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The Religious Conversion of Corporate Social Responsibility

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THE RELIGIOUS CONVERSION OF CORPORATE SOCIAL RESPONSIBILITY

*Elizabeth Sepper**
*James D. Nelson***

ABSTRACT

*This Article debunks the analogy often drawn between principles of corporate social responsibility (CSR) and claims for corporate religious exemption. In the wake of the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, which held that for-profit businesses are eligible for religious exemptions from general laws, a rising tide of scholars and advocates has argued that the two programs are symmetrical and mutually supportive.*

Looking to the intellectual history of CSR, we demonstrate sharp conflicts—rather than congruence—between the analytical underpinnings of CSR and religious exemptions for corporations. Whereas CSR enlists law-abiding corporations to advance public objectives, these religious exemptions oppose state laws in the personal interest of shareholders. Our analysis uncovers a fundamental mismatch between the political and economic orders imagined by CSR and corporate religious exemptions. Corporate social responsibility posits a distinctly democratic political economy with the state leading its corporate allies in pursuit of societal goals. Proponents of corporate religious exemptions subvert this tradition: corporations defend private liberty from the threat of the public. This vision of the state and the corporation in law, politics, and the economy proves anathema to the project of corporate social responsibility.

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INTRODUCTION

Imagine a corporation, let's call it FineCorp.¹ Specializing in media and live events, FineCorp has over 800 employees. Business has been good—annual revenue tops \$50 million. And once construction is completed, FineCorp will run its operations out of a sparkling \$90 million headquarters.

¹ This fictionalized hypothetical is modeled on the Complaint in *O'Connor v. Lampo Group, LLC* and related news coverage. See Complaint at 3–4, *O'Connor v. Lampo Grp. LLC*, No. 3:2-cv-00628 (M.D. Tenn. July 20, 2020), ECF No. 1; Bob Smietana, *Is Dave Ramsey's Empire the 'Best Place to Work in America'? Say No and You're Out*, RELIGION NEWS SERV. (Jan. 15, 2021), <https://religionnews.com/2021/01/15/dave-ramsey-is-tired-of-being-called-a-jerk-for-his-stands-on-sex-and-covid/>. To our knowledge, the Lampo Group has not yet asserted a free exercise defense, as our fictional company does, but it has indicated plans to do so if plaintiff's religious discrimination claim goes forward. See Defendant's Motion to Dismiss Count V of Plaintiff's Amended Complaint at 8 n.8, *O'Connor v. Lampo Grp. LLC*, No. 3:2-cv-00628 (M.D. Tenn. Feb. 23, 2021), ECF No. 20. Our inspiration for the hypothetical company name is found in CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 124–35 (2007) (describing the city of “Fineville”).

FineCorp is not all about the money, though. It sees itself as a “godly company.” Among its values, the firm is committed to working “as unto the Lord.” This religious message has led to the recruitment of committed employees. Working at FineCorp, one employee reports, means she does “more than just make a product people don’t need.” Another recalls thinking, “Wow, here’s a for-profit that’s about Jesus.” To reward its workers, FineCorp pays well above minimum wage. Employment is said to be a “ministry and a mission,” which is why its founder calls FineCorp “the best place to work in America.”

But not everyone shares this enthusiasm. One employee, let’s call her Betty, was fired last year after she became pregnant. Betty was not married—she engaged in premarital sex in conflict with FineCorp’s values. Betty sued FineCorp, claiming that it broke federal and state laws prohibiting sex discrimination. The company then asked the court for a religious exemption. Complying with the law, it says, would infringe on its free exercise of religion in violation of the First Amendment and the Religious Freedom Restoration Act.

We might disagree on whether a religious exemption should be granted. But is firing Betty the same as FineCorp’s decision to pay above the minimum wage? Are both actions examples of corporate social responsibility?

A rising chorus of voices in the legal academy would say yes. Corporate social responsibility (CSR) means that businesses may advance secular values beyond profit maximization. So too should corporate religious exemptions permit businesses to pursue religious values over mere profits.² In corporate law, one faction of scholars has embraced *Burwell v. Hobby Lobby Stores, Inc.*, a Supreme Court decision exempting for-profit businesses from federal law, as an

² See, e.g., Thomas C. Berg, *Are the Welfare State and Religious Freedom Incompatible?*, 8 U. ST. THOMAS J.L. & PUB. POL’Y 171, 182 n.51 (2014) (observing, in support of exemption, “the connection between recognizing businesses’ religious-freedom rights and affirming the premises of corporate social responsibility”); Holly Fernandez Lynch & Gregory Curfman, *Bosses in the Bedroom: Religious Employers and the Future of Employer-Sponsored Health Care*, in LAW, RELIGION, AND HEALTH IN THE UNITED STATES 154, 160–61 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (discussing Hobby Lobby’s corporate religious decision as akin to and supported by corporate social responsibility); Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 291–92 (2014) (invoking CSR policies as support for for-profit corporations’ pursuit of religious exemptions); Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 83–84 (2013) (“Many for-profit businesses voluntarily operate in a socially conscious manner. . . . [These] examples are important to the religious liberty question because they suggest Americans regularly encounter, and accept, the notion of profit-making businesses taking actions based on ethical, philosophical, and moral commitments.”); Mary Ann Glendon, *Free Businesses to Act with Conscience*, BOS. GLOBE (Dec. 8, 2013, 2:01 AM), <https://www.bostonglobe.com/opinion/2013/12/08/should-business-have-conscience/cK6o6G6dwrWeRJjk1uPVYM/story.html> (arguing CSR and corporate claims for religious exemption are normatively indistinguishable aspects of exercising conscience).

endorsement of corporate social responsibility.³ By granting a corporate religious exemption, the Court—these scholars say—affirmatively rejected wealth maximization in favor of CSR.⁴ For their part, religious objectors and their supporters have picked up the analogy and run with it. A host of advocates, academics, and regulators have claimed that CSR advances the case for an expansive range of corporate religious exemptions.⁵

Putting these claims of congruence to the test, this Article reveals that corporate social responsibility and corporate religious exemptions prove irreconcilable. As an initial matter, corporate social responsibility involves doing more than state or federal laws require, whereas corporate religious exemptions lower the regulatory bar. This obvious contradiction, we argue, points to a deeper and more foundational divergence between the political economies of CSR and corporate religious exemptions. Corporate social responsibility looks to the democratic state to lead economic efforts, identify social values, and harness corporate power in the direction of democracy. The pursuit of corporate religious exemptions defies these core commitments. Its underlying political economy portrays the democratic state as a looming threat,

³ 573 U.S. 682, 712 (2014) (observing that corporations routinely support charitable causes, including environmental protection and humanitarian aid, and noting “[i]f for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well”).

⁴ *E.g.*, Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 *BUS. LAW.* 1, 22–23 (2014) (arguing that in “a landmark in corporate law” the Supreme Court had determined corporations properly pursue aims other than wealth maximization).

⁵ *See, e.g.*, ALLIANCE DEFENDING FREEDOM, *Introduction to AN EMPLOYER’S GUIDE TO FAITH IN THE WORKPLACE: LEGAL PROTECTIONS FOR CHRISTIANS WHO OWN A BUSINESS* (2016), https://centerforfaithandwork.com/sites/default/files/PDFs/FaithInTheWorkplace_LeTourneau_FINAL.pdf (“[W]hile some business owners are cheered and commended when they blend certain beliefs and work, Christian business owners are often derided and denigrated, and sometimes face legal challenges, when they do the same.”). For examples of academics making a similar case, see Ronald J. Colombo, *Religious Conceptions of Corporate Purpose*, 74 *WASH. & LEE L. REV.* 813, 840 (2017) (arguing “corporate religious liberty fosters a more robust approach to corporate social responsibility” and should free for-profit corporations from having to act contrary to religious doctrine); Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 *ARIZ. L. REV.* 777, 780 (2015) (“Corporations may be used to pursue moral goals that aim to make the world a better place—an idea that resonates with the (generally left-of-center) corporate social responsibility movement. Where such goals are rooted in religious principles, a corporation may, and should, be able to invoke RFRA protections.”).

With regard to regulators, a leaked draft of the Trump Administration’s proposed rule exempting employers with religious or moral exemptions from the contraceptive mandate reads:

[B]usinesses large and small take positions on matters of social justice, community benefit, and ethical concerns beyond profit. . . . Therefore, the Departments consider it appropriate to exempt any entity possessing religious beliefs or moral convictions against the coverage required by the Mandate, regardless of its corporate structure or ownership interests.

Dylan Scott & Sarah Kliff, *Leaked Regulation: Trump Plans to Roll Back Obamacare Birth Control Mandate*, *VOX* (May 31, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation>.

corporations as bulwarks of freedom, and the public as narrow in scope. This vision of the state and the corporation in law, politics, and the economy proves antithetical to corporate social responsibility.

By exposing these underlying tensions, this Article clarifies the stakes of debates over the rights and responsibilities of businesses. Our analysis leads to the conclusion that CSR provides no support for exempting business corporations from regulation. It further reveals that CSR may be at an inflection point. If some CSR enthusiasts continue to define religious exemptions as socially responsible behavior, they risk corrupting the concept beyond recognition. If, instead, CSR proponents unite in rejecting religious exemptions, they might yet revive CSR in the context of new initiatives for corporate accountability.

Two brief notes about methodology. First, in making this argument, we draw upon the long intellectual history of CSR in legal and management scholarship.⁶ By isolating the central strands of CSR as an intellectual project, we develop a manageable standard against which to measure the coherence of arguments made in its name. We adopt a standard and widely accepted definition of the concept: corporate social responsibility requires managers to attempt to further societal, labor, or environmental goals in ways that do not advance—or may even impede—shareholder wealth maximization. Second, we aim to give a fair and charitable account of both corporate social responsibility and corporate religious exemptions. In previous work, we have opposed corporate religious exemptions on both doctrinal and normative grounds.⁷ We have also criticized corporate social responsibility, in theory and in practice.⁸ Here, we neither defend nor contest either concept. We instead evaluate how they hang together.⁹

⁶ For more extensive treatments of CSR's history, see generally ARCHIE B. CARROLL, KENNETH J. LIPARTITO, JAMES E. POST & PATRICIA H. WERHANE, *CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE* (2012); ANDREW MYZIEWSKI, *MANAGING CORPORATE SOCIAL RESPONSIBILITY* 8–10 (Archie B. Carroll ed., 1977); Andrew Myszewski, *Responsible Riches: The Intellectual Development of Corporate Social Responsibility, 1920–1960* (May 27, 2010) (Senior Honors Thesis, University of Wisconsin-Madison), <http://digital.library.wisc.edu/1793/44214> (detailing the history of corporate social responsibility between the years 1920 and 1960).

⁷ See Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565 (2013).

⁸ For a comprehensive account, see James D. Nelson, *The Trouble with Corporate Conscience*, 71 VAND. L. REV. 1655 (2018). See also Elizabeth Sepper, *supra* note 7, at 1547 (“Within for-profit businesses, even though moral convictions might come into play, the profit motive (in some cases, an obligation to maximize shareholder wealth) must drive decisionmaking.”).

⁹ Nevertheless, by highlighting the disanalogies between CSR and corporate religious exemptions, our analysis may help blunt charges of hypocrisy leveled against those who support CSR and not religious exemption. See *infra* note 79 and accompanying text.

Part I begins by introducing the questions that have split corporate law scholarship for the last century: In whose interests should a corporation act? And what purposes may a corporation pursue? As we explain, for the majority of corporate law scholars, the answer is clear: corporations serve as vehicles to maximize the financial wealth of shareholders.¹⁰ A tenacious minority of corporate law scholars dissent, insisting that corporations can—and should—have broader social purposes and owe duties to stakeholders outside of shareholders.¹¹

In 2014, certain supporters of corporate social responsibility claimed a victory in this long-running debate. The Supreme Court, they said, had affirmed the principles of CSR in granting a religious exemption to a for-profit business in *Burwell v. Hobby Lobby Stores, Inc.*¹² A variety of commentators in corporate law and church-state law explicitly linked CSR and corporate religious exemptions.¹³

In Parts II–IV, we debunk these claims of congruence. Part II explores an evident contradiction between corporate social responsibility’s commitment to legal compliance and corporate religious objectors’ claims to opt out of generally applicable legal minimums.¹⁴ This inconsistency has prompted some exemption advocates to respond that objecting businesses in fact seek to enforce

¹⁰ See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 552 (2002); Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 106 (2020); see also Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001) (arguing wealth maximization was so completely accepted as to be the end of history for corporate law); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) (“Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth.”).

¹¹ See, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 62–63 (2012) (suggesting humans as a whole are “prosocial” and generally act in moral ways to avoid causing harm to others); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 763 (2005) (“[N]o corporate statute has ever stated that the sole purpose of corporations is maximizing profits for shareholders.”); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 303 (1999) (“[C]ase law . . . often explicitly authorizes directors to sacrifice shareholders’ interests to protect other constituencies.”).

¹² 573 U.S. 682, 690–91 (2014).

¹³ See *infra* notes 83–91 and accompanying text.

¹⁴ It is of course possible to argue that a corporation should be permitted to pursue religiously motivated goals consistent with this tradition. See, e.g., Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 872 (2004) (arguing corporations should exceed de minimis legal obligations and adopt a religious approach of responsibility to employees, consumers, and the public). We take proponents of the argument from CSR to go further.

legal protections for religious exercise and thus do not defy any legal obligations.¹⁵ We consider this response and explain why it proves wanting.

More fundamentally, the political economies presumed and sustained by corporate social responsibility and corporate religious exemptions, respectively, are at loggerheads—as Parts III and IV argue. The first disagreement revolves around the problem of power. CSR’s intellectual history manifests remarkable consistency: corporate power poses an existential threat to the democratic state and to the people who depend on it. The solution that CSR proposes is to enlist corporations to advance the state’s objectives. Proponents of corporate religious exemptions, by contrast, take the state to be the primary threat to liberty. Their solution is for corporations to serve as intermediary institutions, standing guard against state incursions and protecting private moralities from state supremacy.

Another source of tension concerns the role of regulation. For theorists of CSR, democratically enacted laws that place obligations on businesses provide the guideposts for socially responsible action. Through regulation, the state identifies social needs and sets the direction for ethical business. But these same regulations play an antagonistic role in the story of corporate religious exemptions. Religious objectors reject the social goals embodied in the law in favor of their own religious commitments.

Finally, CSR and religious exemptions propose conceptions of the public and private that are poles apart. Central to the theory of corporate social responsibility is the “publicness” of nominally private business corporations. Corporations, the theory instructs, perform social as well as economic functions. Under such circumstances, they owe responsibilities not just toward shareholders, but also toward the wider corporate community, including employees, creditors, localities, and society as a whole. Market and politics prove fluid and overlapping.

In contrast, claims for religious exemption assert a rigid line between public and private. Through analogies to the family, the religious corporation becomes distinctly private. Its relationships with employees and consumers, on this view, should be set by contract without state intervention. And the corporation promotes a dramatically narrower set of corporate interests—those of controlling shareholders whose religious beliefs are engrafted onto the corporation. It becomes private property, not public concern.

¹⁵ See *infra* note 99.

Part III explores these themes with regard to CSR. Part IV focuses on the political economy of corporate religious exemptions. By highlighting discrepancies between the political economies of CSR and corporate religious exemptions, our analysis reveals new pathways forward for fields of law and religion, corporate law, and various literatures in law and political economy. One modest—but critical—step is for proponents of religious exemptions to abandon their reliance on CSR. Although its invocation may have provided a transitory strategic advantage in litigation and public relations, the analogy was intellectually misplaced from the outset and may have crowded out stronger arguments for religious exemption.

On the flip side, as Part V argues, CSR supporters should repudiate *Hobby Lobby* and attend to the subversive political economy of corporate religious exemptions. CSR supporters cannot continue to embrace immunity for corporations from antidiscrimination and social welfare protections without converting the normative pull of heightened corporate responsibility into increased corporate power. These corporations now object on religious grounds to serving same-sex couples, covering preventive healthcare services, and making employment decisions without discrimination.¹⁶ In *Bostock v. Clayton County*,¹⁷ the Supreme Court seemed to invite additional corporate demands for exemption, indicating that religious exercise might “supersede Title VII’s commands.”¹⁸ To label these claims social responsibility corrupts the concept’s core meaning.

CSR’s supporters might still have the opportunity to revive its central insights. The pressing socioeconomic transformations of our time have ignited interest in corporate accountability in the academy and politics. These debates might draw inspiration from the earlier, and more authentic, versions of CSR that we uncover in this Article.

¹⁶ See, e.g., *Masterpiece Cakeshop v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2018) (extending rights to free exercise under the Constitution to a for-profit bakery objecting to serving same-sex couples); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752–53 (8th Cir. 2019) (concluding a videography company has free speech and free exercise rights not to comply with antidiscrimination law); *Kelley v. Azar*, No. 4:20-CV-00283-O, 2021 WL 4025804, at *1 (N.D. Tex. Feb. 25, 2021) (denying motion to dismiss claims of individual and corporate plaintiffs that requirement to cover preexposure prophylaxis (“PreEP”) drugs violates their religious freedom); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes*, 201 F. Supp. 3d 837, 841–42 (E.D. Mich. 2016) (involving claims to religious exemption from employment nondiscrimination under the Civil Rights Act).

¹⁷ 140 S. Ct. 1731 (2020).

¹⁸ *Id.* at 1754. Title VII prohibits discrimination in employment based on race, color, religion, sex, and national origin. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e et seq. (2012)).

I. THE CONTOURS OF THE CORPORATE SOCIAL RESPONSIBILITY AND CORPORATE RELIGIOUS EXEMPTION DEBATES

Over the last century, corporate law has lived with a recurring dispute over the responsibilities of corporations. As section A explains, scholars divide over two related questions: In whose interests should a corporation act? And what purposes may a corporation pursue?

On one side are those who view corporations as vehicles to maximize the financial wealth of shareholders. This position has so firmly taken hold of corporate law that two of the world's most accomplished corporate law scholars have declared “the end of history for corporate law” and the triumph of shareholder primacy.¹⁹

On the other side, scholars advance the notion of corporate social responsibility. Corporations can—and should—have broader social purposes and owe duties to stakeholders outside of shareholders, they say.

In 2014, some supporters of corporate social responsibility claimed a victory of their own. The Supreme Court, they said, had confirmed the authority of corporations to pursue objectives beyond shareholder profit in a case involving religious exemptions for for-profit corporations. In their view, *Hobby Lobby* definitively validated CSR and repudiated the primacy of shareholder profit.²⁰ Corporate religious exemption became linked to CSR, as section B details.

A. Shareholder Wealth Maximization and Its Discontents

Intellectual histories commonly trace the origins of corporate social responsibility to the famous 1930s debate between Adolf Berle and E. Merrick Dodd in the pages of the *Harvard Law Review*.²¹ Against the backdrop of the Great Depression, these scholars squared off over the wisdom of giving corporate managers discretion to direct economic resources toward social goals.

¹⁹ Hansmann & Kraakman, *supra* note 10, at 440–41, 449. A number of commentators argued this declaration was premature. See, e.g., Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 535 (2006); Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 L. & CONTEMP. PROBS. 87, 88 (2004) (“[T]he death announcement for the history of corporate law is now revealed as premature.”).

²⁰ See Johnson & Millon, *supra* note 4, at 22 (indicating that the *Hobby Lobby* decision endorses the idea that corporations may legally pursue goals other than profits).

²¹ A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) [hereinafter Berle, *Corporate Powers*]; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) [hereinafter Berle, *A Note*].

Worried that managers would advance their own interests, Berle advocated a stringent duty to serve shareholders alone.²²

In response, Dodd laid the conceptual foundation for what we now call “corporate social responsibility.” While conceding that managers needed taming, Dodd argued that they should serve the interests of the public as well as those of shareholders and could deploy corporate funds for that purpose “without thereby being guilty of a breach of trust.”²³ According to Dodd, the public—and even the executive ranks of America’s most significant companies—increasingly took the view that nominally private business corporations had a “social service” function in addition to their economic function.²⁴

Over time Dodd and Berle switched positions.²⁵ But the two major axes of their debate remained stable: shareholder primacy versus stakeholder governance, profits versus social purposes.

The initial disagreement is over whose interests should be primary—shareholders or a broader set of stakeholders.²⁶ Contemporary corporate law scholarship tends to favor shareholder primacy.²⁷ Perhaps the most forceful judicial statement of shareholder primacy came in 1919 in *Dodge v. Ford Motor Co.*, when the Michigan Supreme Court declared that “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”²⁸ Nearly one hundred years later, the Delaware Court of Chancery struck a similar note in *eBay Domestic Holdings, Inc. v. Newmark*, explaining that directors must “promote the value of the corporation for the benefit of stockholders.”²⁹ These

²² See Berle, *A Note*, *supra* note 21, at 1368–69 (noting corporate managers act in their own interest “to take what each can get”); Berle, *Corporate Powers*, *supra* note 21, at 1065–73 (arguing the corporation’s power to amend its charter and to transfer stock should be used only to protect the interests of all shareholders).

²³ Dodd, *supra* note 21, at 1161; *see id.* at 1147–48 (calling “undesirable” “the view that business corporations exist for the sole purpose of making profits for their stockholders”).

²⁴ See Dodd, *supra* note 21, at 1148, 1154–55 (extensively quoting remarks of Owen D. Young and Gerard Swope, both high-ranking executives at the General Electric Company).

²⁵ ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954) (“The argument has been settled (at least for the time being) squarely in favor of Professor Dodd’s contention.”).

²⁶ Compare Lucian A. Bebchuk & Roberto Tallarita, *supra* note 10, at 108 (arguing that policies favoring all stakeholders can be detrimental), with Martin Lipton, *Professor Bebchuk’s Errant Attack on Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (March 4, 2020), <https://corpgov.law.harvard.edu/2020/03/04/professor-bebchuks-errant-attack-on-stakeholder-governance/> (arguing for the adoption of stakeholder governance).

²⁷ See Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1953 (2018) (“Despite persistent criticism, the idea of shareholder primacy has been widely accepted.”).

²⁸ 170 N.W. 668, 684 (Mich. 1919).

²⁹ 16 A.3d 1, 34 (Del. Ch. 2010).

cases are taught as blackletter law in classrooms across the country.³⁰ Many of the nation's leading corporate law scholars carry the banner of shareholder primacy³¹—a position one of us has defended in previous work.³²

Proponents of stakeholder governance challenge this consensus on both legal and normative grounds. As a legal matter, critics contend that corporate law does not contain any requirement to maximize shareholder wealth. *Dodge* was decided long ago, in a relatively insignificant jurisdiction for corporate law, and has rarely been relied on.³³ *eBay*, they say, was the product of an overzealous trial court dealing with the conceptually distinct problem of minority shareholder oppression.³⁴ And, outside of Delaware, thirty-three states have passed constituency statutes, which explicitly invite directors to consider stakeholder interests.³⁵ Another view contends that regardless of whether there is a technical fiduciary duty to shareholders, the business judgment rule insulates corporate directors from any kind of wealth-maximization mandate.³⁶

As a normative matter, these scholars argue that shareholder primacy leads to a host of pernicious consequences. Corporate managers focus on the short term to the detriment of the long term.³⁷ They become blindered to the morally

³⁰ See, e.g., WILLIAM T. ALLEN & REINIER H. KRAAKMAN, COMMENTARIES ON THE LAW OF BUSINESS ORGANIZATION 284–86 (5th ed. 2016); WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCs, AND CORPORATIONS 220–24 (10th ed. 2018).

³¹ See, e.g., Bebchuk & Tallarita, *supra* note 10.

³² See Nelson, *The Trouble with Corporate Conscience*, *supra* note 8 (defending shareholder primacy as a normative matter); Nelson, *Conscience, Incorporated*, *supra* note 7 (defending shareholder primacy as a legal matter).

³³ See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166–67 (2008).

³⁴ See Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 623 n.194 (2018) (comparing *Dodge* and *eBay*).

³⁵ See Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 93 S. CAL. L. REV. (forthcoming 2021) (manuscript at 17); see also Elhauge, *supra* note 11, at 763 (noting that over thirty states had passed constituency statutes at that time).

³⁶ See M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in CORPORATE LAW STORIES 37, 37–39 (J. Mark Ramseyer ed., 2009).

³⁷ See, e.g., Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1915 (2017) (“[T]hose who manage active funds are likely to have compensation arrangements more based on the fund family’s profits or short-term returns than the long-term returns of the funds they manage.”); Martin Lipton, Steven A. Rosenblum, Sabastian V. Niles, Sara J. Lewis & Kisho Wantabe, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations and Investors to Achieve Sustainable Long-Term Investment and Growth*, WORLD ECON. F. (Sept. 2, 2016), <https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf> (warning that focusing on short-term gains is detrimental to the economy because of the lack of investment in future-looking projects); Lynn A. Stout, *New Thinking on “Shareholder Primacy,”* 2 ACCT., ECON., & L. 1, 12–13 (2012) (proposing the board of directors of a company should be given

compelling interests of other corporate participants.³⁸ Equality and distributive justice face ill effects.³⁹ In 1932, Merrick Dodd labeled shareholder primacy “undesirable.”⁴⁰ In 2012, Lynn Stout put a sharper edge on the point: it was “the dumbest idea in the world.”⁴¹

The battle over shareholder primacy is about *whose interests* should come first—or, as Dodd put the question—“[f]or whom are corporate managers trustees?”⁴² That question is tightly linked to, but distinct from, a second question—*what purposes* are corporations supposed to serve?

On the conventional view, the only socially legitimate goal of corporations is financial wealth—they are supposed to make as much money as possible within the bounds of the law. As Nobel Prize-winning economist Milton Friedman put it, managers betrayed their principals and became “unadulterated socialis[ts]” if they considered wider social goals.⁴³ Put somewhat less tendentiously, when managers promote values other than shareholder wealth, they place a “tax” on shareholders, diverting *other people’s money* to their own pet projects.⁴⁴

Contemporary scholars of law and economics largely subscribe to Friedman’s view.⁴⁵ The primary goal of corporate law accordingly becomes

discretion to “pursue business strategies that preserve long term value, even if these strategies don’t produce immediate gains in share price”).

³⁸ See, e.g., William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, in *ETHICAL THEORY AND BUSINESS* 97, 102–03 (Tom L. Beauchamp & Norman E. Bowie eds., 3d ed. 1988) (noting managers are often compelled to “balanc[e] the multiple claims of conflicting stakeholders” with the caveat that “there will surely be times when one group will benefit at the expense of others”); Marleen A. O’Connor, *Restructuring the Corporation’s Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1201 (1991) (explaining how corporate restructurings meant to increase short-term cash returns worked to the detriment of employees, many of whom were unexpectedly laid off).

³⁹ See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 153–85 (2006); Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL’Y REV. 1, 4 (2008).

⁴⁰ Dodd, *supra* note 21, at 1147–48.

⁴¹ LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 3–6 (2012) (endorsing Jack Welch’s quote).

⁴² See Dodd, *supra* note 21.

⁴³ Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

⁴⁴ See *id.*

⁴⁵ See John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 21, 29 (3d ed. 2017). They reject, however, Friedman’s outdated idea that managers were literally employed by shareholders. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC*

reducing the costs of misalignment between the financial interests of shareholders and those of corporate managers who serve as their economic agents—the “agency-cost” problem that all but occupies the field of corporate law today.⁴⁶

By contrast, for CSR proponents, corporations can—and should—be free to promote a wide variety of other human values. Howard Bowen—sometimes called the “father of corporate social responsibility”⁴⁷—argued that businesses must be judged by their “demonstrable contribution to the general welfare.”⁴⁸ Since the end of the 1990s, the rhetoric, and perhaps the practice, of CSR has been mainstream among business corporations.⁴⁹

Now, to be clear, both sides agree that corporations can further environmental, social, or labor goals—the stuff of corporate public relations. Even Friedman would encourage managers to take any legally permissible steps that increase value.⁵⁰ But, from the conventional point of view, managers may pursue only those social initiatives that strive toward shareholder wealth.⁵¹

Doing well by doing good, however, is not corporate social responsibility. Corporate social responsibility instead indicates that managers can (and should) attempt to further societal, labor, or environmental goals in ways that do not advance—or may even impede—shareholder wealth maximization. And it is this definition of CSR that we, like other scholars, use here.⁵²

STRUCTURE OF CORPORATE LAW 1–39 (1991).

⁴⁶ The foundational article on agency-cost analysis is Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). See Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1326 (2013) (stating the agency-cost approach developed by Jensen and Meckling “remains the dominant framework of analysis for corporate law and corporate governance today”).

⁴⁷ Archie V. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268, 270 (1999).

⁴⁸ HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 52 (2013) (originally published 1953).

⁴⁹ David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 262–77 (2008) (demonstrating that in the 1990s, corporations came to invest in CSR guidelines, initiatives, and education programs in business schools); Tom C.W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1566–67 (2018) (compiling examples of corporations engaged in CSR); Elhauge, *supra* note 11 (showing how corporations do, can, and should sacrifice profits in the public interest).

⁵⁰ Friedman, *supra* note 43.

⁵¹ See, e.g., STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 8, 10, 52–53 (2008); Bebchuk & Tallarita, *supra* note 10.

⁵² See, e.g., C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 80–81 (2002) (observing that corporate social responsibility in debates throughout the twentieth century meant challenging the idea of an overriding notion of shareholder primacy in favor of employee- and community-oriented decisions).

The CSR debate has been revived in the new contexts presented by hedge fund activism, unlimited corporate political spending, and the growth of institutional investors,⁵³ but that revival tends to follow well-worn paths. What is new is that modern debates involving the social responsibilities of corporations have spilled over into controversies about religious exemptions for business corporations.

B. Linking CSR to Corporate Religious Exemptions

The century-long debate over corporate social responsibility received a major jolt in 2014. That year, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court decided the question of whether for-profit corporations could exercise religion.⁵⁴ Some prominent scholars argued that the Court had affirmed the core principles of CSR even as it granted a religious exemption to a for-profit business.⁵⁵ Many supporters of religious exemptions were bolder, claiming that CSR advances the case for an expansive range of corporate religious exemptions.⁵⁶

Hobby Lobby pitted two major pieces of federal legislation against each other.⁵⁷ The Affordable Care Act (ACA) requires large employers to provide their employees with insurance coverage for a variety of contraceptive services with no cost-sharing.⁵⁸ The Religious Freedom Restoration Act (RFRA), on the other hand, offers a vehicle for religious objectors to claim exemptions from federal law.⁵⁹ Dozens of businesses challenged the contraceptive mandate, claiming that its enforcement would impermissibly burden their sincere religious beliefs.⁶⁰

⁵³ For the social consequences of hedge fund activism, see generally Strine, *supra* note 37, at 1874, 1919, 1934–56. For background on corporate political spending, see Lucian Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1 (2020). For issues concerning large institutional investors, see John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve* (Harvard Public Law Working Paper No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 (working manuscript at 2–3, 5–6, 13–14, 19); Jeffrey N. Gordon, *Systematic Stewardship* (Columbia Law and Economics Working Paper No. 640, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782814.

⁵⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 712 (2014).

⁵⁵ See, e.g., Johnson & Millon, *supra* note 4.

⁵⁶ See *infra* notes 83–91 and accompanying text.

⁵⁷ See *Hobby Lobby*, 573 U.S. at 701.

⁵⁸ See 42 U.S.C. § 300gg-13(a) (4) (2012).

⁵⁹ 42 U.S.C. § 2000bb *et seq.*

⁶⁰ See Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1455 (2015) (discussing cases); Nelson, *Conscience, Incorporated*, *supra* note 7, at 1566.

As the litigation proceeded, the analogy between CSR and corporate religious exemption began to take off. While CSR remains a minority position in corporate law literature, advocates of religious exemption recognized its broader social appeal. On the op-ed pages, Mary Ann Glendon contended that CSR and corporate claims for religious exemption were normatively indistinguishable aspects of exercising conscience.⁶¹ An amicus brief argued that failure to recognize free exercise of a for-profit corporation would result in “a significant weakening of the structures that undergird corporate social responsibility.”⁶² Just as Coca-Cola could seek to save polar bears, so too must Hobby Lobby be free to deny contraception.⁶³

The Supreme Court ultimately held that for-profit corporations were eligible to claim religious exemptions from general laws and granted some of them an exemption from the contraceptive mandate.⁶⁴ In so doing, the Court added its own take on corporate social responsibility.⁶⁵ Writing for the Court, Justice Alito observed that corporations routinely support charitable causes, including environmental protection and humanitarian aid.⁶⁶ It followed that “[i]f for profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.”⁶⁷

In an influential article, Lyman Johnson and David Millon declared *Hobby Lobby* an unambiguous validation of corporate social responsibility.⁶⁸ As the first intervention by the nation’s highest court in the decades-long debates over corporate social responsibility, the opinion was “a landmark in corporate law,” they said.⁶⁹ It affirmed the authority of corporations to pursue socially responsible objectives.⁷⁰ Those objectives, as they put it, could take the form of “voluntary actions that exceed legal mandates, whether motivated by religion or by other philosophical, ethical, or social policy convictions.”⁷¹

⁶¹ See Mary Ann Glendon, *Free Businesses to Act with Conscience*, BOS. GLOBE (Dec. 8, 2013), <https://www.bostonglobe.com/opinion/2013/12/08/should-business-have-conscience/cK6o6G6dwrWeRJk1uPVYM/story.html>.

⁶² Brief for 9 Academic Institutions and 27 Comparative Law and Religion Scholars as Amici Curiae Supporting Respondents, *Sebelius v. Hobby Lobby Stores, Inc.*, 572 U.S. 1011 (2014) (Nos. 13-354, 13-356), 2014 WL 334444 (U.S.) at *26.

⁶³ *Id.* at *33.

⁶⁴ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014).

⁶⁵ See *id.* at 712.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Johnson & Millon, *supra* note 4, at 22.

⁶⁹ See *id.*

⁷⁰ See *id.* at 2–3, 22 (“Only with legal freedom is corporate social responsibility even possible.”).

⁷¹ *Id.* at 30.

Johnson and Millon were not alone in their assessment. Brett McDonnell, for example, praised *Hobby Lobby* as affirming “an idea that resonates with the (generally left-of-center) corporate social responsibility movement.”⁷² Thomas Berg also endorsed that view, noting “the connection between recognizing businesses’ religious freedom rights and affirming the premises of corporate social responsibility.”⁷³ And Holly Fernandez Lynch and Gregory Curfman argued that *Hobby Lobby*’s decision to deny contraceptive coverage to female employees was akin to, and supported by, corporate social responsibility.⁷⁴

More generally, a variety of church-state and corporate law experts explicitly connected corporate social responsibility and corporate religious exemptions. In the months before *Hobby Lobby*, Mark Rienzi argued that because for-profit businesses could take socially conscious action “based on ethical, philosophical, and moral commitments,” they could not be precluded from claiming Free Exercise or RFRA exemptions based on religious beliefs.⁷⁵ Alan Meese and Nathan Oman agreed, invoking a variety of socially responsible business policies in support of corporate religious exemptions.⁷⁶ Likewise, Ronald Colombo argued that “corporate religious liberty fosters a more robust approach to corporate social responsibility.”⁷⁷

Some commentators were so puzzled by the failure to recognize this supposed symmetry that they could only chalk it up to ignorance or religious animus. On this account, opposition to *Hobby Lobby* revealed liberals’ ideological “blind-spot.”⁷⁸ Likewise, failure to link CSR to religious exemptions exposed an “unsettling” and “pernicious” hypocrisy: “[T]hat corporations should be encouraged to act conscientiously with respect to protection of sea life, but are ridiculed as being out of bounds when their conscience is the religiously-motivated protection of human life.”⁷⁹

⁷² McDonnell, *The Liberal Case for Hobby Lobby*, *supra* note 5, at 780; *see also* Michele Benedetto Neitz, *Hobby Lobby and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 68 SMU L. REV. 243, 262 (2015) (“The Court’s reasoning undermined decades of corporate focus on profits and shareholder wealth, providing a unique opportunity for corporate social responsibility activists and investors.”).

⁷³ Berg, *supra* note 2.

⁷⁴ *See* Lynch & Curfman, *supra* note 2, at 154–59.

⁷⁵ Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59, 84 (2013).

⁷⁶ *See* Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 291–92 (2014).

⁷⁷ Colombo, *supra* note 5, at 840.

⁷⁸ Brett McDonnell, *Ideological Blind Spots: The Left on Hobby Lobby*, STAR TRIB. (July 10, 2014, 7:01 PM), <http://www.startribune.com/ideological-blind-spots-the-left-on-hobby-lobby/266684261/>.

⁷⁹ Brett Scharffs, *Our Fractured Attitude Towards Corporate Conscience* 17 (Mar. 12, 2014) (unpublished

The stakes of this debate go well beyond *Hobby Lobby* and the contraceptive mandate. Just a few years after *Hobby Lobby*, the Supreme Court expanded the reach of corporate rights, taking as granted that corporations can claim exemptions not only under RFRA, but under the Constitution as well.⁸⁰ In 2019, the Court of Appeals for the Eighth Circuit and the Arizona Supreme Court became the first courts to hold that for-profit corporations have free exercise rights to refuse service contrary to public accommodations antidiscrimination law.⁸¹ At least two justices of the U.S. Supreme Court, Justices Thomas and Gorsuch, agree.⁸² At the same time, corporate religion is ascendant in lobbying groups and calls for religious integralism, according to which faith and business combine and generally applicable law should cede.⁸³

In Parts II–IV, we dispute the claimed congruence between CSR and corporate religious exemptions. At the most basic level, as Part II explains, corporate social responsibility involves exceeding regulatory minimums whereas corporate religious exemptions clash with legal obligations. More fundamentally, as Parts III and IV argue, a deeper asymmetry emerges between

manuscript) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445680); see Stephen Bainbridge, *The Odd Inconsistencies in the Corporate Law Professor Brief in the Mandate Cases*, PROFESSORBAINBRIDGE.COM (Jan. 29, 2014, 5:23 PM), <https://www.professorbainbridge.com/professorbainbridgecom/2014/01/the-odd-inconsistencies-in-the-corporate-law-professor-brief-in-the-mandate-cases.html> (“[A]dvocates of . . . [CSR] argue that corporations should consider the good of society when making corporate decisions. Except it seems when Catholic and other religiously-motivated shareholders want the corporation to address the social issue of abortion.”); see also ALLIANCE DEFENDING FREEDOM, AN EMPLOYER’S GUIDE TO FAITH IN THE WORKPLACE: LEGAL PROTECTIONS FOR CHRISTIANS WHO OWN A BUSINESS 1 (2015) (“[W]hile some business owners are cheered and commended when they blend certain beliefs and work, Christian business owners are often derided and denigrated, and sometimes face legal challenges, when they do the same.”); McDonnell, *supra* note 78 (arguing corporate religious exemptions are “grounded in corporate social responsibility,” but that it is “[t]oo bad so many liberals don’t seem to realize it.”); Keith Paul Bishop, *44 Law Professors Make a Case Against Corporate Social Responsibility*, ALLEN MATKINS: CAL. CORP. & SEC. L. (Feb. 10, 2014), <https://www.calcorporatelaw.com/2014/02/44-law-professors-make-a-case-against-corporate-social-responsibility> (“If corporations can’t have religious beliefs, then it follows that they can’t believe in climate change, sustainable investment or any other beliefs embraced by the corporate social responsibility movement.”); Lyman Johnson, *Hobby Lobby, A Landmark Corporate Law Decision*, BUS. L. PROF BLOG (July 2, 2014), https://lawprofessors.typepad.com/business_law/2014/07/lyman-johnson-hobby-lobby-a-landmark-corporate-law-decision.html (“I found it odd to see these companies opposed by so many corporate progressives. . . . But take comfort: although progressives lost the Hobby Lobby battle, they gained (accidentally) an ironic victory on the all-important corporate purpose war.”).

⁸⁰ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018).

⁸¹ *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755, 758 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 895 (Ariz. 2019).

⁸² See *Masterpiece Cakeshop*, 138 S. Ct. at 1742–43 (Thomas, J., concurring in part and concurring in the judgment).

⁸³ James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 600–03 (2019) (describing these arguments).

the political economies presumed and sustained by corporate social responsibility and corporate religious exemptions.

II. AN OBVIOUS INCONGRUENCE

Corporate religious exemptions defy the most basic assumption about corporate social responsibility—namely, that the corporation must comply with existing regulatory requirements. As we have explained, corporate law scholars disagree about whether corporations can—or should—go *above* those legal requirements in pursuit of something other than shareholders’ economic interests. But there is wide consensus across the ideological spectrum that existing regulatory frameworks establish a floor beneath which socially responsible corporate behavior may not fall.⁸⁴

This requirement to stay within the bounds of the law is baked into business corporation statutes, which typically permit corporations to be organized only to pursue “lawful” business or purposes.⁸⁵ And while the *ultra vires* doctrine has receded over the years, corporate law has retained an emphasis on lawful pursuits as a floor for corporate behavior.⁸⁶ As Elizabeth Pollman has explained, by imposing mandatory duties of obedience to public authority, corporate law acknowledges the importance of the rule of law and the implicit social contract between the state and corporate entities.⁸⁷ It assumes a “binary, on-off” between behaviors inside the rules of the game or outside their scope.⁸⁸

⁸⁴ See, e.g., Carroll, *Corporate Social Responsibility*, *supra* note 47, at 283–84 (noting that definitions of CSR “alluded to businesses’ responsibility to make a profit, obey the law, and ‘go beyond’ these activities”); David L. Engel, *An Approach to Corporate Responsibility*, 32 STAN. L. REV. 1, 67 (1979) (discussing the “extralegislativ” nature of CSR); Keith Davis, *The Case for and Against Business Assumption of Social Responsibilities*, 16 ACAD. MGMT. J. 312, 313 (1973) (“[S]ocial responsibility begins where the law ends.”); JOSEPH W. MCGUIRE, *BUSINESS AND SOCIETY* 144 (1963) (“The idea of social responsibilities supposes that the corporation has not only economic and legal obligations but also certain responsibilities to society which extend beyond these obligations.”); Dodd, *supra* note 21, at 1161 (calling for the “development of business ethics which goes beyond the requirements of law.”); Hillary A. Sale, *The Corporate Purpose of Social License* 7 (June 13, 2019) (unpublished manuscript) (on file at <https://ssrn.com/abstract=3403706>) (“[T]he freedom corporate actors enjoy is subject to laws and regulations . . .”).

⁸⁵ See, e.g., DEL. CODE ANN. tit. 8, § 101(b) (West 2006) (“A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes”); see also Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1316–17, 1317 n.121 (2001) (noting the lawfulness restriction in the Model Business Corporation Act and the corporation codes of 47 states).

⁸⁶ See *Miller v. AT&T*, 507 F.2d 759, 762–63 (3d Cir. 1974) (holding that the business judgment rule does not protect directors who knowingly violate the law). See generally Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2028–29 (2019) (exploring duty of good faith to comply with external law and its legitimizing role for corporate law).

⁸⁷ Pollman, *supra* note 86, at 2027–28.

⁸⁸ Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 711 (2019) (querying whether this

Even the staunchest critics of corporate social responsibility take for granted that corporations are bound by regulatory minimums. Milton Friedman—the most prominent critical voice—made clear that corporate managers, in their dogged pursuit of profits, had an absolute obligation to “stay[] within the rules of the game.”⁸⁹ Modern critics share this perspective.⁹⁰

By contrast, the debate over corporate religious exemptions in the law and religion literature has called for resistance to law. Ronald Colombo, for example, argues that a business’s embrace of a religious identity is undermined or rendered impossible by laws and regulations.⁹¹ The “robust understanding of corporate social responsibility” that he propounds would allow corporations to defy these laws in their religious interest.⁹² Amy Sepinwall is more troubled by the idea that corporations can evade regulatory mandates, yet she too defends the idea that religious conscience can supplant a business’s legal obligations.⁹³

We are not the first to note that religious exemptions clash with corporate social responsibility’s basic assumption of regulatory compliance. Before *Hobby Lobby* was decided, for example, Anne Tucker observed that whereas “[c]orporate social responsibility asks companies to do more than their minimum legal obligations,” corporate religious objectors “are asking to do less.”⁹⁴ Even some proponents of corporate religious exemptions acknowledge this incongruence.⁹⁵ Alan Meese, for example, concedes that many practices motivated by an owner’s religion confer no obvious benefit on others in society

“clear, binary, on-off, lawful or unlawful world that is implicitly reduced to a judgment of good or bad, inside or outside the rules of the game” reflects the wide scope of corporate behavior).

⁸⁹ Friedman, *supra* note 43.

⁹⁰ See, e.g., Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002); Hansmann & Kraakman, *supra* note 10.

⁹¹ Colombo, *supra* note 5, at 840.

⁹² *Id.* at 841.

⁹³ Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby’s Wake*, 82 U. CHI. L. REV. 1897, 1938–44 (2015) (explaining that under governing standards for legal complicity, Hobby Lobby’s exemption should have been denied).

⁹⁴ Anne Tucker, *More or Less?*, L. PROFESSOR BLOGS NETWORK (Feb. 26, 2014), http://lawprofessors.typepad.com/business_law/2014/02/more-or-less.html; see also Elizabeth Pollman, *Corporate Law and Theory in Hobby Lobby*, in THE RISE OF CORPORATE RELIGIOUS LIBERTY 149, 170 (Micah Schwartzman, Chad Flanders, & Zoe Robinson eds., 2016) (noting corporate exemptions are about “opting out,” not about “doing more than the law requires, as is usually the case with corporate social responsibility”); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 690–91 (2016) (arguing there is tension between corporate law’s reliance on external regulation to protect stakeholder interests and allowing businesses to opt out of those regulations); Catherine A. Hardee, *Veil Piercing and the Untapped Power of State Courts*, 94 WASH. L. REV. 217, 236 (2019) (noting corporate religious exemptions “permit shareholders to provide less for other corporate stakeholders and the general public than the law requires”).

⁹⁵ Brett McDonnell, for example, recognizes the difference between “doing more than the law requires” and “opting out of legal requirements.” McDonnell, *The Liberal Case for Hobby Lobby*, *supra* note 5, at 809.

such that “any analogy to CSR would appear to be strained.”⁹⁶ Yet, proponents of corporate religious exemptions continue to rely on that strained analogy.⁹⁷

None of our analysis is meant to suggest that corporate religious activity is necessarily at odds with regulatory requirements. Corporations may express religious messages or identity in a variety of ways. They may post religious text, close on Sundays, or offer optional religious counseling.⁹⁸ They may pay above minimum wage and provide generous employee benefits. They may donate money to charitable organizations with religious missions. But, to meet the most basic requirement of corporate social responsibility, religious corporations may not defy legal obligations.

One potential objection to our account is that we have misidentified the proper legal baseline.⁹⁹ A critic taking this tack might say that the Religious Freedom Restoration Act (RFRA) redefines what it means for a business to meet its legal obligations. To borrow a phrase from Michael Stokes Paulsen, perhaps “RFRA runs through” the entire federal code, such that religious objectors who state a successful exemption claim were never constrained by the challenged regulation in the first place.¹⁰⁰ Alternatively, one might argue that the supremacy of the Constitution means that asserting valid free exercise claims proves compliance with legal duties, properly understood. If one were to accept this conceptual framework, then there is no conflict between corporate religious exemptions and regulatory compliance.

Parsing this objection in the context of the controversy over contraceptive coverage illuminates its contours and, ultimately, its flaws. When it was first promulgated in 2013, the contraceptive mandate applied to large employers with

⁹⁶ Alan Meese, *Hobby Lobby and Corporate Social Responsibility: A View from the Right*, CONGLOMERATE (Jul. 16, 2014), <https://www.theconglomerate.org/2014/07/hobby-lobby-and-corporate-social-responsibility-a-view-from-the-right.html>.

⁹⁷ McDonnell attempts to rescue the CSR analogy by asserting that liberal corporate lawyers and conservative religious objectors both see corporations as allowing people to pursue “a shared vision of the common good in ways that go beyond simply complying with the law.” McDonnell, *supra* note 5, at 809. This observation, however, does not explain how it is that CSR supports corporate religious activity that falls below regulatory minimums.

⁹⁸ Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 28 (2014); see Nelson, *supra* note 83, at 647–48; see also *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring in part, dissenting in part) (“He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween . . .”).

⁹⁹ We thank Stephanie Barclay for raising this objection in conversation.

¹⁰⁰ Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 283 (1995).

fifty or more full-time employees but contained an exemption for churches and their integrated auxiliaries.¹⁰¹ Thus, in 2013, an incorporated church could exclude contraception and be said to meet minimum legal requirements. A small for-profit employer similarly would not be defying legal obligations if it did not cover contraception. But large for-profit employers had a duty to include contraception within employee health plans. The baseline objection suggests that Hobby Lobby and the other large employers challenging the mandate were in full compliance with the law when they refused to cover contraceptives—at the moment their suit was filed and before the Supreme Court vindicated their claims.

But as a functional matter, no one—including the plaintiffs—believed failure to include contraception was complying with the regulatory requirements. RFRA allows a plaintiff who does not wish to comply with law—or is charged with its violation—an exemption if the law substantially burdens their religious beliefs and is not the least-restrictive means to further a compelling governmental interest.¹⁰² That the religious objection conflicts with a legal duty is baked into RFRA.¹⁰³ The logic of a corporate religious exemption claim is not that corporate employers never had a valid legal obligation, but that their religious liberty interests are weighty enough to preclude enforcement of that obligation.

Religious exemptions, whether mandatory or permissive, have long been characterized in this way. For example, Michael McConnell has argued that “[t]he purpose of a religious accommodation is to relieve the believer—where it is possible to do so without sacrificing significant civic or social interests—from the conflicting claims of religion and society.”¹⁰⁴ The government might determine that “the balance between the exercise of religion and enforcement of the law” tips in favor of free exercise, but the underlying law does not disappear.¹⁰⁵

¹⁰¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013) (proposing to exempt “an employer that is organized and operates as a nonprofit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code,” which “refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order”).

¹⁰² 42 U.S.C. § 2000bb-1(a)-(c) (2018).

¹⁰³ See Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. ONLINE 1, 4–7 (2016); Elizabeth Sepper, *Substantiating the Burdens of Compliance*, 2016 U. ILL. L. REV. ONLINE 53, 53 (2016).

¹⁰⁴ Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 26 (1985).

¹⁰⁵ See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 2 (2000) (describing the conventional way of understanding religious exemptions). This kind of exemption results from what Frederick Schauer calls an “external failure,” where the legal rule’s background justification is overridden by competing interests exogenous to the rule. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL*

Consider how this dynamic of defeasibility might work in practice in light of the Court's decision in *Bostock v. Clayton County, Georgia*.¹⁰⁶ In *Bostock*, the Court held that Title VII's prohibition of employment discrimination because of sex covers discrimination on the basis of sexual orientation and gender identity.¹⁰⁷ But in his opinion for the Court, Justice Gorsuch seemed to invite claims for religious exemption, writing that "[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."¹⁰⁸ Indeed, Harris Funeral Homes—a for-profit business and another plaintiff before the Court—had previously claimed entitlement to a corporate religious exemption from Title VII.¹⁰⁹ It sought to enforce sex-specific dress codes and bar a transgender employee from acting as a funeral director.¹¹⁰ If its claim were to succeed, the business would presumably remain subject to Title VII's prohibition on sex discrimination. The corporate religious exemption would simply reflect the overriding strength of the company's religious liberty interest in one particular application.

In sum, corporate social responsibility's commitment to legal compliance proves an awkward fit for corporations seeking to opt out of legal minimums through religious exemptions. In the next two Parts, we argue that this initial and obvious incongruence points to an overlooked and fundamental mismatch between the political and economic orders imagined by corporate social responsibility and corporate religious exemptions.

EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 118 (1991). For example, if a maximum emissions law exempted a business spewing noxious gasses so that it could continue to employ local residents, that exemption would be the result of an external failure. The air-quality justification would ultimately be defeated by a competing social interest.

¹⁰⁶ 140 S. Ct. 1731 (2020).

¹⁰⁷ *Id.* at 1754.

¹⁰⁸ *Id.*

¹⁰⁹ Harris Funeral Homes was successful on its RFRA claim in the district court. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 841–42 (E.D. Mich. 2016). But that decision was reversed by the Sixth Circuit. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018). The company did not seek review of that RFRA holding in its certiorari petition. *See Bostock*, 140 S. Ct. at 1754 (“Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us.”).

¹¹⁰ E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (2016), *rev'd*, 884 F.3d 560 (2018).

III. THE DEMOCRATIC POLITICAL ECONOMY OF CSR

The political economy of CSR starts with the recognition that corporate power poses a substantial threat to democratic governance and societal well-being. As section A explains, the solution CSR proposed was to make corporations responsible to the public and set them in pursuit of the social values of the democratic state. As section B demonstrates, CSR proponents argued that a reasonable proxy for social values could be found in business regulations. On this view, regulation served as a repository of democratic values, identifying social obligations that responsible managers could pursue further.

Finally, and fundamentally, advocates of CSR advanced the view that businesses, at least those of a certain size, were in a meaningful sense public, as section C explains. As the very term corporate *social* responsibility implies, corporations had to take an external orientation toward constituents within society. They could not be treated as private entities to be subject only to contract and economic regulation. From this perspective, the realms of the market and of politics were not separate.

A. *Corporate Power as a Dilemma for Democracy*

For nearly a century, CSR proponents have treated unchecked corporate power as an existential threat to democracy. Corporations threatened to rival—and in some cases even eclipse—the influence of political states. As Dodd and Berle began their debate, the Great Depression had exposed the democratic state as weak, unable to anticipate crises and restrain corporate behemoths. Businessmen, then-recently “celebrated as leaders of the nation,” had proven fallible.¹¹¹

Corporations had grown in size and no longer looked or acted like they once had—a phenomenon that would continue over the twentieth century.¹¹² By the 1950s, influential work by Adolf Berle and John Kenneth Galbraith, among others, had concluded that the corporate landscape bore little resemblance to the neoclassical model of a ruthlessly competitive economy.¹¹³ Concentration among the nation’s largest businesses meant that prices were not a function of competitive pressures, but instead were determined—or as Berle argued

¹¹¹ KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* 6 (2010).

¹¹² For an argument that this trend continues today, see TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

¹¹³ See PHILLIPS-FEIN, *supra* note 111, at 23.

“administer[ed]”—by corporate managers.¹¹⁴ For thinkers from Berle to Galbraith to Vance Packard, these businesses presented unique dangers, both economically and socially.¹¹⁵

First, the size and reach of corporate behemoths meant that they could displace the state itself. As one commentator said in the 1970s, “the mother state has virtually been replaced by the mother company; corporate power is no longer private but has nearly pre-empted public power.”¹¹⁶ As Galbraith and sociologist C. Wright Mills noted, the oligopolistic power of business posed a serious challenge to democracy and representative government.¹¹⁷ This take seemed all the more justified as the Cold War ended and globalization spawned multinational corporations, profoundly altering the relationship between the state of incorporation and its companies.¹¹⁸

Second, corporations could dominate and victimize consumers, employees, and communities. As Berle and Dodd began their debate, “[t]he traditional potency of the family, the church and the local community suddenly seemed dwarfed by the sway of the giant corporations.”¹¹⁹ Corporations had intruded into arenas traditionally viewed as private. They stood to supplant all other forms of association to the detriment of human life and wellbeing. Over the decades, concerns about corporate dominance expanded and shifted, from effects on prices and economic stability to the imposition of social conformity and damage to the environment.¹²⁰

Theorists worried that in the absence of a meaningful change in corporate practices, society would be left without adequate means and political structures to hold businesses accountable. Corporate social responsibility developed as one

¹¹⁴ BERLE, *supra* note 25, at 25, 51.

¹¹⁵ JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 43, 47 (1952); *see also* Wells, *supra* note 52, at 101, 104 (observing that these thinkers would have disagreed on the solution to the problem).

¹¹⁶ PHILLIPS-FEIN, *supra* note 111, at 191.

¹¹⁷ *See* JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (1958); C. WRIGHT MILLS, *THE POWER ELITE* (1956).

¹¹⁸ *See* Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (discussing failures of American legal framework for extraterritorial regulation of multinational corporation activity).

¹¹⁹ ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS 2* (1998).

¹²⁰ *See, e.g.,* Sarah A. Altschuller, *An Attorney’s Perspective on Corporate Social Responsibility and Corporate Philanthropy*, in *CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS: NEW EXPECTATIONS AND PARADIGMS* 471, 475 (2014) (“In the subsequent decades, the emergence of multinational companies with global markets and supply chains both reflected the weakening of ties between individual companies and specific local communities and provoked advocacy seeking to counter the magnitude of corporate power.”).

mechanism to discipline corporate power. Proponents from Dodd onward took the view that legal regulation was not the only tool to ensure that corporations acted for the common good. Corporate managers could—and should—act *voluntarily* for the benefit of society. The new era would judge businesses not by profit maximization alone, but by their commitment to the public as well.¹²¹

For those most worried about democratic displacement, the chief concern was restoring the state’s regulatory authority. Proponents embraced the view that CSR might serve as a bulwark to prevent corporate power from overwhelming democratic lawmakers.¹²² The state would take the lead in asserting public priorities. In principle, big business would follow the state, which in turn would ensure public accountability for the nation’s economic system.¹²³

CSR also meant to offer a strategy to address power imbalances between the corporation and its vulnerable stakeholders. Each period of debate shared the premise that business corporations could not be left alone but required “legal mechanisms that would lead corporate managers and directors to take into account the needs not only of shareholders but [also] of workers, consumers, and communities when making business decisions.”¹²⁴ It was the corporation’s very power over people that required it to assume social and political responsibility in addition to its economic role.¹²⁵

The political economy represented by CSR, then, was a form of restrained capitalism. Capital had been socialized in large firms, and those firms would have to be responsive to community needs to maintain their legitimacy.¹²⁶ In return for the continued pursuit of private profit, corporations would concede the state’s authority and put their shoulders to the wheel in the direction set by the state. While CSR’s emphasis on corporate self-regulation has been criticized for

¹²¹ See Wells, *supra* note 52, at 100.

¹²² For contemporary articulations of a similar view, see Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 343–344 (2015); Leo E. Strine, Jr., *Made for This Moment: The Enduring Relevance of Adolf Berle’s Belief in a Global New Deal*, 42 SEATTLE U. L. REV. 267–268–69 (2019).

¹²³ See ADOLF A. BERLE, *THE AMERICAN ECONOMIC REPUBLIC* 95–97 (1963).

¹²⁴ Wells, *supra* note 52, at 79; see also Archie B. Carroll, *A History of Corporate Social Responsibility: Concepts and Practices*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 19, 25, 27–31, 33–34, 36 (Andrew Crane et al. eds., 2008) (reviewing definitions of CSR).

¹²⁵ PETER F. DRUCKER, *THE NEW SOCIETY: THE ANATOMY OF THE INDUSTRIAL ORDER* 337 (1950).

¹²⁶ BERLE, *supra* note 25, at 188; see also Henry C. Wallich, *The Case for Social Responsibility of Corporations*, in HENRY G. MANNE & HENRY C. WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* 37, 55 (1972) (“Recognition of social responsibilities may give the corporation the kind of acceptance in the community that it needs if it plans to be an ongoing operation.”).

diverting from more fundamental reforms,¹²⁷ in principle it has always granted the state prerogative over policy-setting in what one critic calls “inherent statism.”¹²⁸ While the actors were plural, the goals were unitary.

B. Advancing Regulatory Objectives

Corporations needed a public philosophy to match their role as “quasi-political institutions.”¹²⁹ CSR proponents settled on business regulations as a reasonable proxy for social values that bore the hallmarks of democratic assent. Through regulation, the state identified the obligations of corporations. These same regulations could delineate the scope of firms’ social responsibility and shape the direction of their voluntary efforts.

Business regulation, of course, sets the baseline beyond which socially responsible actors go. Corporate law scholars agree that lawmakers should protect various corporate and public constituencies.¹³⁰ These regulations result from a democratically legitimate process and can be assumed to require corporate acts that serve society’s best interests.

The idea of CSR depended on the argument that the law often fails to set regulatory minimums at an optimal level, such that consensus social goals go unmet. As CSR theorists observed, typically a time-lag occurs between the emergence of any social problem and its ultimate legal resolution through the political process.¹³¹ That political process, moreover, is subject to numerous defects that lead to suboptimal lawmaking, including the fact that corporations frequently manipulate public sentiment¹³² and capture their regulators.¹³³ And

¹²⁷ Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1377 (2011) (observing that CSR is not “revolutionary, or even particularly challenging to the status quo”).

¹²⁸ See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 858 (1997).

¹²⁹ See BERLE, *supra* note 25, at 5.

¹³⁰ See Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 356–57 (2015) (discussing the literature).

¹³¹ See CHRISTOPHER STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 94–107 (1975) (detailing many reasons why the law consistently fails to vindicate popular sentiments favoring corporate regulation). See generally Elhauge, *supra* note 11, at 748–49 (explaining why legal regulation falls short of social optimality). For a recent acknowledgement of this problem, see Mark R. Kramer, *Coronavirus Is Putting CSR to the Test*, HARV. BUS. REV., (Apr. 1, 2020), <https://hbr.org/2020/04/coronavirus-is-putting-corporate-social-responsibility-to-the-test> (calling on corporations to take immediate action to blunt the harm to employees because law will be slow).

¹³² See STONE, *supra* note 131, at 95.

¹³³ See *id.* at 95–96, 107.

even when the law does succeed in translating public sentiment into appropriate corporate regulation, those regulations suffer from substantial underenforcement.¹³⁴

As their debates resurfaced throughout the twentieth century, CSR proponents had ample evidence that these shortcomings were endemic—from the social upheaval of the 1960s to the takeover wave in the 1980s to the globalization of markets in the 1990s.¹³⁵ Best-selling exposés of environmental degradation and consumer dangers, such as Rachel Carson’s *Silent Spring* and Ralph Nader’s *Unsafe at Any Speed*, uncovered the public impact of corporate decisions.¹³⁶ News of widespread corporate misconduct—from illicit payment scandals to Penn Central’s failure—added fuel to the fire.¹³⁷ With globalization, transnational corporations committed labor abuses beyond the reach of their domestic home states and global governance institutions.¹³⁸ More recently, the 2008 global financial crisis and 2020 coronavirus pandemic highlighted the chasm between ideal regulation and the status quo.¹³⁹

Given regulatory deficiencies, CSR directed corporate managers to step up and support public objectives.¹⁴⁰ To exercise this responsibility, however, corporate managers would have to anchor their judgments in something other than personal inclination. As Berle described the concept, corporate responsibility would reflect “[a] set of ideas, widely held by the community, and

¹³⁴ See *id.* at 104. Wayne Norman explains that “governments often cannot keep up with credible monitoring of many of their regulations—as we seem to learn every time unsafe food or medicines begin taking a toll.” Wayne Norman, *Business Ethics as Self-Regulation: Why Principles that Ground Regulations Should Be Used to Ground Beyond-Compliance Norms as Well*, 102 J. BUS. ETHICS 43, 50 (2011).

¹³⁵ Wells, *supra* note 52, at 81; see PHILLIPS-FEIN, *supra* note 111, at 150–51; Terry H. Anderson, *The New American Revolution: The Movement and Business*, in *THE SIXTIES: FROM MEMORY TO HISTORY* 135, 174 (David Farber ed., 1994) (“From 1960 to the early 1970s, the sixties era, activists attacked and in some respects changed America’s way of ‘doing business,’ a topic neglected by historians.”).

¹³⁶ See Christopher Jensen, *50 Years Ago, ‘Unsafe at Any Speed’ Shook the Auto World*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/27/automobiles/50-years-ago-unsafe-at-any-speed-shook-the-auto-world.html>.

¹³⁷ See BRIAN R. CHEFFINS, *THE PUBLIC COMPANY TRANSFORMED* 101, 154 (2019).

¹³⁸ See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819, 819 (2007) (noting the UN Special Representative for Business and Human Rights concluded that “global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of transnational corporations”); Laurie E. Abbott, *Integrating the Ruggie Guiding Principles into the International Economic Community*, 5 GEO. MASON J. INT’L COM. L. 261, 263 (2014) (describing the development of UN guidelines for human rights and transnational corporations, which seek to influence behavior but impose no legal obligations).

¹³⁹ See K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 78–79 (2017); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 1993 (2014).

¹⁴⁰ See Elhauge, *supra* note 11, at 783–96.

often by the organization itself and the men who direct it, that certain uses of power are ‘wrong,’ that is, contrary to the established interest and value system of the community.”¹⁴¹ But how would corporations identify public objectives—that shared “set of ideas”—to put them into practice?

Leading voices in business ethics and law came to take the view that regulation would serve as the legitimating source and guidepost for CSR. As Lee Preston and James Post explained, in addition to “the literal text of law and regulation,” managers should follow “the broad pattern of social direction reflected in public opinion, emerging issues, formal legal requirements, and enforcement or implementation practices”—the spirit of the law.¹⁴²

To explore the difference between the law’s letter and spirit, consider the Fair Labor Standards Act (FLSA). The FLSA obligates employers to pay a minimum wage but suffers from Congress’s long failure to raise minimum wages to reflect rising costs of living.¹⁴³ And so, to showcase social responsibility, a small newspaper corporation might raise worker pay, taking on additional obligations to further the FLSA’s objective of ensuring adequate wages. If instead, the corporation discovered and took advantage of the FLSA’s exception for small newspapers,¹⁴⁴ nobody would consider that action socially responsible. It would not violate the letter of the law, but it would contravene its spirit. Taking advantage of this exception does not further the background justification for imposing obligations on corporations to pay minimum wages.¹⁴⁵ It represents compliance, but not cooperation.¹⁴⁶

¹⁴¹ ADOLF A. BERLE, *POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* 90 (1959).

¹⁴² Lee E. Preston & James E. Post, *Private Management and Public Policy*, 23 *CAL. MGMT. REV.* 56, 57 (1981) [hereinafter *Private Management and Public Policy*]; see also LEE E. PRESTON & JAMES E. POST, *PRIVATE MANAGEMENT AND PUBLIC POLICY: THE PRINCIPLE OF PUBLIC RESPONSIBILITY* 56–57 (1975) (pioneering this argument). Even Thomas Jones, a skeptic of Preston and Post’s prescription, acknowledged that it worked relatively well where policy exists and is clear. See Thomas M. Jones, *Corporate Social Responsibility, Revisited, Redefined*, 22 *CAL. MGMT. REV.* 59, 62 (1980).

For an example, see Jeremy Moon & David Vogel, *Corporate Social Responsibility, Government, and Civil Society*, in *THE OXFORD HANDBOOK*, *supra* note 124, at 312–14 (discussing the ways in which the U.K. government provides “a policy and institutional framework that stimulates companies to raise their performance beyond minimum legal standards”).

¹⁴³ 29 U.S.C. § 206 (2018); Lorie Konish, *It’s Been 12 Years Since the Last Federal Minimum Wage Increase. Where Efforts to Raise the Pay Rate Stand*, CNBC (July 16, 2021, 4:14 PM EDT) <https://www.cnbc.com/2021/07/16/where-efforts-to-raise-the-federal-minimum-wage-stand.html>.

¹⁴⁴ 29 U.S.C. § 213(a)(8) (2018).

¹⁴⁵ Consistent with our account in Part II, this exemption instead responds to yet another form of “external failure.” It permits the apparently stronger interest in keeping small newspapers in business to defeat the background justification of ensuring minimum wages that still applies generally and continues to reflect the government’s views of a floor for wages paid.

¹⁴⁶ See, e.g., Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive’s Social*

Grounding corporate social responsibility in legislative markers was said to have at least two advantages. First, it offered some democratic legitimacy to corporate efforts.¹⁴⁷ The basic idea here was that regulation registers a judgment about the social commitments of liberal democracies. By developing business practices “‘higher’ or ‘more demanding’ than the actual regulations in force,” corporate managers would carry out obligations consistent with the same logic that justified existing regulations.¹⁴⁸ In so doing, they would advance government-indicated (but not mandated) corporate duties.

In recent years, corporate law scholars have picked up on this theme, emphasizing the degree to which CSR and positive law have become imbricated. For example, Elizabeth Pollman has explored Adolf Berle’s idea of “inchoate law,” suggesting that recent calls for CSR’s revival stem from the same social sources as business regulation.¹⁴⁹ Lyman Johnson has argued along similar lines that positive law and broader social views about corporate responsibility “are not distinct, but intertwined.”¹⁵⁰ Corporations align their voluntary CSR practices and their compliance with regulations such that, Cheryl Wade contends, “it is impossible to see where [law] ends and [CSR] begins.”¹⁵¹

The second advantage of identifying law as a proxy for society’s interests was to answer critics’ epistemic objection to CSR. As critics point out, corporate managers are hired for their business acumen and have no particular expertise or ability to identify social consensus.¹⁵² By linking corporate efforts to regulatory minimums, CSR proponents hoped to make the concept of responsible behavior (somewhat) less subjective and open-ended. Corporations would focus on a narrower social agenda than the state, targeting concerns arising from their own operations and effects on society.¹⁵³

Responsibilities with Regard to Law, 41 AM. BUS. L.J. 559, 559–70 (2005) (drawing a contrast between social duty and corporate compliance in the form of taking advantage of legal loopholes (allowing compliance with the legal letter while violating social purpose), ambiguity, and underenforcement).

¹⁴⁷ See Engel, *supra* note 84, at 33.

¹⁴⁸ Norman, *supra* note 134, at 44; see Joseph Heath, *Business Ethics Without Stakeholders*, 16 BUS. ETHICS Q. 533, 534, 536 (2006).

¹⁴⁹ Elizabeth Pollman, *Quasi Governments and Inchoate Law: Berle’s Vision of Limits on Corporate Power*, 42 SEATTLE U. L. REV. 617, 620 (2019).

¹⁵⁰ Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1137–38 (2012).

¹⁵¹ Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187, 1199–1200 (2017).

¹⁵² For an influential statement of this view, see Engel, *supra* note 84, at 4, 62.

¹⁵³ Preston & Post, *Private Management and Public Policy*, *supra* note 142, at 61. As Preston and Post explained, corporations had primary functions—like managing their supply chains and manufacturing products, as well as employing workers—and secondary or consequential effects on the wider community. A business’s social obligation, Preston and Post argued, derived from its line of business and required consideration of people

Even then, as critics note, the public policy underlying democratic lawmaking can be indeterminate.¹⁵⁴ This is a fair critique of the CSR project. Many forms of democratic lawmaking—including regulation of businesses—result from legislative compromise and horse-trading, rather than straightforward implementation of particular social interests. Governments set multiple goals, which may conflict with one another.

While difficult cases may arise, for our purposes it suffices that demands for religious exemptions in particular have tended to occur against a relatively coherent statutory and regulatory backdrop. Consider Montana's Hutterite colonies, religious corporations that are also market leaders in the state's agricultural, construction, and manufacturing industries.¹⁵⁵ They argued that the Free Exercise clause of the First Amendment exempted them from paying for workers' compensation insurance.¹⁵⁶ There was no confusion or indeterminacy about what the regulatory framework required. Likewise, the contraceptive mandate—promulgated as part of the Women's Health Amendment—had a well-defined and well-understood justification of protecting the health and equality interests of women in the workforce.¹⁵⁷

To be sure, the legal regimes governing antidiscrimination law and employee insurance coverage are complex. But the signals they send to managers about a corporation's obligations tend not to conflict.

Moreover, its proponents would say corporate social responsibility contains a corrective against corporations taking the wrong path. The direction of corporate decisions and externality regulation must align, or the state will act. If, for example, a socially responsible corporate manager taking cues from Occupational Safety and Health Administration regulations pursues "too much" safety or not enough, then democratic lawmakers will adjust their regulatory efforts.

primarily or secondarily related to the firm. *Id.*

¹⁵⁴ Jones, *supra* note 142, at 63.

¹⁵⁵ Brief in Opposition to Petition for Certiorari, *Big Sky Colony, Inc. v. Mont. Dept. of Lab. & Indus.*, 291 P.3d 1231 (Mont. 2012) (No. 12-1191), 2013 WL 4495964, *1, *cert. denied*, 571 U.S. 817 (2013).

¹⁵⁶ *Big Sky Colony, Inc. v. Mont. Dep't of Labor & Indus.*, 291 P.3d 1231, 1235 (Mont. 2012), *cert. denied*, 571 U.S. 817 (2013).

¹⁵⁷ Some advocates referred to being a woman as a preexisting condition. *See, e.g.*, 156 CONG. REC. H1719 (daily ed. Mar. 19, 2010) (statement of Rep. Lynn Woolsey); *see also* 155 CONG. REC. S12026 (daily ed. Dec. 1, 2009) (statement of Sen. Barbara Mikulski) (introducing women's health amendment "to save our lives, make sure our lives are not impaired as we get older and, at the same time, be able to save money"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring) ("[T]he mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee.")

This observation of hydraulic pressure has a long pedigree. In his 1950s writings, Berle warned managers that if their constituencies are unsatisfied with corporate acts, “they will go to the political state for solution.”¹⁵⁸ CSR took place in the shadow of regulation. Ultimately, the democratic community—which is to say the public—would determine the bounds of responsible corporate activity.

C. The Publicness of Business Corporations

Central to the theory of corporate social responsibility was the concept of the corporation as public. Publicness worked in two, interrelated ways. First, the theory instructed, corporations performed social as well as economic functions. Setting itself in opposition to the neoclassical model of the corporation as a purely private creature of competitive markets, corporate social responsibility demanded a turn toward a wider set of stakeholders. Second, power transformed corporations into quasi-states. Politics and the market proved fluid, rather than divided.

1. From Private Property to the Public’s Concern

Throughout CSR’s history, the neoclassical model of the firm has stood as a foil. This conception sees firms as private concerns and, in turn, relegates the state to a peripheral role, principally concerned with developing regulations to combat rare market failures.¹⁵⁹ On this neoclassical view, which took off in the 1980s largely through the work of law and economics scholars Frank Easterbrook and Daniel Fischel, forces of market competition serve as the primary, if not exclusive, form of discipline on corporations and their managers.¹⁶⁰

Corporate social responsibility required rejecting these private conceptions of the firm. In his initial intervention, Dodd argued that the public-private line had moved such that an increasing number of nominally private businesses were “affected with a public interest.”¹⁶¹ The corporation had become a public enterprise.

Developments within corporate law spurred and interacted with Dodd’s reconceptualization of the public and private. Before the twentieth century, the

¹⁵⁸ BERLE, *supra* note 25, at 56; see Hillary A. Sale, *The New “Public” Corporation*, 74 L. & CONTEMP. PROBS. 137, 139 (2011) (observing this hydraulic pressure from communities on corporations).

¹⁵⁹ See EASTERBROOK & FISCHEL, *supra* note 45, at 38.

¹⁶⁰ For the culmination of a decade of their work, see EASTERBROOK & FISCHEL, *supra* note 45.

¹⁶¹ Dodd, *supra* note 21, at 1149.

corporation was considered the property of the shareholders held equitably, more like a private partnership than modern business corporation.¹⁶² Courts and commentators would have been confident that duties of directors ran unquestionably to shareholders.¹⁶³ But by the early twentieth century, the then-recent separation of ownership and control had transferred power from a corporation's "owners" to professional managers. Limited liability and ever-larger numbers of shareholders meant a unity between business owner and business could no longer be presumed.¹⁶⁴ This called for major adjustments to the picture of business corporations as merely conduits to private gain. Instead, "the corporate person would have the option of serving several masters."¹⁶⁵

As Berle came around to Dodd's perspective, he too recognized the enlargement of corporate constituencies. Large corporations had "outgrown the 'incorporated partnership' phase," such that directors were "no longer merely stewards . . . for their stockholders," but were "also stewards for the employed personnel, for customers and suppliers, and indeed for that section of the community affected by their operations."¹⁶⁶ While shareholders merited a fair rate of return, corporate law should not bar fair wages, honest prices, and public-interested acts.

Business leaders and educators advanced a vision of public-minded managers as well. Famed management theorist Peter Drucker, for example, argued that "[e]ven the most private of private enterprises is an organ of society and serves a social function."¹⁶⁷ David Rockefeller, another proponent of CSR, emphasized the transformation of corporate norms from "the old concept that the owner of a business had a right to use his property as he pleased" to "the belief that ownership carries certain binding social obligations."¹⁶⁸

Over time, the political stakes crystallized in corporate law. One specific manifestation was the enactment of constituency statutes. As hostile takeovers

¹⁶² William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 266–68 (1992).

¹⁶³ *Id.*

¹⁶⁴ See Berle, *Power Without Property*, *supra* note 141, at 60–64 (describing the historical process by which shareholders were alienated from their role as property owners).

¹⁶⁵ Wells, *supra* note 115, at 93 (describing separation of ownership and control as a wedge to consider other constituencies); see also Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 605 (2001) (describing CSR as a "subset" of solutions to the problem of separation of ownership from control).

¹⁶⁶ Adolf A. Berle, Jr., "Control" in *Corporate Law*, 58 COLUM. L. REV. 1212, 1212 (1958).

¹⁶⁷ PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 331 (Butterworth-Heinemann ed. 2007) (originally published 1955).

¹⁶⁸ Wells, *supra* note 52, at 100.

dramatically spiked in the 1980s, managers faced the prospect that if returns to shareholders lagged, corporate raiders waited around the corner to make a tender offer and boot them out of office. As a consequence, non-shareholder constituencies—including local communities where corporations operated—had to worry that managers would take corporate actions that transferred wealth to shareholders.¹⁶⁹ As a corrective, progressive corporate law scholars advanced constituency statutes to “expand the definition of public responsibilities” of these non-state, nominally private entities.¹⁷⁰ Like their predecessors, these scholars united in rejecting the idea that corporations could be modeled as voluntary private arrangements.¹⁷¹ As Lawrence Mitchell noted, echoing early theorists, the corporation had become “a public institution with public obligations.”¹⁷²

The public obligation of the socially responsible corporation thus stood in contrast to its pursuit of shareholders’ private interests. As Einer Elhauge explains, CSR describes “cases where managers are sacrificing corporate profits in a way that confers a general benefit on others, as opposed to conferring the sorts of financial benefits on themselves, their families, or friends that courts police under the duty of loyalty.”¹⁷³ To be socially responsible, corporations had to act in the interest of a wider public.

2. *The Firm-State Analogy*

If large business corporations were not private property or nexuses of private contracts, then how should theorists and the public approach them? To proponents of corporate social responsibility, the economic dominance—and resulting political and social clout—of big corporations indicated that they were political creatures. Size and concentration had transformed corporations into

¹⁶⁹ CHEFFINS, *supra* note 137, at 155–218; *see also* Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987) (discussing the takeover debate).

¹⁷⁰ *See* Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor*, 50 WASH. & LEE L. REV. 1673, 1691 (1993).

¹⁷¹ PROGRESSIVE CORPORATE LAW, at xiv (Lawrence E. Mitchell ed., 1995) (“Each of the scholars whose work is presented starts from the premise that it is no longer reasonable (if ever it was) to treat the corporation as a purely private mechanism”); *see, e.g.*, Theresa Gabaldon, *Experiencing Limited Liability*, in PROGRESSIVE CORPORATE LAW, *supra*, at 110, 130; Lynne L. Dallas, *Working Toward a New Paradigm*, in PROGRESSIVE CORPORATE LAW, *supra*, at 35, 69; Marleen A. O’Connor, *Promoting Economic Justice in Plant Closings: Exploring the Fiduciary/Contract Law Distinction to Enforce Implicit Employment Agreements*, in PROGRESSIVE CORPORATE LAW, *supra*, at 219, 235–36.

¹⁷² Lawrence E. Mitchell, *Preface* to PROGRESSIVE CORPORATE LAW, *supra* note 171, at xiii.

¹⁷³ Elhauge, *supra* note 11, at 744.

“private governments.”¹⁷⁴ Business and national affairs had merged, which meant that corporations needed their own political philosophy.¹⁷⁵

Critics and advocates of CSR alike agreed on the *political* nature of CSR’s conceptual structure. CSR theorists thought that the nature of modern corporations required some form of political accountability. Berle and Means, for example, anticipated that eventually corporate managers would “develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity”—the firm would operate in essence as administrative agency of the democratic state.¹⁷⁶ CSR would implant a political mechanism firmly inside the corporation.

Critics instead resisted granting corporations a political role. Milton Friedman did so on the ground that politics was reserved to elected representatives.¹⁷⁷ In the 1990s, Stephen Bainbridge likewise critiqued CSR for deputizing corporate managers to accept a political function and, worse, he said, to further a public orthodoxy.¹⁷⁸ Bainbridge identified the longstanding structural affinity between CSR and the political state and argued that CSR misplaced the public-private line.¹⁷⁹

In the view of CSR proponents, the realm of the market and the realm of politics could not be held apart. By supplementing the state’s objectives, corporations were said to function as allies of the regulatory state. In a debate with CSR critic Henry Manne, Henry Wallich described corporations as providing “[a]ppropriate support” to legislative efforts addressing “corporate impact on the environment and on society.”¹⁸⁰ According to Wallich, CSR would cover a range of activities where government and corporation, working in complementary fashion, can best achieve social objectives. Through CSR, corporations would collaborate with government leaders and contribute to furthering national goals.¹⁸¹

¹⁷⁴ RALPH NADER, MARK GREEN & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* 17 (1976) (discussing the views of Berle and his contemporaries); *see also* RICHARD EELLS, *THE GOVERNMENT OF CORPORATIONS* 10–13 (1962) (expressing similar views).

¹⁷⁵ *See* BERLE, *supra* note 25, at 168–69.

¹⁷⁶ *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 356 (1932).

¹⁷⁷ *See* Friedman, *supra* note 43.

¹⁷⁸ Bainbridge, *supra* note 128, at 890.

¹⁷⁹ *Id.* at 903.

¹⁸⁰ Wallich, *supra* note 126, at 54, 59–60 (suggesting corporations should have a duty to “engage constructively with state and non-state regulatory processes”).

¹⁸¹ *See id.*

The relationship, moreover, was one not of reluctant compliance with authority, but of mutual cooperation toward common goals.¹⁸² As historians have shown, two world wars, the Great Depression, and the Cold War fight against communism created a public expectation that businesses would participate in national programs.¹⁸³ Capturing this spirit, President Eisenhower “counted heavily on corporate ‘statesmanship’ and business community self-awareness to execute a political agenda oriented around restraint, patience, and moderation.”¹⁸⁴ Likewise, in 1966, President Johnson relied on large businesses as partners in his campaign to fight inflation.¹⁸⁵

Those most sympathetic to corporations envisioned a world of corporate managers engaging in statesmanship.¹⁸⁶ Berle, for example, hoped that attributing responsibilities to corporations would avoid nationalization and maintain a vibrant capitalist economy.¹⁸⁷

Wallich went further, expressing a preference for corporate implementation of public policy. He argued that CSR had the benefit of “shifting from the public to the private sector activities that should be performed with maximum economy rather than maximum bureaucracy, [which] fits into the design of a pluralistic society seeking a high degree of decentralization.”¹⁸⁸

Indeed, some modern accounts went so far as to describe corporate social responsibility as a form of delegated government.¹⁸⁹ The delegation was typically thought to be implicit—the political state, on this view, was the primary actor in assuring that businesses act responsibly. Socially responsible

¹⁸² See William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 104 (2008) (“Berle widened the scope of the duty so that directors could not only address and comply with a broad, new set of government-specified rules, but also be cooperative participants in a common enterprise with the regulators.”).

¹⁸³ Kim McQuaid, *Corporate Liberalism in the American Business Community, 1920–1940*, 52 BUS. HIST. REV. 342, 349 (1978); Bert Spector, “*Business Responsibilities in a Divided World*”: *The Cold War Roots of the Corporate Social Responsibility Movement*, 9 ENTER. & SOC’Y 314, 315 (2008).

¹⁸⁴ CHEFFINS, *supra* note 137, at 97.

¹⁸⁵ *Id.* at 99.

¹⁸⁶ See Adolf A. Berle, *Foreword*, in *THE CORPORATION IN MODERN SOCIETY*, at ix (Edward S. Mason ed., 1959).

¹⁸⁷ See *id.* at 188 (“Corporate managements, like others, knowingly or unknowingly, are constrained to work within a frame of surrounding conceptions which in time impose themselves.”).

¹⁸⁸ Wallich, *supra* note 126, at 57.

¹⁸⁹ See, e.g., Jeffrey Smith, *Navigating Our Way Between Market and State*, 29 BUS. ETHICS Q. 127, 132 (2018) (“[W]hen states are weak or otherwise underdeveloped[,] corporations assume the obligations of the state to administer justice”); see also CHRISTOPHER MCMAHON, *PUBLIC CAPITALISM: THE POLITICAL AUTHORITY OF CORPORATE EXECUTIVES* 107 (2012) (arguing that CSR is a form of political delegation from weak states).

corporations served as an adjunct, “shoring up legitimate states rather than serving as their replacement.”¹⁹⁰

CSR’s intellectual history reflects consistent themes. The power of the corporation represents a threat to individual freedom and to democracy. The solution is to ask corporations to voluntarily exceed regulatory minimums for the benefit of society. The state, as CSR proponents tell it, sets the direction of these efforts through values expressed in business regulation. The market overlaps with the political in an ideal of pro-social, distinctly democratic capitalism.

IV. THE ANTI-DEMOCRATIC POLITICAL ECONOMY OF CORPORATE RELIGIOUS EXEMPTIONS

Corporate religious exemptions discard the democratic commitments of corporate social responsibility. As section A shows, proponents of exemptions perceive the state as increasingly aggressive in regulating private life, and religious businesses as a check on state power. The strong form of this institutionalism envisions a landscape of plural authorities, where religious institutions including for-profit corporations set their own agendas.

Religious exemptions become the tool to achieve this form of deep pluralism. As section B demonstrates, in the eyes of their supporters, corporations rightly resist regulation and co-optation. Through exemption, they decline to participate in the projects of the democratic state.

As section C argues, religious exemptions for businesses differ in their orientation from the “social” of CSR. At the heart of their concern are the shareholders, who are presumed to have a unity of interest with the corporation. Religious exemptions promote the primacy of these shareholders, albeit in moral rather than financial terms.

A. Democracy as a Dilemma for Institutional Autonomy

Recall that, for theorists of CSR, the corporation posed a threat to a weakened state and a vulnerable public that called out for redress.¹⁹¹ The argument for religious exemptions describes a starkly different dynamic.

¹⁹⁰ Smith, *supra* note 189, at 134.

¹⁹¹ See *supra* Part III.A.

Proponents posit democratic decision-making as an impediment to religious freedom. From this perspective, corporations can offer an antidote to state orthodoxy and ensure spaces for plural visions of community and society.

Exemption proponents paint a picture of the state as a growing threat to private moral ordering. The contraceptive mandate, for example, is described as a product of extraordinary governmental overreach.¹⁹² The state, on this view, is not a presumptively legitimate source of business regulation. Instead, it presents a hovering threat to the natural rights and liberties enjoyed in private associational settings.¹⁹³

The solution—supporters of corporate religious exemptions say—is to cast businesses as buffers against state power. On a common formulation, religious corporate entities resist encroachments from the state into the private sphere.¹⁹⁴ In their absence, it is said, government might “stifle[] the whole of human life.”¹⁹⁵ No room would remain for alternative sources of normative authority on the morality of same-sex relationships or the binary nature of gender identity, for example. Religious believers would be stuck in someone else’s *nomos*.¹⁹⁶

Writing in 1997, during the last resurgence of the CSR debate, Stephen Bainbridge foreshadowed this political economy.¹⁹⁷ In his view, for-profit corporations stood as mediating institutions between individuals and the state.¹⁹⁸ A relatively hands-off government was preferred, as it would create the associational space necessary for private groups to serve their own values, rather than those of the state.¹⁹⁹

¹⁹² See Sepper, *Reports of Accommodation’s Death Have Been Greatly Exaggerated*, *supra* note 98, at 28–29 (describing economic libertarian ethos of the religious liberty claims).

¹⁹³ See Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, *supra* note 94, at 8–9 (making this point).

¹⁹⁴ Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 923–26 (2013) (noting this is the most common argument for religious institutionalism).

¹⁹⁵ Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 83 (2009) (“These institutions serve as a counterweight to the state, ensuring that it ‘may never become an octopus, which stifles the whole of life.’” (quoting ABRAHAM KUYPER, *LECTURES ON CALVINISM* 96 (photo. reprint 1999) (1931))); *see also* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring) (“[T]he autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws.”).

¹⁹⁶ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

¹⁹⁷ See Bainbridge, *supra* note 128, at 903. Bainbridge recognizes that this vision provides no support for CSR. *See id.* at 883–84.

¹⁹⁸ *Id.* at 884.

¹⁹⁹ *See id.* at 892.

This anti-government orientation proves a major contrast to the political economy of CSR. Indeed, Bainbridge's central critique of CSR—the “heart” of his case—was that it replaced private associational virtues with a creeping form of “statism.”²⁰⁰ CSR shifted the balance of social power away from private arrangements and toward the state's objectives.²⁰¹ It thus weakened the private sector's ability to stand as an effective counterweight to state power.²⁰²

Other proponents of religious exemptions generally share this perspective. For example, Alan Meese and Nathan Oman describe the need for a space free of “the heavy hand of the state.”²⁰³ Others argue that religious commercial entities must be sheltered from “the destructive force of taxation, the controlling influence of government, and the backdoor regulation of government.”²⁰⁴ Corporations stand not as partners in the state's project of protecting the vulnerable, but as bastions of liberty against an overweening Leviathan.

In recent years, some law and religion scholars have pushed even further, advancing a particularly robust form of religious institutionalism. As Richard Garnett describes it, “religious institutions—self-defining, self-governing, self-directing institutions—are needed . . . to ‘check the encroachments of secular power.’”²⁰⁵ From this point of view, religious institutions act as sources of authority independent from the secular political state, whose reach then is necessarily limited. Unlike traditional liberal theory, this religious institutionalism claims a near-absolute or presumptive “sovereignty” of religious institutions.²⁰⁶

This form of religious institutionalism has tended to rely on the notion of “freedom of the church” to bolster its claims of religious sovereignty.²⁰⁷ But in the wake of *Hobby Lobby* and its open invitation to disregard traditional

²⁰⁰ See *id.* at 858, 889.

²⁰¹ See *id.* at 889.

²⁰² See *id.* at 896–99.

²⁰³ Meese & Oman, *supra* note 76, at 299–300.

²⁰⁴ Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard-Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 SETON HALL L. REV. 1549, 1609 (2012).

²⁰⁵ Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 295 (2008) (alteration in original) (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 204 (1960)); see, e.g., Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633, 1677 (2004) (“The diversity of religious beliefs . . . presupposes a diversity of religious communities, each of which is able to structure its own internal life according to its own unique religious views and perspectives.”).

²⁰⁶ E.g., Horwitz, *supra* note 195, at 104–09 (arguing “sphere sovereignty offers an especially full and persuasive account of religious entities as First Amendment institutions”).

²⁰⁷ E.g., Richard W. Garnett, “*The Freedom of the Church*”: (Towards) An Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

distinctions among organizational forms, it is not at all clear what principles limit expansive notions of “the church.” In their pursuit of religious exemptions, large business corporations are described as no different than the churches and associations that have traditionally been freed of some regulation out of concern for religious liberty.²⁰⁸ Even among for-profit corporations, some say, “moral pluralism” becomes possible through exemption from state regulation.²⁰⁹ These business corporations have been “[b]aptized by association with heroic historical organizations” and placed in the same conceptual and legal category.²¹⁰

The constitutional ideal then is a fractured political community with separate and insular institutions each able to determine and pursue their own visions of the good in the marketplace without state interference. The “statist” CSR of plural actors with a single decisionmaker is converted into an anti-state enterprise of plural corporate decisionmakers.

B. Resisting Regulation

The same regulations that serve as a legitimating source for theories of CSR play an antagonistic role in the story of corporate religious exemptions. Claims of corporate religious exemption have prompted some in the legal academy to pose the question: “Is the welfare state compatible with religious freedom?”²¹¹ And other conservative law and religion scholars have answered no, taking the position of Richard Epstein, the preeminent opponent of the New Deal in the legal academy.²¹² For them, “all tensions” between religion and the state arise from state regulation of contract and employment.²¹³

The corporations seeking exemption resist precisely these regulations. Unlike the ideal socially responsible corporation, they do not take on additional obligations toward state-determined ends. They do not go “above” or “beyond” compliance with duty-imposing regulations, seeking to serve the public interest through acts of supererogation. They instead criticize and diminish public objectives as less than compelling. Indeed, their lawsuits can fairly be described

²⁰⁸ See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 85 (2013) (“[A]llowing normatively divergent corporations to flourish” helps “counter government-induced homogeneity and cultural assimilation” (quoting Andrew Beerworth)).

²⁰⁹ Robert K. Vischer, *Individual Rights vs. Institutional Identity: The Relational Dimension of Conscience in Health Care*, 9 AVE MARIA L. REV. 67, 68, 73–74 (2010).

²¹⁰ See Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1473 (1987).

²¹¹ See Berg, *supra* note 73, at 172.

²¹² Sepper, *supra* note 60, at 1482–83 (summarizing these claims).

²¹³ *Id.*

as seeking to substitute private moral judgments for those of democratic lawmakers.²¹⁴

A critic might say that we have mischaracterized corporate religious exemptions as rejecting public objectives. After all, religious corporations could be said to further the public value of religious liberty. As Angela Carmella puts it, “[e]xemptions may be fully consistent with the state’s public order function and the larger common good, particularly when they allow institutions in civil society to engage in socially responsible, stabilizing and beneficial activities.”²¹⁵ And because religious liberty is part of our public commitments, corporate religious exemptions do not stand in conflict with CSR.

We agree that businesses may pursue religiously motivated goals consistent with the tradition of CSR.²¹⁶ Arguably, many of the employers objecting to the ACA’s contraceptive mandate did just that in providing access to employer-sponsored health insurance, even though neither state nor federal law required this benefit before passage of the ACA.²¹⁷ To give another example, Hobby Lobby paid well-above minimum wage to its employees due to its founder’s religious convictions.²¹⁸ In this respect, it acted consistent with the foundational tenet of CSR—exceeding legal compliance to advance government-indicated (but not mandated) corporate duties.

And religiously motivated businesses might promote a public good in the form of religious liberty. One plausible example would involve an employer subject to Title VII of the Civil Rights Act, which requires reasonable accommodation of an employee’s religious observance or practice unless it imposes an undue hardship on the business.²¹⁹ Motivated by religion, a corporation might offer accommodations that exceed the reasonableness

²¹⁴ See Hardec, *supra* note 94, at 237 n.117 (describing exemptions in this way).

²¹⁵ Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good*, 110 W. VA. L. REV. 403, 408 (2007).

²¹⁶ See, e.g., Peter Jessorer Smith, *Wegmans Among Businesses Putting Catholic Social Teaching to Good Use*, NAT’L CATH. REG. (May 2, 2017), <https://www.ncregister.com/news/wegmans-among-businesses-putting-catholic-social-teaching-to-good-use> (describing Wegman’s grocery store chain’s commitment “to its five stakeholders—the employees, the suppliers, the investors, the customers, and the community at large”).

²¹⁷ Prior to the ACA, federal law encouraged employers to provide insurance by giving more favorable tax treatment to benefits than wages.

²¹⁸ Press Release, Hobby Lobby Raises Minimum Wage (Sept. 14, 2020) (on file at <https://newsroom.hobbylobby.com/articles/hobby-lobby-raises-minimum-wage/>) (“In 2009, Hobby Lobby was one of the first retailers to establish a nationwide minimum hourly wage well above the federal minimum wage and has since raised its minimum wages ten times over the last eleven years. In 2014, Hobby Lobby raised its full-time minimum hourly wage to \$15.”).

²¹⁹ 42 U.S.C. § 2000e(j) (1991).

threshold—for example, providing a nondenominational chapel for religious observance. Although the Supreme Court has construed “undue hardship” to prevent employees from claiming religious accommodations that impose anything more than “de minimis” burdens on a business, corporations not infrequently offer workers more generous accommodations.²²⁰ Such corporations would satisfy the first prongs of CSR, having met the regulatory minimum and advanced the policy objective of accommodating religious employees that is embodied in the Civil Rights Act.

But a key difference exists between these exercises of corporate religion and claims for corporate religious exemptions. The legal rules that shape the content of corporate social responsibility impose duties on businesses toward the state or people affected by their operations. In the pursuit of their own interests, businesses impinge on the welfare of a host of social actors, including employees, members of the local community, and the public at large. By forcing firms to assume obligations toward others, the law makes businesses socially accountable. CSR too is supposed to operate in this way. In principle, socially responsible businesses consider how to structure their relationships and operations by reference to these existing regulatory duties. When, for example, employers offer additional health benefits or religious accommodations for religious or ethical reasons, they follow this logic of obligation.

But the Religious Freedom Restoration Act (RFRA), under which businesses claim exemption, does not operate along similar lines. The Act does not specify obligations that fall on corporations and thus invite the socially responsible manager to go above and beyond them. Instead, a court faced with a RFRA claim considers whether a business’s free exercise of religion is substantially burdened by the application of a regulation.²²¹ The regulation thus clashes with the corporation’s desired activity. A court then evaluates whether the corporation’s private interest in religious liberty overrides the governmental interest in the regulation. Once exempted, businesses evade legal obligation despite the effects on others—whether employees, consumers, or community members.

But the background justification for the regulation—as well as the regulation itself—remains operative. Consider religious objections to state public accommodations laws, which require businesses to provide equal service to

²²⁰ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). See generally Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES*, *supra* note 2, at 215, 221–26 (detailing how courts have applied the de minimis rule in more accommodating ways).

²²¹ 42 U.S.C. § 2000bb-1 (2018).

people without regard to race, sex, sexual orientation, and other protected traits. When wedding vendors—bakeries, photography studios, hotels, and the like—refuse service to same-sex couples, they do not deny that LGBTQ customers have an interest in obtaining goods and services equal to others. Indeed, their own filings tend to indicate that, with the exception of wedding products, they accept the public interest and goal of nondiscrimination toward LGBTQ customers.²²² That accepted background justification continues to set the direction of the social responsibility of corporations.

This analysis is baked into the standard that courts use to evaluate RFRA claims. They must consider: Can the government still further its interest if the legal obligation is not enforced against the objector? That is, will the background justification for the regulation continue undamaged? Only if the answer is yes can the accommodation, perhaps, be granted.

Proponents of corporate religious liberty often emphasize the modest and individualized nature of exemption claims. Corporations are not asking for any statute or regulation to be struck down in its entirety. Instead, they are merely requesting that *they* be excused from a legal obligation that still applies to everyone else without a similar religious liberty claim.²²³

While this way of characterizing religious exemptions may make them seem less threatening to the social order, it also highlights their self-interested nature. Corporations claiming religious exemptions are not acting as private attorneys general, using accommodation regimes to vindicate social values. They are asserting a bespoke liberty right to avoid rules laid down for everyone else.

C. A Rigid Line Between the Public and the Private

Unlike the ample public of CSR, a rigid public-private divide characterizes claims for corporate exemption. This line operates in two ways. First, subsection one shows that whereas CSR sees corporations as meaningfully public, claims to religious exemption posit purely private companies. They align market actors with intimate institutions of family and church. The primary role for law, from this perspective, is to structure voluntary transactions within and with the firm. Second, subsection two argues that the focus of exemptions is the self-interest

²²² See e.g., Brief for Petitioners at 8–9, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762, at *8–9 (“Phillips gladly serves people from all walks of life, including individuals of all races, faiths, and sexual orientations.”).

²²³ E.g., Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 148 (2015) (arguing accommodation “leaves the legislation in place as to the vast majority of applications and simply requires an exception in certain cases”).

of shareholders, not the benefit of society. Any public concern for impact and governance becomes minimal.

1. *The Privacy of the (Religious) Corporation*

Proponents of corporate religious exemptions insist on the purely private nature of the business corporation. With the closely held family business as their touchstone, they employ a firm-family analogy, rather than the firm-state analogy of CSR. Litigation and scholarship sharply distinguish between the political public and the private realms of market, contract, and family.

Religious exemption advocates paint a picture of small private corporations markedly different from the large, public corporations that inspire CSR. In practice, claims for corporate religious exemptions—at least thus far—have come from closely held businesses that manifest a high degree of unity between ownership and control.²²⁴ Unlike the conglomerates of Dodd and Berle's concern, some claimants have been genuinely small enterprises, such as the wedding vendors currently challenging antidiscrimination laws.²²⁵ These businesses tend to be run by conservative businesspeople who are more-or-less insulated from broader developments in the capital markets and the shareholder activism that CSR often proposes.²²⁶

Characterizing objecting corporations as small and private worked to deny the public's interest in their operations. But as Justice Ginsberg noted in her *Hobby Lobby* dissent, “[c]losely held” is not synonymous with “small.”²²⁷ The employers opposed to the contraceptive mandate, for example, were by definition large firms—those with fifty or more full-time employees that were subject to the Affordable Care Act.²²⁸ Yet, the popular press and scholarly commentary tended to call them small or “mom and pop.”²²⁹ The Supreme Court likewise labeled as “small businesses” Conestoga Wood, with over 400 employees, and Hobby Lobby, with north of 13,000 employees.²³⁰

²²⁴ See DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS § 1.01 (2019) (explaining that closely held corporations tend to have a small number of owners who “take a[n] . . . active role in the management and operation of the business”).

²²⁵ See *supra* notes 79–80 and accompanying text.

²²⁶ See Wells, *supra* note 52, at 115.

²²⁷ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 757 n.19 (2014) (Ginsberg, J., dissenting).

²²⁸ 26 U.S.C. § 4980H (2018).

²²⁹ Ken Starr, *Obamacare Shackles Religious Freedom*, USA TODAY (Mar. 23, 2014), <https://www.usatoday.com/story/opinion/2014/03/23/hobby-lobby-sebelius-obamacare-contraception-mandate-column/6574699/> (describing Hobby Lobby, then with over 13,000 employees, as “mom and pop”).

²³⁰ *Hobby Lobby*, 573 U.S. at 706 (“Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests?”).

In a move foreign to the CSR tradition, the relationships of religious employer-employee or of vendor-consumer then were described as appropriately governed by private law, not public interest. Many objectors to the contraceptive mandate, for example, expressed their religious claims as a right to contract with their employees.²³¹ They said their employees consented—explicitly or implicitly—to the terms of their benefits.²³² From the same point of view, antidiscrimination laws constituted infringements on the “freedom to choose . . . whom to contract with and for what goods.”²³³ Echoing the neoclassical view of corporations, religious objectors indicated that the relationship between employer and employee, vendor and consumer, should be set by contract without state intervention. An ideal of private ordering in matters economic and religious dominated, and the political realm dwindled.

Even as emphasis on size and private contract appealed to privacy, an analogy to the family further privatized the corporation. In place of the firm-state analogy of CSR theory, the quintessential “private” entity—the family—helped the *Hobby Lobby* Court to categorize the plaintiffs as private. The decision contained a lengthy description of the family members who founded, incorporated, and ran the businesses, and their children who helped direct them.²³⁴ According to this narrative, the corporation served as an extension of the domestic life of the family, entitled to substantial privacy to pursue the family’s values without government interference.²³⁵ The corporations thus became doubly private—as entering agreements in the free market and as reflecting intimacy in the family home. The *Hobby Lobby* Court effectively bridged—to use Martha Ertman’s term—the “private/private divide.”²³⁶

²³¹ See, e.g., *Armstrong v. Sebelius*, No. 13-CV-00563, 2013 WL 5213640, at *3 (D. Colo. Sept. 17, 2013) (quoting mortgage company complaint arguing that compliance with the ACA “will have a profound and adverse effect’ on . . . how [it] negotiate[s] contracts and compensate[s] [its] [730] employees”) (alteration in original).

²³² See Jessie Hill, *Ties That Bind? The Questionable Consent Justification for Hosanna-Tabor*, 109 NW. U. L. REV. ONLINE 91, 98 (2014) (critiquing this vision of religious institutions as “stretching the idea of consent past the breaking point”).

²³³ Ryan T. Anderson, *‘Homosexual Jim Crow Laws’? Get Real*, NAT’L REV. (Feb. 19, 2014), <http://www.nationalreview.com/corner/371454/homosexual-jim-crow-laws-get-real-ryan-t-anderson>. See generally Sepper, *supra* note 60, at 1455–59 (arguing that in their interpretations of the First Amendment and the Religious Freedom Restoration Act, courts replicate the commitment to private ordering and resistance to redistribution that were at the heart of *Lochner v. New York*).

²³⁴ *Hobby Lobby*, 573 U.S. at 700–03, 717.

²³⁵ For a discussion on the ways the market has been treated as public and individualistic and the family as private and value-laden, see generally Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

²³⁶ Ertman, *supra* note 235, at 98.

2. *Self-Interest of Shareholders*

In contrast to the “social” of CSR, the pursuit of religious exemption advances the interests of corporate shareholders. It treats the corporation as private property to be dispensed as its owners feel best. This inward turn creates a form of shareholder primacy, favoring shareholders over those burdened by corporate acts. Even according to proponents’ own lights, corporate exemptions work in the shareholders’ personal interest, not for the general benefit of corporate constituencies. The controlling shareholders of Hobby Lobby argued that “[a]s with all aspects of their business, . . . it is imperative that [employee health] benefits honor their religious convictions.”²³⁷ Likewise, the Arizona Supreme Court described the owners of a calligraphy business as being asked to forsake their religious convictions by “creat[ing] invitations that enable and facilitate the attendance of guests at a same-sex wedding.”²³⁸ Complicity is at the heart of these arguments. Complying with the law would harm their “good conscience” by connecting them to the purportedly wrongful act (contraceptive-taking and same-sex marriage, respectively);²³⁹ exemption by contrast would preserve their moral integrity.

In objecting to compliance with welfare or civil rights legislation, these corporations do not purport to benefit others within society. While the objectors may believe society would be better off if governed according to their religious principles, they deny the objective of impeding access to contraceptives or same-sex marriage. Indeed, they deny that any consequences will result from corporate exemption—employees will still get and use contraception; same-sex couples will still marry.²⁴⁰ What is at stake is the shareholders’ own spiritual interest.

This contrast between social and self-interested can be sharpened with examples taken from the field of corporate philanthropy. When a corporation makes a gift to United Way, it would be easy to characterize such a gift as beneficial to the wider society. Indeed, according to the organization’s mission statement, “United Way improves lives by mobilizing the caring power of communities around the world to advance the common good.”²⁴¹

²³⁷ Plaintiffs’ Motion for Preliminary Injunction and Opening Brief in Support, *Hobby Lobby v. Sebelius*, 870 F. Supp. 2d (W.D. Okla. 2012) (No. CIV-12-1000-HE), 2012 WL 5851136.

²³⁸ *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 919–22 (Ariz. 2019).

²³⁹ Plaintiffs’ Motion for Preliminary Injunction and Opening Brief in Support, *supra* note 237

²⁴⁰ Brief in Support of Motion for Preliminary Injunction at 17–20, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2-13) (No. 5:12-cv-06744-MSG) (arguing the government could not show any compelling interest in requiring contraceptive coverage because it could not prove that employees were not already accessing and using contraceptives, notwithstanding lack of employee health coverage).

²⁴¹ Our Mission, UNITED WAY, <https://www.unitedway.org/our-impact/mission> (last visited Nov. 11,

But corporate philanthropy aimed at branding,²⁴² self-dealing,²⁴³ or personal ideology²⁴⁴ stands differently. Gifts to managers' favorite social clubs or vanity projects are not in the public's interest. And corporate political spending designed for partisan ends promotes neither social wealth nor democratic equality.²⁴⁵ In each instance, social concern recedes, and self-interest becomes primary.

The Supreme Court's decisions embraced this primacy of shareholders' personal interests over those of other stakeholders. *Hobby Lobby*, for example, maintained that corporate exemption "protects the religious liberty of the humans *who own and control* those companies."²⁴⁶ Likewise, in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a First Amendment case in which a bakery sought exemption from antidiscrimination law, the Supreme Court emphasized the interests of its owner, Jack Phillips, in running the business consistent with his personal views.²⁴⁷

With the unification of ownership and control, the owners' interests in religious liberty became the corporation's, and the corporation's decisions about employee benefits became the owners'. Indeed, the most prominent manifestations of corporate religious exemption presumed a unity between shareholder and corporation. As cases percolated up to the Supreme Court, lower courts that granted religious exemptions typically held that the corporation and its owners were coextensive.²⁴⁸ For example, one court said that "when the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter-ego of its owners for religious

2021).

²⁴² See, e.g., P. Rajan Varadarajan & Anil Menon, *Cause-Related Marketing: A Coalignment of Marketing Strategy and Corporate Philanthropy*, 52 J. MKTG. 58, 58–59 (1988).

²⁴³ See *Khan v. Sullivan*, 594 A.2d 48, 51, 54 (Del. 1991) (discussing Occidental Petroleum Corporation's \$85 million pledge to fund the Armand Hammer Museum of Art and Cultural Center, a pet project of the company's chairman). For discussion of this case and others involving self-interested philanthropy, see Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 619–20 (1997).

²⁴⁴ See Stevelman Kahn, *supra* note 243, at 611–13 (discussing Morrison Knudsen Corporation's donation to The Nurturing Network, an anti-abortion organization founded by the CEO's wife).

²⁴⁵ See Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007, 1019–20, 1022, 1024–26 (2020); John C. Coates IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 658 (2012).

²⁴⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014) (emphasis added).

²⁴⁷ 138 S. Ct. 1719, 1724, 1726, 1728 (2018).

²⁴⁸ *Korte v. Sebelius*, 528 F. App'x 583, 587 (7th Cir. 2012) (finding that corporate form is not dispositive because the individual plaintiffs would "violate their religious beliefs" if the corporation had to comply with the mandate).

purposes.”²⁴⁹ By contrast, when a corporation adopts a CSR initiative, shareholders “can derive benefit from it, but neither they nor other constituencies are the responsible ‘corporate’ actor, in the eyes of the law or in society at large.”²⁵⁰

The interests of constituents other than the owners mattered little to the exercise of corporate religion. While Justice Alito gestured in *Hobby Lobby* toward the idea that corporate religious liberty could also safeguard officers and employees “who are associated with a corporation in one way or another,”²⁵¹ the religion of constituents other than the shareholders remained unexamined. Indeed, the opinion referred to employees as “third parties” unrepresented by their employers’ religious claims.²⁵² Justice Kennedy similarly noted that the accommodation of a business’s exercise of religion reflected the interests of the owners not the efforts of “other persons, such as employees, in protecting their own interests, interests the law deems compelling.”²⁵³ Indeed, the entire debate over “third party harms” takes for granted that many religious accommodations will disadvantage third parties.²⁵⁴ The benefits of corporate religious exemptions flow to owners instead of employees, customers, and society—presenting a persistent disanalogy with CSR.

This distinction further indicates that many religiously motivated corporate acts—even those that comply with positive law—do not amount to social responsibility. The law may be neutral as to holiday greetings, Sunday closures, and religious products, but a company with such policies acts in its own interests and pursues goals defined by individual conscience. Such indifference to the values and expectations of society or to the myriad constituencies affected falls outside the bounds of corporate social responsibility.²⁵⁵

²⁴⁹ Tyndale v. Sebelius, 904 F. Supp. 2d 106, 117 (D.D.C. 2012); see also Monaghan v. Sebelius, 931 F. Supp. 2d 794, 802 (E.D. Mich. 2013) (adopting alter ego theory).

²⁵⁰ Johnson & Millon, *supra* note 4, at 30.

²⁵¹ *Hobby Lobby*, 573 U.S. at 706.

²⁵² *Id.* at 729–30 n.37.

²⁵³ *Id.* at 739 (Kennedy, J., concurring).

²⁵⁴ On one side, critics argue that imposing such costs is constitutionally impermissible. See Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 328, 329–30 (Susanna Mancini & Michel Rosenfeld eds., 2018); Tebbe et al., *supra* note 220, at 215; Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 346–48 (2014). On the other side, defenders claim that those costs are justified by our commitment to religious liberty. See Stephanie H. Barclay, *First Amendment “Harms,”* 95 IND. L.J. 331, 338 (2020); Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 876–77 (2019).

²⁵⁵ For a proponent of corporate religious exemption making this point, see Meese, *supra* note 96.

The irreconcilable differences between the political economies of corporate social responsibility and corporate religious exemption do not ultimately resolve whether or when religious exemptions for business corporations are justified. Nevertheless, our account leads to the modest conclusion that scholars and litigants should abandon their reliance on this strained analogy. They must pursue alternative and better-grounded arguments for religious exemption.

V. RETIREMENT OR REVIVAL OF PRINCIPLED CSR?

The theory of corporate social responsibility is at an inflection point. Two possibilities emerge for its theorists—retirement or revival. Perhaps CSR has run its course. As we have shown, *Hobby Lobby*—once claimed as a win—reflects commitments antithetical to the political economy of corporate social responsibility. It converts the normative pull of heightened corporate responsibility into increased corporate authority. Alternatively, burgeoning literatures on law and political economy and sociopolitical movements to hold corporations accountable might embrace—and revive—the insights of CSR’s intellectual history. We briefly sketch each of these paths.

A. *Time for Retirement?*

For decades, critics from the left have argued that, in practice, corporate social responsibility bears little resemblance to the principled version we have described. They say that it provides a smokescreen for profit-seeking (and thus is not CSR at all).²⁵⁶ And by granting commercial entities the authority to perform more and more tasks once left to the state, it serves neoliberalism.²⁵⁷ From this point of view, the enthusiasm of big corporations for CSR has atrophied the political domain²⁵⁸—consistent not with the democratic political

²⁵⁶ E.g., Michael L. Barnett, *The Business Case for Corporate Social Responsibility: A Critique and an Indirect Path Forward*, 58 BUS. & SOC’Y 167, 167 (2019) (noting that firms’ “increasingly strategic view of CSR” increases firm financial performance but the gaps between the interests of business and society grow); Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1239 (2002) (“There is real concern that corporate social responsibility will become just another commodity that businesses sell in the service of short-term shareholder wealth maximization, rather than the basis for any substantive change in the way business is done”).

²⁵⁷ Peter Utting, *Corporate Social Responsibility and the Movement of Business*, 15 DEV. PRAC. 375, 380 (2005).

²⁵⁸ Ronen Shamir, *Socially Responsible Private Regulation: World-Culture or World-Capitalism?*, 45 LAW & SOC’Y REV. 313, 314 (2011); Utting, *supra* note 257, at 384 (noting that one “major criticism of CSR relates to so-called ‘regulatory’ or ‘institutional capture,’ . . . the increasing penetration and influence of large corporations in the public-policy process”).

economy we describe but with the weak state that corporate religious exemptions propose. Viewed in this way, CSR's practice more or less aligns with the political economy of corporate religious exemptions.

CSR advocates in the academy, however, have consistently resisted these corporate practices. They have maintained a principled stance, notwithstanding cooptation of CSR by less scrupulous managers. Now, some of these scholars claim corporate religious exemption as their own. But our account makes clear that the pro-democratic "statist" theory of CSR cannot be reconciled with the radically different vision of law, politics, and the economy of religious exemptions. Stretched to include corporate exemptions from employee and consumer protections, the idea of corporate social responsibility becomes corrupted beyond recognition.

Three aspects of this corruption bear noting. First, corporate social responsibility comes to mean all things, or nothing at all. Hobby Lobby withheld benefits from employees, resisted federal law, and diminished the government's interest in women's health. From there, it is a short step to Harris Funeral Homes terminating an employee for dressing in accordance with her gender identity or Telescope Media denying videography services to same sex couples. What about a corporation that is dedicated to achieving white supremacy or supporting violent insurrection? If all corporate acts that are not profit-maximizing count as social responsibility—no matter their goals, ideology, or consistency with the flourishing of society—then the idea is, and ought to be, a dead letter.

Second, assimilation of corporate religious exemptions converts CSR from a prosocial to an antisocial program. As we have explained, the intellectual history of corporate social responsibility sees corporations as institutions embedded in and contributing to society. To include corporate exemptions within the definition of socially responsible behavior means permitting corporations to pursue their own private objectives without serious inhibitions stemming from concern for others. In the extreme case, following the lead of early neoliberal thinkers like Friedrich Hayek, the "social" in CSR disappears altogether.²⁵⁹

Third, such corruption of CSR further weakens government and, in turn, the sincere practice of CSR. As we have demonstrated, throughout its history, CSR

²⁵⁹ See FRIEDRICH A. HAYEK, 2 *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 62–100 (1976) (claiming social justice is a "mirage"); *see also* Interview by Douglas Keay, Woman's Own, with Margaret Thatcher, Prime Minister, at No. 10 Downing Street (Sept. 23, 1987), <https://www.margaretthatcher.org/document/106689> ("There is no such thing as society.").

has been interwoven with the political state. As it developed, the principled practice of CSR depended on a healthy and functioning state to set the normative course for businesses. Democratic politics were not assumed to be perfect, but they were thought to undergird legitimate corporate social action. If, instead, the state is no longer willing—or no longer able—to set down normative markers for corporations to follow, then the threat of regulation—and its hydraulic pressure on corporate activity—no longer seems plausible. And CSR as we have known it can barely get off the ground.

CSR instead may morph from a constructive force in American politics into a weapon of neoliberal anti-politics. Recall that corporate religious exemptions resist regulation and treat the state as a threat. So, too, with the momentum of antipolitical forces, many Americans have come to see government as “the problem, not the solution.”²⁶⁰ Decades of anti-state rhetoric denigrating government as “interest-group capture and entrenchment”²⁶¹ have had real political consequences. Through demonization and defunding, the state has become increasingly distrusted and dysfunctional. There may be no better illustration of this point than the government’s abject failure to control the deadly spread of COVID-19. When you try to drown the government in a bathtub, as commentators have observed, sometimes you succeed.²⁶²

B. *Opportunity for Revival?*

What are the prospects for reviving the idea of corporate social responsibility? Burgeoning proposals for corporate accountability might find insight from the earlier—and more authentic—versions of CSR that we have discussed. In the last few years, the corporate law community has rekindled longstanding debates over corporate purposes.²⁶³ Business schools are engaged in cognate efforts to put “purpose before profit.”²⁶⁴ And major institutional

²⁶⁰ WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 58 (2019) (quoting a common neoliberal refrain from the Reagan-Thatcher years).

²⁶¹ Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1807 (2020).

²⁶² For a variation on this point, see Dana Milbank, Opinion, *When You Drown the Government in the Bathtub, People Die*, *WASH. POST* (Apr. 10, 2020), <https://www.washingtonpost.com/opinions/2020/04/10/when-you-drown-government-bathtub-people-die/> (discussing Grover Norquist’s idea to shrink government to the size where “we can . . . drown it in the bathtub”).

²⁶³ See, e.g., Martin Lipton, William Savitt & Karessa L. Cain, *On the Purpose of the Corporation*, *HARV. L. SCH. F. ON CORP. GOVERNANCE* (May 27, 2020), <https://corpgov.law.harvard.edu/2020/05/27/on-the-purpose-of-the-corporation/>; *Statement on the Purpose of a Corporation*, *BUS. ROUNDTABLE* (Aug. 19, 2019), <https://purpose.businessroundtable.org>.

²⁶⁴ See *Corporations and Society Initiative*, *STAN. GRADUATE SCH. OF BUS.*, <https://www.gsb.stanford.edu/faculty-research/centers-initiatives/casi> (last visited Nov. 11, 2021); Future of the Corporation, *THE BRITISH*

investors have announced their intention to ratchet up demands for corporate social responsibility.²⁶⁵ Prominent policymakers, including Senators Bernie Sanders, Elizabeth Warren, and Tammy Baldwin, have introduced legislation aimed to enhance corporate accountability.²⁶⁶ And in the legal academy, progressive scholars have launched formidable challenges to the neoliberal consensus, insisting that “the political community must be able to assert its collective will over the economic order.”²⁶⁷

One place to start would be to recover the notion that law plays a constitutive role in the modern economy. Consistent with legal realism, theorists of CSR understood that there is nothing natural or inevitable about markets—they are constructed by an interlocking web of background legal regimes, including property law, contract law, tax law, and organizational law.²⁶⁸ Their work provides further foundation for shattering artificial notions of a clean line between public and private. And as Sanjukta Paul reminds us, because the law constitutes markets, we are free to constitute them differently.²⁶⁹

How might reconstructing a democratic vision of corporate social responsibility take place? One way to revive CSR’s commitment to democracy would focus on matters *internal* to the corporation. Progressive scholars have long criticized corporate governance for not sufficiently representing the interests of those who contribute to firms’ team production.²⁷⁰ Corporate law is intensely focused on the relationship between boards of directors and shareholders. And although some argue that directors may take interests other than shareholder wealth into account, the right to vote at annual elections and on fundamental transactions is vested exclusively in shareholders.²⁷¹ This exclusive shareholder franchise, it is said, leaves the interests of other corporate constituencies unrepresented.²⁷²

ACAD., <https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/> (last visited Nov. 11, 2021).

²⁶⁵ See, e.g., Larry Fink, 2019 Letter to CEOs: Profit & Purpose, BLACKROCK (2019), <https://www.blackrock.com/corporate/investor-relations/2019-larry-fink-ceo-letter>.

²⁶⁶ See, e.g., CEO and Worker Pension Fairness Act, S. 3341, 116th Cong. (2020); Accountable Capitalism Act, S. 3215, 116th Cong. (2020); Reward Work Act, S. 3540, 116th Cong. (2020).

²⁶⁷ Britton-Purdy et al., *supra* note 261, at 1831.

²⁶⁸ See Jamee K. Moudud, *The Constitutional Theory of the Business Enterprise: Toward a Monetary Theory of Production*, LPE PROJECT (Feb. 20, 2020), <https://lpeproject.org/blog/the-constitutional-theory-of-the-business-enterprise-toward-a-monetary-theory-of-production/> (discussing legal realist insights).

²⁶⁹ See Sanjukta Paul, *On Socializing the Constitution of Economic Coordination*, LPE PROJECT (June 29, 2020), <https://lpeproject.org/blog/on-socializing-the-constitution-of-economic-coordination/>.

²⁷⁰ E.g., NADER ET AL., *supra* note 174, at 260.

²⁷¹ See, e.g., DEL. CODE ANN. tit. 8, §§ 211–212 (2021).

²⁷² See, e.g., GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 2–15 (2020).

To remedy this representational deficit, CSR proponents might advocate for expanded corporate voting rights. In contemporary debates, most advocates of reform have focused on empowering employees. Senator Warren’s proposed Accountable Capitalism Act, for example, calls for employee election of at least forty percent of the board at large companies.²⁷³ Many supporters point to the German codetermination model as a viable system of employee representation in an advanced industrial economy.²⁷⁴

More broadly, calls to democratize the internal governance of corporations resonate with an emerging intellectual appetite to apply concepts drawn from political science to nominally private businesses.²⁷⁵ The hope is that an internally democratized firm will better reflect the interests of all constituencies, while avoiding some of the excessive social costs that come with shareholder primacy.²⁷⁶ Political scientist David Ciepley, for example, argues that stockholders “are just one contributor to the success of the firm,” and once we discard myths about their primacy, we can see that the real questions are about fair distribution of economic surplus.²⁷⁷

Rather than focus on representation, a reinvigorated democratic CSR might seek to limit the power that corporations wield over their various constituencies. Contemporary advocates of this approach have emphasized the outsized—and often unchecked—authority that corporations hold over their workers.²⁷⁸ This emphasis on authority has led to a revival of the firm-state analogy and the idea that corporations exercise a form of “private government.”²⁷⁹ In other work, we have drawn on the firm-state analogy to explore limits on corporate authority in religious businesses.²⁸⁰ At a minimum, reviving a principled version of CSR

²⁷³ See Accountable Capitalism Act, S. 3215, 116th Cong. (2020).

²⁷⁴ See, e.g., Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2427 (2020) (discussing German codetermination “as an empirical proof of concept”). Jens Dammann and Horst Eidenmueller argue that codetermination can also serve to make democracy more robust by helping defuse the risks inherent in excessive corporate power. Jens C. Dammann & Horst Eidenmueller, *Codetermination and the Democratic State*, UNIV. ILL. L. REV. (forthcoming 2022).

²⁷⁵ See, e.g., HAYDEN & BODIE, *supra* note 272; CHIARA CORDELLI, *THE PRIVATIZED STATE* (2020); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013).

²⁷⁶ See, e.g., HAYDEN & BODIE, *supra* note 272, at x (discussing climate change and income inequality).

²⁷⁷ David Ciepley, *Privatizing Sovereignty, Socializing Property: What Economics Doesn’t Teach You About the Corporation*, LPE PROJECT (Feb. 18, 2020), <https://lpeproject.org/blog/privatizing-sovereignty-socializing-property-what-economics-doesnt-teach-you-about-the-corporation/>.

²⁷⁸ See, e.g., ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017).

²⁷⁹ See *id.*; see also Ciepley, *supra* note 277 (discussing sources of the “right to rule”).

²⁸⁰ Nelson, *Corporate Disestablishment*, *supra* note 83, at 635–41; Elizabeth Sepper & James D. Nelson, *Disestablishing Religious Hospitals*, 49 J.L. MED. & ETHICS (forthcoming 2021).

would destabilize the notion of a private economy of voluntary contracts free from coercion. It would replace that myth—that “insecurity of illusion”²⁸¹—with the reality of pervasive power relations.

Another avenue for reviving CSR’s commitment to democracy would be to focus on the *external* relationship between corporations and the state. On this approach, concerns of internal corporate governance—who gets to vote, what they vote on, and what kind of information they need to make informed decisions—recede, and the concerns of political democracy rise to the top.

This revived form of CSR could link up with contemporary movements to see economic relations in “constitutional” terms.²⁸² In a recent book, for example, Tim Wu argues that concentration of private power in our economic system threatens the foundations of democracy, reaching “constitutional dimensions.”²⁸³ Though Wu identifies Louis Brandeis as his inspiration,²⁸⁴ CSR’s intellectual history teems with support.²⁸⁵

Once again, CSR’s revival might learn best from its own history. In the 1950s and ‘60s, for example, the firm-state analogy led mainstream legal scholars to debate whether corporations should—or would—have constitutional responsibilities. In 1952, Berle published an article arguing that corporations should be subject to many of the same constitutional limitations that applied to political states to avoid violations of individual liberty.²⁸⁶ And Abram Chayes relatedly proposed due process type limitations on corporations to guarantee that “significant power will be exercised not arbitrarily, but in a manner that can be rationally related to the legitimate purposes of the society.”²⁸⁷

Advocates of CSR might also be able to leverage (re-)emerging scholarly interest in law and political economy.²⁸⁸ As one recent statement describes it,

²⁸¹ GALBRAITH, *supra* note 115, at 1–9.

²⁸² See, e.g., Moudud, *supra* note 268; Paul, *supra* note 269.

²⁸³ WU, *supra* note 112.

²⁸⁴ See *id.* at 33–44.

²⁸⁵ See, e.g., ADOLF A BERLE, *THE AMERICAN ECONOMIC REPUBLIC* (1963). Berle’s later writings, for example, provide a vision of economic arrangements that bolsters democracy, rather than subordinates or subverts it.

²⁸⁶ Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

²⁸⁷ Abram Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 186, at 25, 31.

²⁸⁸ The Texas Law Review held a major symposium on the Constitution and Economic Inequality exploring these questions. For an overview of the contributions, see Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287 (2016).

this intellectual program urges scholars to focus on “the relation of politics to the economy, understanding that the economy is always already political in both its origins and its consequences.”²⁸⁹ This movement identifies three central issues of political economy. First, blinkered focus on shareholder wealth has made our economy insufficiently sensitive to the plight of workers.²⁹⁰ Second, concerns for economic efficiency have too often fostered autocratic corporate management.²⁹¹ And third, industrial concentration paired with a hollowed-out welfare state has inverted the goals of democracy.²⁹² A lasting insight of CSR theorists is that these themes are tied together.

Here, the ways in which CSR proponents foregrounded questions of power in economic relations could be especially instructive. In *Power Without Property*, Berle outlined a “democratic economy” in terms of a “balance between the forces which may be called ‘democratic’ and those whose authority is derived from historical property rights rather than popular mandate.”²⁹³ This democratic political economy required responsiveness to the will of the people through a system of industrial government.²⁹⁴ Striking notes of democratic aspiration, the economy would function as “a sort of continuing election in which there are no nonvoters.”²⁹⁵

Despite warnings from their ancestors, those concerned with preserving the values of a free society too often have focused on abuse of public power to the exclusion of growing threats from the private sphere. The urgent question now, as Katharina Pistor argues, is whether we continue to put the law in service of private capital or whether we put it in service of something else.²⁹⁶ CSR indicates that something else must be democracy.

We make no predictions about how CSR will develop in the coming years and decades. The economic, social, and political inflection point at which we find ourselves is particularly unstable. Nevertheless, CSR proponents might

²⁸⁹ Britton-Purdy et al., *supra* note 261, at 1792.

²⁹⁰ See, e.g., Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy, A Reply to Professor Rock*, 76 BUS. LAW. (forthcoming 2021).

²⁹¹ See ANDERSON, *supra* note 278, at 37–74.

²⁹² See WU, *supra* note 283; Moudud, *supra* note 268.

²⁹³ BERLE, *supra* note 141, at viii; see also GALBRAITH, *supra* note 115 (discussing the idea of “countervailing power”).

²⁹⁴ BERLE, *supra* note 141, at 19–22.

²⁹⁵ *Id.* at 26.

²⁹⁶ KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY*, at xi (2019).

have reason for optimism, as CSR was forged in the fire of economic turmoil and corporate failure. In a time when interest in corporate accountability and democratic political economy is on the rise, theories of corporate social responsibility might still hold important lessons.

CONCLUSION

The intellectual history of corporate social responsibility reflects a profound concern for corporate excess and governance failure. In theory, if not always in practice, CSR offers a mechanism to address power imbalances between the corporation and its vulnerable stakeholders. The responsibility is not of the corporation to its owners, but of the corporation to a wider society of others. In its ideal form, the concept of socially responsible corporations subscribes to a distinctly democratic political economy where corporations support the state.

Corporate religious exemptions deny these foundational agreements. Corporate religious objectors fail to meet, let alone exceed, the regulatory minimum promulgated by the state. Claiming a right to avoid regulation, proponents posit the state as infringing on freedom and corporations as intermediaries ensuring a plural and free society. They seek autonomy to advance their own interests, not partner with the state in the interests of others.

The disconnect between CSR and religious exemption does not ultimately resolve whether or when corporate religious objectors should be able to avoid regulation. But it does make clear that CSR provides no support for granting exemptions to religiously motivated businesses. Conversely, it indicates that corporate social responsibility may have been irreparably corrupted by a rush to embrace corporate religion.

From this story broader questions emerge about the historical contingency of this particular resurgence of debate over CSR. Why has the intellectual battle over the nature of the corporation's duties to society re-emerged now? What factors are driving the decision to label religious exemptions as CSR? If CSR is not an appropriate model for these exemptions, what historical antecedents best explain the phenomenon? What does the vision of political economy represented by corporate religious exemptions share with past visions of a democracy? What might CSR offer to emerging scholarly and advocacy efforts to tame giant corporations? Scholars of history, corporate law, constitutional doctrine, and beyond must take up these questions.