lobby*, 573 U.S. at 701 (describing the Hahns’ belief in running their business “in accordance with their religious beliefs”); *id.* at 703 (describing the Greens’ similar beliefs); see *infra* Part I.B.

³⁵ See, e.g., Kent Greenawalt, *Judicial Resolution of Issues About Religious Conviction*, 81 MARQ. L. REV. 461, 463–65 (1998) (analyzing various aspects of religiousness in theory and practice); Anna Su, *Judging Religious Sincerity*, 5 OXFORD J.L. & RELIGION 28, 28 n.1 (2016) (listing a “micro-sampling of the gargantuan academic effort” to define religion in the law).

multifaceted, and the role it plays in the life of believers varies.³⁶ Due to its perceived importance to the human experience, religion is given a special place and special protection in our legal system.³⁷ Religious accommodations or exemptions to neutrally applicable laws have been available through the Free Exercise Clause of the First Amendment,³⁸ as well as for certain federal laws under the Religious Freedom Restoration Act (RFRA)³⁹ and the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁴⁰ Such protections necessitate some inquiry by the courts into what constitutes religion and religious belief. All religious accommodations require the plaintiff to show sincere religious beliefs.⁴¹ The sheer breadth and diversity of religious beliefs and practices, however, raises the omnipresent specter that courts may incorrectly deem unusual or unorthodox beliefs insincere.⁴² As such, several justices and numerous scholars have advocated that courts should refrain from inquiring into the religious sincerity of parties.⁴³

³⁶ Greenawalt, *supra* note 35, at 463–64 (describing three different kinds of “religiousness”); Su, *supra* note 35, at 28 (noting that religion can be “a belief, a form of identity, and a way of life”).

³⁷ Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481, 481 (2017) (“In ways almost beyond counting, our legal system treats religion differently, subjecting it both to certain protections and certain disabilities.”). There is, however, a recent movement among scholars questioning whether religion deserves a special place in the law. *See generally* Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012) (noting that the law treats religion as special but questioning the justifications for such treatment).

³⁸ Although, such claims were limited by the Court’s controversial decision in *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 872–83 (1990). The majority and concurring opinions in *Masterpiece Cakeshop* have placed *Smith*’s continuing viability into doubt. *See Masterpiece Cakeshop*, 138 S. Ct. at 1719–40; Beery, *supra* note 6, at 121.

³⁹ Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

⁴⁰ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2018).

⁴¹ *See* Chapman, *supra* note 8, at 1187 (“The rule is simple: to qualify for a religious accommodation, a claimant must demonstrate sincerity.”); *see also* Holt v. Hobbs, 574 U.S. 352, 360–63 (2015) (holding that RLUIPA requires sincerity); *Hobby Lobby*, 573 U.S. at 717 n.28 (“To qualify for RFRA’s protection, an asserted belief must be ‘sincere’ . . .”).

⁴² *See* Su, *supra* note 35, at 42 (noting that “if a religion seems incredulous or is not at all familiar to a judge then it [could] evoke skepticism and therefore, less protection”).

⁴³ Justice Jackson most famously opposed adjudicating religious sincerity in the context of a fraud conviction for claims of spiritual healing. *United States v. Ballard*, 322 U.S. 78, 92–95 (1944) (Jackson, J., dissenting); *see also* Chapman, *supra* note 8, at 1206–10 (analyzing Justice Jackson’s objection to inquiring into the religious sincerity). More recently, Justice Ginsburg’s dissent in *Hobby Lobby* stated that the courts should stay “out of the business of evaluating” religious sincerity. 573 U.S. at 771 (Ginsburg, J., dissenting) (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)). Many scholars share this view or see adjudication of religious sincerity as a necessary evil. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 957 (1989); Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 10 (2015) (discussing the danger of “feigned” religious beliefs that take advantage of accommodations); *see also* Chapman, *supra* note 8, at 1189 (noting this is the “mainstream view among legal scholars”). *See generally* Ronald J. Krotoszynski, Jr., *The Apostle*,

Despite this theoretical confusion, the courts must create and, in fact, have created workable rules to determine religious sincerity.⁴⁴ In cases involving “strong incentive[s] to feign religious sincerity” to claim a beneficial exemption, courts have been willing to consider “any fact which casts doubt on the veracity of the” claimant.⁴⁵ A financial windfall or other secular motive for accommodation can provide evidence of insincerity.⁴⁶ Further, the claimant’s own statements or behaviors that are inconsistent with the claimant’s purported beliefs, or even a lack of “fit” between the purported belief and the “claimant’s religious narrative,” can provide additional evidence of a phony claim.⁴⁷ Such determinations regarding witness credibility and whether a party is fraudulently claiming religious beliefs are firmly within the courts’ expertise.⁴⁸

Although courts must adjudicate religious sincerity, to avoid imposing orthodoxy on religious claimants, they should focus not on the accuracy of a religious tenet but, rather, on the sincerity of the claimant’s belief in that tenet.⁴⁹ Stated differently, the court should not consider “whether a religious claim is

Mr. Justice Jackson, and the “Pathological Perspective” of the Free Exercise Clause, 65 WASH. & LEE L. REV. 1071 (2008).

⁴⁴ See Chapman, *supra* note 8, at 1201 (“In the course of making and enforcing law, . . . the government cannot avoid deciding matters that touch on religion and religious beliefs.”); Su, *supra* note 35, at 33 (noting that “courts must discharge their judicial duty and sometimes decide and define what is religion for the purpose of protecting its exercise”).

⁴⁵ Adams & Barmore, *supra* note 8, at 60 (quoting *Witmer v. United States*, 348 U.S. 375, 381 (1955)). Insincere claims motivated by profit or other secular goals have been found in a variety of contexts from exemptions to military service or drug laws to fraudulent transfers in bankruptcy. *Id.* at 60–62.

⁴⁶ See Chapman, *supra* note 8, at 1231–32 (describing cases involving ulterior motives for exemptions). Although ulterior motives can be evidence of insincerity, the fact that an individual is motivated by both religious sincerity *and* an additional motive (such as profit or secular beliefs) should not defeat the religious sincerity of her claim. *Id.* at 1233.

⁴⁷ *Id.* at 1234–37 (detailing cases where courts found claimants insincere due to evidence that their statements to the Court were not truthful based on previous actions or statements). Evidence of “inconsistencies between a litigant’s purported beliefs and his behavior” is more debatable because people often “fail[] to live up to [their] religious ideals.” Adams & Barmore, *supra* note 8, at 63. Even so, actions can be “strongly probative of sincerity.” *Id.*

⁴⁸ See Adams & Barmore, *supra* note 8, at 63–64 (“Claims of religious sincerity are ultimately questions of fact, and courts have a wealth of experience weighing witness credibility.”) (footnote omitted).

⁴⁹ See *id.* at 64 (identifying the risk that courts might conflate sincerity and orthodoxy). For example, the petitioners in *Hobby Lobby* believed that the contraceptives at issue were abortifacients. 573 U.S. at 691. The medical profession, however, agrees that the contraceptives are not abortifacients, even taking into account the petitioners’ own definition of when life begins. See Jen Gunter, *The Medical Facts About Birth Control and Hobby Lobby—From an OB/GYN*, NEW REPUBLIC (July 6, 2014), <https://newrepublic.com/article/118547/facts-about-birth-control-and-hobby-lobby-ob-gyn> [<https://perma.cc/X5UC-MDHN>] (summarizing scientific conclusions about contraceptive methods at issue in *Hobby Lobby*). That professional conclusion is irrelevant to the analysis of whether petitioners actually believed them to be abortifacients.

“true,” but it should determine “whether the claimant ‘truly’ believes it.”⁵⁰ Despite these efforts, some slippage between the two is likely inevitable, in part because it is easier to believe the claimant is sincere about a religious practice familiar to the factfinder.⁵¹

Although the dangers of orthodoxy slipping into the courts’ sincerity analysis should not be ignored, there are good reasons to take seriously the need to ferret out insincere religious claims. Insincere religious claims are inevitable, especially when there are benefits to be gained from religious accommodation.⁵² Allowing religious fraud to remove regulatory burdens on a claimant is rent-seeking behavior that should not be countenanced.⁵³ In addition, religious accommodation involves a “trade-off of public goods” where accommodation “is exchanged for administrative complication, financial costs, and, in some cases, increased burdens on others.”⁵⁴ In the case of claims involving exemptions based on the claimant’s alleged complicity in the sinful acts of others, the harm to third parties is especially acute. Such complicity-based conscience claims do not involve direct actions by the claimant but, rather, the claimant’s belief that a third party’s lawful conduct is sinful.⁵⁵ Complicity-based claims, thus, necessarily involve a claimant asking to shift the burden of their religious practice onto a third party for whom the regulation was designed to protect.⁵⁶

⁵⁰ Chapman, *supra* note 8, at 1202; *see also id.* at 1226 (“[A]ccuracy depends on the statement’s correspondence to observable reality external to the speaker[,]” whereas “[s]incerity depends on the statement’s correspondence to the speaker’s subjective belief.”).

⁵¹ *Id.* at 1229 (“The more implausible a factfinder believes the religious belief to be, the harder it will be for the factfinder to conclude that the claimant actually believes it.”); Su, *supra* note 35, at 41–42.

⁵² *See* Chapman, *supra* note 8, at 1211 (noting that “religious hucksters have long been a staple of the American experience”).

⁵³ *See id.* (discussing the costs of disregarding sincere religious beliefs as a method to protect against religious insincerity).

⁵⁴ *Id.* at 1214; *see also* Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717, 719 (2017) (“The impact of religious accommodations on others will affect decisions about whether to adopt an accommodation and the scope and form it will take.”).

⁵⁵ NeJaime & Siegel, *supra* note 22, at 2519. For example, in *Hobby Lobby*, the petitioners did not claim that the law forced them to use certain contraception. Rather, they objected to paying for insurance that some employees might use to fill a prescription for contraception that petitioners believed to be sinful. 573 U.S. at 691.

⁵⁶ *See* NeJaime & Siegel, *supra* note 22, at 2527 (“Complicity-based conscience claims are oriented toward third parties who do not share the claimant’s beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn.”); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1973 (2015) (arguing that courts should focus on third-party harms in complicity-based claims).

Equally troubling, the failure to take seriously questions of religious sincerity may have doctrinal implications. If a judge is suspicious of the claimant's religious sincerity but cannot adjudicate the issue overtly, the suspicion will likely creep into the other elements of the accommodation analysis, making bad law for future claimants.⁵⁷ In addition, insincere claims may directly affect another component of the accommodation analysis—whether the government can show that the regulation is the least restrictive means of achieving a compelling government interest. To meet its burden, the government may demonstrate that the number of legitimate or illegitimate demands for accommodation would undermine the regulation at issue.⁵⁸ Thus, the specter of a flood of insincere claims for exemptions may provide the government with justification to deny sincere claims.⁵⁹ Finally, “[w]hen the government gives a pass to those who insincerely claim the benefits of religious liberty, it erodes the value of that liberty in the eyes of the public.”⁶⁰ These concerns make it necessary to carefully consider questions of religious sincerity.

B. Hobby Lobby, Masterpiece Cakeshop, and Corporate Veracity

The Supreme Court has introduced corporate religious rights into this milieu and, along with them, the need to determine corporate religious sincerity. In *Hobby Lobby*, the Supreme Court granted religious exemptions under RFRA to three corporations seeking to avoid some aspects of the Affordable Care Act's (ACA) contraceptive mandate.⁶¹ The Court notes that each corporation is owned and operated by members of families who share the same sincerely held religious beliefs. The Green family “own[s] and operate[s]” and “retain[s] exclusive control” over Hobby Lobby Stores, Inc. and Mardel, Inc., two companies incorporated in Oklahoma.⁶² Both companies were operated through a management trust controlled by the Green family.⁶³ Members of the Hahn family “exercise sole ownership” of Conestoga Wood Specialties, Inc., a Pennsylvania corpora-

⁵⁷ See Chapman, *supra* note 8, at 1216 (“[S]uspicion creep can have the unintended effect of perverting a court’s articulation of the requirements for a religious accommodation claim, making it harder for sincere claimants in future cases to state a claim.”).

⁵⁸ See *id.* at 1221–22.

⁵⁹ See *id.*

⁶⁰ *Id.* at 1222 (noting a popular comedian who parodied prosperous churches and arguing that “the misperception that religious liberty entails the protection of phony religious claims undermines public support for the protection of sincere ones”).

⁶¹ 573 U.S. at 690–91.

⁶² *Id.* at 702.

⁶³ *Id.* at 703 n.15. This management trust is in itself an example of a contract to ensure religious continuity regardless of the sincerity of existing shareholders, as it requires the corporation to continue as its “religious identity,” “even after the company’s founder and family patriarch steps down.” See Sepper, *supra* note 22, at 958–59.

tion, and the family “control[s] its board of directors and hold[s] all of its voting shares.”⁶⁴

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Court heard the free exercise claim of Jack Phillips and Masterpiece Cakeshop, Ltd., who were seeking an exemption to Colorado’s anti-discrimination statute.⁶⁵ In its opinion, the Court entirely ignores the corporate party to the litigation. The Court never mentions the corporate party, not even its state of incorporation, other than to say that it is “operated” by its owner, Jack Phillips.⁶⁶ Throughout the opinion, the corporate party is simply referred to as a “bakery” or a “shop” and is discussed only in relation to Jack Phillips.⁶⁷ In fact, Masterpiece Cakeshop is a corporation incorporated in the state of Colorado and has an additional shareholder—Jack’s wife, Debra Phillips—who is never mentioned in the Court’s opinion.⁶⁸ The Court’s failure to acknowledge the corporate party makes it arguable that the Court did not conclusively establish a free exercise right for corporations. Given the haphazard way the Court has historically bestowed constitutional rights on corporations, however, there is reason to believe future decisions may treat corporate religious free exercise as a *fait accompli*.⁶⁹ As such, the Court’s treatment—or lack thereof—of the corporation’s religious sincerity may provide a useful data point.

⁶⁴ *Hobby Lobby*, 573 U.S. at 700–01.

⁶⁵ 138 S. Ct. 1719, 1719 (2018). The Court did not determine whether the plaintiff qualified for an exemption, resolving the case on the grounds of state animus towards religion in the administrative decision below. *Id.* at 1724. Despite never referencing the corporate party, the Court’s unusual remedy to the animus claim gave Masterpiece Cakeshop its requested exemption. *Id.* at 1732 (reversing judgment in its entirety); see also Chad Flanders & Sean Oliveira, *An Incomplete Masterpiece*, 66 UCLA L. REV. DISCOURSE 154, 175 (2019), <https://www.uclalawreview.org/an-incomplete-masterpiece/> [<https://perma.cc/X5TJ-2HAJ>] (noting the unusual remedy served as a “windfall” to Phillips).

⁶⁶ *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

⁶⁷ See, e.g., *id.* at 1723, 1724 (describing Masterpiece Cakeshop as “a bakery in Colorado,” and noting, “Jack Phillips is an expert baker who has owned and operated the shop for 24 years”).

⁶⁸ Brief for Petitioners at ii, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762, at *ii.

⁶⁹ See Adam Winkler, *Masterpiece Cakeshop’s Surprising Breadth*, SLATE (June 6, 2018, 10:29 AM), <https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html> [<https://perma.cc/5N74-M6CZ>] (arguing that *Masterpiece Cakeshop* will likely become precedent granting Free Exercise rights to corporations). In *Santa Clara County v. Southern Pacific Railroad Co.*, the Supreme Court famously created similar precedent through implication. 118 U.S. 394 (1886). The Court granted Fourteenth Amendment rights to corporations via a court reporter documenting “a comment from the bench to that effect in the headnotes to the opinion.” Pollman, *supra* note 7, at 659. The headnote was then used as precedent and forms the basis for the due process rights of corporations. *Id.*

1. Whose Sincerity Is Relevant?

The question of whose sincerity is relevant is a necessary precursor to the question of what beliefs a petitioner must claim for a corporation to be granted an exemption. Is it the religious sincerity of the corporation itself or some (or all) of the humans involved in the corporation?⁷⁰ By disregarding the corporate entity, *Hobby Lobby* and *Masterpiece Cakeshop* make it clear that shareholders are the relevant subjects of the sincerity analysis.⁷¹ The majority in *Hobby Lobby* disregards the corporate entity to focus on the shareholders as individuals using the corporation for their religious ends.⁷² The religious freedom at stake is the religion of the shareholders, not the corporation.⁷³ Religious sincerity is based on those who “own and operate” the corporation.⁷⁴ The Court in *Hobby Lobby* never ascribes religious beliefs or religious sincerity to the corporation itself.⁷⁵ Instead, the beliefs are attributed to the various shareholders of the corporations.⁷⁶

Rather than viewing religious rights as being held and exercised by the corporation itself, *Hobby Lobby* is better understood as allowing individuals to

⁷⁰ There is an existing test to determine the religious sincerity of an entity itself, but it has rejected the claim that a for-profit entity can be sufficiently religious to qualify as a religious entity. *See infra* notes 143–146 and accompanying text.

⁷¹ The problems inherent in the Court’s decision to disregard the corporate entity and focus on shareholders are well documented by many corporate scholars. *See infra* note 78 and accompanying text. Given the Court’s composition, however, a change in direction seems unlikely. Rather than encouraging reversal, this Article attempts to work within the parameters set by the Court thus far.

⁷² *See* 573 U.S. at 706 (“[I]t is important to keep in mind that the purpose of [the corporation] is to provide protection of human beings.”).

⁷³ *See id.* at 683–84 (“Protecting the free-exercise rights of closely held corporations . . . protects the religious liberty of the humans who own and control them.”). Although the Court initially included officers and employees in the rights-holding individuals who fall under the corporate umbrella, they drop out of the equation almost immediately. *See* Eric W. Orts, *Theorizing the Firm: Organizational Ontology in the Supreme Court*, 65 DEPAUL L. REV. 559, 588 (2016) (“What happened to the rights of employees when the topic of religion within the firm arose? They simply appear to have been ignored.”).

⁷⁴ *See, e.g., Hobby Lobby*, 573 U.S. at 717 (noting that the companies are “each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs”).

⁷⁵ *See* Catherine A. Hardee, *Who’s Causing the Harm?*, 106 KY. L.J. 751, 774–75 (2018) (detailing attribution of religious beliefs to the individuals but that “nowhere in the opinion does the Court so clearly ascribe a belief system to Hobby Lobby or Conestoga”).

⁷⁶ *See, e.g., Hobby Lobby*, 573 U.S. at 689–90 (noting religious sincerity, “the sincerely held religious beliefs of the companies’ owners”); *id.* at 691 (noting religious beliefs, “[t]he owners of the businesses have religious objections to abortion . . . [; i]f the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price”); *id.* at 720 (noting religious beliefs, “the Hahns and Greens have a sincere religious belief that life begins at conception”).

use a corporation to further their personal religious beliefs.⁷⁷ The corporation is merely a conduit for expressing the shareholders' religion, rather than an entity standing apart from the shareholders with its own religious identity.⁷⁸ One reading of the opinion is that the Court is willing to allow corporations to exercise religion when there is justification to ignore the corporate existence and focus directly on the individual shareholders. The Court is not making distinctions between or among corporations regarding which qualify for exemptions, but, rather, it is determining eligibility by the way the *use* of the corporation is related to the religious sincerity of the human beings involved.

This reading explains why the Court in *Hobby Lobby* refused to categorically rule out any type of corporation as capable of exercising religion. There are formal distinctions between types of corporations in corporate law—such as for-profit, nonprofit, benefit corporations, and religious corporations. The Court explicitly rejected these categories as a relevant metric for determining eligibility for exemptions.⁷⁹ The only category the Court did endorse—closely held corporations—is problematic.⁸⁰ First, the term “closely held” does not have a universal definition.⁸¹ Second, although some states do define closely held corporations, this formal distinction is unlikely to be outcome determinative, as it would include corporations that would be unlikely to qualify for religious exemptions—such as venture-capital-backed startups.⁸² In addition, the

⁷⁷ See Catherine A. Hardee, *Veil Piercing and the Untapped Power of State Courts*, 94 WASH. L. REV. 217, 250 (2019) (arguing the opinion disregards the corporate entity to allow shareholders to exercise their personal religion); Gregory A. Mark, *Hobby Lobby and Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value*, 65 DEPAUL L. REV. 535, 541 (2016) (noting that the corporations “exist solely as vehicles” for the shareholders rights).

⁷⁸ Corporate law scholars have criticized this aspect of the decision as being at odds with the fundamental principle of corporate law that the corporation is an entity separate from its shareholders. See, e.g., Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 149, 157 (Micah Schwartzman et al. eds., 2016); Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 948 (2016); Mark, *supra* note 77, at 540; Thomas E. Rutledge, *A Corporation Has No Soul—The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1, 17–18 (2014).

⁷⁹ *Hobby Lobby*, 573 U.S. at 708 (noting that “person” cannot mean “some but not all corporations”); *id.* at 709–10 (rejecting profit motive as disqualifying); *id.* at 685 (describing the limit on public companies claiming exemptions as practical, not categorical).

⁸⁰ See *id.* at 719 (“[W]e hold that a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.”).

⁸¹ See Pollman, *supra* note 78, at 164 (noting that there is no single definition for closely held corporation in corporate law and that the Court utilizes a “general understanding” of the term).

⁸² See, e.g., CAL. CORP. CODE § 158 (West 2019) (defining a “close corporation” as one with thirty-five or fewer shareholders, a statement in the articles of incorporation that it is a close corporation, and compliance with provisions in Section 202). Venture capital startups would be unlikely to pass the *Hobby Lobby* test, given that they are generally composed of a disassociated group of profit-driven investors who fund a large variety of businesses. See Patrick J. Kennan & Christiana Ochoa, *The Human Rights Potential of Sovereign Wealth Funds*, 40 GEO. J. INT’L L. 1151, 1168 (2009)

Court leaves open the possibility that a public corporation could qualify if the practical hurdles were overcome.⁸³ Thus, the relevant question is not whether the corporation is sincere but, rather, whether the *use* of the corporation demonstrates a sincere exercise of religion by the appropriate corporate participants.

Disregard for the corporate entity is even clearer in *Masterpiece Cakeshop* because the corporation is literally absent in the opinion, despite receiving the relief it sought.⁸⁴ Although the Court did not require a finding that either Jack Phillips or Masterpiece Cakeshop was sincere in order to hold that the Commission was not acting with religious neutrality,⁸⁵ it repeatedly articulated Jack Phillips' sincerity in his religious beliefs.⁸⁶

The argument that the Court views individual shareholders as the appropriate subjects of the sincerity inquiry is further supported by the Court's conclusion in *Hobby Lobby* that, in enacting RFRA, Congress did not intend to "discriminate" against people based on how they choose to run their business.⁸⁷ Despite this language, the *Hobby Lobby* decision clarifies that not all corporations will be able to claim religious exemptions.⁸⁸ The Court expressed its holding as limited "to closely held corporations."⁸⁹ In the opinion, the Court limits eligibility even further by taking pains to clarify why the corporations at issue qualify for an exemption even beyond their status as a "closely held corporation," focusing on the number of shareholders, the shareholders' control

("Venture capital firms are enterprises that use funds received from outsiders to invest in entrepreneurial ventures.").

⁸³ *Hobby Lobby*, 573 U.S. at 685 (noting that "numerous practical restraints would likely prevent" public companies from asserting RFRA claims).

⁸⁴ The Court's holding set aside the Commissioner's actions. *Masterpiece Cakeshop*, 138 S. Ct. at 1724. This included its order against Masterpiece Cakeshop. *Id.* at 1732 (reversing the Colorado Court of Appeals without limitation).

⁸⁵ *Id.* at 1731 (holding that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment").

⁸⁶ See, e.g., *id.* at 1723 ("The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions."); *id.* at 1724 (detailing Phillips' religious beliefs); *id.* at 1728 (detailing how Phillips' work intersects with his "deep and sincere religious beliefs"). Although the Court does not place any emphasis on the particular nature of the corporation at issue in the case, it seems unlikely that the Court would allow a publicly held supermarket corporation to claim a religious exemption.

⁸⁷ 573 U.S. at 691 (rejecting argument that the form of business determines whether RFRA claims are available).

⁸⁸ *Id.* at 691–93. Such distinctions are in stark contrast to the speech rights granted to corporations in *Citizens United v. Federal Election Commission*, where the Court went out of its way to grant free speech rights to *all* corporations. 558 U.S. 310, 365 (2010). Although presented with a narrow as-applied challenge by a non-profit corporation, the Court broadly held that the campaign finance restrictions at issue were facially invalid for all corporations, including public, for-profit entities. *Id.*; see Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 459 (discussing the voluntarily broad nature of the Court's holding).

⁸⁹ *Hobby Lobby*, 573 U.S. at 736.

interests and sincere beliefs, and the religious actions taken by the corporation.⁹⁰ Certain types of corporations—namely public corporations and those with dissenting minority shareholders—are singled out as potentially unlikely to qualify for exemptions.⁹¹ In the end, the majority explicitly rejects the dissent’s concern that their holding will lead to widespread exemptions by for-profit corporations.⁹²

Any distinctions between corporations are, at first blush, somewhat perplexing, as the underlying issue in the case was whether corporations fall under the definition of “a person” under RFRA.⁹³ In its analysis, the Court heavily relies on the Dictionary Act’s definition of “person,” that includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”⁹⁴ Despite this, the Court fails to note anything in the Dictionary Act that would suggest that some corporations constitute “persons” whereas others do not. Recognition that the human shareholders, not the corporation itself, are the subject of the Court’s sincerity inquiry harmonizes the apparent disconnect between the rejection of “discrimination” against and between corporations and the Court’s potential limitation of religious exemptions to a subset of for-profit corporations.

2. What Sincerity Is Required?

Notwithstanding the fact that the government did not contest the Hahns’ and Greens’ religious sincerity, it did dispute whether it is possible to “ascertain the sincere ‘beliefs’ of a corporation,” especially one with religiously heterogeneous shareholders.⁹⁵ Although the government’s argument is better read as identifying the difficulty in determining whose beliefs will be attributed to the corporate entity,⁹⁶ the Court provided a mixed response, alternating between the issue of attribution and a more traditional sincerity analysis.⁹⁷ The

⁹⁰ *Id.* at 718; see Jennifer S. Taub, *Is Hobby Lobby a Tool for Limiting Corporate Constitutional Rights?*, 30 CONST. COMMENT. 403, 419–20 (2015) (describing the apparent corporate attributes necessary to qualify for exemptions).

⁹¹ *Hobby Lobby*, 573 U.S. at 718–19 (indicating it is up to state law to determine which corporations with dissenting shareholders may claim exemptions); *id.* at 685 (noting that, as a practical matter, public corporations are unlikely to qualify for exemptions).

⁹² *Id.* at 705 (rejecting that their holding will allow “for-profit corporations and other commercial enterprises” to “opt out of any law . . . they judge incompatible with their sincerely held religious beliefs”) (internal quotations omitted).

⁹³ *Id.*

⁹⁴ *Id.* at 707–08 (quoting the Dictionary Act, 1 U.S.C. § 1 (2018)).

⁹⁵ *Id.* at 717.

⁹⁶ See *infra* Part II.

⁹⁷ See *Hobby Lobby*, 573 U.S. at 717–18 (discussing attribution for public corporations, then sincerity compared to institutionalized persons, then attribution for corporations with dissenting shareholders); see also *infra* Part II.A (analyzing the Court’s attribution discussion).

majority in *Hobby Lobby* rejected the notion that it would be difficult to determine the sincerity of for-profit corporations.⁹⁸ The opinion predicted that claims of corporate religion will be “less difficult” to adjudicate than the sincerity of religious claims by prisoners, who have a “well documented” propensity to “assert claims of dubious sincerity.”⁹⁹ With prisoner claims, as with any individual’s accommodation claim, the sincerity inquiry can be framed as a determination of whether an individual truly believes their claimed beliefs or is merely pretending to hold a belief to gain some benefit from the exemption.¹⁰⁰ Prisoners may have more incentive than most to lie about their religious sincerity to game a regimented system.¹⁰¹ The Court is correct that federal courts have a long pedigree in determining this type of sincerity.¹⁰² Given the potential for profit by escaping a regulatory burden, religious claims by for-profit corporations could raise a similar incentive to fabricate claims.¹⁰³ The Court is almost certainly correct that the federal courts can address the potential for shareholders falsely asserting religious beliefs on the same terms as other exemption cases.

Despite claiming simplicity, the Court in *Hobby Lobby* did recognize that corporate sincerity, even with religiously homogenous shareholders, is slightly more complicated than claims by individuals. The Court points to actions by the corporations that could arguably demonstrate the *corporation’s* sincerity. In shoring up the religious bona fides of the Greens, the Court notes that Hobby Lobby and Mardel close their stores on Sundays, at the expense of “millions in sales annually,” “refuse to engage in profitable transactions that facilitate or promote alcohol use,” “contribute profits to Christian missionaries and ministries,” and take out religious advertisements.¹⁰⁴ Taking actions that are opposed

⁹⁸ 573 U.S. at 717–19.

⁹⁹ *Id.* at 718 (noting that Congress demonstrated faith in the federal courts’ ability “to weed out insincere claims” by prisoners when it included “institutionalized persons” as a protected category in RLUIPA).

¹⁰⁰ See Chapman, *supra* note 8, at 1201–02 (noting that the sincerity inquiry is appropriately focused on whether the “claimant ‘truly’ believes” their asserted beliefs); *supra* Part I.A (discussing traditional test for religious sincerity); Adams & Barmore, *supra* note 8, at 60 (noting the incentive accommodations create to “feign religious sincerity”).

¹⁰¹ See Adams & Barmore, *supra* note 8, at 61 (“In the prison environment, both sincere and insincere religious accommodation claims are common, as intense regulation of mundane details of daily life gives rise to frequent conflict between government and religious interests.”).

¹⁰² See *id.* at 61–62 (detailing adjudication of religious accommodation claims by prisoners).

¹⁰³ See Carlson, *supra* note 8, at 181 (“When there is a reason to believe there is an ulterior motive for an assertion of religious belief, there is reason to be skeptical.”); see also Sepper, *supra* note 22, at 957 (noting that the financial benefits of being deemed a religious entity under The Employee Retirement Income Security Act of 1974 (ERISA) could lead to contracting to attain said benefits).

¹⁰⁴ *Hobby Lobby*, 573 U.S. at 703. In his concurrence in *Masterpiece Cakeshop*, Justice Thomas takes note of similar profit-sacrificing activities by Masterpiece Cakeshop. 138 S. Ct. at 1745 (Thomas, J., concurring) (noting that “Phillips routinely sacrifices profits” in furtherance of his faith by clos-

to the profit motive of the corporation help demonstrate the religious sincerity of the corporation by ruling out the most likely alternative motivation behind the corporation's expression of religion—profit. Although the Court notes no similar profit-damaging corporate activities by Conestoga, it does refer to a “board-adopted ‘Statement on the Sanctity of Human Life’” as evidence of the corporation engaging in religious activity.¹⁰⁵

Using corporate action to demonstrate religious sincerity for a corporation, even action that may arguably harm the corporation's bottom line, is problematic, including for corporations with homogeneous shareholders. None of the actions noted by the Court require any person involved in the corporation to hold sincere religious beliefs.¹⁰⁶ These corporate acts could be required by contractual remnants from a former religious insider that corporate actors are bound to continue.¹⁰⁷

In addition, the actions the Court noted could be taken by a cynical business seeking to cash in on religious customers—a form of religious “greenwashing.”¹⁰⁸ Determining whether a particular corporate action will help or hurt the bottom line is notoriously difficult. For example, the lost profits from

ing on Sundays, paying above averages wages, and not baking cakes “containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween”). Although Justice Thomas uses these activities as “evidence that Phillips’ conduct is expressive,” he marshals them in response to the argument that Masterpiece’s for-profit status negates the exercise of Phillips’ speech rights. *Id.* Arguably, he likely would find the same evidence compelling in determining the corporation’s religious sincerity.

¹⁰⁵ *Hobby Lobby*, 573 U.S. at 700 (quoting *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 382 n.5 (3d Cir. 2013)). This suggests that although corporate actions that disavow a profit motive may help demonstrate sincerity, they are not necessary.

¹⁰⁶ Management of the corporation has great latitude to make virtually any business decision that complies with the law, regardless of motive. *See Hardee*, *supra* note 77, at 235 (describing how corporate law allows management of corporations to take actions that exceed regulatory standards); Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 83 (2015) (“Indeed, corporations can even possess states that none of their members hold.”); *infra* Part II.B.1.

¹⁰⁷ For example, a provision requiring all corporate stores to be closed on Sunday could be placed in the corporation’s articles of incorporation and corporate management would be required to follow such dictates, even if the religious insider responsible for the provision had since left the corporation. *See Iuliano*, *supra* note 106, at 90–91 (demonstrating how a corporation can “adopt religious beliefs independent of the beliefs of their members” and, thus, is capable of having religious beliefs of its own). Such a provision is not merely theoretical. Mergers and other business combinations between secular and Catholic hospitals have led to “zombie” religious institutions where provisions in the merger documents require hospitals to maintain their “religious identity and/or restrictions” on treatment even after “they further no charitable mission, grant no role to religious orders, and have no Catholic ownership.” Sepper, *supra* note 22, at 940. These agreements can require “an eternity of compliance.” *Id.* at 941.

¹⁰⁸ The purchasing power of the Christian market is around \$5.1 trillion a year. *See Liza Porteus Viana*, *Faith-Based Marketing Can Tap into Powerful Consumer Base*, FOX BUS. (Sept. 28, 2011), <https://www.foxbusiness.com/features/faith-based-marketing-can-tap-into-powerful-consumer-base> [<https://perma.cc/EM92-63R8>] (discussing ways that corporations market themselves to Christian customers).

closing the store on Sunday may be more than made up for by religious customers who choose the store over its competitors because of its religious stance.¹⁰⁹

The Court's discussion is better read as proof of the *shareholders'* sincere belief that they must run their corporation according to their religious beliefs than as evidence of the *corporation's* religion.¹¹⁰ Religious sincerity for exemptions claimed by a corporation, thus, require a claim that shareholders have both a sincere religious belief that an action the law requires of the corporation is sinful *and* a sincere religious belief that it is sinful to own and operate a corporation engaged in that sinful activity.¹¹¹ These two prongs explain why the Court looks to both the individual shareholders' sincerity and the corporation's practices—as the Court notes, the Hahns and the Greens meet both requirements.¹¹²

For religiously homogenous corporations, requiring a belief that it is sinful to own a corporation engaging in sinful behavior should be limited to situations where the religious shareholders exercise ownership *and* control over the corporation.¹¹³ If an exemption were to require a belief that merely profiting from ownership in a corporation that engages in sinful behavior violates the claimants' religious beliefs, then whether the claimants own stock in other corporations that engage in that behavior could provide evidence that they are acting “inconsistently with their alleged religious beliefs.”¹¹⁴ This type of “narrative fit evidence” was not at issue in *Hobby Lobby*, although the Hahns and the Greens almost certainly have assets in the public stock market, which would

¹⁰⁹ The difficulty in determining whether corporate decisions were calculated to lead to increased profits led to the creation of the business judgment rule, which protects management from shareholders second guessing board decisions that lead to corporate losses. See Mocsary, *supra* note 4, at 1333 (describing the operation of the business judgment rule in the context of closely held corporations).

¹¹⁰ See Chapman, *supra* note 8, at 1235–36 (noting that courts will look at the “narrative fit” between the claimed belief and the “claimant’s religious biography”).

¹¹¹ These two prongs are conceptually distinct. A corporate owner may believe that their personal use of contraception is sinful but not believe that providing health insurance to their employees that covers contraception implicates them personally. They may also hold the religious belief that they are required to separate their religion from the commands of the secular government as much as possible. See, e.g., *Matthew* 22:21 (King James) (“Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”).

¹¹² See *Hobby Lobby*, 573 U.S. at 701 (“The Hahns believe that they are required to run their business in accordance with their religious beliefs and moral principles.”) (internal quotations omitted); *id.* at 703 (“Each [of the Greens] has signed a pledge to run the businesses in accordance with the family’s religious beliefs . . .”).

¹¹³ For heterogeneous corporations, a shareholder with a minority position in a corporation claiming an exemption could make passive ownership in other corporations relevant to the “narrative fit” of the claimed exemption. See *infra* note 250 and accompanying text.

¹¹⁴ Chapman, *supra* note 8, at 1234–37 (describing “narrative fit evidence”). Although not outcome determinative, this evidence can be used in determining sincerity. *Id.*

mean they were likely profiting from companies that provide the contraceptive coverage they refused to fund.¹¹⁵

Once the sincerity inquiry is properly focused on the shareholders of the corporation, the veracity of the shareholders' beliefs fits comfortably within the traditional sincerity analysis for individuals. The Court may focus on the truthfulness of the shareholders' beliefs, rather than their accuracy, with only the slight wrinkle that such beliefs must also include a claim that their religion requires them to run their business in accordance with their religious beliefs. This shareholder focused sincerity inquiry, however, fractures when confronting a corporation with shareholders who do not share the same sincere religious beliefs.

II. AN ATTRIBUTION INQUIRY IS NECESSARY TO DETERMINE CORPORATE RELIGIOUS SINCERITY

Although the corporate religious exemption cases have only involved corporations with religiously homogenous shareholders thus far, the Court left open the door to religious exemption claims by corporations with religiously heterogeneous shareholders. Because they involve shareholders with profit motives and shareholders with religious motives, these heterogeneous shareholder corporations raise an additional axis on which to adjudicate religious sincerity: whose beliefs should be attributed to the corporation for purposes of determining the sincerity of the corporate entity requesting the exemption? Although it may be tempting to adopt the least complicated answer—use the motivation of whomever controls the decision regarding corporate religion for the corporation—that solution is highly problematic. The laws governing corporate control have no sincerity requirement so equating attribution and control would allow parties to monetize religious sincerity in a way that is harmful to third parties and diminishes the value of religious liberty.

A. Exemptions for Religiously Heterogeneous Corporations

The similarities between the corporate shareholders in *Burwell v. Hobby Lobby Stores, Inc.* have prompted some scholars to hypothesize that both unanimous religious sincerity among owners and exclusive corporate control may be prerequisites for claiming a corporate religion exemption.¹¹⁶ The Court's

¹¹⁵ The fact of their concurrent ownership would be relevant to “fit,” even though the fact that Hobby Lobby voluntarily provided coverage for the same contraceptives under previous health plans was not. *See id.* at 1234–35 (cautioning that changes in belief over time or mistakes should not lead to a finding of insincerity).

¹¹⁶ *See* Taub, *supra* note 90, at 419–20 (arguing that all shareholders sharing the same religious beliefs is a potential prerequisite for claiming a corporate exemption under RFRA).

limited discussion of Jack Phillip’s ownership and control over the corporation in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* is consistent with that reasoning.¹¹⁷ Although that position is arguable, and may in fact be the ideal normative outcome, the Court’s failure to detail the other shareholders involved in the corporations and its dicta regarding dissenting shareholders and public corporations makes it likely that religious exemptions may be available to at least some corporations that do not fit the unanimous shareholder sincerity model.¹¹⁸

The Court’s corporate religion opinions, either intentionally or inadvertently, paper over complexities regarding the ownership of the corporations at issue. Jack Phillips is not the sole owner of Masterpiece Cakeshop. His wife is also an owner, although she is never mentioned in the opinion.¹¹⁹ Likewise, although the Green family operates Hobby Lobby through a management trust that holds all of the company’s voting shares, there are also nonvoting shares in the corporation that are “divided into various interests held by the individual members of the Green family.”¹²⁰ Perhaps the Court ignored these complications in its written opinion because it was confident that the religious sincerity of all owners of the corporations was accounted for, but it is possible that the Court used a definition of “own and operate” that does not require unanimity of ownership and control.

Even without reading into the background of the corporations at issue, the Court’s dicta in *Hobby Lobby* suggests that homogenous religious shareholder sincerity is not required. In response to concerns that dissenting minority shareholders might be forced to participate in the majority’s religious exercise, the Court notes that state law regarding intra-corporate disputes “provides a

¹¹⁷ The Court repeatedly stresses that Phillips “owns” the bakery. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723 (2018) (“the shop’s owner”); *id.* at 1723–24 (“The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public . . .”). In fact, Masterpiece Cakeshop has an additional owner, Debra Phillips, Jack’s wife. See *infra* note 150 and accompanying text.

¹¹⁸ See *infra* notes 240–245 and accompanying text (arguing the Court should require unanimous shareholder agreement to claim an exemption); *infra* notes 276–278 and accompanying text (arguing the best rule is de minimis shareholder ownership and control by non-religious shareholders).

¹¹⁹ Brief for Petitioners, *supra* note 68, at ii. Phillips’ brief to the Court does not mention whether Debra Phillips shares the same religious beliefs as her husband. This lack of attention to the other shareholder of Masterpiece Cakeshop might also suggest that there are different rules for religious exemptions that rely on a shareholder as an employee being personally forced to engage in allegedly expressive activity. See *infra* notes 147–151 and accompanying text.

¹²⁰ James Lesinski, *Caring for the Body and the Soul: Small Businesses Post-Hobby Lobby and HHS Contraceptive Rule*, 27 HEALTH MATRIX 495, 514 (2017) (describing the ownership structure of Hobby Lobby). Because it is a private corporation, there are no public disclosures regarding shareholders. What information is available was gleaned from what the corporation’s General Counsel chose to share during an interview. See *id.* at 514 n.127 (citing an interview with Peter Dobelbower, General Counsel of Hobby Lobby Stores).

ready means for resolving” such conflicts.¹²¹ This response suggests that a shareholder who does not share the sincerely religious views of the majority does not necessarily defeat the corporation’s religious sincerity, allowing for exemptions by religiously heterogeneous corporations.¹²²

Of note, the *Hobby Lobby* opinion says nothing about corporations with *assenting* agnostic shareholders, but it is logical to extend the Court’s reasoning to them.¹²³ Corporations with dissenting shareholders and assenting agnostic shareholders are both comprised of some shareholders who do not hold the same religious beliefs as those claiming the exemption. If a shareholder who objects to the controlling shareholders’ religious exercise through the corporation does not defeat the corporation’s claim for an exemption, it seems logical that a shareholder who does not share, but is willing to go along with, the controlling shareholder’s religious exercise would likewise not necessarily defeat an exemption. A contrary result would embrace the normatively problematic stance that a lack of unanimity is *only* acceptable if the controlling shareholder’s religious beliefs are being forced upon a minority shareholder.¹²⁴

Exemptions for corporations with heterogeneous shareholders combined with the Court’s dicta regarding public corporations broaden the inquiry even further. The Court refused to rule out the possibility that public corporations may claim religious exemptions, merely noting that sufficient shareholder agreement is unlikely to happen as a practical matter.¹²⁵ If unanimity of shareholder belief is not required, however, it is not at all clear that a number of

¹²¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 718–19 (2014). State corporate law, in fact, does not have such a mechanism that aligns well with forced religious practice claims by minority shareholders. See *infra* notes 207–239 and accompanying text.

¹²² See Carlson, *supra* note 8, at 196 (remarking that the courts will eventually face “intra-corporate disputes” regarding exemptions).

¹²³ See Adams & Barmore, *supra* note 8, at 65–66 (noting that courts will eventually need to face questions about religious sincerity in “nonuniform corporations”). The Department of Health and Human Services (HHS) has passed regulations under both President Obama and President Trump that provide for exemptions without unanimous shareholder sincerity. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pt. 2590; 45 C.F.R. pt. 147) (Trump final rule); Coverage of Certain Preventive Services Under the Affordable Care Act, 45 C.F.R. § 147 (2015) (Obama final rule).

¹²⁴ This rule would paradoxically allow a dissenting shareholder to curb the use of the corporation for religious purposes simply by supporting the majority’s religious exercise—even though still not sharing the majority’s religious faith.

¹²⁵ *Hobby Lobby*, 573 U.S. at 718 (stating “numerous practical restraints would likely prevent” assertions of RFRA claims by public corporations). The Court’s language in this section again suggests unanimity is not required. The Court merely states that it is unlikely that “unrelated shareholders . . . would agree to run a corporation under the same religious beliefs.” *Id.* at 717. Public corporations “agree” to take actions by electing directors who then choose to take those actions and only a plurality shareholder vote is necessary to elect directors. See, e.g., DEL. CODE ANN. tit. 8, § 216(3) (2020) (“Directors shall be elected by a plurality of the votes . . .”).

public corporations would be unable to gather the required shareholder assent. Many public companies have controlling shareholders or shareholder families.¹²⁶ In addition, the increasing popularity of dual class structures allows for small numbers of shareholders, sometimes individuals, to control the voting power of large public corporations.¹²⁷ In sum, it appears that although unanimous shareholder sincerity is sufficient to find corporate sincerity, it is not necessary.

Corporations with heterogeneous religious beliefs among their shareholders add a layer of complexity to the question of corporate sincerity. Unlike human beings, who have a singular identity, corporations are comprised of any number of people, all with their own values and motivations for corporate ownership.¹²⁸ One group of shareholders may sincerely believe in a religious practice whereas another group makes no claim that they share such beliefs. Heterogeneous shareholder religion, thus, creates the potential for asymmetry between the sincerity of some shareholders and the religious claims of the corporation. In addition to individual motivations, each corporation has its own unique structure that defines who within the corporation has what powers and benefits.¹²⁹ Thus, sincerity for a corporation is not a singular inquiry regarding the veracity of shareholders' beliefs but, rather, requires an analysis of all the

¹²⁶ See Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1279 (2017) (noting that 220 public companies on the Russell 3000 Index have one shareholder with more than fifty percent ownership).

¹²⁷ "One-fifth of companies that listed on U.S. stock exchanges last year had dual-class shares." Vijay Govindarajan et al., *Should Dual-Class Shares Be Banned?*, HARV. BUS. REV. (Dec. 3, 2018), <https://hbr.org/2018/12/should-dual-class-shares-be-banned> [<https://perma.cc/MHH5-LDEC>]. They are particularly popular with family-controlled firms and large tech companies, including tech giants like Facebook and Alphabet. *Id.*; see also Bebchuk & Hamdani, *supra* note 126, at 1279 (noting that "a sizeable minority of large, publicly traded firms" has controlling shareholders).

¹²⁸ A singular identity does not necessarily mean a singular focus. Individuals may be motivated to engage in one action for multiple reasons, some religious, some secular. These mixed motives do not defeat religious sincerity so long as the act is at least in part motivated by religious sincerity. See Chapman, *supra* note 8, at 1233 (arguing that only one sufficient motivation is necessary to meet the religious sincerity requirement, even if other non-sincere motivations exist). Corporate religious sincerity differs because the base unit by which sincerity is judged is the individual. See *supra* Part I.B.1. In religiously heterogeneous corporations, the corporation has mixed motives but each individual does not—some are sincere and some are unquestionably not sincere. See generally Mocsary, *supra* note 4 (advocating for the law to permit formalizing multiple corporate purposes due to the aforementioned variety of reasons for corporate ownership).

¹²⁹ See Easterbrook & Fischel, *supra* note 23, at 1417 ("The corporate code in almost every state is an 'enabling' statute. An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator and without effective restraint on the permissible methods of corporate governance."); Bernard S. Sharfman, *A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs*, 63 VILL. L. REV. 1, 21–22 (2018) (describing how private ordering allows each corporation to tailor itself to suit the unique needs of participants).

individuals who may be working together for various purposes and their varying levels of ownership and control.

To take a simple example, consider a corporation with two shareholders: Shareholder A holds sincere religious beliefs that life begins at conception, that certain contraception mandated under the ACA are abortifacients, and that it would be sinful for him to provide health insurance to his employees that covers such contraception.¹³⁰ Shareholder B affirmatively states she does not share these beliefs. Sincerity is not a question of ferreting out whether A and B are honest about their religious beliefs. Rather, it is a question of determining whose religious beliefs should be attributed to the single entity that is claiming the exemption (the corporation).¹³¹

The myriad possibilities for corporate control and structure complicate the question exponentially. Attribution may differ if A owns 90% of the corporation's common stock or if A owns only 10%. Beyond share ownership percentages, A and B may have entered into any number of agreements that divvy up control over the corporation. A may own nonvoting shares or a class of shares that elects the majority of directors. A and B may have entered into a contract giving A the right to determine the religious practices of the corporation writ large or a narrower contract that gives A the right to make decisions relating to employee contraceptive coverage. In addition, B might oppose the exemption or assent to it. As the number of shareholders increases, the potential for complexity grows. Given the virtually unlimited ways a corporation can be constituted, the question of which combinations of ownership, control, and contractual rights allow for religious shareholders to claim exemptions and which do not is a practical quagmire.

Assenting agnostic shareholders who agree to allow religious shareholders to use the corporation for religious ends do so in exchange for some financial or control benefit.¹³² When negotiating the myriad aspects of the corporation, the right to use the corporation for religious ends could become another "stick" in the bundle of corporate rights that can be monetized in the negotiations between shareholders in determining their relationship to one another and

¹³⁰ These are the beliefs held by petitioners in *Hobby Lobby*. 573 U.S. at 701.

¹³¹ This question could be reframed as determining whose burden is considered for demonstrating a burden on religious practice. In this example, there is a burden on A's religious beliefs, but B suffers no burden.

¹³² Benefits may include additional share ownership, reduced capital commitments, and control rights over other aspects of the corporation. The right to claim religious exemptions on behalf of the corporation could also serve to entice a reluctant investor to decide to invest in the corporation. *See infra* Part II.B.1.

the corporation.¹³³ The religious shareholder can gain concessions from the agnostic shareholder regarding the religious practices of the corporations in exchange for providing some financial or control benefit to the agnostic shareholder.¹³⁴ This relatively mundane reality of corporate practice becomes problematic in a religious setting because of the profit motive driving the agnostic shareholder. It is clear from religious sincerity doctrine that a pure profit motive defeats claims of religious sincerity.¹³⁵ Profit motives are de jure in corporate law, however, making it unclear whether corporate religious exemptions are justified when some shareholders have sincerely religious motives and others have a profit motive.

The Court's note that corporations may claim exemptions despite dissenting shareholders, if state corporate law permits it, suggests that some mixed motives among shareholders may be allowed.¹³⁶ If it is possible to claim an exemption with a dissenting shareholder, then unanimous shareholder sincerity cannot be required to find corporate sincerity. A shareholder dissenting to corporate religious practices *ex post*—after their investment is already locked into the corporation—may have the ability under state law to block religious practices that harm corporate profits.¹³⁷ If they lack that ability, however, the Court seems to suggest that the religious controlling shareholder may request a religious exemption over their dissent. Unlike an assenting shareholder, a dissenting shareholder does not introduce a profit motive into the corporation because they have not negotiated with the religious shareholder to allow the exemption. Although this scenario may be less troubling in relation to profit motives, it raises a host of issues regarding the religious rights of the minority shareholder.¹³⁸

The Court in *Hobby Lobby* ignores the complexity raised by attribution and instead questions why it would be more difficult to determine the sincerity of for-profit corporations than the sincerity of nonprofit corporations.¹³⁹ The answer is that nonprofit corporations do not suffer from the problem of profit motivation. Nonprofits do not exist to make a profit, in fact, they are prohibited from distributing corporate assets, and in most states they do not even have

¹³³ See Easterbrook & Fischel, *supra* note 23, at 1430 (describing how corporate governance terms are “fully priced in transactions among the interested parties”); Mocsary, *supra* note 4, at 1337–38 (describing the bundle of sticks of corporate ownership, including ownership and control rights).

¹³⁴ See Sharfman, *supra* note 129, at 21–22 (describing private ordering as a “bargaining process” for corporate governance arrangements).

¹³⁵ See *Hobby Lobby*, 573 U.S. at 717 n.28 (“[A] corporation’s pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.”); see also Chapman, *supra* note 8, at 1231–32 (noting that “financial windfalls” can be “powerful evidence of insincerity”).

¹³⁶ *Hobby Lobby*, 573 U.S. at 718–19.

¹³⁷ See *infra* Part III.A.1.

¹³⁸ See *infra* Part III.A.1.

¹³⁹ 573 U.S. at 718 (noting that the government conceded that RFRA would apply to nonprofits).

shareholders.¹⁴⁰ Rather, nonprofits exist to further a social mission with everyone involved in the nonprofit corporation, at the very least, sharing a belief in that social mission.¹⁴¹ Although members of a nonprofit, such as congregants of a church, might disagree over particular practices the organization wishes to engage in, the organization itself is the entity the courts evaluate, not its constituent members.¹⁴² Courts already make such determinations under Title VII, which allows “religious corporations” to discriminate on the basis of religion.¹⁴³ These determinations are made based on whether the corporation itself can legitimately be considered “religious” based on its “purpose, function, activity, and self-expression to the community.”¹⁴⁴ The entity is deemed religious, making any disagreements regarding religious practices among members irrelevant.¹⁴⁵ Corporate religious sincerity under RFRA, on the other hand, is not focused on the corporation itself, but, rather, it looks through the corporation to the individuals involved, making the disparity between shareholders’ religious beliefs a key consideration.¹⁴⁶

Religious exemptions for the expressive religious actions of a shareholder acting in their role as an employee add another potential wrinkle to the corporate attribution question. In many closely held corporations, shareholders do not just own and control the corporation—they also work as employees.¹⁴⁷ In *Hobby Lobby*, the shareholders were not required to demonstrate that they were personally involved in the distribution of the objected-to contraceptives or the administration of the company insurance plan; the corporation itself pay-

¹⁴⁰ See Macey & Strine, *supra* note 88, at 521–22 (describing structural differences between nonprofit and for-profit corporations).

¹⁴¹ See *id.* at 523. They may have other motivations for being involved in the nonprofit, but individuals with multiple internal motivations do not defeat sincerity. See Chapman, *supra* note 8, at 1233 (arguing that only one sufficient motivation is necessary to meet the religious sincerity requirement, even if other non-sincere motivations exist).

¹⁴² See Carlson, *supra* note 8, at 184–85 (describing how courts determine whether a corporation is a religious organization for purposes of Title VII, Section 702 of the Civil Rights Act of 1964 (Title VII)).

¹⁴³ *Id.* This legitimacy test has “easily rejected” for-profit companies as religious organizations, despite the religious sincerity of the individual owners, because the corporation is primarily secular in nature. *Id.* at 185–86.

¹⁴⁴ *Id.* at 185. Nonprofits that perform both secular and religious services are not always found to be “religious” under this test because of an entity’s mixed mission, but the “sincerity of the religious beliefs of [their] individuals[,] founders[,] and managers” is still irrelevant. *Id.* at 186.

¹⁴⁵ See *id.* at 185–86.

¹⁴⁶ Professor Carlson considers whether the sincerity of for-profit corporations under RFRA should be judged by the individual sincerity test or the entity legitimacy test and concludes that given *Hobby Lobby*’s focus on the religious beliefs of the individuals, it must be the former. *Id.* at 194–96; see also *supra* notes 70–94.

¹⁴⁷ See Mocsary, *supra* note 4, at 1328–29 (noting that in the early stages of the corporation, the founders likely work within the firm).

ing for insurance was sufficient to justify an exemption for all shareholders.¹⁴⁸ The Court in *Masterpiece Cakeshop*, however, spent significant time focused on Jack Phillips' acts as an *employee* baking the cake instead of any acts as an owner.¹⁴⁹ A claim that is both religious and expressive may then be based on a combination of share ownership, control, and employment, which further complicates the attribution analysis. A corporation could conceivably demonstrate that the corporation writ large is sincere because there is a sufficient presence of religious shareholders, but there may be an additional requirement that the shareholder-employee engaged in the expressive act is one of the religious shareholders.¹⁵⁰

B. Corporate Control Is Not the Appropriate Attribution Inquiry

One solution to the attribution inquiry is to look to “whomever the law assigns authority to determine the institution’s religious ‘beliefs,’” and if the individuals who have the power to control corporate action are religiously sincere, “a court should conclude that the institution [is] too.”¹⁵¹ This understanding finds support in *Hobby Lobby*, where the Court tasked state corporate law with determining whether a corporation with dissenting shareholders can claim an exemption.¹⁵² By drawing a parallel to a corporate decision to close their stores on the Sabbath, *Hobby Lobby* could be read as indicating that state law regarding corporate control will determine which shareholder’s sincerity is relevant for attribution.¹⁵³ In other words, whoever has the power to make the decision regarding the religious practice is the individual who must hold the sincere religious beliefs.

Although a control test is tempting in its ease of application, the majority in *Hobby Lobby* was not consistent in its consideration of corporate control. The majority notes that public corporations are unlikely to claim exemptions

¹⁴⁸ See 573 U.S. at 724 (noting the petitioner’s belief that the corporation providing the insurance was sinful).

¹⁴⁹ The focus in the opinion was on the creation of the cake and the expressive nature of that act. See, e.g., 138 S. Ct. at 1724 (“To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.”); *id.* (quoting Phillips that “to create a wedding cake . . . would have been a personal endorsement”). This focus is understandable given the nature of Phillips’ two claims: a Free Exercise and Free Speech claim. *Id.* at 1726. Although the majority only addressed the Free Exercise question, the speech elements of the claim cannot be ignored.

¹⁵⁰ The fact that Debra Phillips is never mentioned in the opinion, despite being a co-owner of the corporate party, suggests that the claim relates to Mr. Phillips’ rights alone, perhaps due to his role as the employee at issue. See *supra* note 68 and accompanying text.

¹⁵¹ Chapman, *supra* note 8, at 1240.

¹⁵² 573 U.S. at 718–19.

¹⁵³ See *id.* at 718.

because their *shareholders* are unlikely to agree to do so.¹⁵⁴ Shareholders, however, are not the individuals who have the power to determine corporate action in public companies—the board of directors makes such decisions.¹⁵⁵ The Court recognized this in *Citizens United v. Federal Election Commission*, where it tapped “the procedures of corporate democracy,” rather than the shareholders, with determining who speaks for corporations, including public corporations.¹⁵⁶

This disconnect arises because the Court’s holding in *Hobby Lobby* boils down to a determination that it is appropriate in some circumstances to ignore the corporate entity and to look at the religious liberty of the shareholders directly.¹⁵⁷ It is difficult to use corporate law to make consistent determinations regarding which corporations qualify for exemptions when those rules depend on an entity that the Court disregarded.¹⁵⁸ A mismatch results because both *Hobby Lobby* and *Masterpiece Cakeshop* make it clear that shareholders, rather than the corporation itself, have the right to religious freedom, but in corporate law, shareholders do not always equate to control and control does not equate to sincerity.

¹⁵⁴ *Id.* at 717.

¹⁵⁵ See Sharfman, *supra* note 129, at 23–24 (calling “the rule that provides the board with ultimate decision-making authority,” “the most important default rule under corporate law”). Arguably, shareholders control the board with the power to remove directors with whom they disagree, but in reality, the shareholder franchise in public corporations is notoriously weak. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 310 (1999) (“In both theory and practice . . . shareholders’ voting rights—at least in publicly-traded corporations—are so weak as to be virtually meaningless.”); Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 443–44 (2016) (noting the institutionalization of stock ownership and the minimal influence most stockholders have in the voting process).

¹⁵⁶ 558 U.S. 310, 361–62 (2010) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)); see Hardee, *supra* note 75, at 772–73 (distinguishing the Court’s differing treatment of corporate control in *Citizens United* and *Hobby Lobby*).

¹⁵⁷ See 573 U.S. at 707 (“[P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”); see also Hardee, *supra* note 77, at 250–51 (noting the rejection of a separate corporate entity); Mark, *supra* note 77, at 541 (“Note that to assert the rights of its owners’ equity, the collective acts of the entity are beside the point; entities exist solely as vehicles to ‘provide protection for human beings.’”).

¹⁵⁸ These distinctions are not made in *Citizens United*, where the Court granted speech rights to all corporations. See *supra* note 88 and accompanying text. Speech rights were granted to the corporation itself, with the power to determine corporate speech clearly placed in the hands of whomever controls the corporation. See Hardee, *supra* note 75, at 768. Perhaps the Court felt more comfortable granting speech rights to those who control the corporation because the right to speak does not require any personal sincerity.

1. Corporate Law Is Not Designed to Measure Sincerity

Using corporate control to substitute for attribution is attractive because it prevents allegations that the law is hostile to religion by using “religiously-neutral principles of law that govern the analysis of a corporation’s mental state in other contexts.”¹⁵⁹ But corporate law does not analyze the corporation’s mental state in other contexts. The focus of corporate law is on the contractual rights of parties, not their motivations.¹⁶⁰ Numerous scholars have documented the poor fit between corporate religious rights and corporate law.¹⁶¹

Corporate law is designed to facilitate contracting between private parties, not to adjudicate the public law rights of shareholders.¹⁶² In general, shareholders and management are allowed to contract between themselves for whatever set of financial and control benefits they desire.¹⁶³ Corporate law’s preference for private ordering is strongest when dealing with nonpublic, or closely held, corporations.¹⁶⁴ Shareholders of nonpublic companies may, either through the board of directors or between themselves, contract for nearly any corporate structure they choose. This includes dissolving the board of directors to manage the corporation directly and delegating corporate decision-making authority to corporate outsiders.¹⁶⁵ To the extent that private ordering harms those not party to corporate contracting, the law relies on external regulation to police the negative externalities of the corporate form.¹⁶⁶

¹⁵⁹ Chapman, *supra* note 8, at 1240.

¹⁶⁰ The only motive corporate law assumes, and occasionally requires, is a profit motive. Profit motives are required when minority shareholders’ financial interests are harmed by the majority’s other motivations. *See infra* Part III.A.1. At other times, profit is assumed as the default because it is the only motive all shareholders have in common. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1049 (1998) (“While real people must balance competing values, . . . corporations . . . just maximize shareholder value.”); Strine & Walter, *supra* note 4, at 347.

¹⁶¹ *See generally* Buccola, *supra* note 7; Pollman, *supra* note 7; Strine, *supra* note 7.

¹⁶² *See* Pollman, *supra* note 7, at 657 (noting that corporate law is not designed to answer constitutional questions).

¹⁶³ *See* Easterbrook & Fischel, *supra* note 23, at 1418 (noting that “corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy”).

¹⁶⁴ *See* Mocsary, *supra* note 4, at 1330 (noting that shareholder power “is at its apex” in firms with simple structures because the shareholders have complete ownership and control over the corporation).

¹⁶⁵ *See, e.g.*, MODEL BUS. CORP. ACT § 7.32 (AM. BAR ASS’N 2016) (permitting shareholder agreements that allow for changes to otherwise mandatory corporate law rules, such as running the corporation through the board of directors).

¹⁶⁶ This was not always the case. Private ordering did not always exist to the extent allowed today. Historically, the dangers of negative externalities from the corporate form were controlled by corporate law through, among other means, limited corporate purposes and the *ultra vires* doctrine. *See* Pollman, *supra* note 7, at 647–50 (detailing the history of corporate law).

The primary driver of corporate law is economic efficiency.¹⁶⁷ Parties are given great freedom to contract because it is believed that, in doing so, they will create corporate structures that maximize the value of the enterprise.¹⁶⁸ In determining value, one underlying presumption is that everyone involved in the corporation is motivated, at least in part, by a desire for profit.¹⁶⁹ Corporate law largely ignores other motivations, not because shareholders do not have them—for example, family legacy, continued employment, environmental protection, etc.—but because such goals are not necessarily common to all shareholders.¹⁷⁰ To the extent that some shareholders hold idiosyncratic values apart from profit, the law allows corporate participants to monetize those values through contracting to create the greatest overall value for all parties to the corporation.¹⁷¹ When disputes arise, the law does not parse out motives but, instead, seeks to enforce the parties' agreements. In doing so, it is believed that the value of the enterprise to all participants will be maximized.

2. A Control Test Would Allow Exemptions That Monetize Sincerity

The most telling evidence that corporate law is a bad measure of sincerity is that a corporation can engage in a practice without having a single living person in the corporation who agrees with it.¹⁷² Such a situation is problematic under *Hobby Lobby*, given the Court's focus on the sincere religious beliefs of the shareholders. Even assuming that the Court would require at least one cur-

¹⁶⁷ See Easterbrook & Fischel, *supra* note 23, at 1421 (arguing that corporate law permits private ordering to incentivize corporate actors to maximize economic efficiency). There are scholars who criticize this aspect of corporate law, arguing that corporate law should be driven by more communitarian values, including a more expansive view of corporate stakeholders. See, e.g., Ackerman & Cole, *supra* note 78, at 902.

¹⁶⁸ See Easterbrook & Fischel, *supra* note 23, at 1421 (describing how flexibility to contract for governance structures will “find the devices most likely to maximize net profits”). Some theories of the corporation that reject shareholder primacy still recognize that courts will “enforce explicit contracts among team members allocating rights and duties” because on balance respecting internal decision making is advantageous to the corporation and its various stakeholders. See Blair & Stout, *supra* note 155, at 284–85 (describing the rationale behind the enforcement of contracting under the team production theory of corporations).

¹⁶⁹ See Strine, *supra* note 155, at 441 (noting that although humans have varying interests, shareholders' “only common interest is in corporate profitability”).

¹⁷⁰ See *id.* (same).

¹⁷¹ See Easterbrook & Fischel, *supra* note 23, at 1426 (noting that contractual arrangements within corporations are “wonderfully diverse, matching the diversity of economic activity that is carried on within corporations”).

¹⁷² See Iuliano, *supra* note 106, at 92 (using the decision-making features of corporations to demonstrate that a “corporation will perform an action that not a single one of the decision makers wanted it to do”); see also Sepper, *supra* note 22, at 940 (describing how contracting can lead to institutions that continue their religious identity after all relationships with the original religious entity have ceased).

rent corporate participant to be religiously sincere, because corporate law encourages parties to contract for control to maximize corporate value, allowing control to stand in for the attribution inquiry opens up avenues to monetize religious sincerity.

For example, corporate law would not prevent a secular company looking to take advantage of the financial benefits of a religious exemption from selling a corporate share with control over the religious practice in question to a sincerely religious shareholder. Various contractual arrangements could give that religious shareholder very little ownership interest, except for the sole power to control the corporation's religious practices. This power could control the corporation's religious practices as a whole or only the religious practice relating to the claimed exemption.¹⁷³ Given that the religious exemptions claimed to date do not appear to result in a financial windfall for the corporation, this type of scenario may not be of great concern.¹⁷⁴

A far more likely scenario is a religious investor who wishes to prevent as many people as possible from engaging in practices he believes to be sinful. He may do so by investing in companies in exchange for the right to control the "religious practices" of the company, including claiming religious exemptions. Certain religious groups do not hide their intention to use religious exemptions to prevent what they see as sinful behavior that the law may no longer prohibit outright.¹⁷⁵ These groups encourage parishioners to run their businesses in accordance with their faith, including seeking religious exemptions that compel those dependent on the company, such as employees, to follow the religious practices of their employers.¹⁷⁶ In doing so, religious individuals are able to preserve traditional morals by utilizing religious accommodations for complicity-based exemptions, which attempt to enforce cultural norms by leveraging financial control—such as the provision of employer-supplied health insurance—to disincentivize "sinful" behavior in others.¹⁷⁷

¹⁷³ For example, the religious shareholder could be given a share that has the power to veto a particular decision by the board of directors, which could include decisions involving contraceptive coverage for employees. This type of "holy share" would find an analog in the "golden share" originally held by governments in privatized enterprises. See Andrei A. Baev, *Is There a Niche for the State in Corporate Governance? Securitization of State-Owned Enterprises and New Forms of State Ownership*, 18 HOUS. J. INT'L L. 1, 4 (1995) (describing golden shares in the privatization context).

¹⁷⁴ This scenario is not out of the realm of possibility, however, as there are some religious exemptions that provide financial incentives. See Sepper, *supra* note 22, at 957–58 (discussing the financial benefits to religious institutions who are not required to comply with costly ERISA regulations).

¹⁷⁵ See NeJaime & Siegel, *supra* note 22, at 2548 (discussing the mobilization of some Christian denominations "to enforce traditional morality in the law of abortion and marriage and to seek conscience-based exemptions from laws that depart from traditional morality").

¹⁷⁶ See *id.* at 2548–50 (providing examples of such encouragement).

¹⁷⁷ See *id.* at 2552 (explaining the process of preservation through transformation).

Investors are no exception to this trend.¹⁷⁸ Religious shareholders could choose to invest in corporations with assenting agnostic shareholders for purely business motives because the religious shareholders believe it is the most profitable use of their time or capital.¹⁷⁹ But religious shareholders may also consider the investment itself a religious exercise by creating more business entities that are operated in accordance with their religious faith, including seeking religious exemptions to prevent “sinful” behavior by others.¹⁸⁰ Investing to expand the number of business entities who can claim religious exemptions could be considered a religious end in itself.¹⁸¹

If there is a group of people who value something—such as the power to control a corporation’s religious actions—the market for corporate control is designed to respond with the ability to buy it.¹⁸² Agnostic entrepreneurs seeking to finance a new or existing business may be willing to exchange control over a religious exemption (for example, the right to determine the contraceptive coverage for employees) for a secular benefit like securing capital.¹⁸³ Early stage religious investors could use contracts to lock in control over a religious exemption for relatively low amounts of capital—bringing new meaning to the term “angel investor.”¹⁸⁴ As the company grows, the religious investor

¹⁷⁸ For example, Praxis provides training for entrepreneurs looking for funding with an emphasis on “Redemptive Entrepreneurship,” defined as “the work of joining God in creative restoration through sacrifice, in venture building and innovation.” *Mission and Model*, PRAXIS LABS, <https://www.praxislabs.org/mission-and-model> [<https://perma.cc/HUR5-J4DM>]. Praxis advertises a network of religious investors who work with their entrepreneurs to build businesses that further Christian ideals. Their website declares: “The future of culture largely depends on the next generation of entrepreneurs. And our culture needs entrepreneurs who are formed by the gospel.” *Id.*

¹⁷⁹ For example, two business acquaintances may decide to enter into a joint venture because they value each other’s business acumen, and it is merely a coincidence that one believes her religion dictates running the business in line with her religious beliefs whereas the other does not.

¹⁸⁰ This Article assumes the sincerity of the religious shareholder, including their belief that they have a religious obligation to increase the number of businesses operating according to religious principles.

¹⁸¹ See NeJaime & Siegel, *supra* note 22, at 2552 (quoting a Catholic Bishop who stated that *Hobby Lobby* is “a mandate for evangelization”). Although there may be arguments that investing for the specific purpose of claiming exemptions in the greatest number of companies possible is not a sincere exercise of religion, if the investor truly believes that they are commanded by their faith to use their wealth to prevent sinful practices, it seems likely that such investments would qualify as religious exercise under the existing sincerity test. See *supra* notes 50–51 and accompanying text.

¹⁸² See Easterbrook & Fischel, *supra* note 23, at 1430 (describing how corporate governance is priced into transactions between corporate parties); *id.* at 1432 (“It turns out to be hard to find any interesting item that does not have an influence on price.”).

¹⁸³ See, e.g., Sepper, *supra* note 22, at 941 (noting some evidence that healthcare nonprofits price religious practices when selling religious hospitals).

¹⁸⁴ RODDY BAILEY, SECURITIES LAWS IMPLICATIONS RELATED TO INVESTMENT WITH HIGH NET WORTH INDIVIDUALS *1 (2013), Westlaw 5290487 (“The term ‘angel investor’ has been applied to high net worth individuals who were willing to invest in companies and ‘save’ the company from business failure.”).

would continue to exercise control over the religion of the corporation, even as his ownership interest shrinks.¹⁸⁵

This scenario may not be considered problematic because, as the Court notes, state corporate law already allows for parties to contract regarding the religious practices of the corporation, such as closing business operations on the Sabbath.¹⁸⁶ Where a religious decision does not require an exemption to the law, state law will allow the parties to bargain for whatever business practice they prefer.¹⁸⁷ Each shareholder can place a value on their religious and secular interests and negotiate for their most favored outcome.¹⁸⁸ For example, a devout investor may be willing to give up some share of corporate profits to the agnostic shareholder to keep the corporation's stores closed on the Sabbath.

A crucial distinction must be drawn, however, between corporate decisions in compliance with the law and decisions that require religious exemptions to the law. Parties can monetize a religious practice, like closing the store on the Sabbath, without monetizing religious sincerity because religious sincerity is not required for religious acts in compliance with the law.¹⁸⁹ Applying the same negotiation process to religious exemptions from neutrally applicable laws is more problematic. Parties are not just making tradeoffs between themselves regarding profit and religion. They are asking the court to declare their financial bargain an exercise of religious sincerity. In doing so, the court creates a new, and potentially valuable, "stick" in the corporate rights bundle—the right to be judicially determined as the religious "soul" of the corporation. This monetization of religious sincerity has the potential to increase the harm to

¹⁸⁵ See Mocsary, *supra* note 4, at 1333–34 (describing how initial shareholders can "retain the right to have the firm run in accord with their original contract, whether it calls for the pursuit of wealth or another end"). To those unfamiliar with corporate practice, such contracting might seem easy to regulate, but corporate lawyers make their living finding ways to contract around attempts to regulate business relationships. They are largely successful because of the contractual freedom in corporate law. See Christopher G. Bradley, *Artworks as Business Entities: Sculpting Property Rights by Private Agreement*, 94 TUL. L. REV. 247, 247–48 (2020) (describing the use of business entities to circumvent attempts to regulate contracts); Easterbrook & Fischel, *supra* note 23, at 1433 (noting that regulation of corporate relationships is difficult: "[b]ecause so many terms are open to explicit contracting, it is almost always possible to make an end run around any effort to defeat a particular [contractual] term").

¹⁸⁶ *Hobby Lobby*, 573 U.S. at 718–19; see also Sepper, *supra* note 22, at 935 (describing contracting for "Ethical and Religious Directives" that bind non-religious entities to the religious practices of affiliated religious providers).

¹⁸⁷ Such allowance is not always true if the decision will hurt corporate profits and the shareholders do not all agree. See *infra* Part III.B.1.

¹⁸⁸ See Easterbrook & Fischel, *supra* note 23, at 1418 (highlighting how corporate law allows participants to customize contractual terms to maximize value for shareholders).

¹⁸⁹ For example, atheist shareholders could agree to close the corporation's stores on the Sabbath as a naked cash grab in an effort to appeal to a religious clientele, or a religious shareholder can "purchase" the right to keep the store closed from a non-religious shareholder by agreeing to a smaller percentage of corporate shares.

protected groups who are not party to the bargain and diminishes the value of religious liberty.

C. Monetizing Religious Sincerity Harms Third Parties and Diminishes Religious Liberty

The potential dangers of monetizing religious sincerity are great—both for third parties and for religious liberty itself. Religious exemptions for corporations have been vigorously criticized as coming at the expense of third parties.¹⁹⁰ The corporate exemption claims thus far have generally involved “religious objections to being made complicit in the assertedly sinful conduct of others.”¹⁹¹ These “complicity-based conscience claims” focus on a third party’s conduct that is protected by the law and the claimant’s belief that such conduct is sinful.¹⁹² Because they involve the choices of the people the law was intended to protect or benefit, complicity-based claims result in harm to identifiable third parties.¹⁹³ The monetization of religious sincerity could lead to an increase in religious exemption claims, especially by those who wish to parlay their economic influence into cultural influence. The result would be to undermine the gains made by historically disenfranchised groups through the democratic process.¹⁹⁴

In addition to the potential harm to third parties, monetizing religious sincerity is likely to diminish the value of religious liberty in the courts in several ways. First, courts may consider the number of potential claims when deciding

¹⁹⁰ See NeJaime & Siegel, *supra* note 22, at 2527 (discussing harm to third parties); Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L.J. F.* 201, 216–18 (2018), https://www.yalelawjournal.org/pdf/NeJaimeSiegel_t7ffwsc.pdf [<https://perma.cc/RH9A-3MSE>] (describing harms caused by exemptions to public accommodation laws); Elizabeth Sepper, *Contraception and the Birth of Corporate Conscience*, 22 *AM. U. J. GENDER SOC. POL’Y & L.* 303, 305 (2014) (noting that giving secular corporations the same exemptions as religious organizations risks eroding “gender equality and religious freedom in all workplaces”). See generally Strine, *supra* note 7. These harms occur irrespective of the corporate form at issue.

¹⁹¹ NeJaime & Siegel, *supra* note 22, at 2519.

¹⁹² See *id.* at 2527 (“Complicity-based conscience claims are oriented toward third parties who do not share the claimant’s beliefs about the conduct in question. For this reason, their accommodation has distinctive potential to impose material and dignitary harm on those the claimants condemn.”); see also Sepinwall, *supra* note 56, at 1905 (identifying that, under *Hobby Lobby*, religious exemptions are granted without consideration of the impact they have on those other than the sincerely religious).

¹⁹³ See Hardee, *supra* note 77, at 229–30 (describing harm to reproductive rights and LGBT community); Sepper, *supra* note 190, at 337–38 (noting complicity-based claims subrogate the employees’ right to make their own decisions to the employer’s morality).

¹⁹⁴ See Sepper, *supra* note 7, at 1502–07 (arguing that court-imposed religious exemptions harm third parties and the democratic process); Strine, *supra* note 155, at 458–59 (noting that exemptions or workarounds make regulation to protect disenfranchised groups more expensive).

to grant an exemption.¹⁹⁵ The government must show that the regulation burdening the claimant's religion is "the least restrictive means of accomplishing a compelling government interest," and the government may do so by "show[ing] that there would be so many legitimate demands for a religious accommodation that those accommodations would completely undermine the regulation."¹⁹⁶

Second, judges' feelings that claimants have gamed the system by monetizing religious sincerity may "creep" into their determinations on the other elements of the claim.¹⁹⁷ Because they doubt the claimant's sincerity, judges may be more likely to deny exemptions on other grounds, such as finding that the claimant's religion is not substantially burdened.¹⁹⁸ Not only does this undercut the rule of law, but also it "can have the unintended effect of perverting a court's articulation of the requirements for a religious accommodation claim, making it harder for sincere claimants in future cases to state a claim."¹⁹⁹

Third, and finally, monetized religious sincerity would likely diminish the value of religious liberty among the public at large.²⁰⁰ The availability of religious exemptions has led to a movement by academics who question whether religion deserves special treatment under the law.²⁰¹ The Court's pronouncement that corporations can engage in protected religious exercise has already tested America's faith in religious liberty.²⁰² "Whether religion is 'a good thing'—whether it ought to enjoy any kind of unique status, and whether that status should find meaningful constitutional protection—has itself come up for

¹⁹⁵ See Sepper, *supra* note 22, at 958–63 (describing how religious exemptions are designed to be exemptions rather than the rule).

¹⁹⁶ Chapman, *supra* note 8, at 1221.

¹⁹⁷ *Id.* at 1215–16 (describing cases involving "suspicion creep" when judges believe claimants to be insincere); see also Sepper, *supra* note 22, at 984 (noting that widespread contracting for religious identity among healthcare providers may lead to courts scrutinizing religious claims and the definition of a "religious entity" more closely).

¹⁹⁸ Chapman, *supra* note 8, at 1216 (noting that this problematic practice appears to occur in other cases involving unaddressed doubts regarding religious sincerity).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1222 ("When the government gives a pass to those who insincerely claim the benefits of religious liberty, it erodes the value of that liberty in the eyes of the public.").

²⁰¹ See generally, e.g., Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1146–48 (2010) (clarifying the author's position in the debate regarding whether religion is special); Lund, *supra* note 37, at 483–84 (describing the movement that sees religious exemptions "as undeservedly privileging religious commitments—a kind of discrimination against those whose fundamental commitments are nonreligious in nature"); Schwartzman, *supra* note 37 (noting that the law treats religion as special but questioning the justifications for such treatment).

²⁰² See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 155 (2014) (noting that *Hobby Lobby* marked a shift in public attitudes towards "the basic terms of the American church-state settlement").

grabs.”²⁰³ The awareness that religious sincerity is for sale is likely to damage the reputation of religious liberty further.²⁰⁴

Because such financial bargains often come at the expense of third parties, condoning the sale of religious sincerity is even more likely to cause outrage—potentially undermining the legitimacy of the Court. Monetizing sincerity could be perceived as an expansion of religious accommodations driven by wealthy individuals “buying back” the cultural control they have lost at the ballot box. The Roberts Court has already been criticized for weaponizing the First Amendment for the benefit of the wealthy.²⁰⁵ A cynic might view the monetization of religious sincerity as further evidence that the Roberts Court is not motivated by a desire to protect religious liberty but, rather, is acting to give those on the losing side of the culture wars the ability to circumvent the democratic process to reinstate cultural norms on the most vulnerable populations.

III. A FRAMEWORK FOR DETERMINING ATTRIBUTION

Mechanically applying state law regarding corporate control to the question of attribution leads to results that conflict with the values underlying religious sincerity. A framework for determining attribution needs to consider the unique nature of religious liberty as well as a nuanced understanding of state corporate law. Corporations with dissenting shareholders raise different issues than corporations with assenting agnostic shareholders, suggesting separate considerations are necessary to determine attribution for each. Corporate law’s flexibility to customize corporate structure, resulting in a dizzying array of business combinations, makes bright-line rules difficult to draw. Nevertheless, there are factors that courts and policymakers should consider in trying to craft rules for attribution. Ultimately, the most defensible result may be to require unanimous, or near unanimous, religious sincerity by corporate shareholders. It is difficult to predict how the attribution question will ultimately be settled, as whoever creates the test—federal or state, administrations or courts—is likely to greatly impact the substance of the test itself.

A. Corporations with Dissenting Shareholders

The Court in *Burwell v. Hobby Lobby Stores, Inc.* recognized that minority shareholders may object to the corporation’s exercise of religion. The major-

²⁰³ *Id.* at 159.

²⁰⁴ See Chapman, *supra* note 8, at 1222 (using a late-night comedian’s parody of profit-seeking churches to demonstrate how the public is affected by the perception that religious exemptions shield sham religions from the law).

²⁰⁵ See, e.g., Sepper, *supra* note 7, at 1453; Strine, *supra* note 155, at 423–24 (providing an overview of recent Supreme Court cases and noting the shift in influence towards the wealthy).

ity noted that “[s]tate corporate law provides a ready means for resolving [such] conflicts” and that the courts should turn to rules regarding corporate structure “and the underlying state law in resolving disputes.”²⁰⁶ Existing state law did not evolve with shareholder sincerity in mind, however, and is insufficiently protective of dissenting shareholders’ religious convictions.

1. Applying Existing State Law

State corporate law generally provides little protection for minority shareholders who disagree with the business decisions of controlling shareholders.²⁰⁷ The default rules give a shareholder, or a group of shareholders with a bare majority of votes, the power to control the corporation.²⁰⁸ A majority shareholder, or shareholders, can unilaterally elect every member of the board,²⁰⁹ amend the charter and bylaws (including corporate purpose),²¹⁰ decide whether to issue dividends,²¹¹ and make the decision to sell the corporation.²¹² Minority shareholders’ rights are generally limited to the fiduciary duties owed to them by majority shareholders.²¹³ Minority shareholders are ex-

²⁰⁶ 573 U.S. 682, 718–19 (2014).

²⁰⁷ See Smith, *supra* note 19, at 310 (“Since the earliest reported cases, courts have consistently held that the will of the majority of the shareholders governs business corporations in all actions within the bounds of the corporate charter.”). Because corporate law is a matter of state law—both statutory and common law—there is no monolithic “state corporate law.” This Article does not provide a fifty-state survey but, rather, necessarily speaks in generalities about common state practices and provides examples from specific states.

²⁰⁸ Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 757 (2000) (describing majority shareholder control over close corporations).

²⁰⁹ See, e.g., DEL. CODE ANN. tit. 8, § 216(3) (2020) (electing directors via plurality of shareholder votes). Some states allow, or even mandate cumulative voting, which allows minority shareholders to have some representation on the board. See, e.g., CAL. CORP. CODE § 708 (West 2019) (mandating cumulative voting for nonpublic corporations). Cumulative voting still leaves the majority shareholder with a majority of the seats on the board, which is sufficient for complete control over board action under the default rules. See Moll, *supra* note 208, at 757.

²¹⁰ See, e.g., DEL. CODE ANN. tit. 8, § 216(2) (“In all matters other than the election of directors, the affirmative vote of the majority of shares . . . shall be the act of the stockholders.”).

²¹¹ The board of directors controls the decision to issue dividends. See, e.g., *id.* § 141(a), (c)(2) (giving the board power to run the corporation and to declare dividends).

²¹² The decision to merge the corporation at one time required unanimous shareholder consent but no longer does. Pollman, *supra* note 7, at 649; see, e.g., DEL. CODE ANN. tit. 8 § 141; MODEL BUS. CORP. ACT § 11.04(e).

²¹³ Mocsary, *supra* note 4, at 1332–33. Many states employ a “reasonable expectations test” that will allow minority shareholders to challenge corporate decisions by the majority that encroach on the minority’s “reasonable expectations to be employed by the corporation, to be involved in managing it, and to receive corporate distributions, either in salary or dividends.” Manuel A. Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329, 1346. Although these minority oppression cases do not center on corporate profit, they do involve the financial interests of minority shareholders, such as continued employment. See Moll,

pected to contract *ex ante* for the power to protect themselves from the ultimate control the law gives majority shareholders.²¹⁴ If they fail to do so, the law locks in their investment in the corporation.²¹⁵ Once locked in, minority shareholders have no control over how their investment is used and, in a corporation with no market for its stock, very little practical ability to cash it out.²¹⁶

Corporate law recognizes the precarious position that minority shareholders are in *vis-à-vis* the majority with the doctrine of minority shareholder oppression. One of the most important tools for protecting minority-shareholder interests is the profit maximization doctrine, which requires those controlling the corporation to put shareholder profit above other interests.²¹⁷ One of the driving forces behind profit maximization is the idea that all shareholders have a right to earn the most profit possible from their investment. Thus, courts will intervene, if the majority shareholders are frustrating the minority's ability to accomplish that end.²¹⁸

The Court, perhaps unwittingly, gave an example of such a claim when it raised potential non-RFRA religious disputes among shareholders about closing the company's store on the Sabbath.²¹⁹ The Court suggests that the rules regarding the establishment of a corporation's governing structure would answer this question, but the power to do so under the corporate structure is not the end of the story. Even if a majority shareholder had the control right to decide to close the store on the Sabbath, that decision would be subject to the

supra note 208, at 757–58 (describing ways a controlling shareholder can impact the financial interests of a minority shareholder).

²¹⁴ Utset, *supra* note 213, at 1343. This can be done in a variety of ways, such as contracting for employment security, veto power over corporate decisions, and dispute resolution mechanisms. *Id.*

²¹⁵ Locking in the capital investment of shareholders is one of the key features of the corporation. See Larry E. Ribstein, *Should History Lock in Lock-in?*, 41 TULSA L. REV. 523, 523 (2006) (describing the capital lock-in of corporate investments).

²¹⁶ See Pollman, *supra* note 7, at 652 (noting that shareholders in a closely held corporation have no market for their shares); Utset, *supra* note 213, at 1341 (describing the lack of meaningful exit options for minority shareholders).

²¹⁷ See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (holding that majority shareholders cannot value social goals over shareholder profit at the expense of minority shareholders); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (same); see also Smith, *supra* note 19, at 318–21 (demonstrating the importance of the shareholder primacy norm in minority oppression cases).

²¹⁸ See, e.g., *eBay Domestic Holdings*, 16 A.3d at 34. Applying this rule to the question of a minority shareholder who disagrees with the majority's religious decisions for the corporation is complicated by the Court's explicit rejection of shareholder profit maximization in *Hobby Lobby*. See 573 U.S. at 711–12 (stating that corporate law does not limit corporations to profit motives). The status of the profit maximization doctrine is therefore in doubt. See Hardee, *supra* note 77, at 249 (noting the conflict between the direction to use state corporate law to resolve intercorporate disputes and the rejection of profit maximization).

²¹⁹ See *Hobby Lobby*, 573 U.S. at 718–19.

profit maximization, or minority oppression, rule.²²⁰ If the majority stated their intent to put their religious beliefs ahead of the minority shareholder's reasonable expectations of profit, at least some state courts would likely step in and protect the minority shareholder's profit expectations.²²¹

Although shareholder-profit maximization provides some protection for minority shareholders, it is greatly limited by the business judgment rule, which protects the board from decisions made in good faith.²²² In practice, as long as the board claims the decision was made both to further their personal religious beliefs *and* increase profits (or at least be profit neutral), the courts will not second guess whether the decision will in fact be profitable.²²³ Even an exemption that eventually hurts the company financially, such as taking a potentially unpopular position that the company does not support equality claims by the LGBTQ+ community, would be protected under the business judgment rule, if the controlling shareholder claims a plausible marketing strategy to gain sufficient religious customers to offset the customers lost by its anti-LGBTQ+ stance.²²⁴

In addition, shareholder profit maximization provides no protection to minority shareholders where the exercise of corporate religion does not impact corporate profit. If a decision to claim an RFRA or free exercise exemption does not impact the bottom line, or if it is financially beneficial to the corporation, the minority shareholder's financial interests are protected. Therefore, minority shareholders likely have no claim under existing state law, even if they object to the actions of the majority.²²⁵

The ability of controlling shareholders to unilaterally implement a religious exemption is concerning because minority shareholders are locked into

²²⁰ Such a decision would be made by the board of directors, but the board in a closely held corporation is generally responsive to the majority shareholders' demands. *See* Mocsary, *supra* note 4, at 1332–33. The board might have leeway to make such decisions, or be required to, if the corporate charter provided otherwise.

²²¹ *See, e.g., eBay Domestic Holdings*, 16 A.3d at 34. The majority shareholder could avoid this claim by stating that the decision was made to increase profits—e.g. by tapping into a religious market—but that might impact the sincerity of their claim under RFRA.

²²² *See* Mocsary, *supra* note 4, at 1333 (noting the “business judgment rule (BJR) makes it difficult for noncontrolling shareholders to vindicate their rights”).

²²³ *See, e.g., Gagliardi v. Trifoods Int'l, Inc.*, 683 A.2d 1049, 1049 (Del. Ch. 1996) (allowing management leeway to determine what actions will be profitable). Although management is given great leeway in determining what is in the best interests of the corporation, courts are more diligent in policing fiduciary duties in closely held corporations. *See* Mocsary, *supra* note 4, at 1333.

²²⁴ Courts are reluctant to second-guess the business decisions of corporate managers, even when they end in financial disaster. *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 28 (Del. 2006) (finding no liability despite arguably ill-advised contract that cost company over \$130 million).

²²⁵ Even in a state using the reasonable expectations test, the test would have to be modified to include the expectation to determine the religious actions of the corporation. *See* Utset, *supra* note 213, at 1346 (describing reasonable expectations test).

the corporation.²²⁶ Even if the dissenting shareholder walks away from any management role, their investment is still funding the corporate religious actions with which they disagree.²²⁷ This problem is made obvious when considering a shareholder dissenting on religious grounds of their own. The majority may wish to turn away LGBTQ+ customers on the ground that their religion objects to gay marriage.²²⁸ But the minority shareholder may believe that discriminating against LGBTQ+ individuals violates their religious beliefs in equality and love for all.²²⁹ Being forced to fund a business that refuses service for gay weddings may violate the minority's religious beliefs as strongly as being forced to sell cakes for gay weddings violates the majority's beliefs.²³⁰ States should, and are perhaps required to, take these claims seriously.²³¹ If they do not, a neutral state law—locking in the investment of shareholders—will result in forcing a religious practice on an unwilling minority shareholder. This is the same evil that justified the religious exemption in the first place.

The counterargument to this concern is that minority shareholders can already be forced to financially support religious practices that violate their beliefs so long as they do not affect corporate profits. The Court was correct that corporations can make everyday business decisions that reflect the religious beliefs of their shareholders.²³² Corporate law gives minority shareholders little say over those decisions, if they do not harm profits.²³³ If the board decides the corporation should engage in a religious practice, either because of its own religious convictions or at the behest of the majority shareholders who elect them, minority shareholders currently have no recourse, even in public corporations, unless the religious practice can be shown to harm the bottom line.²³⁴

²²⁶ See Ribstein, *supra* note 215, at 523.

²²⁷ Having their investment in the company used to fund practices the shareholder deemed sinful was the crux of the petitioners' claims in *Hobby Lobby*. 573 U.S. at 700–03.

²²⁸ It is not clear whether a religious exemption to anti-discrimination laws will be permitted under RFRA, but this hypothetical assumes it for the sake of the argument.

²²⁹ This religious dispute is currently making waves within the United Methodist Church. See Julie Zauzmer & Sarah Pulliam Bailey, *United Methodist Church Votes to Maintain Its Opposition to Same-Sex Marriage, Gay Clergy*, WASH. POST (Feb. 26, 2019, 6:35 PM), https://www.washingtonpost.com/religion/2019/02/26/united-methodist-church-votes-maintain-its-opposition-same-sex-marriage-gay-clergy/?utm_term=.9255d26506d8 [<https://perma.cc/D3C6-NRKD>] (describing the rift among clergy and theologians caused by the Church's vote to maintain its opposition to gay marriage).

²³⁰ If such complicity-based claims are treated as valid for a majority shareholder, they should be uniformly treated when raised by minority shareholders.

²³¹ Although RFRA does not apply to the states, the minority shareholders may have a free exercise claim similar to that raised by *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* or a claim under state religious freedom laws. See 138 S. Ct. 1719, 1720 (2018).

²³² See *Hobby Lobby*, 573 U.S. at 710.

²³³ See *supra* Part III.A.1.

²³⁴ For example, the Marriott Corporation, a public company, puts copies of the Bible and The Book of Mormon in almost all of its hotel rooms. The books are donated, and the company's position

Religious exemptions to neutrally applicable laws are arguably distinct from such everyday decisions. The most obvious distinction is that the latter does not violate a neutrally applicable law and, thus, does not require a religious exemption. These decisions, therefore, do not require any showing of religious sincerity by anyone in the corporation.²³⁵ As such, a corporation closing on the Sabbath does not necessarily attribute religious beliefs to the corporation's owners, whereas a religious exemption has the court's imprimatur that at least some of the corporation's shareholders sincerely hold a particular belief.

In addition, the fact that a religious practice does not violate the law informs the reasonable expectations of the parties. Minority shareholders understand that they have little control over the decisions of the corporation—economic, social, or religious—but they may have an expectation that the corporation will be confined by the democratic process. Religious exemptions provide an end run around the democratic process by constraining the law's reach over certain practices.²³⁶ Despite these distinctions, it is still ironic that a dissenting minority shareholder has more ability to protect their financial interests than their religious rights. If the law continues to expand the role of corporations as religious actors, perhaps state law should adapt to further protect minority shareholders' religious interests, even when exemptions are not necessary for the corporation's religious practice.

There is an additional complication caused by the fact that existing state law only allows dissenting shareholders to block religious practices when they can demonstrate that such practices hurt the corporation's bottom line. One type of evidence the justices found compelling to demonstrate shareholders' sincerity in both *Hobby Lobby* and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* was that the shareholders had previously sacrificed profit to further their religious beliefs.²³⁷ Although sacrificing profits does not appear to be required to show religious sincerity, it is peculiar that controlling shareholders would have a right to exercise their religion through the corporation only when they are equally pursuing profits as well as religious ends.²³⁸

is that some customers appreciate them, whereas the rest disregard them. Even though some shareholders may disagree with the practice of supplying religious texts in the hotel rooms, there is no recourse in corporate law to stop it. See Dee-Ann Durbin, *Holy Nights: New Marriott Rooms to Get Bible, Book of Mormon*, U.S. NEWS & WORLD REP. (Aug. 25, 2018), <https://www.usnews.com/news/business/articles/2018-08-25/a-room-with-a-pew-new-marriotts-get-bible-book-of-mormon> [<https://perma.cc/HV3K-PZGE>].

²³⁵ See *supra* notes 106–109 and accompanying text.

²³⁶ See Sepper, *supra* note 7, at 1453 (describing use of religious exemptions to circumvent democratically enacted regulations). As a legislative enactment, RFRA could, at least theoretically, be amended to limit corporate exemptions. If, however, the Supreme Court extends First Amendment protection for corporate religious exemptions, a democratic response may be difficult.

²³⁷ See *supra* note 104 and accompanying text.

²³⁸ See *supra* note 106 and accompanying text.

From the standpoint of corporate law, this outcome follows logically from the primacy of corporate profit. From the standpoint of religious liberty, however, it results in the law subjugating religious concerns to profit motives. It also potentially raises questions about the sincerity of the controlling shareholders' beliefs if they willingly entered into a corporation with a non-religious shareholder knowing that the law would prevent them from exercising their religion through the corporation if it impacted profits.²³⁹

2. Reconceiving Attribution with Dissenting Shareholders

A new framework is needed to consider attribution in corporations with dissenting shareholders that will adequately protect the minority's elevated interests when determining religious sincerity. Protecting the religious rights of dissenting shareholders as well as controlling shareholders is not an easy task. As a single entity, it is difficult to divide the corporation in a way that accounts for the different desired ends of the various shareholders. This difficulty is one reason corporate law largely concerns itself solely with shareholders' rights to profit from the corporation.²⁴⁰ Money is easily apportioned outside the corporation and provides a universal metric by which to judge what each shareholder is owed, thereby greatly simplifying the mediation of disagreements among shareholders.

Once the law recognizes the right to use the corporation for religious reasons, however, this system is upended. Principles of religious freedom and freedom from forced religious practice justify taking seriously dissenting shareholders' concerns. One method courts could use to balance the religious practices of majority and minority shareholders would be to provide a judicially created exit option for minority shareholders.²⁴¹ This solution would allow the minority to exit the corporation on fair terms and the majority to use the corporation to further their religious ends.

Another alternative would be to require that all shareholders agree to adopting a corporate religion and to seeking a corporate religious exemption. Although unanimous agreement is rarely required in corporate law, unanimity

²³⁹ This could be evidence that their actions do not "fit" with their professed belief that they must run their corporation according to their religious beliefs—even those that harm profits. *See* Chapman, *supra* note 8, at 1234–35 (discussing narrative fit evidence). But, as Chapman notes, courts should use this evidence "thoughtfully," as inconsistent or imperfect religious practice is to be expected. *Id.* at 1234.

²⁴⁰ *See, e.g.,* Easterbrook & Fischel, *supra* note 23, at 1434–35 (justifying a lack of intervention into contracting parties' agreements because "[i]nvestors and other participants agree on the stakes: money").

²⁴¹ Some courts already provide for judicial dissolution of the corporation or forced buyouts as remedies for other forms of minority shareholder oppression. *See* Moll, *supra* note 208, at 759–60; Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1118–19 (1999).

is necessary when fundamentally altering the corporate structure.²⁴² The decision to turn the corporation into an entity that represents the shareholders' sincere religious beliefs is arguably such a change.²⁴³ Corporations with a social purpose as well as a profit motive, more commonly known as benefit corporations, are incorporated under an entirely different statutory scheme in the states that allow them.²⁴⁴ Even if corporations are not required to reincorporate as benefit corporations to request religious exemptions, a similarly fundamental change to the corporate purpose suggests that unanimous shareholder approval is appropriate.²⁴⁵ Requiring unanimous agreement addresses the problems raised by dissenting shareholder rights but leaves open the issue of determining sincerity with assenting agnostic shareholders.

B. Corporations with Assenting Agnostic Shareholders

Corporations with assenting agnostic shareholders present a different set of problems for religious sincerity. Unlike dissenting shareholders, assenting agnostic shareholders are willing to allow the religious shareholder to claim exemptions on behalf of the corporation in exchange for some secular benefit. These corporations are made up of shareholders motivated by sincere religious beliefs and shareholders with an insincere motivation—either profiting from the exemption itself or the benefit they received from the religious shareholder for their agreement. A framework is needed to determine which shareholders' beliefs are attributed to the corporation for evaluating the corporation's request for accommodation.

In creating such a framework, it is important to remember that corporate law's preference for permissive private ordering combined with the value that religious shareholders may place on the right to control the religious actions of a corporation makes it likely that parties will be incentivized to innovate ways to monetize religious sincerity through contracting.²⁴⁶ Given this, the test for attribution must appropriately value religious sincerity and build on a realistic and nuanced understanding of state corporate law. The first step is identifying factors that courts should consider relevant in the attribution inquiry. These

²⁴² See, e.g., MODEL BUS. CORP. ACT § 7.32(b) (requiring unanimous shareholder approval to enter into shareholder agreement to alter corporate structure).

²⁴³ See Mocsary, *supra* note 4, at 1392 (suggesting "a near-unanimity" requirement to adopt a corporate purpose other than profit).

²⁴⁴ See Hardee, *supra* note 77, at 247 (describing benefit corporations).

²⁴⁵ States could potentially create a religious benefit corporation code and require any corporation seeking to claim an exemption to incorporate under that code. It is unclear whether the Supreme Court would allow such a requirement. See *Hobby Lobby*, 573 U.S. at 709 (suggesting that the expression of religion is not tied to the corporate form).

²⁴⁶ See *supra* Part II.B.2.

factors can then be used to compare the benefits of a balancing test versus bright-line rules for attribution. Ultimately, without greatly restricting the freedom to contract for religious sincerity, it is difficult to create a workable test.

1. Potential Factors Relating to Attribution

There are a number of factors that courts should consider in determining whose religious beliefs to attribute to the corporation. None of them is sufficient on its own to determine corporate sincerity, and each is malleable by contract in ways that raise questions about the corporation's qualifications for an exemption. But each of them provides some insight into the balance between the religiously sincere and the assenting agnostic shareholders within the corporation.

a. Control Held by Sincerely Religious Shareholders

Control cannot be the only metric used to determine attribution because its malleability by contract could lead to corporations claiming exceptions with little, or even no, human sincerity within the corporation.²⁴⁷ In addition, control is easily monetized within the corporation, leading to the inevitable monetization of corporate sincerity.²⁴⁸ Whereas control should not be sufficient to find attribution, significant control by the religious shareholder is necessary. The Court in *Hobby Lobby* focused on the control the Hahn and Green families exercised over their corporations as a key factor in holding that they had sufficient overlap of identity with the corporations to justify an exemption.²⁴⁹ A religious shareholder who is merely a passive investor has a weaker argument that the corporation's actions are attributable to them.²⁵⁰

Control is necessary, but what type of control must be demonstrated by religious shareholders is a complicated question. "Control" in a corporation is not a monolithic concept.²⁵¹ Control does not necessarily coincide with share ownership interests in the corporation—an individual can be a minority share-

²⁴⁷ See *supra* Part II.B.1.

²⁴⁸ See *supra* Part II.B.2.

²⁴⁹ See 573 U.S. at 700–03.

²⁵⁰ A passive investor could also run into trouble with the veracity inquiry. If a shareholder claims that a passive ownership interest in a corporation that engages in a "sinful" practice burdens their religious practice, the court could inquire whether they have passive ownership interests in other corporations that engage in the same "sinful" practice—such as stock ownership in public markets. See Chapman, *supra* note 8, at 1234–35 (discussing narrative fit evidence).

²⁵¹ See Easterbrook & Fischel, *supra* note 23, at 1417 (describing the various ways corporate control can be divided).

holder but still wield control over the entire corporation.²⁵² In addition, control in a corporation can be divided up for specific purposes.²⁵³ For example, different classes of shares may have special voting power on specific issues or for designated board positions. In nonpublic corporations, shareholders can enter into shareholder agreements that allow them to divvy up control among themselves or even designate third parties to exert control over corporate decisions.²⁵⁴

This flexibility to parse out corporate control is a key feature of corporate law, but it makes it difficult to value the control exercised by the religious shareholders in relation to the agnostic shareholders for purposes of attribution of religious sincerity. If courts wish to prevent the monetization of religious sincerity by ferreting out business arrangements that are motivated by a desire to buy or sell the corporations' religious practices, they should focus on the nature of the control held by religious shareholders. Control that relates only to the corporate practices underlying the exemption in question should be suspect, as they are most likely to be motivated by strategic contracting to gain an exemption. General control over the business practices of the corporation provides better evidence of the religious shareholders' involvement in the company. Even complete control over the corporation, however, should not be sufficient to demonstrate sincerity for the corporation, as that would include a sizeable number of public corporations whose sincerity would almost certainly be rejected.²⁵⁵

b. "Ownership Interest" Held by Sincerely Religious Shareholders

Another factor that courts should consider in determining attribution is the "ownership" or "equity" interest held by sincerely religious shareholders. The Court in *Hobby Lobby* placed great emphasis on the families' ownership of the corporations involved, suggesting ownership is relevant to the attribution inquiry.²⁵⁶ Equity interest can be conceived of as roughly the shareholder's percentage of financial interest in the company. In a corporation with a simple, single class structure, a shareholder who owns 51% of the common stock could

²⁵² One example of this type of control is dual class structures, where some shareholders have control rights and others do not, which leads to great disparities between ownership and control. See Sharfman, *supra* note 129, at 7 (describing dual class structures).

²⁵³ See Easterbrook & Fischel, *supra* note 23, at 1417–18 (providing descriptions of different structural changes).

²⁵⁴ See MODEL BUS. CORP. ACT § 7.32(a)(8) (permitting agreements that divide up corporate control in any way that does not violate public policy).

²⁵⁵ See Bebhuk & Hamdani, *supra* note 126, at 1279 (noting that "a sizeable minority of large, publicly traded firms" have controlling shareholders).

²⁵⁶ 573 U.S. at 700–02; see also Hardee, *supra* note 75, at 771–72 (describing the Court's focus on ownership). Likewise, the fact that the Court suggested that the relevant group to consider in public companies is the shareholder class, rather than the board of directors, suggests that share ownership is more important than control over the corporation. See *id.* at 717.

be considered a 51% “owner” of the corporation.²⁵⁷ Financial interest is less susceptible to gamesmanship because agnostic owners would be less likely to give up a significant portion of the *raison d’être* for corporate ownership—profit. Like with every aspect of corporate practice, however, the ability to contract complicates the “ownership” question. There are myriad ways to calculate the “ownership” of a corporation based on contracts relating to share ownership, and determined parties can provide financial benefits, such as dividends, to shareholders without correlating such benefits to equity ownership.²⁵⁸

Despite this malleability, the concept of equity or ownership stake in the company is likely still the metric that most reliably tracks the religious shareholders’ financial investment in the corporation. As such, it provides a helpful way to think about what is meant by “sincerity” in the context of religiously heterogeneous shareholders. Is an individual’s financial interest in the corporation the right metric to determine how much weight to place on their religious sincerity? If so, how much investment is enough? Corporate law would likely answer the first question in the affirmative.

Whether financial interest is the correct metric when thinking about religious sincerity is a different question. Valuing the religious beliefs of the majority shareholder at the expense of minority shareholders’ religious beliefs is problematic.²⁵⁹ Setting aside dissenting shareholders, using financial interest as the determining factor for attributing religious sincerity to a corporation with assenting agnostic shareholders raises questions about the nature of corporate religious sincerity that require answers the Court has thus far obfuscated. To determine what percentage of religious ownership is sufficient, it becomes important to more clearly delineate the rationales for granting corporations religious exemptions: Is it because religious shareholders somehow change the nature of the corporation itself? Or is it because the religious shareholders have a personal right to act through the corporation?

If the exemption is considered from the perspective of the corporation, the percentage of ownership should be judged by the total impact that the religious shareholders have on the corporation. In other words, are they sufficiently influential to transform the corporate entity into a religiously sincere body?²⁶⁰

²⁵⁷ The idea that shareholders “own” the corporation is controversial in corporate law, but this sense of financial interest is the rough equivalent of the colloquial idea of ownership. In closely held corporations, shareholders are more accurately conceived of as “owners.” See Mocsary, *supra* note 4, at 1330 (noting that with simply structured corporations “shareholders behave as owners in all relevant ways”).

²⁵⁸ For example, preferred shares that provide profit distributions but not a residual interest in the company arguably should not be considered equity ownership.

²⁵⁹ See *supra* Part III.A.1.

²⁶⁰ This question begins to resemble the legitimacy test for religious organizations under Title VII. See Carlson, *supra* note 8, at 185–86.

This might suggest that attribution is appropriate when religious shareholders hold more than fifty percent equity interest in the corporation because the corporation itself is more sincere than not.²⁶¹ A majority rule still leaves the potential for almost half the holders of the corporation's equity to be motivated by profit. If a corporation with forty-nine percent of its equity held by religious shareholders is not a religious corporation, a slight shift in its equity ownership arguably does not fundamentally alter the nature of the corporation such that the corporation itself is now a religious entity.²⁶²

If the rationale for granting corporations religious exemptions is based on the individual shareholder's right to act through the corporation, the percentage of ownership may be more appropriately judged by the importance of the ownership share to the religious shareholder—not in relation to the corporation as a whole.²⁶³ In that case, even a small equity interest in a corporation may take on religious significance to a religious investor.²⁶⁴ The percentage of ownership, therefore, may relate more to veracity than attribution: does the shareholder's claim that his religion requires accommodation even in companies where he is a minority shareholder "fit" with his other investments?²⁶⁵ Although this metric takes seriously the religious shareholder's interest in the corporation, such a rule would facilitate the monetization of corporate sincerity, much like the control rule.²⁶⁶ This monetization of sincerity would likely have negative side effects both to third parties and to the concept of religious liberty.²⁶⁷

c. Number of Sincerely Religious Shareholders

It is unlikely that even a combination of majority ownership and control is sufficient to claim an exemption, otherwise numerous public companies would qualify.²⁶⁸ Although the idea of a religiously sincere public corporation may sound absurd, considering ownership and control alone does not rule them out. The relevant difference between public and privately held corporations appears

²⁶¹ Under the Obama Administration, HHS took this approach to its regulations. *See supra* note 123 and accompanying text.

²⁶² Such a corporation would certainly fail the legitimacy test for religious entities under Title VII. *See* Carlson, *supra* note 8, at 185–86 (noting that for-profit corporations do not pass the primarily religious test).

²⁶³ The *Hobby Lobby* opinion more clearly takes this approach. *See supra* Part I.B.1.

²⁶⁴ For example, to an evangelical investor who invests to increase the number of corporations acting in accordance with his religious beliefs, even a small ownership share in the corporation may be fundamental to his religious exercise. *See supra* notes 175–181 and accompanying text.

²⁶⁵ *See* Chapman, *supra* note 8, at 1234–35 (describing narrative fit evidence).

²⁶⁶ *See supra* Part II.B.2.

²⁶⁷ *See supra* Part II.C.

²⁶⁸ *See* Bebchuk & Hamdani, *supra* note 126, at 1279 (noting that 220 public companies have one shareholder with more than fifty percent ownership and control).

to be the number of people involved. Even with a small number of religious shareholders controlling the majority of the corporation's equity, the thousands, or even hundreds of thousands, of agnostic or dissenting public shareholders are difficult to ignore.²⁶⁹ This suggests that courts should consider the total number of shareholders involved in the corporation—both sincere and agnostic—in determining attribution.

This is a somewhat unusual axis on which to consider sincerity from a corporate law standpoint, as the number of people behind a corporate action is rarely relevant—it is ownership or control rights that matter. The number of shareholders is sometimes relevant, however, when the law makes distinctions between corporations for certain privileges. For example, some states define “closely held” corporations in part by their number of shareholders.²⁷⁰ The ability to claim pass-through taxation as an “S Corp” under the federal tax laws is dependent on having one hundred or fewer shareholders.²⁷¹ In considering religious sincerity, placing a value on each individual's religious beliefs rather than focusing solely on their financial investment in the corporation tracks well with the personal nature of religion and gives equal weight to each individual's religious interests.

d. Corporate Religious Action

Despite the focus on the shareholders' religious sincerity, the Court has also placed some emphasis on the way that shareholders express their sincerity through the corporation.²⁷² Part of the veracity inquiry requires religious shareholders to demonstrate that their religious beliefs include a requirement that they run the corporation in accordance with their faith.²⁷³

Whether the religious practices of the corporation should be relevant to the attribution inquiry again depends on whether attribution is based on the corporation itself being transformed into a religious entity or whether sincerity

²⁶⁹ This is especially true because many of these shareholders are institutional investors who represent an even larger number of Americans who invest in corporations through mutual funds and pensions. See Strine, *supra* note 155, at 443–44 (describing the prevalence of modern stock ownership and ownership through intermediaries).

²⁷⁰ See, e.g., CAL. CORP. CODE § 158(a) (defining closely held corporations as those with fewer than thirty-five shareholders). Other states allow certain contracting options only to nonpublic companies, regardless of the number of shareholders. See, e.g., MODEL BUS. CORP. ACT § 7.32 cmt. 4 (explaining that section 7.32(d) requires that shareholder agreements are void after a company goes public).

²⁷¹ 26 U.S.C. § 1361(b)(a) (2018). S Corps provide a good analogy to religious corporations because the U.S. Internal Revenue Service allows them to be taxed as if the corporate form did not exist. See Mocsary, *supra* note 4, at 1329. This is much like the way the Court treats religious exemptions for corporations. See *supra* notes 159–171 and accompanying text (discussing courts disregarding the corporate form to grant religious exemptions).

²⁷² See *supra* notes 104–105 and accompanying text.

²⁷³ See *supra* notes 106–107 and accompanying text.

continues to be determined by examining the shareholders' individual rights. For the former, religious practices by the corporation are certainly relevant.²⁷⁴ For the latter, causing the corporation to take religious actions—even profit-reducing actions—provides mixed feedback. Because minority shareholders likely have the ability to prevent corporate religious practices that harm the bottom line, evidence that the corporation engaged in such behavior is really evidence that the religious shareholder is willing to “buy” consent to those practices from the agnostic shareholder.²⁷⁵ That evidence may point to attribution, if the monetization of religious practices is considered in weighing the relative strength of the religious shareholder's commitment to their beliefs. On the other hand, the ability and desire to commit the corporation to religious practices may be probative of the relative influence of the religious shareholder over the corporation.

2. Balancing Test Versus Bright-Lines

The question of attribution should factor in the relative control, equity ownership, and number of the religious versus agnostic shareholders, as well as corporate religious action. Although the relevant factors can be identified, the question of how to use them to determine attribution is far more difficult. Corporate law's strong commitment to the freedom to contract means that every corporation presents a unique combination of control, ownership, number of shareholders, and corporate action. This makes bright-line rules regarding attribution difficult, as they are likely to be both under- and over-inclusive.²⁷⁶ Bright-line rules also have the disadvantage of providing a roadmap for monetizing sincerity by giving corporate participants clear guidelines as to what contracting is necessary for a finding of religious sincerity.²⁷⁷

A balancing test that weighs the factors might be preferable, as it allows the courts to make fine-tuned determinations regarding sincerity given each corporation's unique structure. To be effective, however, any balancing test requires a better definition of what is meant by sincerity in the corporate context. The Supreme Court has largely sidestepped the question because homog-

²⁷⁴ This test finds a corollary in the legitimacy test for religious organizations, which focuses on “the organization's creation, purpose, function, activity and self-expression to the community.” Carlson, *supra* note 8, at 185.

²⁷⁵ See *supra* Part III.A.1.

²⁷⁶ See Lesinski, *supra* note 120, at 507–09 (critiquing the Obama-era regulations that draw bright-line rules for eligibility for exemptions as both under- and over-inclusive).

²⁷⁷ Corporate lawyers excel at this practice, which is generally not considered problematic in most instances because corporate law is designed to monetize corporate power. See Bradley, *supra* note 185, at 25 (describing broad latitude given to the creation of business entities to circumvent regulations). This monetization is problematic, however, in the religious liberty context. See *supra* Part II.C.

enous religious sincerity among shareholders makes it easy to ignore the corporation and, with it, the way corporate law and practice complicates the question of religious sincerity with religiously heterogeneous shareholders. The ultimate question for corporate exemptions that the Court appears to have embraced thus far is whether the corporation is owned and operated in such a way that it justifies disregarding the entity and looking through to the shareholders.²⁷⁸ If the ultimate question is whether the corporate entity can be disregarded, a balancing test that tries to determine the weight or impact of the religious shareholders versus agnostic shareholders on the corporation misses the mark. So too would a test that seeks to determine whether any of the parties were motivated to contract solely to claim a religious exemption.

A test for attribution that resolves the question of whether the corporate entity can be disregarded would be better conceptualized as determining whether the corporate structure involves relationships among religious and nonreligious shareholders with sufficient complexity to make ignoring the corporate entity difficult. Although it is relatively easy to ignore the corporation with homogenous shareholders, the entity is harder to disregard when a web of contractual arrangements and corporate law rules define the relationship between parties with divergent values. The mere existence of contracting among the shareholders relating to, or effecting, the corporate religious practice underlying the exemption could serve to solidify the separate corporate entity and counsel against finding attribution. Because corporate law includes default rules that create contracts between shareholders regarding control and ownership interest, such a test would likely find that more than *de minimis* involvement by nonreligious shareholders in the corporation makes the separate corporate entity difficult to ignore.

C. Who Will Define the Attribution Inquiry?

Although the Court has detailed the veracity inquiry for corporate religious sincerity, the need for the attribution inquiry has thus far gone unnoticed. Other than suggesting that corporations with religiously heterogeneous shareholders may still claim exemptions, how to determine whose sincerity should be attributed to the corporation is uncharted territory. This Article has provided a framework for attempting to untangle the many issues raised by attribution, but the factor that will likely be the most influential in determining how sincer-

²⁷⁸ See *supra* Part I.B.1.

ity is ultimately attributed to the corporation is whether the states or the federal courts will make the decision.²⁷⁹

The question of religious sincerity under RFRA and the Free Exercise Clause has traditionally been a question for the federal courts. As demonstrated by the decisions in *Hobby Lobby* and *Masterpiece Cakeshop*, the Court appears unwilling to leave this decision with respect to corporations entirely in the states' hands.²⁸⁰ States are unlikely to have the authority to define corporations as unable to exercise religion in any circumstances.²⁸¹ The Court has now spoken to what religious sincerity looks like in corporate form, likely establishing the ability to exercise religion through a closely held corporation with homogeneous religious sincerity, regardless of state law to the contrary.²⁸² In addition, questions relating to the veracity of shareholders' beliefs will likely remain in the purview of the federal courts, as they closely mirror the questions of sincerity relating to individual claimants.²⁸³

Although some measure of corporate religion appears fixed by the federal courts, the open questions regarding attribution in heterogeneous corporations involve mixed questions of religious sincerity and corporate structure that do not fit squarely under either religious exemption or state corporate law. Despite the federal courts' experience in determining individual sincerity, attribution involves questions of corporate governance that are outside the federal courts' wheelhouse. State corporate law, on the other hand, is largely unconcerned with the sincerity of beliefs but is expert at the distribution of power within the corporate structure, the validity of private agreements between the parties, and, to a lesser extent, harm to the public from the corporate form.²⁸⁴ Determining religious sincerity for a religiously heterogeneous corporation necessarily concerns proper corporate purpose, the internal control structures of corporations,

²⁷⁹ It is also possible that Congress could step in and lay out a test for attribution in RFRA itself. See Adams & Barmore, *supra* note 8, at 66 (suggesting that Congress amend RFRA to address this issue). This solution would not affect free exercise claims.

²⁸⁰ See Buccola, *supra* note 7, at 599 (noting that state power cannot override the Court's interpretation of corporate rights).

²⁸¹ Although, this is not entirely foreclosed. The Court's holding in *Hobby Lobby* rested on the statement that states do not require corporations to exist solely for profit. See 573 U.S. at 713. The question of corporate purpose is one traditionally left to the states, so it is an open question whether a state could clearly declare that the Court was incorrect in allowing a non-profit motive for a corporation chartered in the state. See Buccola, *supra* note 7, at 599 (proposing that state may have the authority to "effectively cabin the consequences of federal rights" by "disempower[ing] the corporations they create from doing the kinds of things that implicate disfavored federal rights").

²⁸² Although *Hobby Lobby* decided this issue under RFRA, it is still an open question under the Free Exercise Clause, although the complete lack of attention paid to the corporation in *Masterpiece Cakeshop* suggests that the same treatment will likely apply under the First Amendment. See *supra* note 69 and accompanying text.

²⁸³ See *supra* Part I.B.2.

²⁸⁴ See *supra* Part II.B.1.

and issues relating to the appropriate use of contracts, which suggests states should play a strong role in determining the applicability of religious exemptions for religiously heterogeneous corporations.

Despite their lack of expertise in state corporate law, the federal courts may be unwilling to cede control to the states on matters of federal statutory and constitutional interpretation, especially if the Court perceives that some states are likely to curb the availability of religious rights to corporations. The Supreme Court may federalize the attribution inquiry by determining whether and how heterogeneous shareholders can contract for corporate religion.²⁸⁵ They could conceivably draw the line anywhere between requiring unanimous shareholder religious sincerity and allowing any contracting so long as at least one shareholder is sincerely religious. Regardless of what they decide, short of unanimous approval, locking every state into a single set of rules regarding corporate contracting would be an unprecedented federalization of state corporate law.²⁸⁶ Even a rule that requires states to treat contracts relating to religious exemptions the same as any other corporate contracts does not provide an easy solution, as every state has exceptions to the freedom to contract.²⁸⁷ In addition, corporate religion for heterogeneous shareholders is a *sui generis* question. There are no other corporate questions that combine the personal nature of religion, the potential for harm to others, and the possibility of monetizing religious sincerity—making determination of the appropriate corporate law analog a fraught proposition.

Alternatively, the federal courts could allow states to play their traditional role in determining proper corporate purposes and governance structures. Scholars have noted that the Court's recent decisions regarding corporate rights put pressure on state corporate law to determine how such rights can be exercised.²⁸⁸ The Court in *Hobby Lobby* explicitly tasked state law to determine the rights of dissenting shareholders.²⁸⁹ It is unclear whether this delegation requires states to simply apply existing state law to these new corporate rights or if states retain the power to adapt their corporate law to changing cir-

²⁸⁵ In defining corporate purpose, the Court has already indicated a willingness to federalize corporate law to an unprecedented extent. *See Hardee, supra* note 77, at 22–23 (describing the creeping federalization of state corporate law).

²⁸⁶ States have traditionally had the power to define their corporate creations and what powers may be wielded through the corporate form. *See Buccola, supra* note 7, at 609–10 (describing the history of state control over the corporations they charter).

²⁸⁷ *See Easterbrook & Fischel, supra* note 23, at 1417–18 (noting that “[s]ome things are off-limits” for corporate contracting, such as many rules relating to fiduciary duties and fraud).

²⁸⁸ *See, e.g., Pollman, supra* note 7, at 665; *Strine, supra* note 155, at 497.

²⁸⁹ 573 U.S. at 717–18. Likewise, the Court in *Citizens United* tasked “the procedures of corporate democracy” to determine who speaks for the corporation. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 361–62 (2010) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

cumstances.²⁹⁰ Until the Court holds otherwise, states may decide to push back on federalization by determining the attribution of religious sincerity in religiously heterogeneous corporations.²⁹¹

Although there are many advantages to states defining the attribution question, one major drawback is that such an approach would likely lead to inconsistency among the states. Because the state of incorporation generally determines the state corporate law that governs, the application of RFRA—a federal statute—would vary depending on the state of incorporation.²⁹² Perhaps even more troubling, if the Court adopts a similar model for First Amendment claims, the constitutional rights of individuals acting through their corporations would likewise vary state by state. This inconsistency may be tolerable because shareholders may choose their state of incorporation, but there are still potential issues. First, state corporate law allows a controlling shareholder to reincorporate in a different state without the permission of a minority shareholder.²⁹³ Thus, concerns about protecting dissenting shareholders are amplified because the majority shareholder can move the corporation to a state with fewer protections after the minority’s investment is locked in.²⁹⁴

Second, such a system could put pressure on the choice-of-law rule that the state of incorporation provides the law governing the internal workings of the corporation, otherwise known as the internal affairs doctrine.²⁹⁵ Because religious exemptions have the potential to harm third parties in the state where the corporation does business, states may choose not to apply the internal af-

²⁹⁰ See Buccola, *supra* note 7, at 616–17; Hardee, *supra* note 77, at 246–47.

²⁹¹ Several commentators have argued in favor of a more robust use of state power in response to federal corporate rights. See generally Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010) (arguing states should adapt special decision-making rules for corporate political speech); Buccola, *supra* note 7 (providing justification for state power in this area); Hardee, *supra* note 77 (arguing states should adapt veil piercing test to take into account claims for religious exemptions); Joseph K. Leahy, *Corporate Political Contributions as Bad Faith*, 86 U. COLO. L. REV. 477 (2015) (arguing political expenditures may constitute bad faith under state law).

²⁹² See Easterbrook & Fischel, *supra* note 23, at 1420 (describing competition between states and noting that the “fifty states offer different menus of devices (from voting by shareholders to fiduciary rules to derivative litigation) for the protection of investors”). The Court may not be troubled by this fact, as they suggested such an outcome in *Hobby Lobby* with respect to corporations with dissenting shareholders.

²⁹³ This is usually accomplished by causing the corporation to merge with a newly created corporation in another state. See Federico M. Mucciarelli, *The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU*, 20 TUL. J. INT’L & COMP. L. 421, 427 (2012) (describing the process of reincorporation through merger). The default rule is that mergers require only majority shareholder approval. See *supra* note 212.

²⁹⁴ See *supra* Part III.A.1.

²⁹⁵ See Buccola, *supra* note 7, at 635–36 (defining the internal affairs doctrine).

fairs doctrine to questions about the ability to contract for exemptions.²⁹⁶ If so, the availability of an exemption would rely on where the conduct takes place rather than the state of incorporation. This furthers the state's interest in protecting its citizens while still preserving some measure of choice for corporate shareholders, as they can choose whether to do business in the state. It does not, however, provide the much more painless choice of simply incorporating in a different state than where the shareholder lives and works.²⁹⁷

The Supreme Court will almost certainly speak on corporate religious exemptions again. In the meantime, states may decide to begin filling in the gaps regarding attribution of corporate sincerity—either as legislative changes to corporate codes or through the development of common law doctrine. Ultimately, the doctrine of attribution is likely to be created through conversations between states and the federal courts, with uncertainty lying in how much leeway the federal courts are willing to give states in determining their own state corporate law.

CONCLUSION

The Roberts Court's commitment to religious liberty suggests it is likely to continue pushing the evolution of religious accommodation doctrine by increasing the ability of individuals to claim exemptions on behalf of the corporations they own and operate. It is inevitable that courts will eventually be faced with claims for religious accommodation by religiously heterogeneous corporations. The traditional method of determining religious sincerity for individuals is incomplete when adjudicating an exemption claim by a corporation with both religiously sincere shareholders and shareholders who disavow any religious motivations. An attribution inquiry is necessary to fully consider the corporation's right to an exemption. This question of attribution places corporate law's freedom to contract squarely at odds with the idea that religious liberty is different in kind from more mundane market commodities. Courts faced with determining attribution should be careful not to diminish the value of religious liberty by allowing parties to monetize religious sincerity in the name of religious freedom.

²⁹⁶ See Gregory Scott Crespi, *Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice-of-Law Principles*, 64 N.Y.U. ANN. SURV. AM. L. 85, 98 (2008) (arguing that the internal affairs doctrine should not apply when third parties are harmed by corporate actions). It is debatable whether the internal affairs doctrine is constitutionally required or merely a policy of comity between the states, but states have carved out exceptions to the internal affairs doctrine without incident, especially when it relates to a strong public interest in the state. See Buccola, *supra* note 7, at 636–37.

²⁹⁷ The law does not require the corporation to do any business within its state of incorporation, so the choice to incorporate may be made entirely on the desire for the incorporating state's corporate law. See Hardee, *supra* note 77, at 240–41.