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The Supreme Court and the Pro-Business Paradox

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INTRODUCTION

Corporations have long posed conceptual difficulties in a variety of doctrinal contexts. From the first cases involving corporate claims for protection under the U.S. Constitution,[1] to early recognitions of corporate criminal liability a century later,[2] the Supreme Court has an extensive history of inquiring into the nature of corporations and what that answer might tell us about their rights and responsibilities.[3] It has often come up short in this regard — for example, using thin characterizations of corporations as "artificial entities" or "creatures" given their separate legal personality, or as "associations of persons" or "aggregates" given the human interests at stake.[4] At times, the Court has ignored or dismissed as irrelevant the corporate identity of a rights claimant or litigant,[5] or it has simply acted pragmatically, such as to discard an "old and exploded doctrine" that no longer fit societal realities regarding corporate liability.[6]

The Court has continued this struggle with corporations in the twenty-first century. With rising globalization, technological development, and complexity in business organizations, the divergence grows

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[1] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

[2] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909); Hale v. Henkel, 201 U.S. 43 (1906).

[3] *See, e.g.*, Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1676 (2015) (examining the history of the U.S. Supreme Court's corporate rights jurisprudence); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 68–105 (1992) (describing the development of corporate theory in nineteenth- and early twentieth-century debates on corporate personhood); ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS xvi (2018) (telling the history of the "corporate rights movement").

[4] *See* Blair & Pollman, *supra* note 3, at 1695, 1717 (describing nineteenth- and twentieth-century case law on corporate rights using views of the corporation as an artificial entity or an association of individuals).

[5] *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977); Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936).

[6] *N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. at 496.

between the Court's characterizations or abstractions and the realities of corporations. For example, blockbuster cases on corporate rights in the Roberts Court era, such as *Citizens United v. Federal Election Commission*[7] and *Burwell v. Hobby Lobby Stores, Inc.*,[8] paint a picture of corporations as "associations of citizens"[9] and as rights bearers for "the humans who own and control [them]."[10] People do not, however, typically look at their 401(k) account and think about civic participation in expressive associations. Nor does one generally think of a national chain with hundreds of stores as the same as its small handful of shareholders. While expanding corporate rights to political spending and religious liberty, the Court's opinions in these cases gave little sense of the distance between its view of corporations and their reality to everyday people who participate in them and bear the weight of their activity.

Further, in shaping and interpreting the law on rights and responsibilities, the Court continues to struggle not only with questions of *what* are corporations and *whom* do they serve — but also *where* are corporations?[11] Adequate resolutions to these questions seem as far from grasp as at any time in the past. Corporations can transcend borders, change form to arbitrage or to take advantage of laws, outsource activity, and divide into subsidiaries around the world.[12] Analogies between corporations and natural persons often fall flat as they do not capture these capabilities, the roles and relationships among corporate participants created by internal governance, and the related facts and values.[13] Attempts to parse where corporate conduct occurred can become roadmaps for corporations to evade liability.

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[7] 558 U.S. 310 (2010).

[8] 573 U.S. 682 (2014).

[9] *Citizens United*, 558 U.S. at 354.

[10] *Hobby Lobby*, 573 U.S. at 707.

[11] *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810–12 (1935) (observing the question "[w]here is a corporation?," *id.* at 809, is "the language of transcendental nonsense," *id.* at 812, that courts approached in "essentially supernatural terms," *id.* at 811, and "without appreciation of the economic, social, and ethical values which it involves," *id.* at 812).

[12] For a sampling of literature on these topics, see generally ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY (Richard P. Appelbaum & Nelson Lichtenstein eds., 2016); CHRISTOPHER M. BRUNER, RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD (2016); BARNALI CHOUDHURY & MARTIN PETRIN, CORPORATE DUTIES TO THE PUBLIC (2019); RESEARCH HANDBOOK ON TRANSNATIONAL CORPORATIONS (Alice de Jonge & Roman Tomasic eds., 2017); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010); and Frank Partnoy, *Shapeshifting Corporations*, 76 U. CHI. L. REV. 261 (2009).

[13] *See* James D. Nelson, *Facts and Values in Corporate Legal Theory*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 240, 241 (Elizabeth Pollman & Robert B. Thompson eds., 2021) [hereinafter Nelson, *Facts and Values in Corporate Legal Theory*] (discussing the need to inquire into the interests at stake and contextual facts and relationships, rather

In the recent Supreme Court Term, three of the world's largest corporations — Ford, Nestlé USA, Inc. (Nestlé), and Cargill — argued that they could not be held accountable to plaintiff victims in the jurisdictions in which these litigants brought suit. In *Ford Motor Co. v. Montana Eighth Judicial District Court*,[14] the global auto company asserted that personal jurisdiction was lacking in two products liability suits stemming from accidents that injured residents in Montana and Minnesota, where the Ford vehicles arrived through resales and relocations.[15] In *Nestlé USA, Inc. v. Doe*,[16] together with *Cargill, Inc. v. Doe*,[17] the food giants defended themselves against claims under the Alien Tort Statute[18] (ATS) brought by plaintiffs who were enslaved as children on cocoa farms in Ivory Coast (Côte d'Ivoire) and who maintained that the corporate defendants had aided and abetted human rights violations in their supply chains from their U.S. headquarters.[19] Nestlé and Cargill boldly asserted that they had categorical immunity as U.S. corporations, and, alternatively, that the Court should parse where the relevant conduct occurred and find it outside the reach of the statute.[20]

Critically, both cases hinged upon the Court's understanding of corporations and where it located their activity for purposes of potential liability. And, in each of these two consolidated cases, ranging on the merits from products liability to international human rights, the corporate defendants attempted to avoid legal responsibility through clever arguments that put corporations on better footing than individuals. Many observers would find the cases quite unsurprising in this regard. Corporations are shaped by a complex mix of forces, including both internal and external governance and rules of the game —

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than the nature of corporate "beings," in determining corporate rights); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630–31 (describing the weakness of using flawed conceptions and metaphors of the corporation instead of "the purpose of the constitutional right at issue, and whether it would promote the objectives of that right to provide it to the corporation — and thereby to the people underlying the corporation," *id.* at 1631).

14 141 S. Ct. 1017 (2021). This case was consolidated with *Ford Motor Co. v. Bandemer*. *Id.* at 1017.

15 *Id.* at 1023.

16 141 S. Ct. 1931 (2021). This case was consolidated with *Cargill, Inc. v. Doe*. *Id.* at 1931.

17 141 S. Ct. 184 (2020) (mem.).

18 28 U.S.C. § 1350.

19 *Nestlé*, 141 S. Ct. at 1935.

20 *Id.* at 1936 ("Petitioners . . . argue that respondents improperly seek extraterritorial application of the ATS."); *see also id.* at 1940 (Gorsuch, J., concurring) ("[T]his Court granted certiorari to consider the petitioners' argument that the Alien Tort Statute (ATS) exempts corporations from suit."); Transcript of Oral Argument at 5–6, *Nestlé*, 141 S. Ct. 1931 (No. 19-416) [hereinafter *Nestlé* Oral Argument], https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-416_6k47.pdf [https://perma.cc/6YDN-6BCZ] (asserting that corporations should have categorical immunity under the ATS and requesting dismissal on the basis of prohibited extraterritorial application).

corporate and securities laws govern the "internal" world of corporations and everything else is perceived as "external," such as civil procedure, human rights, environmental law, labor law, consumer protection, and so on.[21] Corporations have often pushed for rights and challenged external rules and regulations that create responsibility, and as the Supreme Court in recent years has appeared to take a friendly stance toward their claims, it has developed a "pro-business" reputation.[22]

Although far from absolute, whether one takes a quantitative or qualitative approach to the question, it is possible to observe that corporations and business litigants have often succeeded in their claims before the Court and in shaping the direction of the law.[23] This past Term, Nestlé and Cargill did not obtain categorical immunity, but they

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[21] *See* John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *What Is Corporate Law?*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 1, 23 (3d ed. 2017) (discussing the goal of corporate law as "maximiz[ing] the value of firms" based on the "assumption . . . that any externalities that the corporation generates are best addressed by regulatory constraints from other areas of law"); Ann M. Lipton, *Beyond Internal and External: A Taxonomy of Mechanisms for Regulating Corporate Conduct*, 2020 WIS. L. REV. 657, 657, 660 (observing that "[c]orporate discourse often distinguishes between internal and external regulation of corporate behavior," *id.* at 657, and arguing that regulatory processes could improve "by focusing on how legal rules operate rather than their nominal categorization as 'corporate law' or 'external law,'" *id.* at 660).

[22] *See, e.g.*, Adam Feldman, *Empirical SCOTUS: The Big Business Court*, SCOTUSBLOG (Aug. 8, 2018, 4:51 PM), https://www.scotusblog.com/2018/08/empirical-scotus-the-big-business-court [https://perma.cc/7EXV-4TMQ] ("The current Supreme Court is friendly toward big business . . . perhaps as friendly as any court dating back to the *Lochner* era, when laissez-faire policies permeated the court's rulings."); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), https://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html [https://perma.cc/5676-P65N] (noting that the Roberts Court's rulings have been "far friendlier to business than those of any court since at least World War II").

[23] *See* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1451, 1472 (2013) (finding "the Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts," *id.* at 1472, and that, over the span of 1946 to 2011, Chief Justice Roberts and Justices Alito and Thomas rank in the top five Justices most favorable to business, *id.*); Lee Epstein, William M. Landes & Richard A. Posner, *When It Comes to Business, the Right and Left Sides of the Court Agree*, 54 WASH. U. J.L. & POL'Y 33, 33 (2017) (finding that, in the Roberts Court era, "the current Democratic and Republican appointees support business at record levels"); MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 204, 213 (2013) (arguing that the "overall balance sheet in business cases fits the 'pro-business' view of the Court reasonably well," *id.* at 213, and the "procedural" cases on arbitration, class actions, and statutory limitations "capture[] the Roberts Court's way of being pro-business: the use of procedural rules that favor the big guys," *id.* at 204); *cf.* Jonathan H. Adler, *Introduction* to BUSINESS AND THE ROBERTS COURT 1, 12 (Jonathan H. Adler ed., 2016) ("[T]he Roberts Court can be called probusiness insofar as it is sympathetic to some basic business-oriented legal claims, reads statutes narrowly, resists finding implied causes of action, has adopted a skeptical view of antitrust complaints, and does not place its finger on the scales to assist non-business litigants. . . . [T]his is a Court that business likes — except when it doesn't . . . [and] the Court's tendencies in business-related cases are not easily reduced to a hashtag slogan.").

emerged victorious in their claim that the plaintiffs' complaint impermissibly sought extraterritorial application of the ATS. Even though a majority of the Justices seemed prepared to hold domestic corporations to the same standard of liability as natural persons under the ATS, Nestlé and Cargill convinced the Court to accept a narrow view of where they could be held accountable for their conduct. The Court flatly rejected as insufficient the plaintiffs' allegations that the corporate defendants made "major operational decisions" in the United States, reversing the decision below and allowing Nestlé and Cargill to avoid a trial on the merits.[24] Ford, by contrast, lost its bid to aggressively draw lines around where it could be sued for products liability, as the Court stood by existing precedent and ruled in favor of plaintiffs. Yet the case might still reflect a pro-business trend as an instance of corporate overreach following a string of corporate wins that have reshaped personal jurisdiction doctrine. Ford's audacious argument that it could not be sued in Montana and Minnesota because the particular cars involved in the plaintiffs' accidents were not originally sold in-state exemplifies just how far the law has already evolved in corporate defendants' favor.[25]

Other cases from the recent Term also help to fill out this picture of the Court's approach to corporations. Most notably, in *Americans for Prosperity Foundation v. Bonta*,[26] the Court endorsed a robust understanding of the First Amendment right to freedom of association for nonprofit corporations and other charitable organizations. In a splintered majority opinion, the Court held that a California regulation unconstitutionally burdened associational rights by requiring these organizations to disclose donor information to the state's Attorney General's Office for potential investigation into fraud and other wrongdoing.[27] The Court's willingness to strike down the regulation and raise the bar on the "exacting scrutiny" standard suggests that campaign finance regulations and other compelled disclosure regimes — even for business corporations — may be dismantled or threatened in the future.

Thus, from parsing the location of corporate activity for accountability to shielding organizations from disclosures on the basis of associational freedom, these cases provide valuable entry points for exploring how the Court's conceptions of corporations shape its jurisprudence. And yet digging into these cases also reveals that the pro-business label is at once correct but also wrong — or at least too

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[24] *Nestlé*, 141 S. Ct. at 1935–36.

[25] *See* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1022 (2021) (discussing Ford's argument "that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there"); *see also* Alexandra D. Lahav, *The New Privity in Personal Jurisdiction*, 73 ALA. L. REV. (forthcoming 2022) (on file with the Harvard Law School Library) (tracing the evolution of personal jurisdiction doctrine).

[26] 141 S. Ct. 2373 (2021).

[27] *Id.* at 2383.

simple. Corporations have often been empowered with rights and unburdened from responsibilities. Certainly this can be understood as favorable to business organizations in the broad sense. But deeper examination reveals that an enormous diversity of corporations exists and serves the interests of many different constituencies — many of whom do not benefit from, or welcome, this "pro-business" jurisprudence. The very notion of what is in the "business" interest of a corporation is highly contested and varies widely across corporations and participants. Cases from the recent Term, and others from the Roberts Court era, therefore also present an opportunity to examine the complex relationship between the Court's treatment of corporations and contrasting trends regarding corporate law and governance.

This Comment makes two primary contributions. It first observes that cases from the recent Term reflect an important way in which the Roberts Court has earned its reputation: over the beginning of the twenty-first century, the Court has often expanded corporate rights while narrowing corporate liability or access to justice against corporate defendants. Part I of this Comment sets forth this argument, using *Americans for Prosperity*, *Ford*, and *Nestlé* as case studies to show how the Court uses ill-fitting conceptions or overbroad generalizations to empower corporations and limit their accountability.

This trend gives rise to a paradox that Part II subsequently explores: the "pro-business" Court is often at odds with internal activity in corporate law and governance. Quite remarkably, as the Roberts Court has expanded corporate rights and narrowed pathways to liability, many shareholders and stakeholders have become vocal participants, putting pressure on corporations to rein in the use of their rights, to mitigate risks generated by their externalities, and to take account of environmental, social, and governance (ESG) concerns. The Court's expansion of corporate rights not only disserves many corporate participants and spurs them to action but also might fuel challenges to new disclosure rules about corporate political activity or other ESG-related concerns that investors and others seek for effective participation in corporate governance. Further, as the Court has downplayed or ignored corporate decisionmaking structures in its jurisprudence expanding rights and narrowing liability, by contrast, in the world of corporate law and governance, we see that board oversight, monitoring, and compliance functions have grown in importance. State corporate law cases have heightened attention on the board's role in providing oversight to ensure legal compliance throughout the corporation's operations and to mitigate litigation and reputational risks that can arise from corporate abuses around the world. Corporate compliance programs and voluntary ESG initiatives have proliferated amid widespread debate about the purpose of the corporation and a broadened role for stakeholders.

Looking at these diverging developments together suggests that, at least in some important circumstances, the Supreme Court's approach may not capture the reality of modern business corporations, and it might not be what many shareholders and corporate participants actually want. It may instead create new tensions in corporations that are not fully and easily resolved through private ordering and that undermine the conceptual foundation for the existing arrangements in corporate law and governance. It may also ultimately serve only a limited set of business interests — not the great number of workers who are often framed as stakeholders on the other side of "pro-business" jurisprudence, nor the majority of public corporation shareholders, who are increasingly diversified through institutions that rely on external regulation to constrain corporations and minimize systematic risk. And so, in sum, corporations might bear little resemblance to the Court's characterizations, and the business world, on the whole, might often be better off without "pro-business" jurisprudence that empowers corporations and erodes their external constraints.

I. EXPANDING CORPORATE RIGHTS AND LIMITING RESPONSIBILITIES IN TWENTY-FIRST-CENTURY SUPREME COURT JURISPRUDENCE

When scholars have approached the question of whether the Roberts Court is pro-business, they have used a variety of methods ranging from coding and counting cases to qualitative analyses in different subject areas.[28] All of the leading accounts have reached the conclusion that, in various qualified ways, and without singular meaning, the answer is yes — it is "pro-business."[29]

This Part explores one of the most notable but less explored trends of this era — the expansion of corporate rights and narrowing of liability or access to justice against corporate defendants. Landmark cases from previous Terms such as *Citizens United* and *Hobby Lobby* have garnered significant attention on the first part of the equation — expanding rights.[30] Running through these cases is a failure to capture the full nature, dynamics, and facts on the ground of corporations. By describing corporations as "associations of citizens" in a "corporate

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[28] *See* sources cited *supra* note 23.

[29] *See* sources cited *supra* note 23.

[30] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707 (2014).

democracy,"[31] and projecting the beliefs of shareholders onto corporations,[32] the Court has empowered corporations with greater speech rights and religious liberty.[33] In *Citizens United*, the Court held that corporations have a First Amendment right to make independent political expenditures.[34] In *Hobby Lobby*, the Court held that the Religious Freedom Restoration Act of 1993[35] (RFRA) applied to three closely held business corporations, allowing them to claim a religious exemption from providing certain contraceptive coverage to their employees.[36] In both cases, the Court extended protections — either constitutional or statutory — to for-profit business corporations.

And, although *Citizens United* and *Hobby Lobby* are the most well-known recent corporate rights cases, they are not alone. The Court has also invigorated the commercial speech doctrine[37] and given a forum for a business corporation's claim to a First Amendment right to discriminate against customers.[38] Most recently, in *Cedar Point Nursery v. Hassid*,[39] the Court validated agricultural employers' claims that sought Fifth and Fourteenth Amendment protection against a state regulation that provided periodic access to their farm property for labor union organizers.[40] As discussed by Professor Nikolas Bowie in this

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[31] *Citizens United*, 588 U.S. at 354 (referring to corporations as "associations of citizens"); *id.* at 361–62 (reasoning that there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy'" (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978))).

[32] *See Hobby Lobby*, 573 U.S. at 720 ("By requiring the Hahns and Greens *and their companies* to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates *their religious beliefs*" (emphasis added)).

[33] *See* Kent Greenfield & Daniel A. Rubens, *Corporate Personhood and the Putative First Amendment Right to Discriminate*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 13, at 283, 285 (discussing the failure of the Supreme Court to acknowledge the separate legal personality of corporations in *Hobby Lobby*); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 672–73 (2016) (critiquing the Supreme Court's characterization of corporations in *Citizens United*); Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 495–514 (same).

[34] 558 U.S. at 365.

[35] 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[36] 573 U.S. at 736.

[37] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 571–72 (2011) (striking down a state restriction on the sale, disclosure, and use of pharmaceutical prescription records for marketing purposes).

[38] *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018). The case involved a bakery corporation that refused to sell a wedding cake to a same-sex couple, which was challenged by Colorado as a violation of its state antidiscrimination law. *Id.* at 1723. The Supreme Court granted a writ of certiorari to hear the claims asserted by the business corporation and individual baker-shareholder of a First Amendment free exercise and speech right to discriminate against the same-sex couple. *Id.* at 1727. It ultimately decided the case on another ground — that the state commission had failed to treat the asserted religious beliefs in a neutral and unbiased manner. *Id.* at 1723–24.

[39] 141 S. Ct. 2063 (2021).

[40] *Id.* at 2080.

issue, the case takes a sweeping approach to Takings Clause jurisprudence in favor of the employers[41] — operating as corporations or through other forms of business organization. Further, as noted above, in *Americans for Prosperity*, the Court sided with nonprofit organizations, under the First Amendment freedom of association, in their facial challenge to a state disclosure requirement that facilitated regulatory oversight.[42] The Roberts Court has recognized the most expansive scope of corporate constitutional rights in U.S. history.[43]

Other cases from the recent Term, *Ford* and *Nestlé*, provide insight into the latter part of the equation about how the Court tilts or narrows the procedural rules and external laws regulating corporations.[44] *Ford* involved the Due Process Clause of the Fourteenth Amendment and the doctrine of personal jurisdiction,[45] and *Nestlé* involved the Alien Tort Statute, a part of the Judiciary Act of 1789 enacted in the first session of the U.S. Congress.[46] Both cases contemplated ongoing challenges with conceptualizing corporations, and reflect how, from time to time, the Court displays awareness that its rulings and reasoning do not fit or fully capture the nature of modern corporations or that the law has tilted in their favor without meaningful justification. Concurring and dissenting opinions in *Ford* and *Nestlé* notably did so, and yet still failed to put the Court on a different path. They followed years of cases which have trended, albeit not in absolute fashion, toward limiting corporate responsibility and access to accountability against corporate defendants.[47]

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[41] Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160, 161, 192 (2021).

[42] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385 (2021).

[43] For discussions that trace the ever-expanding scope of corporate rights in Supreme Court jurisprudence, including the role of the Roberts Court in that expansion, see Blair & Pollman, *supra* note 3, at 1725, 1728; and WINKLER, *supra* note 3, at xvi. For accounts that place the recent era into context with the Supreme Court's *Lochner* era, see generally Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1495–1507 (2015); and Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133.

[44] For another case from the recent Term that reflects this general trend, see *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021), holding that a credit reporting company's maintenance of misleading information about plaintiff-consumers in their credit files did not result in "concrete harm" for purposes of Article III standing if undisclosed, *id.* at 2210.

[45] Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021); *see also* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1251–55 (2017) (describing the historical evolution of the personal jurisdiction doctrine and an understanding of its enforcement as "a subcategory of due process," *id.* at 1253).

[46] *Nestlé*, 141 S. Ct. at 1935, 1937; *see also* Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (including the ATS as originally enacted); Alien's Action for Tort, 28 U.S.C. § 1350 (providing that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States").

[47] *See, e.g.*, Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016) (allowing exemption from the Fair Labor Standards Act by declining to apply *Chevron* deference in light of industry reliance on prior policy); Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (holding that the EPA

The discussion next turns to a more in-depth look at three of these examples — *Americans for Prosperity*, *Ford*, and *Nestlé* — as the recent Supreme Court Term provides a microcosm of the general trend identified in this Part. Arising under widely different areas of law, each is offered in the spirit of a case study to explore in more detail how the Court's understanding of corporations can translate into expansions of rights and contractions of responsibilities.

A. Corporations as Rights-Bearing Legal Persons

The first example, *Americans for Prosperity*, comes from the world of nonprofit corporations and charitable organizations. Specifically, the case raised the issue of whether California's requirement that nonprofit organizations disclose information about their major donors to the state authorities violated the First Amendment right to free association.[48] The purpose of the required disclosures — Schedule B to Internal Revenue Service Form 990, including a list of major donors — was to facilitate the state Attorney General's ability to police against charitable fraud and misconduct.[49] Although the state Attorney General's registry inadvertently provided public access to confidential Schedule Bs at one point several years ago, since that time the state codified a policy prohibiting such public disclosure and imposed security measures to protect the filings.[50]

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unreasonably disregarded cost when deciding to put emissions limits on coal and oil power plants following lengthy regulatory process); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 69 (2013) (limiting ability to bring collective action claims under the Fair Labor Standards Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013) (enforcing contractual waiver of class arbitration); PLIVA, Inc. v. Mensing, 564 U.S. 604, 609 (2011) (holding that federal drug regulations preempt state tort law claims against generic-drug manufacturers for inadequate warning labels); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011) (denying a class action certification of over a million female employees for lacking commonality in gender-pay discrimination claims); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011) (holding the Federal Arbitration Act preempts state rule regarding unconscionability of class arbitration waivers in consumer contracts); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 75–76 (2010) (enforcing arbitration provision against employee who challenged validity of contract as unconscionable); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) (restricting plaintiffs from using class arbitration where clause is silent on the issue of class treatment); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009) (enforcing collective bargaining agreement to require union members to arbitrate age discrimination claims); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007) (narrowly construing the EEOC charging period for plaintiff's employment discrimination claim), *overturned due to legislative action by* Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

[48] *Ams. for Prosperity*, 141 S. Ct. at 2379. For a discussion of managerial misconduct and governance failures in nonprofit organizations and the role of state attorneys general, see Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1499–1503, 1522–25 (2021).

[49] *Ams. for Prosperity*, 141 S. Ct. at 2380, 2385–86.

[50] *See id.* at 2381–82.

The litigants bringing the challenge were two organizations that might be characterized as ideologically or religiously oriented affinity groups: the Americans for Prosperity Foundation, described by the Court as a "public charity" with a stated mission of "education and training about the principles of a free and open society, including free markets, civil liberties, immigration reform, and constitutionally limited government,"[51] and the Thomas More Law Center, described by the Court as a "public interest law firm," with a stated "mission . . . to protect religious freedom, free speech, family values, and the sanctity of human life."[52]

Two aspects of the case are particularly noteworthy as they speak to the Roberts Court's approach to corporate rights. First, the Court's 6–3 ruling found *facially* unconstitutional the disclosure requirement with little inquiry into whether most of the nonprofit organizations to which it applied would have any associational interests burdened.[53] This approach, without sensitivity to the specifics of entities and the interests of the people involved in them, can lead to granting overbroad corporate rights. A similar dynamic was at play in *Citizens United*, when the Court granted First Amendment political spending rights to all corporations instead of simply the nonprofit political advocacy corporation that was before it as a litigant.[54] This pattern reflects how the Roberts Court tends to either characterize corporations with ill-fitting descriptions or avoid examining them altogether to elide how broadly it is ruling.

To elaborate further on this point, the litigant organizations — the Americans for Prosperity Foundation and the Thomas More Law Center — might indeed be composed of individual donors who understand that their affiliation expresses values they hold and exercise through association, and who have privacy interests at stake that can be represented by the entities.[55] In that way, although vastly differing in

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[51] *Id.* at 2380 (quoting Brief for Petitioner at 10, *Ams. for Prosperity*, 141 S. Ct. 2373 (No. 19-251)).

[52] *Id.* (quoting Brief for the Petitioner Thomas More Law Center at 10, *Ams. for Prosperity*, 141 S. Ct. 2373 (No. 19-255)).

[53] *Id.* at 2386.

[54] *See* Blair & Pollman, *supra* note 3, at 1734. For a discussion of various ways the Court could have reached a narrower decision in *Citizens United*, see Michael W. McConnell, Essay, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 415–16 (2013).

[55] *See* James D. Nelson, Essay, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 495 (2015) (observing that "[b]y looking at the dominant pattern of individual attachment to different kinds of associations, we can begin to make distinctions among them" and that some associations are "genuine communities that are constitutive of their members' identities"); *see also* Nelson, *Facts and Values in Corporate Legal Theory*, *supra* note 13, at 255–56 (discussing how a realist approach to corporate rights might "help disaggregate the organizational world," *id.* at 255, as "there are myriad ways in which real-world differences among vastly different kinds of organizations might matter for rights analysis," *id.* at 256).

aims and burdens, the organizations could perhaps be likened, as the Court did, to the NAACP, a civil rights group pursuing racial justice through its organization as a membership corporation.[56]

However, in the landmark 1958 freedom of association decision, *NAACP v. Alabama ex rel. Patterson*,[57] the Court invalidated only a targeted production order requiring that the NAACP disclose its membership list to the state.[58] Further, the NAACP specifically showed that it was associational in nature, it brought together members with common beliefs, and the individuals represented by the organization faced the severe threat of violent reprisals if their names and addresses were disclosed pursuant to the production order.[59]

By contrast, in *Americans for Prosperity*, the Court broadly invalidated the state regulation as to all nonprofit organizations — approximately 100,000 registered in California — and did little to examine the interests, associational dynamics, or evidence of threats or chilling effects on any other organizations besides the two litigants.[60] Many of the 100,000 nonprofit organizations registered in California might have few if any individual donors making contributions large enough to be listed on a Schedule B, nor organizational aims and dynamics that would give rise to a concern about causing serious harm to donors or chilling their association.[61] Over strong dissent by Justice Sotomayor on this point, which was joined by Justices Breyer and Kagan,[62] the Court cited only evidence from the two litigants and cursorily noted briefs filed in support by amici curiae organizations that also wished to avoid disclosing donor information to the state.[63] In sum, the

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[56] *See Ams. for Prosperity*, 141 S. Ct. at 2382 (noting that *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), involved the chilling effect of compelled disclosure of affiliation "in its starkest form").

[57] 357 U.S. 449.

[58] *See id.* at 459–63 ("To require that [the right to associational privacy] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *Id.* at 459.).

[59] *See id.* at 462–63, 466 ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466.).

[60] *See Ams. for Prosperity*, 141 S. Ct. at 2380, 2389; *cf. id.* at 2391 (Thomas, J., concurring in part and concurring in the judgment) (noting that while the majority stated that the regulation was "facially unconstitutional," the relief provided was specific to the petitioners).

[61] The Court rejected this line of inquiry. *See id.* at 2388 (majority opinion) ("It is irrelevant, moreover, that some donors might not mind — or might even prefer — the disclosure of their identities to the State.").

[62] *See id.* at 2402–04 (Sotomayor, J., dissenting) ("[T]he Court has decided, in a radical departure from precedent, that there no longer need be any evidence that a disclosure requirement is likely to cause an objective burden on First Amendment rights before it can be struck down." *Id.* at 2404.).

[63] *See id.* at 2381, 2388 (majority opinion) (discussing petitioners' claims that supporters had been subject to threats and protests).

majority opinion takes an expansive approach to assuming privacy and associational interests for a wide array of organizations that it does not investigate — broadly enforcing rights with little regard for determining whether the facts on the ground showed them to be in danger.[64]

Second, the Court arrived at its ruling by applying a narrow tailoring requirement to the standard of "exacting scrutiny"[65] — a move that could have broad implications for a variety of disclosure regulations, including for business corporations.[66] Instead of focusing on deeper analysis of the *organizations* and the significance of their burdens, the Court justified invalidating the law on a facial challenge because of its view of the *regulation* — that the state's investigative goals were merely for "administrative convenience" and not narrowly tailored.[67] A majority of the Court joined in applying this standard and reaching this conclusion, though Chief Justice Roberts did not sway enough of his colleagues to also join in his one-size-fits-all vision that, "[r]egardless of the type of association, compelled disclosure requirements [should be] reviewed under exacting scrutiny."[68] In separate concurrences, however, Justices Thomas and Alito (joined by Justice Gorsuch) set out their views for either applying an even higher level of scrutiny or leaving open the question of a uniform standard for cases involving a First Amendment challenge to compelled disclosure.[69]

Altogether, the decision avoids investigating the associational dynamics and interests of thousands of nonprofit organizations, ratchets up scrutiny to strike down the state's disclosure regulation, and suggests that future challenges to compelled disclosure might receive the same or even greater levels of scrutiny. As cases involving the rights of nonprofit corporations and charitable entities have been harbingers for business

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64 *See id.* at 2388 ("The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California."); *cf. id.* at 2402–04 (Sotomayor, J., dissenting) (noting that "research shows that the vast majority of donors prefer to publicize their charitable contributions," *id.* at 2403, and many nonprofit organizations, such as "hospitals and clinics; educational institutions; . . . museums and art [organizations]; food banks and other organizations providing services to the needy, the elderly, and the disabled; animal shelters; and organizations that help maintain parks and gardens," are engaged in "uncontroversial pursuits," *id.*).

65 *Id.* at 2383 (majority opinion) ("While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest.").

66 *See infra* section II.A, p. 247–254.

67 *See Ams. for Prosperity*, 141 S. Ct. at 2387 (noting a facial challenge is appropriate to invalidate a law "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," and in the case at hand, "[t]he lack of tailoring to the State's investigative goals is categorical — present in every case — as is the weakness of the State's interest in administrative convenience" (citation omitted)).

68 *Id.* at 2383 (plurality opinion).

69 *See id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 2392 (Alito, J., concurring in part and concurring in the judgment).

corporations,[70] *Americans for Prosperity* is an important example of the Roberts Court's trend of expanding corporate rights with an approach insensitive to many of their realities.

B. Corporations and Procedural Rules of the Game

Turning now from expanding rights on one side of the "pro-business" trend identified in this Part to limiting accountability on the other, consider two other cases from the recent Term: *Ford* and *Nestlé*. Starting with the first, *Ford* illustrates how procedural rules are infused with conceptions of corporations and have often been tipped in their favor. It is the latest in a long line of personal jurisdiction cases involving corporate defendants that dates back to *International Shoe Co. v. Washington*.[71] The history before and after this 1945 case is a cat-and-mouse tale of courts taking rules made for individuals, roughly adapting them to corporations, and then acceding to corporate claims to whittle them down over time.

Before *International Shoe*, courts interpreted theories of consent, doing business, and presence in a state to give "relatively unlimited jurisdiction over corporate and individual defendants having certain commercial ties with the forum."[72] Gradually, however, corporations engaged in crafty tactics to get around these rules, and courts began to embrace a more limited and dispute-specific approach to jurisdiction, often leaving injured parties without a convenient forum for their

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[70] For example, one of the earliest corporate rights cases involved a nonprofit educational institution, and the Supreme Court subsequently applied its ruling to business corporations. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 519–21 (1819) (recognizing Contract Clause protection for corporations in a case involving a nonprofit college); *see also, e.g.*, Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 518, 545, 560 (1830) (applying the *Dartmouth College* ruling on Contract Clause protection to a bank corporation). Likewise, in the twentieth century, the Court protected the associational and speech rights of the NAACP, a nonprofit membership corporation, during the Civil Rights era, and later cited these rulings to support extending First Amendment speech rights to newspaper corporations and then to business corporations more generally in the context of political spending. *See* NAACP v. Button, 371 U.S. 415, 429 (1963) (holding the NAACP's activities of associating to assist persons seeking legal redress were protected by First and Fourteenth Amendment rights to speech and association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) (holding that the state's production order of NAACP membership list violated freedom of association rights); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (citing NAACP cases in reasoning to support granting business corporations First Amendment protection against a state-law prohibition on corporate independent expenditures related to state ballot initiatives); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (citing *Button* in reasoning to support extending First Amendment protection to a newspaper corporation).

[71] 326 U.S. 310 (1945).

[72] Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 620–22 (1988) (explaining that pre–*International Shoe*, courts deemed corporations present in states to which they sent products or agents, or in which they had registered to do business or designated an agent for service of process); *see* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1036–37 (2021) (Gorsuch, J., concurring).

claims.[73] In *International Shoe*, the Court charted a new course: it held that due process requires only that a corporate defendant have "minimum contacts" with the forum state such that "the maintenance of the suit"[74] is "reasonable, in the context of our federal system,"[75] and does not "offend traditional notions of fair play and substantial justice."[76] Further, the Court noted that "continuous corporate operations within a state [could be] so substantial and of such a nature [so] as to justify suit against [the corporation] on causes of action arising from dealings entirely distinct from those activities."[77] Subsequently, by the mid–twentieth century, a framework recognizing two types of personal jurisdiction emerged: general and specific jurisdiction.[78]

Recent years have once again given a "massive gift to corporate defendants,"[79] however — a string of Supreme Court cases that contracted both types of personal jurisdiction.[80] Most notably, using flawed analogies to individual humans, the Court has dispensed with the notion that general jurisdiction subjects corporations to jurisdiction in all states

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[73] *See* Twitchell, *supra* note 72, at 622–23; Robert H. Jackson, *What Price "Due Process"?*, 5 N.Y. L. REV. 435, 436 (1927).

[74] *Int'l Shoe*, 326 U.S. at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[75] *Id.* at 317.

[76] *Id.* at 316 (quoting *Milliken*, 311 U.S. at 463) (internal quotation marks omitted).

[77] *Id.* at 318.

[78] Twitchell, *supra* note 72, at 626–27 (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1122 (1966)); *see also* Calder v. Jones, 465 U.S. 783, 787 (1984) (referencing the framework of general and specific jurisdiction). General jurisdiction is "all-purpose" and extends to "any and all claims" brought against a defendant, whereas specific jurisdiction "depends on an affiliatio[n] between the forum and the underlying controversy." Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (alteration in original) (internal quotation marks omitted).

[79] Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655, 767 (2019); *see also* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1092–93 (2015) (discussing how the Court's recent personal jurisdiction cases "exclude a significant amount of transnational litigation arising from foreign conduct by foreign [corporate] defendants," *id.* at 1092); Charles W. "Rocky" Rhodes, Cassandra Burke Robertson & Linda Sandstrom Simard, Ford*'s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102, 102 (2020) ("In six personal jurisdiction decisions over the last nine years, the Roberts Court upended several previously accepted jurisdictional norms.").

[80] *See Goodyear*, 564 U.S. at 924 (holding that general jurisdiction exists where a corporation is "at home," which, subject to special exception, consists of its state of incorporation and principal place of business); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877–78 (2011) (insulating foreign manufacturers that use American distributors from products liability claims); Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) (denying jurisdiction in U.S. court for a claim brought by foreign plaintiffs against foreign defendants based on events outside the United States); Walden v. Fiore, 571 U.S. 277, 284 (2014) (tightening the jurisdictional focus to the defendant's conduct in the forum); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017) (rejecting state court's finding of jurisdiction where "out-of-state" corporation had thousands of miles of railroad track and thousands of workers in state but injuries occurred elsewhere); Bristol-Meyers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1781 (2017) (rejecting the relevance of defendant's forum contacts unrelated to the dispute for specific jurisdiction).

in which they do "continuous and systematic" business.[81] Envisioning a natural person's "domicile" as the "paradigm forum," the Court interpreted "an equivalent place" or "home" for corporations as the state of incorporation and principal place of business.[82] General jurisdiction exists, essentially, in just one or two states for most U.S. corporations.[83] Further, specific jurisdiction evolved to cover a "narrower class of claims,"[84] in which the corporate defendant "purposefully avails itself of the privilege of conducting activities within the forum State"[85] and the plaintiff's claims "aris[e] out of or relat[e] to the defendant's contacts" with the forum.[86]

Seizing on this line of favorable precedent, Ford took an aggressive stance in response to suits brought against it in Montana and Minnesota for accidents in those states involving its vehicles.[87] The multinational auto manufacturer is incorporated in Delaware, headquartered in Michigan, and advertises, sells, and services its vehicles in the United States and abroad.[88] In the cases before the Court, it claimed that personal jurisdiction was lacking because general jurisdiction did not attach and, although there might have been purposeful availment, there was no *causal* link between its conduct in Montana and Minnesota and the plaintiffs' claims.[89] Specifically, Ford asserted that the particular vehicles involved in the relevant accidents were designed, manufactured, and first sold in states other than Montana and Minnesota — it was only through resales and relocations that the vehicles had found

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[81] *See Goodyear*, 564 U.S. at 923–24; *see also Daimler*, 571 U.S. at 154 (Sotomayor, J., concurring in the judgment) (noting that the language had been "taught to generations of first-year law students").

[82] *Goodyear*, 564 U.S. at 924. For a discussion of the history of treating corporations more favorably than individuals, unions, and unincorporated business organizations such as partnerships and LLCs in some jurisdictional matters, see Susan Gilles & Angela Upchurch, *Finding a "Home" for Unincorporated Entities Post-*Daimler AG v. Bauman, 20 NEV. L.J. 693, 700–10 (2020).

[83] *See Daimler*, 571 U.S. at 139 n.19 ("We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.").

[84] Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024 (2021).

[85] Hanson v. Denckla, 357 U.S. 235, 253 (1958); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475–76 (1985) (discussing the "purposeful availment" requirement).

[86] *Daimler*, 571 U.S. at 127 (quoting Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984)); Bristol-Meyers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1780 (2017).

[87] *See Ford*, 141 S. Ct. at 1023; Brief for Petitioner at 17, 45–46, *Ford*, 141 S. Ct. 1017 (Nos. 19-368 & 19-369) (arguing that the conduct of petitioners that allegedly led to plaintiffs' claims could not satisfy the requirements of specific jurisdiction because it did not occur in the forum state); Transcript of Oral Argument at 5–6, *Ford*, 141 S. Ct. 1017 (Nos. 19-368 & 19-369), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-368_m648.pdf [https://perma.cc/R94S-JGPK].

[88] *Ford*, 141 S. Ct. at 1022.

[89] *See id.* at 1023.

their way into those states, and thus by its logic, specific jurisdiction was improper.[90]

Reflecting on this history and Ford's claim, Justice Gorsuch, in his concurrence, forcefully rejected Ford's claim and observed the inequity: "Nearly 80 years removed from *International Shoe*, it seems corporations continue to receive special jurisdictional protections in the name of the Constitution. Less clear is why."[91] He highlighted the Court's failure to modernize its approach to corporations: "[I]t seems almost quaint in 2021" to "speak of a corporation having one or two 'homes'"[92] when we are "in a world where global conglomerates boast of their many 'headquarters.'"[93] And although in the 1940s "purposeful availment" might have been "a reasonable new substitute for assessing corporate 'presence,'" in the twenty-first century with Internet advertising, e-commerce, platform business models, and global reach, "the old test no longer seems as reliable a proxy for determining corporate presence as it once did."[94]

Not only is the doctrine out of touch with modern business, Justice Gorsuch noted, but it treats corporations better than humans — "*individual* defendants remain subject to the old 'tag' rule, allowing them to be sued on any claim anywhere they can be found."[95] Indeed, "[t]he Constitution has always allowed suits against *individuals* on any issue in any State where they set foot."[96] Corporations, of course, do not have a physical body to set foot anywhere except through directors and agents, but the failure to fairly assess their presence or consent is precisely the point. Justice Gorsuch did not spell out the consequences in his concurrence, but they are clear: plaintiffs pay the price.[97] Those plaintiffs may be corporations themselves or individuals, who, going about their everyday lives, are harmed by corporations' products or services and then might be unable to bring suit in their home state.

What, then, did the Court rule in *Ford*? It "proceed[ed] as the Court has done for the last 75 years — applying the standards set out in *International Shoe* and its progeny."[98] Writing for the Court, Justice Kagan acknowledged its recent case law narrowing specific jurisdiction for corporate defendants and rejected Ford's attempt to further narrow

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90 *See id.*

91 *Id.* at 1038 (Gorsuch, J., concurring in the judgment).

92 *Id.* at 1034.

93 *Id.* at 1038.

94 *Id.*

95 *Id.* (citing Burnham v. Super. Ct., 495 U.S 604, 610–11 (1990)).

96 *Id.* at 1039 n.5.

97 *See* Peterson, *supra* note 79, at 762 (describing how "corporate defendants are taking advantage" of recent personal jurisdiction case law to seek dismissals and how "[t]he greater the plaintiff's burden and expense, the lower . . . the [expected] settlement value of the case").

98 *Ford*, 141 S. Ct. at 1026 n.2.

the rule to include a strict causal relationship between the defendant's in-state activity and the plaintiff's claim.[99] From there, the Court affirmed the decisions below by applying its statement from 1980 in *World-Wide Volkswagen Corp. v. Woodson*[100] that if a car manufacturer "serves a market for a product in the forum State and the product malfunctions there," it is not unreasonable to subject it to suit in that state.[101]

This time, Ford lost. But the bigger picture is the trend line of decisions incrementally tilting in favor of corporate defendants, leading to Ford — one of the largest U.S. corporations, which sells millions of vehicles across all fifty states — claiming that it could not be sued for products liability in Montana or Minnesota. The shortcomings of personal jurisdiction doctrine to capture modern business and the inequity in treatment between individuals and corporate defendants were brought to light, but the status quo remained. The Court quite reasonably noted that the facts did not distinctively raise the issues discussed in Justice Gorsuch's concurrence[102] — but, of course, it granted certiorari in *Ford* in the first instance and not in another case that might have done so. It remains to be seen if the pendulum favoring corporatate defendants has started to swing back, or if *Ford* simply signals that the Court will not go further than its already accommodating approach.

C. Corporations and External Laws

Finally, *Nestlé* provides another window into how the Court's jurisprudence conceptualizes corporations and can limit access to justice against corporate defendants or otherwise narrow sources of liability. It represents the third major ATS case of the Roberts Court era to assail the hopes of victims of human rights abuses to have their claims heard in U.S. courts.[103]

A brief examination of the ATS helps shed light on this path. The First Congress enacted the ATS in the Judiciary Act of 1789 to provide a federal forum for foreigners to bring tort suits against violators of the "law of nations."[104] Scholars have explained that, at that time, "every nation had a duty to redress certain violations of the law of nations

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[99] *See id.* at 1026–27.

[100] 444 U.S. 286 (1980).

[101] *Ford*, 141 S. Ct. at 1027 (citing *World-Wide Volkswagen*, 444 U.S. at 297).

[102] *See id.* at 1025 n.2.

[103] *See Nestlé*, 141 S. Ct. at 1937; Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013).

[104] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 721 (2004); *id.* at 717–19 (discussing adoption of the ATS); *see also* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996) (discussing the limited legislative history of the ATS).

committed by its citizens or subjects against other nations or their citizens."[105] If a nation did not provide a forum to pursue a remedy, it became responsible and gave "just cause for war"[106] — an outcome to be avoided. Therefore, with the passage of the ATS, "the First Congress enabled the United States to remedy an important category of law of nations violations committed by U.S. citizens against aliens."[107]

Invocation of the statute was rare until the 1980s.[108] With evolving recognition that certain atrocities and abuses violated international norms, courts began to hear ATS actions based on modern human rights harms.[109] Debate ensued over the meaning of the ATS and its scope.[110] Federal courts took different approaches to ATS cases, and the fact patterns were wide-ranging.[111] By the late 1990s, human rights advocates began to bring suits against corporations for being complicit in human rights abuses in violation of international law.[112]

The first modern ATS case to reach the Court, *Sosa v. Alvarez-Machain*,[113] came in 2004, just before the Roberts Court era began.[114] It involved an international dispute that arose out of a drug

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105 Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 448 (2011); *see id.* at 450 ("Although the practice has been largely forgotten today, a nation became responsible under the law of nations for injuries that its citizens inflicted on aliens if it failed to provide an adequate means of redress — by punishing the wrongdoer criminally, extraditing the offender to the aggrieved nation, or imposing civil liability.").

106 *Id.* at 448–49.

107 *Id.* at 449; *see also id.* at 454 ("In 1789, the most natural way to read the ATS, given its full legal and historical context, was as a grant of jurisdiction to federal district courts to hear common law tort claims by aliens against United States citizens for intentional injuries to person or property.").

108 *See id.* at 458–59 (noting "the only significant invocation of the statute," *id.* at 458, before the 1980s occurred in *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607)); *see also Jesner*, 138 S. Ct. at 1397 ("Over the first 190 years or so after its enactment, the ATS was invoked but a few times.").

109 *See Jesner*, 138 S. Ct. at 1398 (describing the history of ATS litigation).

110 *See* Bellia & Clark, *supra* note 105, at 461.

111 *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 845–46, 848 (11th Cir. 1996) (finding that a U.S. district court had jurisdiction under the ATS to hear claims of Ethiopian citizens arising from allegations of torture in Ethiopia); *In re* Est. of Marcos, Hum. Rts. Litig., 25 F.3d 1467, 1467 (9th Cir. 1994) (finding that a U.S. district court had jurisdiction under the ATS to hear claims of families of alleged victims of torture, execution, and disappearance against the former President of the Philippines); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775, 798–99 (D.C. Cir. 1984) (per curiam) (dismissing complaint brought by primarily Israeli citizens against parties allegedly responsible for an attack in Israel in violation of the law of nations); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (allowing citizens of Paraguay to sue another Paraguayan citizen for "deliberate torture perpetrated under color of official authority").

112 *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880, 880 (C.D. Cal. 1997); *see also* ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 55–58 (2021) (discussing the history of ATS litigation involving corporate defendants).

113 542 U.S. 692 (2004).

114 *See* Bellia & Clark, *supra* note 105, at 458.

cartel–related incident involving the U.S. Drug Enforcement Agency and a Mexican national.[115] Reviewing the history of the ATS, the Supreme Court determined that it is a jurisdictional statute, and claims should "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,"[116] such as interfering with the rights of ambassadors, violating safe conducts, and piracy.[117] Any such norm must be "specific, universal, and obligatory."[118] If that threshold is met, a court should also consider whether allowing the case to proceed is an appropriate exercise of judicial discretion, particularly in light of the potential for foreign policy consequences.[119] Applying this understanding, the Court concluded that the case before it failed,[120] but it rejected the notion "that federal courts must avert their gaze entirely from any international norm intended to protect individuals."[121] Instead, it concluded "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[122]

To date, however, following *Sosa*, three ATS suits have gone before the Roberts Court, each involving corporate defendants, and each time the Court has pushed the door closer to shut. First, in *Kiobel v. Royal Dutch Petroleum Co.*,[123] the Court rejected a suit against two foreign corporations accused of aiding and abetting atrocities committed by the Nigerian government, holding that the presumption against extraterritoriality applies to the ATS.[124] According to the complaint, "after concerned residents in Ogoniland began protesting the environmental effects" of a joint subsidiary of two large oil and gas companies, the corporate defendants "enlisted the Nigerian Government to violently suppress the burgeoning demonstrations."[125] For years after, the "Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property," while the companies allegedly provided the

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115 *See Sosa*, 542 U.S. at 697–99.

116 *Id.* at 725.

117 *Id.* at 724–25. This focus on Blackstone's identification of "principal" offenses left out another, broader category, which would have been understood at the time of passage of the ATS: intentional torts against the citizens of another nation. *See* Bellia & Clark, *supra* note 105, at 448, 454.

118 *Sosa*, 542 U.S. at 748 (quoting *In re* Est. of Marcos, Hum. Rts. Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

119 *See id.* at 727–28.

120 *See id.* at 733–38.

121 *Id.* at 730.

122 *Id.* at 729.

123 569 U.S. 108 (2013).

124 *See id.* at 116–17, 121, 124.

125 *Id.* at 113.

Nigerian forces with resources and staging ground for the attacks.[126] The plaintiffs, victims of these abuses, were granted political asylum in the United States and brought suit under the ATS.[127] Although the defendant corporations were traded on the New York Stock Exchange and had a New York office through an affiliate company, the Court held that the suit could not be maintained because the relevant conduct occurred overseas and did not "touch and concern the territory of the United States."[128] In a concurrence, Justice Breyer pointed out a weakness in the majority's reasoning — applying the presumption against extraterritoriality did not properly account for piracy, which has long been understood as "fair game 'wherever found.'"[129] As Justice Breyer noted, this is why the Court had previously left the door open to ATS claims and prompted judges to ask, "*[W]ho are today's pirates?*"[130]

Next, in *Jesner v. Arab Bank, PLC*,[131] the Court further constricted the reach of the ATS, holding that foreign corporations are categorically exempt from suit under the statute.[132] The Court ruled in favor of a Jordanian bank accused of transferring funds through its New York branch for terrorist groups that committed deadly attacks in the Middle East.[133] In so doing, the Court gave an assortment of reasons for excluding foreign corporations from suit under the ATS: (1) international tribunals do not evidence a "specific, universal, and obligatory" norm[134] of imposing liability on "corporations or other artificial entities";[135] (2) separation of powers concerns weigh in favor of deferring to Congress;[136] and (3) if plaintiffs could sue multinational corporate entities, other nations might hale American corporations into their courts "seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world."[137] In all, the Court concluded it prudent to exclude foreign corporations from suit under the ATS and leave it to Congress to say otherwise.[138]

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, vigorously dissented in *Jesner* and explained that the text and historical

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126 *Id.*

127 *See id.*

128 *Id.* at 125 ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."); *see id.* at 139 (Breyer, J., concurring).

129 *Id.* at 130–31 (noting that the piracy example "typically involve[s] applying our law to acts taking place within the jurisdiction of another sovereign," *id.* at 130).

130 *Id.* at 131 (emphasis added).

131 138 S. Ct. 1386 (2018).

132 *See id.* at 1407.

133 *See id.* at 1393–95.

134 *Id.* at 1399 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

135 *Id.* at 1400.

136 *See id.* at 1403.

137 *Id.* at 1405.

138 *See id.* at 1407.

context of the ATS "requires only that the alleged conduct be specifically and universally condemned under international law,"[139] not the method of enforcement such as corporate liability.[140] The Court had unnecessarily provided immunity to foreign corporations and undermined the original purpose of the ATS.[141] In some instances under the Court's ruling, the "harm will persist unremedied"[142] because corporations may have a "profit motive"[143] for human rights abuses, and individual employees may be unavailable or unable to compensate plaintiffs.[144] Moreover, suits against individuals "d[o] not impose accountability for the institution-wide disregard for human rights."[145] Citing *Citizens United* and *Hobby Lobby*, the dissent concluded that immunizing corporations from human rights liability under the ATS allows "these entities to take advantage of the significant benefits of the corporate form and enjoy fundamental rights, without having to shoulder attendant fundamental responsibilities."[146] As this Part highlights, that trend is indeed the leitmotif of the "pro-business" Roberts Court.

Against this history, the Court heard *Nestlé* in the recent Term and further narrowed access to justice against corporate defendants — this time U.S. corporations.[147] At the root of the case is the fact that the majority of the world's cocoa comes from Ghana and Ivory Coast, and child labor has been pervasive on cocoa farms in these countries, with over a million children as young as five years old engaged in hazardous work.[148] The low price of cocoa from farms in this region reflects the economics of using child labor; the vast majority of the cocoa farms are

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139 *Id.* at 1421 (Sotomayor, J., dissenting).
140 *Id.* at 1420–21.
141 *See id.* at 1435.
142 *Id.*
143 *Id.* at 1437.
144 *See id.* at 1435.
145 *Id.*
146 *Id.* at 1437 (citations omitted).
147 *See Nestlé*, 141 S. Ct. at 1935.
148 *See Child Labor in the Production of Cocoa*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa [https://perma.cc/8KBB-MYK4] ("Côte d'Ivoire and Ghana, together, produce nearly 60% of the world's cocoa each year, but latest estimates found 1.56 million children engaged in hazardous work on cocoa farms in these two countries."); Vivienne Walt, *Big Chocolate's Child-Labor Problem Is Still Far from Fixed*, FORTUNE (Oct. 19, 2020, 10:40 AM), https://fortune.com/2020/10/19/chocolate-child-labor-west-africa-cocoa-farms [https://perma.cc/FZH6-4LY2] ("[T]he proportion of children in Ghana and Ivory Coast between the ages of five and 17 who work on cocoa farms has increased by a staggering 14 percentage points in the past decade, up from 31% to 45% of children living in the two countries . . . [and] about 95% of those kids face one or more significant safety hazards on cocoa farms . . . ."); *see also* GEORGE, *supra* note 112, at 41–42 (describing the problem of child labor in chocolate production and various suits against chocolate companies such as Hershey and Nestlé).

tiny enterprises, and many of the farmers themselves earn about one dollar a day.[149] The plaintiffs, originally from Mali, "allege[d] that they were trafficked into Ivory Coast as child slaves to produce cocoa."[150] They sued Nestlé and Cargill — U.S. corporations that bought cocoa from farms in Ivory Coast, where plaintiffs claim they were enslaved, and "provided those farms with technical and financial resources — such as training, fertilizer, tools, and cash — in exchange for the exclusive right to purchase cocoa."[151] Although the resource distribution and injuries occurred in Ivory Coast, the plaintiffs argued that the corporate defendants "made all major operational decisions within the United States" and "knew or should have known" that the farms were using enslaved child labor, and thus could be held liable for aiding and abetting child slavery under the ATS.[152] By contrast, the corporate defendants argued that they were immune from suit under the ATS and, alternatively, it would be an improper extraterritorial application of the ATS in this case.[153]

Writing for eight members of the Court, Justice Thomas ruled in favor of the corporate defendants on their latter argument, reasoning that "[n]early all the conduct [plaintiffs] say aided and abetted forced labor — providing training, fertilizer, tools, and cash to overseas farms — occurred in Ivory Coast" and only "allegations of general corporate activity — like decisionmaking" occurred in the United States.[154] The tight, matter-of-fact language dispensed with "generic allegations" of decisionmaking as "general corporate activity" that is "common to most corporations" and plainly insufficient for alleging a domestic application of the ATS.[155]

This conception of corporate activity is quite perplexing, however. A fundamental tenet of corporate law is that the board of directors is vested with authority to manage the affairs of the corporation.[156] It acts

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[149] *See* Walt, *supra* note 148 (describing economics of West African cocoa farms); SANTADARSHAN SADHU ET AL., NORC FINAL REPORT: ASSESSING PROGRESS IN REDUCING CHILD LABOR IN COCOA PRODUCTION IN COCOA GROWING AREAS OF CÔTE D'IVOIRE AND GHANA 9 (2020), https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report_English.pdf [https://perma.cc/Y5MR-UUBS] (noting a relationship between the price of cocoa and hazardous child labor).

[150] *Nestlé*, 141 S. Ct. at 1935. The case involved Nestlé USA, Inc. (Nestlé), a subsidiary of the Swiss multinational Nestlé S.A.

[151] *Id.*

[152] *Id.*

[153] *Nestlé* Oral Argument, *supra* note 20, at 5–6. For a discussion of the procedural history of the case, see Recent Case, Doe I v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019), 133 HARV. L. REV. 2643 (2020).

[154] *Nestlé*, 141 S. Ct. at 1937.

[155] *See id.*

[156] *See* DEL. CODE ANN. tit. 8, § 141(a) (2021).

as a collective body through decisionmaking.[157] The board of directors may properly meet in person or convene via technological means, whether inside or outside of its state of incorporation — the location of such a board meeting makes no difference as a matter of corporate law; what is important is that there is a decision of the corporation.[158] All other decisions and operations flow from the board's authority by delegation — from the board to the CEO and then all the way down to the employee or agent at the lowest rung.[159] Therefore, to look at the lowest rung of corporate activity — agents on the ground — and dismiss the decisionmaking at the top as insignificant turns the ordinary understanding of corporate activity on its head.[160] Although tools and cash might have a tangible presence in a location, that does not make the decisionmaking that got them there any less important. Nor is there difficulty in attributing the decisionmaking of a U.S. corporation to the United States. And decisionmaking can provide assistance that constitutes aiding and abetting in various contexts.[161] Boards also have oversight duties to monitor their organizations for legal compliance — an obligation with significant complexity for multinational corporations that are coming under increasing scrutiny by regulators, shareholders, and other stakeholders around the world.[162] As section II.B explores in more detail, the Court's reasoning thus fundamentally misconstrues or understates the significance of the corporate decisionmaking structure that is integral to the corporate entity and one of its defining features.

Further, generic allegations of corporate decisionmaking might understandably raise pleading concerns, but it is unclear how plaintiffs who were trafficked and enslaved as children on cocoa farms can be expected to pinpoint exactly who at the corporation was involved in the decisionmaking. Tort victims do not have "the tools at hand" that are available to corporate shareholders, who have the right to request

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157 *See id.* § 141(b), (f), (j).

158 *See id.* § 141(g), (i).

159 *See id.* § 142(a), (b); R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 4.10 (4th ed. 2021) (discussing delegations by a board of directors); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003).

160 *See, e.g.*, Virginia Harper Ho, *Team Production & the Multinational Enterprise*, 38 SEATTLE U. L. REV. 499, 507 (2015) ("[T]he existence of a corporate board at multiple tiers of the organization does not diminish the role of corporate boards at the headquarters or ultimate parent level in shaping strategy and decisionmaking, nor does it ignore the importance of hierarchical control within [multinational enterprises].").

161 *See, e.g.*, Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135 (2006). And, as Justice Sotomayor pointed out at oral argument, there is evidence that aiding and abetting was conduct contemplated to fit within the ATS as "those who provided assistance to pirates were themselves held liable, whether they committed it on land or the sea, as aiders and abetters." *Nestlé* Oral Argument, *supra* note 20, at 16–17.

162 *See infra* sections II.B–II.C, pp. 254–261.

corporate books and records to investigate corporate wrongdoing before filing suit.[163] The circumstances might allow for inference, given the well-known pervasiveness of child labor on cocoa farms in Ivory Coast and the cocoa prices that reflect this practice — and that is exactly what the plaintiffs' complaint highlights.[164] From these facts, it would admittedly be more difficult to infer knowledge or reckless tolerance of human trafficking and child slavery rather than unforced child labor. The Court did not attempt to distinguish between human rights abuses, however — it only made the empty statement that alleging "general corporate activity — like decisionmaking" is not enough.[165] It also did not specify whether, or what kind of, specific corporate activity might suffice to establish domestic application of the ATS.[166]

Moreover, the Court did not rule on the larger question it granted certiorari to address — Are U.S. corporations immune from liability under the ATS?[167] The issue of corporate liability was a central focus of oral argument, with Justices repeatedly asking variations on Justice Kagan's question: "If you could bring a suit against 10 [enslavers], when [they] form a corporation, why can't you bring a suit against the corporation?"[168] Justice Breyer similarly reimagined the Marbois affair of 1784, in which a French official had been assaulted in Philadelphia, as being done by a corporation instead of an individual and asked: "Why should that make a difference?"[169]

Justice Alito, alone, dissented on this ground.[170] He explained: "I would decide that question, and . . . I would hold that if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation."[171] Quite simply, "[c]orporate status does not justify special immunity."[172] In Justice Alito's view, the Court had put the cart before the horse by answering the question of extraterritoriality instead of the

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163 *See* DEL. CODE ANN. tit. 8, § 220 (providing shareholders with a right to inspect corporate books and records); George S. Geis, *Information Litigation in Corporate Law*, 71 ALA. L. REV. 407, 420 (2019) (examining shareholders' "tools at hand" to obtain information (quoting Grimes v. Donald, 673 A.2d 1207, 1218 (Del. 1996))).

164 Complaint at 9–12, Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (No. CV 05-5133); Brief of Respondents at 3–6, *Nestlé*, 141 S. Ct. 1931 (Nos. 19-416 & 19-453).

165 *Nestlé*, 141 S. Ct. at 1937.

166 *Id.* For example, corporations increasingly face mandatory obligations around the world to engage in human rights due diligence or voluntarily adopt soft commitments to do so. *See infra* sections II.B–II.C, pp. 254–261. Difficult questions might arise about whether detailed allegations of U.S. corporations engaging in active and ongoing monitoring of human rights abuses in their supply chain would suffice under the ATS.

167 Petition for Writ of Certiorari, *Nestlé*, 141 S. Ct. 1931 (No. 19-416).

168 *Nestlé* Oral Argument, *supra* note 20, at 20, 23.

169 *Id.* at 10–11.

170 *Nestlé*, 141 S. Ct. at 1950 (Alito, J., dissenting).

171 *Id.*

172 *Id.*

threshold issue of corporate liability.[173] The through line to Justice Gorsuch's *Ford* concurrence on personal jurisdiction was clear — U.S. corporations should not be put on special footing.[174]

And, indeed, Justice Gorsuch concurred in *Nestlé* with this view as well: "Nothing in the ATS supplies corporations with special protections against suit."[175] Neither the statutory text nor original understanding suggests that corporations are exempt.[176] As Justice Gorsuch highlighted, the text refers to who may sue ("alien[s]"), and the types of claims ("tort[s]" in "violation of the law of nations or a treaty of the United States"), but "nowhere does it suggest that anything depends on whether the defendant happens to be a person or a corporation."[177] At the time of the passage of the ATS, corporations could be sued as defendants at common law,[178] the purpose of the ATS was to provide judicial recourse, and one of the earliest ATS cases involved an in rem action against a ship involved in piracy.[179]

In a separate concurrence, Justice Sotomayor, joined by Justices Breyer and Kagan, also argued that U.S. corporations should not be immune from liability[180] — which added up to five Justices holding that view, and a mystery why *Nestlé* did not reach this holding.[181] Instead, after reaching critical mass on the issue of extraterritoriality, the bulk of the remaining concurrences fought about the scope of actionable torts under the ATS and attempts to further erode the pre–Roberts Court case of *Sosa*.[182] No clarity emerged on the cognizability of secondary liability such as complicity or aiding and abetting liability.[183]

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[173] *Id.*

[174] Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1034–39 (2021) (Gorsuch, J., concurring).

[175] *Nestlé*, 141 S. Ct. at 1941 (Gorsuch, J., concurring).

[176] *Id.*

[177] *Id.*

[178] *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 463 (1765)).

[179] *Id.* at 1941–42. For a discussion of in rem actions against ships involved in the slave trade and piracy, see Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Respondents at 15, *Nestlé*, 141 S. Ct. 1017 (Nos. 19-416 & 19-453).

[180] *Nestlé*, 141 S. Ct. at 1947 n.4 (Sotomayor, J., concurring). Justice Sotomayor explained: "For reasons similar to those articulated in my dissent in *Jesner* . . . , I would answer this question [of corporate immunity under the ATS] in the negative. (So would four other Justices.)" *Id.* Further: "As Justice Gorsuch ably explains, there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons." *Id.*

[181] Justices Gorsuch and Alito did not reconcile their positions in *Nestlé* with *Jesner* regarding a "norm of corporate liability" under international law. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1401 (2018).

[182] *See Nestlé*, 141 S. Ct. at 1937; *id.* at 1942–43 (Gorsuch, J., concurring); *id.* at 1944 (Sotomayor, J., concurring).

[183] *See* Beth Van Schaack, Nestlé & Cargill v. Doe*: What's Not in the Supreme Court's Opinions*, JUST SEC. (June 30, 2021), https://www.justsecurity.org/77120/nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions [https://perma.cc/28QG-56EY].

In sum, instead of making clear that domestic corporations can be defendants and keeping the "engine of international human rights protection" alive in *Nestlé*,[184] the Court narrowed the path to liability through its self-admittedly "convoluted" parsing of the location of corporate conduct[185] and reasoning untethered to the legal and practical realities of how multinational corporations operate. A more nuanced treatment of the roles and duties of corporate boards and officers might have set the Court on a different path, but it instead overlooked their significance and continued to embrace an approach that limits the places that a corporation can be held to account for the consequences of its decisions. Battles ensued through concurrences about just how narrowly to construe actionable torts for any case going forward, after a series of cases that had already adopted an unnecessarily cramped understanding of the statute, even from an originalist standpoint.[186] This is how corporate accountability shrinks or disappears.

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As this Part has argued, one of the most notable trends of the Roberts Court era to date is expanding corporate rights and narrowing liability or access to justice against corporate defendants. The recent Term is a microcosm of this trend: *Americans for Prosperity* displays the Court's tendency toward broad rulings for rights without regard to relational facts and dynamics of organizations. *Ford* reflects how flawed analogies and a failure to reimagine longstanding principles have bent the law over time toward favorable procedural rules for corporations and emboldened corporate defendants in their claims. *Nestlé* reveals the Court's willingness to disregard the reality of multinational corporations and their decisionmaking structures and supply chains. And, although principles of fairness and accountability motivate underlying doctrines in areas such as personal jurisdiction and the Alien Tort Statute, the Court often seems to come to decisions that do not fully resonate with these values. They leave readers with colorful questions: Why are corporations deemed "at home" in only one or two states? Who are today's pirates? But more importantly, they raise a broader concern: Why are corporations treated more favorably than individuals? Particularly as this concern is expressed in concurrences and dissents by Justices across a spectrum of viewpoints and with different judicial philosophies, it suggests that the "pro-business" label captures something notable about the Court's orientation or outcomes as a general trend. Yet, as the next Part argues, it is also too simple as a description of the larger dynamic.

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184 *Nestlé* Oral Argument, *supra* note 20, at 25.

185 *Nestlé*, 141 S. Ct. at 1943 (Gorsuch, J., concurring).

186 *See supra* note 117.

II. THE PRO-BUSINESS PARADOX

The discussion so far has focused on the Supreme Court's treatment of corporations regarding "external" rules and regulations. This Part now shifts to the related "internal" world of business. Doing so highlights something remarkable: many of the Court's rulings seen as pro-business are actually at odds with corporate law or catalyze countervailing activity in corporate governance. In many ways, the Roberts Court has moved in the opposite direction as current corporate debates and activity — the world that is inhabited by investors, directors, executives, other business industry insiders, as well as stakeholders.

This Part investigates this relationship between the internal and external realms and the impact of the Court's jurisprudence on corporations. It does so in four interrelated sections. First, the discussion examines how expanding corporate rights can trigger internal battles and imperil key governance mechanisms such as disclosure. Next, the discussion explores how the Court's jurisprudence is not only in tension with corporate law and governance on the topic of rights, but also on core issues of accountability for board decisionmaking and oversight. Bringing these threads together leads to the larger observation that increasing rights and weakening external accountability more broadly undermines basic assumptions of corporate law. The Court's "pro-business" jurisprudence contributes to a dynamic that ultimately increases pressure on internal law and governance to create stronger constraints and processes to sort the various interests of its participants and stakeholders, as evidenced by growing calls for reform and the rising ESG movement. These efforts to shape corporate activity through the internal realms may create benefits, but might also be costly for corporations and their participants, as well as limited in their overall effects, and potentially hindered by the Court's robust conceptions of corporate rights. Finally, the discussion concludes by observing that the "pro-business" Court may not actually serve the interests of many shareholders and stakeholders when it tilts toward corporate power and narrows responsibility.

A. Corporate Rights, Governance Battles, and Regulatory Pressures

Some Supreme Court decisions directly catalyze an internal reaction in corporations. Most notably, when the Court expands corporate rights, an impact on the corporation may be "inevitable."[187] With expanded rights comes a need to decide whether and how to use them. A "pro-business" ruling can thus, paradoxically, spur a corporate battle as

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[187] Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Supreme Court, 2009 Term — Comment: Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84 (2010) ("As long as corporations are permitted to engage in political speech, we show, decisional rules governing whether and how they decide to do so are inevitable.").

participants attempt to rein in corporate activity. Further, the Court's expansion of rights can influence new regulation or bolster challenges seeking to dismantle existing regulation that applies to corporations. Each of these situations has the potential to create significant tensions in corporate law and governance, as we can see from *Citizens United*, earlier in the Roberts Court era, to *Americans for Prosperity*, from the recent Term.[188]

For over a decade since the Court opened the door to corporate independent political expenditures in *Citizens United*, shareholders in large corporations have fought to restrain this spending and receive disclosures for greater transparency.[189] Given the Court's flawed assumptions and vision of corporations as "associations of citizens" in a "corporate democracy" with access to information,[190] corporate political spending has become an intractable problem of corporate law and governance.[191] Private ordering occurs, but is unlikely to succeed on a

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[188] By contrast, the Roberts Court's decisions on securities litigation have been "generally preservative and modest in their effects." John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 ARIZ. L. REV. 1, 3 (2015); *see also* Eric C. Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court*, 67 CASE W. RSRV. L. REV. 847, 849–50 (2017) (comparing the Roberts Court on securities fraud and litigation issues to "a museum curator maintaining historical relics from bygone eras," *id.* at 850).

[189] Ciara Torres-Spelliscy, *More Shareholders Seek Transparency on Corporate Political Spending and Climate Change*, BRENNAN CTR. FOR JUST. (June 16, 2021), https://www.brennancenter.org/our-work/analysis-opinion/more-shareholders-seek-transparency-corporate-political-spending-and [https://perma.cc/CKL9-SKJW] (observing that activism around shareholder proposals has been "robust for a decade, especially after the Supreme Court's decision in *Citizens United v. FEC* greenlit a whole new ability for corporations to spend in politics"); *see* Ephrat Livni, *On Voting Rights, It Can Cost Companies to Take Both Sides*, N.Y. TIMES (June 5, 2021), https://www.nytimes.com/2021/06/05/business/dealbook/voting-rights-companies.htm [https://perma.cc/PMJ3-6VW9] (reporting that about ten percent of the S&P 500 each year receives shareholder proposals related to corporate political spending and disclosure, which receive significant support).

[190] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354, 361–62, 370 (2010) (assuming that there is "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy,'" *id.* at 361–62 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)), and "[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable," *id.* at 370). Justice Kennedy, who wrote the *Citizens United* majority opinion, later acknowledged that his assumption about shareholders' access to information was "not working the way it should." Marcia Coyle, *Justice Anthony Kennedy Loathes the Term "Swing Vote"*, NAT'L L.J. ONLINE (Oct. 27, 2015), https://www.law.com/nationallawjournal/almID/1202740827841/Justice-Anthony-Kennedy-Loathes-the-Term [https://perma.cc/WAU6-76PC].

[191] Even though many corporations' political spending may not be "expressive," attempts to change corporate law itself to restrict corporate political spending would be subject to constitutional scrutiny. *See* Victor Brudney, *Association, Advocacy, and the First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 70–71 (1995) ("If a broader restraint is to be considered — e.g., a proscription of corporate advocacy speech or a requirement of stockholder consent for such speech — the question is whether the restraint is sufficiently narrow to be constitutionally tolerable."); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1027 (2011) ("[R]egulation specifically restricting speech by for-profit corporations may be considered

wide scale.[192] Shareholder proposals sometimes garner majority support, but overall the shareholder proposal mechanism is a costly and inefficient means for achieving widespread change and is subject to collective action and agency problems given the realities of intermediated and retail investment.[193] Some companies have voluntarily adopted policies regarding corporate political spending and disclosure, but only a small handful have agreed to stop spending, and many companies have failed to keep their promises or disclose only partial information.[194] Shareholders have turned to behind-the-scenes negotiations for private deals with management on corporate policies — furthering the lack of transparency and democratic processes in corporations.[195] A petition for the Securities and Exchange Commission (SEC) to mandate

viewpoint-discriminatory and subject to a higher level of First Amendment scrutiny."). Reasonable corporate governance reform that does not unduly restrict speech might pass constitutional scrutiny, but few attempts to do so have been made. *See* Ribstein, *supra*, at 1041–44 (discussing a proposal for governance regulation after *Citizens United*).

192 *See* Rebecca Henderson, *Foreword* to BRUCE FREED ET AL., CTR. FOR POL. ACCOUNTABILITY, 2020 CPA-ZICKLIN INDEX OF CORPORATE POLITICAL DISCLOSURE AND ACCOUNTABILITY 8 (2020) [hereinafter 2020 CPA-ZICKLIN INDEX], http://www.politicalaccountability.net/cpa-zicklin-index [https://perma.cc/4AY2-BL8G] ("While a few particularly enlightened firms may decide to unilaterally disarm, most firms will continue to devote resources to political action unless and until it becomes clear that every firm will cease and desist."). Other avenues for shareholder action besides proposals are generally nonstarters — selling stock does not provide an adequate remedy, and derivative lawsuits are unlikely to succeed. Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 54–55 (2009) (explaining how selling stock does not provide a remedy and that other mechanisms such as director elections and derivative lawsuits are generally ineffective at constraining corporate political spending).

193 Livni, *supra* note 189 (noting that "[i]nvestors are battling with corporate boards, filing shareholder resolutions that demand more transparency and accountability about political donations," and "[i]ncreasingly, they're winning"); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 895–96 (1994) (explaining that "shareholder voting in public corporations requires collective action through the proxy mechanism," *id.* at 895, and so "the chance of an outright voting victory is slim even in the case of value-producing proposals," *id.* at 896, because of "rational shareholder apathy" and "suboptimal production," *id.*).

194 2020 CPA-ZICKLIN INDEX, *supra* note 192, at 28 (noting only thirteen companies in the S&P 500 had policies prohibiting political spending other than through employee-funded political action committees); HEIDI WELSH & ROBIN YOUNG, IRRC INST., CORPORATE GOVERNANCE OF POLITICAL EXPENDITURES: 2011 BENCHMARK REPORT ON S&P 500 COMPANIES 26 (2011) (on file with the Harvard Law School Library) ("Out of the 57 companies . . . that have policies apparently prohibiting political spending, only 23 companies actually did not give money to political committees, parties or candidates . . . ."); Lucian A. 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, 28 (2020) (discussing a report by Citizens for Responsibility and Ethics in Washington that found "significant discrepancies between the companies' voluntary disclosure policies and their actual practices").

195 *See* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 269 (2016) (examining private settlement agreements that corporations negotiate with shareholders through a "process [that] plays out completely behind closed doors, with no notice to or participation by most shareholders, other stakeholders, or the public," and with which "companies have often failed to comply").

corporate political spending disclosure has stalled despite a record-breaking 1.2 million comments.[196] Meanwhile, corporate political spending has increased and gone "underground" to intermediaries.[197]

All of this is so despite many, if not most, shareholders having a variety of reasons — including business and financial — to prefer restraint in corporate political spending. Corporate political spending presents agency cost problems that are difficult for shareholders to monitor and eliminate.[198] Shareholders do not want corporations they are invested in to engage in political speech they oppose.[199] Institutional investors have a "double legitimacy" problem as neither investment funds nor company management have legitimacy to speak for shareholders.[200] Corporate political spending can increase social and political risk, either at a particular company or more generally across the market if such spending and perceptions of corruption significantly contribute to polarization and social instability.[201] And, corporate political spending

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196 Bebchuk et al., *supra* note 194, at 3.

197 Douglas M. Spencer & Abby K. Wood, Citizens United*, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 318 (2014).

198 *See* Bebchuk et al., *supra* note 194, at 22 (discussing managerial agency costs associated with corporate political spending); John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657, 658 (2012) (finding that "[i]n the majority of industries . . . political activity . . . correlates negatively with measures of shareholder power (shareholder concentration and shareholder rights), positively with signs of managerial agency costs (corporate jet use by CEOs), and negatively with shareholder value"); *see also* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 876 (2004) (showing "that the containment of agency costs . . . played a formative role in the regulation of corporate politics").

199 *See* Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 264 (1981) ("To permit corporate funds to be used to influence the exercise of government power . . . fractures [a shareholder's] power to influence government decisions on a range of issues — such as environmental or health and safety regulations, taxation, race relations . . . [and] may impinge upon . . . individual preferences."). For discussions of the Court's asymmetrical treatment of shareholders and union members regarding political spending by corporations and labor unions, see *id.* at 268–70; and Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 436, 450–53 (2016) [hereinafter Strine, *Corporate Power Ratchet*].

200 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, 1022–27 (2020).

201 *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1402 (2020) (concluding based on interviews with "leading public and private companies, large asset managers, investors and pension funds, shareholder advisory firms, and sustainability standard setters and data providers" that "it was investors who pushed hard for environmental and social initiatives" and "investors' support for sustainability is precisely because it helps fight risks that are otherwise hard to diversify"); Jeffrey N. Gordon, *Systematic Stewardship* 1 (Eur. Corp. Governance Inst., Working Paper No. 566/2021, 2021) (on file with the Harvard Law School Library) (arguing that large diversified funds such as index funds "should seek to mitigate systematic risk, which most notably would include climate change risk, financial stability risk, and social stability risk"). For an example of an investor coalition expressing concern that "the erosion of political stability in the United States . . . poses substantial systemic risk to long-term investors' portfolios," and demanding

might undermine external laws and weaken corporate accountability[202] — which diversified shareholders should not favor. Even many corporate directors and officers might have preferred to forego corporations having the power of political spending in order to avoid the difficulty of navigating these decisions and risks in a polarized era.[203] And so, *Citizens United* not only empowered corporations as political actors, but also launched a thousand ships in corporate governance and created problems that cannot easily be solved.

New battles now loom on the horizon. In particular, with rising interest in corporations' ESG activity and data, securities regulation increasingly appears to be on a collision course with the First Amendment — what corporate and securities law experts frame as a "disclosure" regulation might become "compelled speech" as a matter of constitutional scrutiny.[204] To date, the Supreme Court has avoided the question of whether the First Amendment covers speech affected by securities regulation,[205] and for many years observers believed it was inapplicable,[206] but current developments suggest this could be the next "jurisprudential train wreck"[207] for corporate investors and stakeholders.

Americans for Prosperity intensifies concern that a heightened level of scrutiny might apply to mandatory ESG disclosure, and thus has the

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corporate political spending reform, see Letter from the Inv. Coal., Majority Action, to Corp. Donors (June 16, 2021), https://www.majorityaction.us/investor-coalition [https://perma.cc/8LNG-BM93].

202 Pollman, *supra* note 33, at 687–92; Strine, *Corporate Power Ratchet*, *supra* note 199, at 432.

203 *See* Robert H. Sitkoff, *Politics and the Business Corporation*, REGUL., Winter 2003–2004, at 30, 35 (explaining that corporate managers embraced the Tillman Act, which prohibited corporate political contributions).

204 *See, e.g.*, Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 KAN. L. REV. 163, 205 (1994) (arguing that "[g]overnance speech shares enough of the underlying characteristics that supposedly distinguish political from commercial speech that such speech should be treated either as political speech or as a hybrid between commercial and political"); Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. REV. 789, 807–18 (2007) (summarizing debate about whether the First Amendment applies to securities regulation).

205 *See* Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003) (per curiam) (dismissing certiorari as improvidently granted); Lowe v. SEC, 472 U.S. 181, 211 (1985) (resolving a challenge to the Investment Advisers Act of 1940 with narrow statutory interpretation); *see also* Page, *supra* note 204, at 789–90 ("When Congress passed [the 1933 and 1934 securities acts], the First Amendment was thought to be irrelevant to securities regulation because the Supreme Court had not yet extended First Amendment coverage to government-compelled speech or commercial speech.").

206 Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 223 (1990) ("The received wisdom for fifty years has been that the [F]irst [A]mendment is inapplicable to speech relating to the operation of securities markets.").

207 Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613, 616–17 (2006) (arguing there is an "impending jurisprudential train wreck in the realm of securities regulation," *id.* at 616, and "the Supreme Court's forced divide between commercial speech and corporate political speech is intellectually unstable," *id.* at 617).

potential to influence the content and structure of the SEC's rulemaking on a host of disclosure issues from corporate political spending to climate risk. Simmering under the surface of the Court's opinion and various concurrences in the case was a debate about the standard of constitutional review for compelled speech under the First Amendment. This space has increasingly become muddled with gray areas about when the Court will apply strict scrutiny, exacting scrutiny, intermediate scrutiny, rational basis review — or something in between.[208]

A majority of the Court in *Americans for Prosperity* ratcheted up exacting scrutiny by imposing a narrow tailoring requirement, and in a splintered portion of the opinion, Chief Justice Roberts suggested on behalf of a three-Justice plurality that this level of scrutiny should categorically apply to all compelled disclosure requirements, "[r]egardless of the type of association."[209] He noted that the Court had applied exacting scrutiny outside of electoral-disclosure regimes, and that under *NAACP v. Alabama ex rel. Patterson*, "'it is immaterial' to the level of scrutiny 'whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.'"[210] A concurrence by Justice Alito, joined by Justice Gorsuch, declined to decide between exacting and strict scrutiny for a uniform approach to compelled disclosure, but applauded the majority opinion for giving "real teeth" to the exacting scrutiny standard.[211] None of these discussions in *Americans for Prosperity* makes clear whether they would extend a heightened form of scrutiny to securities regulation of business corporations such as for corporate political spending or other forms of ESG disclosures, as opposed to the specific context at issue in the case of nonprofit organizations and freedom of association. The general tenor of *Americans for Prosperity*, however, suggested an approach even more protective of organizations than *Citizens United*, which had upheld disclosure of corporate political spending.[212] Justice Sotomayor's dissent in *Americans for Prosperity* indeed observed: "Today's analysis marks reporting and disclosure requirements with a bull's-eye."[213]

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[208] *See, e.g.*, Zauderer v. Off. of Disciplinary Couns., 471 U.S 626, 651 (1985) (applying a standard below the intermediate scrutiny of *Central Hudson* to a disclosure requirement of "purely factual and uncontroversial information" to prevent deception of consumers). For a discussion of "uncertainty" and "confusion" about when the Court will apply one of its "three identifiable versions of strict scrutiny" or "several varieties of intermediate scrutiny," see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1267, 1298–302 (2007).

[209] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021).

[210] *Id.* (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958)).

[211] *Id.* at 2391 (Alito, J., concurring).

[212] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367–71 (2010).

[213] *Ams. for Prosperity*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

In the shadow of this case is a growing ESG movement in which global and U.S. institutional investors and asset managers are demanding expanded ESG disclosures using a standardized, mandatory reporting framework.[214] Trillions of dollars are under management with sustainability screens and strategies to integrate ESG data into portfolio selection and management, but the information currently being produced through voluntary initiatives is limited, suffers from quality problems, and lacks comparability.[215] Whether various ESG information is "material" or outside of the SEC's "core mission" has been the subject of robust debate, while investors and corporate managers increasingly embrace the potential benefits of ESG strategies for risk mitigation and long-term value.[216]

After a change in administration, the SEC requested public comment on climate change and other areas of potential mandatory ESG disclosures such as political spending, workforce diversity, and more — signaling that it intends to act.[217] A tidal wave of responses has swiftly come into the SEC with varying views on content and approach, including a warning from one state attorney general of a plan to file a First Amendment lawsuit if the SEC adopts ESG disclosure requirements.[218]

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[214] *See* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1454, 1458 (2021).

[215] *See id.* at 1453, 1458; *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 392–99 (2020) (discussing the evolution of ESG investing); *Sustainable Investing Basics,* US SIF, https://www.ussif.org/sribasics [https://perma.cc/KG8Z-6QCV] (discussing ESG investments).

[216] *See, e.g.*, Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 925 (2019) (discussing debate about the materiality of ESG and the trend that "issuers are modifying their operations in response both to investor demands and to the claim that sustainable business practices lead to improved economic performance"); Hester M. Peirce, Comm'r, SEC, Chocolate-Covered Cicadas, Remarks Before the Brookings Institution (July 20, 2021), https://www.sec.gov/news/speech/peirce-chocolate-covered-cicadas-072021 [https://perma.cc/B265-W5TM] (discussing materiality as a guiding principle for securities regulation and arguing that "[m]any ESG issues lack a clear tie to financial materiality").

[217] Katanga Johnson, *U.S. SEC Chair Provides More Detail on New Disclosure Rules, Treasury Market Reform*, REUTERS (June 23, 2021, 1:42 PM), https://www.reuters.com/business/sustainable-business/sec-considers-disclosure-mandate-range-climate-metrics-2021-06-23 [https://perma.cc/43Y8-YL39]; Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, SEC (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures [https://perma.cc/WJS3-XTVM].

[218] *See Commenters Weigh in on SEC Climate Disclosures Request for Public Input*, DAVIS POLK (July 6, 2021), https://www.davispolk.com/insights/client-update/commenters-weigh-sec-climate-disclosures-request-public-input [https://perma.cc/HRJ4-4LG7] (summarizing comments from academics, accounting firms, asset managers and investors, trade associations, government officials, sustainability groups, and technology companies); Letter from Patrick Morrisey, Att'y Gen., State of West Virginia, to Allison Herren Lee, Acting Chair, SEC (Mar. 25, 2021), https://ago.wv.gov/Documents/Letter%20to%20Acting%20Chair%20Lee.pdf [https://perma.cc/836Q-N7TY] (stating that "First Amendment strict scrutiny is an unmistakable roadblock for your proposal" and "[i]f the

In combination with a D.C. Circuit decision in 2015 that struck down the SEC's conflict minerals disclosure rule on First Amendment grounds,[219] and the Supreme Court's recent ratcheting up of scrutiny on compelled speech, the SEC is likely aware that it faces a choice between exceedingly tightly crafted rulemaking or years of litigation.

This is the crux of the tension — while many investors want additional disclosures to broadly understand a wide array of environmental, social, and governance activities and risks of corporations, cases like *Americans for Prosperity* suggest that government regulation forcing this disclosure will come under fire. And, all together, from *Citizens United* to *Americans for Prosperity*, the Roberts Court's jurisprudence could ironically lead to a situation in which the Court has protected a corporation's right to engage in political spending based on a view of it as an "association of citizens," but allows constitutional scrutiny to block actual participants in the corporation from getting information about matters relating to the social and political activity of the corporation.

B. Accountability for Board Decisionmaking and Oversight

The Court's approach to corporations emerges not only in its expanding rights jurisprudence that creates governance tensions and imperils disclosure obligations, but also in its decisions in other areas of law that misconceive or ignore key features of corporations and erode corporate accountability. *Nestlé* provides an example, with the Court's ruling and reasoning diminishing the central corporate activity of board decisionmaking. More generally, the trend of increasing rights and tilting external rules and regulation toward corporations undermines foundational assumptions about the role of corporate law and runs counter to emerging investor preferences.

Recall the *Nestlé* majority opinion's conclusion that "general corporate activity — like decisionmaking" is insufficient for ATS pleadings to avoid the presumption against extraterritoriality.[220] Such phrasing and understanding is difficult to reconcile with corporate law, which creates the corporation as a separate legal person and places the board of directors at the heart of its decisionmaking structure and vests it with the authority to manage the affairs of the corporation.[221] This centralized decisionmaking structure is a "cardinal precept" of corporate law

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Commission proceeds down this pathway, States and other interested stakeholders will not hesitate to go to court to oppose a federal regulation compelling speech").

[219] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015).

[220] *See supra* p. 242.

[221] *See, e.g.*, Bainbridge, *supra* note 159, at 552 (observing that U.S. corporations have "a branching hierarchy headed by a board of directors"); Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 788 ("The governance structure prescribed

and the means through which a corporation takes action.[222] Further, board decisionmaking is embedded in a structure for accountability, as exercise of this power carries with it the fiduciary duties of loyalty and care, which are often expressed as being owed to the corporation and its shareholders.[223]

Corporate law has long focused on decisionmaking as a potential basis for liability, and contemporary doctrine has evolved to encompass broader oversight obligations. As part of their duty of loyalty, corporate directors and officers have a duty to act in good faith, which prohibits decisionmaking with the intent to violate positive law.[224] Corporate law does not limit the scope for legal obedience to domestic laws, nor does it limit the beneficiaries of legal obedience only to shareholders — thus the duty of good faith in decisionmaking can have far-ranging impacts.[225] Further, Delaware courts, the most influential purveyors of corporate law, have also recognized that a failure to make a good faith effort to put in place and oversee a board-level system of monitoring and reporting could constitute a breach of fiduciary duty giving rise to director liability.[226] Under the *Caremark* doctrine, directors can be held liable if they knew or should have known that violations of law were occurring in the corporation, and if they failed to take steps in good faith to prevent or remedy the situation.[227] That is, corporate law requires legal obedience to rules of positive law and further recognizes that directors can be held liable in certain circumstances for decisionmaking as well as inaction — such as a failure of oversight regarding legal compliance.[228] These principles of corporate law serve public values by incorporating legal responsibility, and protect shareholders and the corporation by prohibiting fiduciaries from knowingly allowing the corporation to participate in lawbreaking.[229]

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by corporate law since the early nineteenth century is a managerial hierarchy topped by a board of directors that is distinct from shareholders, managers, and employees, and that has fiduciary duties to the corporation itself as well as to shareholders."); J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 BUS. LAW. 33, 35 (2015) ("Delaware corporate law embraces a 'board-centric' model of governance.").

[222] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984); *see also* Quadrant Structured Prods. Co., Ltd. v. Vertin, 115 A.3d 535, 548 (Del. Ch. 2015).

[223] *Aronson*, 473 A.2d at 811.

[224] *See* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006).

[225] *See* Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 739–40, 740 n.150 (2019).

[226] *See In re* Caremark Int'l, Inc., Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); *Stone*, 911 A.2d at 368.

[227] *In re Caremark*, 698 A.2d at 971.

[228] *See* Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2018–25 (2014).

[229] *See id.* at 2016–17, 2026.

Claims for a breach of the duty of good faith are difficult for shareholder-plaintiffs to win even in egregious circumstances, but over time Delaware corporate law has trended toward a more robust conception of the monitoring board and its oversight duties.[230] This fits into a larger trend in which corporate compliance programs have proliferated and taken on greater importance in corporate practices, including for global issues such as supply chain risk management, foreign corrupt practices, and other regulatory regimes.[231]

Put in this light, the Court's disregard for the importance of board decisionmaking and oversight is all the more glaring — large corporations with significant risk for legal violations related to core aspects of their business model are likely well aware that their decisionmaking or failure of oversight could expose both the corporation and its fiduciaries to litigation and liability, particularly if they failed to monitor and respond in good faith to "red flags."[232] Under corporate law the individual directors' fiduciary obligations notably run to shareholders for enforcement, not third-party tort victims — but the larger point here is about conceptualizing corporations and their accountability. If "general corporate decisionmaking" in the United States is not enough, and financing and training farmers in Ivory Coast is outside of reach, it would seem the Court has set up a nearly insuperable standard for ATS claims that does not cohere with general corporate understandings of the significance of board decisionmaking and oversight responsibility.

Looking ahead, the Court has not fully foreclosed U.S. corporate liability under the ATS and could still correct course while respecting the limits of the statute. Congress could act to clarify the ATS or specific

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[230] Recent cases in which plaintiffs' *Caremark* claims have survived motions to dismiss in Delaware courts include: *In re Boeing Co. Derivative Litig.*, No. 2019-0907-MTZ, 2021 WL 4059934, at *25 (Del. Ch. Sept. 7, 2021); *Marchand v. Barnhill*, 212 A.3d 805, 808 (Del. 2019); *In re Clovis Oncology, Inc., Derivative Litig.*, No. 2017-0222-JRS, 2019 WL 4850188, at *10 (Del. Ch. Oct. 1, 2019); and *Hughes v. Hu*, No. 2019-0112-JTL, 2020 WL 1987029, at *15 (Del. Ch. Apr. 27, 2020). For discussions of recent developments in Delaware's oversight doctrine, see Pollman, *supra* note 228, at 2023–25; Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1863–67 (2021); and Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark *and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective* Caremark *and EESG Strategy*, 106 IOWA L. REV. 1885, 1897 n.39 (2021).

[231] *See, e.g.*, Harper Ho, *supra* note 160, at 533; Wim Huisman, *Corporations, Human Rights and Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 989, 990 (Benjamin van Rooij & D. Daniel Sokol eds., 2021); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 934 (2017); Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 249–56 (2020).

[232] *See* Peter Whoriskey, *Supreme Court Weighs Child-Slavery Case Against Nestlé USA, Cargill*, WASH. POST (Dec. 1. 2020, 2:45 PM), https://www.washingtonpost.com/business/2020/12/01/cocoa-supreme-court-child-labor [https://perma.cc/RQ63-AF7F] (noting that "the world's chocolate supply depends heavily on child labor and . . . despite two decades of industry promises, it remains widespread," and an investigation "found representatives of some of the biggest and best-known brands could not guarantee that any of their chocolate was produced without child labor").

areas for accountability as it has done in decades past by granting express causes of action for victims of torture and human trafficking.[233] Further, Congress could follow the lead of other lawmaking bodies around the world by mandating corporations to engage in human rights due diligence.[234] But in the absence of these developments, corporations will likely receive the message that the door that was left open in *Sosa* to ATS claims for international human rights abuses has nearly closed.[235] And more broadly, the Court's lack of attention to corporate principles could perpetuate flawed reasoning in other areas of law.[236]

C. Opposite Trends and Changing Dynamics in the Role of Corporate Law

In addition to the above, the larger trend of increasing rights and narrowing liability for corporations undermines corporate law principles in a more fundamental way. Since the early twentieth century, U.S. corporate law has developed with a focus on shareholders, directors, and officers, with a view that concerns about stakeholders and the impact of corporations on society will be primarily addressed by laws external to corporate law.[237] State corporate law does little to take formal account

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[233] *Id.* For a discussion of the Torture Victim Protection Act of 1991 and the Trafficking Victims Protection Act of 2000, see generally Anna Williams Shavers, *Human Trafficking, the Rule of Law, and Corporate Social Responsibility*, 9 S.C. J. INT'L L. & BUS. 39, 49–53 (2012).

[234] *See* John F. Sherman, III, *Human Rights Due Diligence and Corporate Governance*, *in* A GUIDE TO HUMAN RIGHTS DUE DILIGENCE FOR LAWYERS (forthcoming 2022) (manuscript at 15–16), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_WP_79_Final.pdf [https://perma.cc/Q6R2-4D2N] (describing mandatory human rights due diligence legislation passed and pending in several European countries as well as a proposal for an EU-wide directive that would apply to "non-EU companies that sell goods or services into the EU market," *id.* (manuscript at 15); *see also* Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727, 731–35 (2019) (arguing that a combination of legal and reputational mechanisms can incentivize corporations to engage in human rights due diligence and compliance in global supply chains).

[235] *See* Joseph E. Stiglitz & Geoffrey Heal, *Are US Corporations Above the Law?*, PROJECT SYNDICATE (July 12, 2021), https://www.project-syndicate.org/commentary/nestle-cargill-chocolate-child-slavery-case-by-joseph-e-stiglitz-and-geoffrey-heal-2021-07 [https://perma.cc/VTF4-N886] ("[T]he US Supreme Court has sent a dangerous message. Apparently, US corporations will not be held to the same standards of decency and human rights abroad as they are at home."); *see also* William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality [https://perma.cc/WT4Z-4XBR] (observing the "potentially dramatic implications" of the Court's approach to extraterritoriality and that cases that fit the description of "conduct in the United States that goes beyond making decisions about how to conduct operations abroad" are "likely to be few and far between").

[236] For example, another notable opinion that fails to account for the separate legal personality of the corporation and the board of directors as the key decisionmaking body is *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). *See* Greenfield & Rubens, *supra* note 33, at 285.

[237] *See* sources cited *supra* note 21.

of participants such as employees, creditors, consumers, or other stakeholders in the governance structure, and assumes that their interests will be furthered by external regulation and contracts.[238] As this Comment's discussion has highlighted, the boundaries between the internal and external realms of corporate governance and regulation are far more permeable than this traditional formulation suggests, and some aspects of corporate and securities laws serve stakeholder interests or leave considerable room for boards, shareholders, and managers to do so[239] — but the basic framing remains.[240]

When the Supreme Court increases corporate rights, particularly in the political realm, and narrows accountability through external regulation, it thus weakens the justification for leaving stakeholders without voice or protection in corporate law and governance.[241] Put differently, corporate law and governance rely on the enforcement of external regulation to constrain corporate activity in the interest of social welfare.[242] Jurisprudence that weakens corporate accountability or tilts the rules of the game in their favor eventually increases pressure on corporate law and governance to create stronger internal constraints and processes to

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[238] *See* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 425 (2002) (arguing that corporate "externalities should be constrained through general welfare legislation, tort litigation, and other forms of regulation"); Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 951 (2008) ("[S]takeholders of the firm — for example employees, communities, or customers — are left to depend primarily on 'external' regulations, such as minimum-wage laws, environmental regulations, and consumer safety rules."); Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L.J. 401, 402 (1993) (explaining that under state corporate law doctrine, apart from nonbinding constituency statutes, "[p]rotection for other sorts of [nonshareholder] claimants [has] existed only to the extent provided by contract").

[239] Lipton, *supra* note 21, at 657 ("Corporate discourse often distinguishes between internal and external regulation . . . [but] most commenters would likely agree that these categories are too simplistic; relationships between investors and managers are often regulated with a view toward benefitting other stakeholders."); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 11–13, 36–40, 48–52) (on file with the Harvard Law School Library) (describing discretion afforded to boards to consider stakeholder interests and incorporation of stakeholder interests into corporate activity through shareholder-driven ESG initiatives).

[240] *See, e.g.*, Leo E. Strine, Jr., *Corporate Power Is Corporate Purpose I: Evidence from My Hometown*, 33 OXFORD REV. ECON. POL'Y 176, 179 (2017) (describing corporate law structure giving shareholders power and boards of directors authority to manage business affairs); *see* sources cited *supra* p. 223 (describing the traditional internal/external dichotomy underpinning corporate law).

[241] *See* Pollman, *supra* note 33, at 691; Strine, *Corporate Power Ratchet*, *supra* note 199, at 432.

[242] *See, e.g.*, Elizabeth Sepper & James D. Nelson, *The Religious Conversion of Corporate Social Responsibility*, 70 EMORY L.J. (forthcoming 2021) (manuscript at 30–36) (on file with the Harvard Law School Library) (describing laws that impose obligations on businesses); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 918–28 (2016) (tracing the history of corporate law development alongside the enactment of external law that constrained corporate political spending).

sort the various interests of its participants and stakeholders. In the bigger picture, the Court's jurisprudence is just one thread among many in the twenty-first century that has contributed to the changing balance of powers and protections for corporations and their stakeholders,[243] but it is notable nonetheless. And, as one might expect given the tension identified here, recent years have evidenced this changing landscape with corresponding calls from scholars and politicians for a rethinking of corporate law to promote stakeholder interests and increase democratic values and processes in corporate governance.[244]

In this environment, other mechanisms besides external regulation, and short of major corporate law reform, have moved into the spotlight. Corporate social responsibility (CSR) has evolved into a mainstream ESG movement that continues to gain steam.[245] Managers and investors increasingly see ESG initiatives as a means of incorporating stakeholder interests into corporate activity and mitigating risks and externalities created by corporations, ultimately promoting the creation of sustainable, long-term value.[246]

This trend is moving in the opposite direction as the Court's jurisprudence and suggests that many investors and other corporate participants may not want "pro-business" rulings that weaken corporate incentives to mitigate their externalities.[247] Further, the trend is global and multinational corporations do not escape its reach.[248] For example,

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[243] For a discussion of changes in "countervailing power," such as "governmental regulation . . ., competitive pressure from rival firms, and organized labor," see Brian R. Cheffins, *Corporate Governance and Countervailing Power*, 74 BUS. LAW. 1, 1 (2019).

[244] *See, e.g.*, Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 HARV. L. REV. 2009, 2014 (2019) (reviewing ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018)); Jens Dammann & Horst Eidenmueller, *Codetermination and the Democratic State*, U. ILL. L. REV. (forthcoming) (on file with the Harvard Law School Library); Franklin A. Gevurtz, *The Yin and Yang of Corporations and Democracy* (forthcoming) (manuscript at 51–54) (on file with the Harvard Law School Library); GRANT M. HAYDEN & MATTHEW T. BODIE, RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE 13 (2020); Accountable Capitalism Act, S. 3348, 115th Cong. (2018); Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, MINN. L. REV. (forthcoming) (on file with the Harvard Law School Library).

[245] Lund & Pollman, *supra* note 239 (manuscript at 35–36) (examining the evolution of CSR to ESG).

[246] *Id.* (manuscript at 36) (discussing the ESG movement); Mark S. Gerber, *U.S. Corporate Governance: The Ascension of ESG*, SKADDEN (Jan. 26, 2021), https://www.skadden.com/insights/publications/2021/01/2021-insights/corporate/us-corporate-governance [https://perma.cc/EH3M-UUUD]; Ann M. Lipton, *ESG Investing, Or, If You Can't Beat 'Em, Join 'Em*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD, *supra* note 13, at 130, 131–32.

[247] *See, e.g.*, Kishanthi Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 327 (2021) (noting that a "[l]ack of legal accountability subsequently translates into low legal risk for corporate misconduct, which reduces the likelihood of prevention").

[248] *See* Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH U. L. REV. 1765, 1794 (2021).

as the Court has made it considerably harder to hold corporations liable for human rights abuses under the ATS, demands on companies to eradicate human rights abuses from their supply chains have grown. The chocolate industry has come under significant public pressure for reform.[249] In fact, before or while litigating their cases all the way up to the Supreme Court, Nestlé and Cargill became signatories to the United Nations (UN) Global Compact.[250] The related UN Guiding Principles on Business and Human Rights provide a soft law framework that directs companies to "protect, respect and remedy" human rights and "to comply with all applicable laws," including on issues of product safety and quality, forced labor, and child labor.[251] Ford is also a signatory to the Global Compact,[252] and while its managers and legal team might drive it to take an aggressive stance on issues of personal jurisdiction in an attempt to limit customer suits, many others who have a stake in the company recognize that dodging accountability on product safety issues ultimately poses a risk to the company's brand and reputation.

Although many view with great skepticism corporate commitments to voluntary compacts and principles and rightfully express concern about "bluewashing," these soft law frameworks are "hardening" and becoming part of a complex and quickly evolving environment for multinational corporations.[253] Investors and stakeholders bring a global perspective and impose expectations on corporations to engage with

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[249] *See, e.g.*, Peter Whoriskey, *Chocolate Companies Ask for a Taste of Government Regulation*, WASH. POST (Dec. 31, 2019), https://www.washingtonpost.com/business/2019/12/31/chocolate-companies-ask-taste-government-regulation [https://perma.cc/G6EN-X38T]; *Child Labor in the Production of Cocoa*, BUREAU OF INT'L LAB. AFFS., https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa [https://perma.cc/X8KY-HRF4].

[250] *See Our Participants*, UNITED NATIONS GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/participants [https://perma.cc/K3X3-FBTU].

[251] Rep. of the Special Representative of the Sec'y Gen. on the Issue of Hum. Rts. & Transnat'l Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, at 6 (Mar. 21, 2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/L56N-7D3E]; Alan S. Gutterman, *Embedding Your Business' Human Rights Commitment*, AM. BAR ASS'N (May 17, 2021), https://www.americanbar.org/groups/business_law/publications/blt/2021/05/human-rights [https://perma.cc/D3WK-YMLF].

[252] *See Our Participants*, *supra* note 250 (search for "Ford" in the field labeled "Search Participants"); FORD MOTOR CO., UN GUIDING PRINCIPLES REPORTING FRAMEWORK INDEX (2021), https://corporate.ford.com/microsites/integrated-sustainability-and-financial-report-2021/files/ir21-ungprf.pdf [https://perma.cc/7B42-JDXJ].

[253] *See* GEORGE, *supra* note 112, at 314–18. For example, the Hague District Court in the Netherlands recently ordered Royal Dutch Shell plc to reduce its CO_2 emissions by at least 45% relative to 2019 levels by 2030 and grounded the standard of care in the Paris Agreement, the Guiding Principles, and internationally accepted human rights. RBDHA 26 mei 2021 (ECLI:NL:RBDHA:2021:5339) (Milieudefensie et al./Royal Dutch Shell) (Neth.), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339 [https://perma.cc/YWQ6-KPDD].

voluntary soft law frameworks and otherwise prevent social harms to avoid reputational risk, mitigate liability, maintain their social license to operate, and contribute to long-term value — reflecting an "enlightened" view that is not readily captured by the "pro-business" label.[254]

Yet lessons from the past decade also suggest that there are limits to what can be achieved consistently, efficiently, and transparently through corporate law and governance to adapt to increasing corporate rights and to address corporate externalities without regulation and legal accountability.[255] Most corporations still do not resemble the "corporate democracy" envisioned by the Court in *Citizens United*, nor is there consensus that they should. The continued expansion of rights reflected in *Americans for Prosperity* highlights the uncertain fate of regulation that mandates disclosure. Incentives for corporate boards, managers, and shareholders to prioritize corporate oversight and compliance, and to embrace the growing ESG movement and concerns for stakeholders and social welfare, are connected in complex ways to legal accountability, litigation, and reputation — particularly in a global business environment. Further, these movements occur through a system oriented toward shareholder interests,[256] and with large amounts of intermediated capital in public corporations.[257] Consequently, the shortcomings of the Court's "pro-business" approach likely cannot be fully or easily resolved through counter trends in corporate law and governance.

D. Implications and Deeper Questions

This Part has thus far explored how, in many respects, the Supreme Court's nominally "pro-business" jurisprudence of the twenty-first century has trended in the opposite direction of corporate law and governance, and pays little attention to corporate realities and principles.

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[254] *See, e.g.*, BLACKROCK, INVESTMENT STEWARDSHIP: OUR APPROACH TO ENGAGEMENT WITH COMPANIES ON THEIR HUMAN RIGHTS IMPACTS 2 (2021), https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf [https://perma.cc/LG6K-7T35] ("Unmanaged potential or actual adverse human rights issues can . . . expose companies to significant legal, regulatory, operational, and reputational risks.").

[255] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 94 (2020) (arguing that "the most effective way" to "ensure that capitalism works well for all corporate stakeholders" is through "external" laws and government policies); Leo E. Strine Jr., Stewardship 2021: The Centrality of Institutional Investor Regulation to Restoring a Fair and Sustainable American Economy (Oct. 23, 2020) (unpublished manuscript) (on file with the Harvard Law School Library) (describing the need for regulation of institutional investors and corporate externalities).

[256] *See generally* Lund & Pollman, *supra* note 239 (describing the shareholder-oriented U.S. system of public company governance).

[257] *See* Gordon, *supra* note 201, at 12–23 (describing the rise of stewardship by institutional investors); Strine, *supra* note 255 (manuscript at 4–13) (describing problems with aligning the interests of institutional investors and their ultimate beneficiaries).

It is debatable whether challenges with conceptions of the corporation are genuine obstacles in reasoning through thorny legal questions or whether rhetoric about corporations justifies outcomes determined through other means.[258] This Comment has therefore not aimed to uncover or opine on possible biases or motivations of Justices, but instead to apply a sharper lens focused on conceptions of the corporation across different areas of law to understand patterns in the Court's jurisprudence and its impact on corporations.

As this approach has highlighted diverging corporate trends and internal battles, it leads to a larger question: who actually benefits from the Court's "pro-business" rulings? A full exploration of this topic could fill a volume on its own, and generalizations are dangerous, but at least a few modest observations flow from the preceding discussion.

To start, the business world, and the corporations that inhabit it, is far more complicated than a unitary term like "pro-business" could possibly convey. A wide universe of corporations exists and corporations engage in nearly endless forms of activity. Even just looking at large public corporations, a diverse set of interests in these corporations is on display in the myriad corporate governance contests of our time. From hedge fund activists winning proxy fights at Exxon by championing renewable energy strategies[259] to Amazon warehouse workers pushing the company unsuccessfully for a diversity audit and board seats,[260] we see a range of highly engaged corporate participants and clashing views on the issue of just what, exactly, is in the "business" interest.[261]

Ownership structures and trends in stockholding can help to make some additional observations at a high level about who might benefit from "pro-business" jurisprudence. First, about half of Americans are invested in the stock market, but most people who own stock have very little.[262] Less than one third of U.S. households have $10,000 or more

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[258] One could observe, for example, that U.S. Supreme Court Justices in recent decades have not had extensive expertise in corporate and securities laws — it is not the typical background or path to the Court. *See, e.g.*, A.C. Pritchard & Robert B. Thompson, *The Future of Securities Law in the Supreme Court*, 2021 COLUM. BUS. L. REV. (forthcoming 2021) (manuscript at 113) (on file with author) (observing that "the Court has not had a Justice with a particular interest in the topic [of securities regulation] since Powell retired").

[259] Justin Baer & Dawn Lim, *The Hedge-Fund Manager Who Did Battle with Exxon — And Won*, WALL ST. J. (June 12, 2021, 3:12 PM), https://www.wsj.com/articles/the-hedge-fund-manager-who-did-battle-with-exxonand-won-11623470420 [https://perma.cc/KUY9-ZA8U].

[260] Matt Day, *Amazon Warehouse Workers Push for Changes at Annual Meeting*, BLOOMBERG (May 26, 2021, 2:22 PM), https://www.bloomberg.com/news/articles/2021-05-26/amazon-warehouse-workers-push-for-changes-at-annual-meeting [https://perma.cc/FW2D-T5C3].

[261] *See, e.g.*, Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 536 (2016) ("If theorists of the corporation of all stripes can agree on one vision, surely it is the firm as a site for cooperation among persons with imperfectly aligned aims.").

[262] David J. Berger, *Reconsidering Stockholder Primacy in an Era of Corporate Purpose*, 74 BUS. LAW. 659, 666 (2019).

in stock holdings.[263] Conversely, "more than 80 percent of the value of the stock market is held by the wealthiest 10 percent of our country; . . . and the share held by the entire top 1 percent is twice as large as the share held by the entire bottom 90 percent."[264] Thus, to the extent the Court's jurisprudence empowers corporations, dismantles their constraints, or enriches them by minimizing their costs and liabilities, it is likely disproportionately serving the interests of the wealthiest individuals. Particularly when one considers that most people own relatively little stock and have interests outside of stock ownership related to employment, consumer contracts, the environment, democratic participation, and so on, it is likely that most shareholders would not be served by much of the Court's jurisprudence that increases rights and limits legal responsibility of corporations.[265]

Second, putting aside general trends of wealth inequality reflected in public company stock ownership, another way to parse who might benefit from "pro-business" jurisprudence is to consider that most Americans hold stock through institutional investors, and a rising amount of stock ownership is invested through diversified index funds.[266] Institutional owners currently hold 70-80% of all U.S. publicly traded stock.[267] Three big mutual fund complexes now collectively hold an average stake of more than 20% of large public corporations.[268] The ultimate beneficiaries are unlikely to be served by expansions of corporate rights, as they have no direct voice in decisions about their use, and the institutions that they invest through increasingly aim to minimize systematic risk at low cost, and generally benefit from external regulations in areas that do so, such as climate change, social stability, and financial security.[269]

In contrast to diversified investors who largely "hold the market," individuals who hold large corporate stakes in public or private corporations, including corporate directors and executives who receive large compensation packages and equity, have more concentrated

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[263] *Id.*

[264] *Id.*

[265] *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, 1871–73 (2017) [hereinafter Strine, *Who Bleeds*]; Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 583–84 (2006) (explaining that "universal owners are thought of as 'owning the economy,'" *id.* at 583, and "can be contrasted with undiversified shareholders, such as inside shareholders and founding-family shareholders," *id.* at 584, who are likely to have different "risk preferences and concern over externalities," *id.*).

[266] *See* Strine, *Who Bleeds*, *supra* note 265, at 1872, 1878.

[267] Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971, 973 (2019).

[268] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724, 736 (2019).

[269] Gordon, *supra* note 201, at 1.

interests that may be furthered by "pro-business" jurisprudence. For example, Ford is a public company but with dual-class stock through which the founding family still holds a controlling stake.[270] Cargill is one of the largest family-owned private U.S. companies.[271] The large individual shareholders in these corporations, or those with substantial voting power, likely benefit from at least a significant portion of "pro-business" decisions as they have voice in the corporation and stand to gain a proportionately large amount of wealth from holding equity in corporations relative to other interests and concerns such as salary from employment, consumer contracts, and so on.[272] In closely held corporations, the large shareholders may be able to control the corporate levers to direct corporate wealth to themselves as salary or dividends.[273]

Business executives and directors who get significant compensation packages from a corporation, and especially those who have significant managerial control to direct a corporation in line with their views, are likely also key beneficiaries of the Court's "pro-business" jurisprudence. For example, although the Court likened corporations to "associations of citizens" in *Citizens United*, shareholders generally have little to no voice in decisionmaking about corporate political activity — that is an ordinary business decision under corporate law, and the board of directors and executives have "virtually plenary authority."[274] They also typically receive outsized compensation packages compared with average workers, often with equity stakes, and thus stand to disproportionately gain from corporate profit-making, and can do so even when their companies lag behind the overall market.[275] Influential business

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[270] Mike Colias, *Ford Tries to Soothe Weary Shareholders*, WALL ST. J. (May 14, 2020, 5:09 PM), https://www.wsj.com/articles/ford-tries-to-soothe-weary-shareholders-11589472858 [https://perma.cc/TGB8-XN83].

[271] Chloe Sorvino, *Silent Giant: America's Biggest Private Company Reveals Its Plan to Get Even Bigger*, FORBES (Oct. 22, 2018, 5:50 AM), https://www.forbes.com/sites/chloesorvino/2018/10/22/silent-giant-americas-biggest-private-company-reveals-its-plan-to-get-even-bigger-1 [https://perma.cc/8NH2-EQT9].

[272] Nonprofit corporations do not have shareholders, but large individual shareholders or corporations might similarly make large contributions and have significant voice in these organizations. The largest private U.S. company, Koch Industries, or its principals have been the key funders for Americans for Prosperity. Shane Goldmacher, *How David Koch and His Brother Shaped American Politics*, N.Y. TIMES (Aug. 23, 2019), https://nytimes.com/2019/08/23/us/politics/david-koch-republican-politics.html [https://perma.cc/VDC7-2DLJ]; *America's Largest Private Companies: 2020 Ranking*, FORBES, https://www.forbes.com/largest-private-companies/list [https://perma.cc/FV6W-HHXR] (listing Koch Industries as the largest U.S. private company with $115 billion in revenue and 120,000 employees).

[273] *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE §§ 3:19, 6:3 (rev. 3d ed. 2021); Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1103 (1999).

[274] Bebchuk & Jackson, *supra* note 187, at 83.

[275] *See, e.g.*, Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123, 1126 (2019) (noting "[t]he sizable pay gaps highlighted

trade organizations often lobby for these executives' interests and push a pro-management agenda, sometimes framed through the lens of serving shareholders or business more generally to minimize the optics of these internal tensions.[276]

Ultimately, answering the question of who benefits will vary depending on the specific case at hand as well as the corporation and its participants. In the ways discussed here, we can at least start to observe that what is in the "business" interest is complex and contestable, and the Court's jurisprudence not only often misses the realities of corporations and creates internal tensions, but also serves a limited set of business participants' interests. Significant numbers of shareholders, and certainly other stakeholders like employees, might often be better off without decisions that empower corporations and erode their external constraints.

CONCLUSION

Whether genuine conceptual difficulty or mere rhetoric, the Roberts Court's struggle with analogies and realities involving corporations is reflected in a trend of case law expanding corporate rights and limiting their exposure to liability. The trend is far from unqualified, but perceptible in blockbuster cases like *Citizens United* as well as lesser-known cases like those from the recent Term that this Comment examines. *Americans for Prosperity* applied earlier freedom of association rulings to a broad facial challenge from nonprofit organizations seeking to avoid a routine administrative-disclosure regime. The Court invalidated a regulation for tens of thousands of organizations without inquiring into to whether they had real people with burdened privacy and associational interests at stake. *Ford* affirmed rulings for plaintiffs and maintained the status quo, but brought to light conceptual challenges and favorable treatment of corporate defendants in contemporary doctrine on personal jurisdiction. *Nestlé* disregarded the significance of corporate decisionmaking to find the corporate defendants' activities outside the reach of the ATS, furthering the

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by the data" from pay ratio disclosures, such as a company in which its "CEO gets paid 5,000 times more than the typical worker"); Steven A. Bank & George S. Georgiev, *Paying High for Low Performance*, 100 MINN. L. REV. HEADNOTES 14, 14–15 (2016) (discussing outsized executive compensation packages at "companies [that] lagged behind the overall market by a large margin and even lost value for the year," *id.* at 15).

[276] *See* Lund & Pollman, *supra* note 239 (manuscript at 20) (discussing trade associations through which corporate executives act, such as the Business Roundtable); Alyssa Katz, *The Chamber in the Chambers: The Making of a Big-Business Judicial Money Machine*, 67 DEPAUL L. REV. 319, 319–20 (2018) (describing the lobbying and litigation activity of the U.S. Chamber of Commerce); Brianne J. Gorod, *The First Decade of the Roberts Court: Good for Business Interests, Bad for Legal Accountability*, 67 CASE W. RSRV. L. REV. 721, 724, 728–29 (2017) (observing that the U.S. Chamber of Commerce has been "remarkably successful" before the Roberts Court, *id.* at 724, and this success has been reflected in case law that "has made it more difficult for individuals to hold businesses accountable when they violate the law," *id.* at 729).

Court's pattern of limiting the viability of ATS claims against corporations for complicity in human rights abuses.

Although not absolute, this trend of expanding rights and narrowing responsibility supports the "pro-business" reputation that the Roberts Court has developed. Under current doctrine, corporations have great power to shape their regulatory environment through political spending and influence as well as to challenge a host of business regulations using a panoply of rights. At the same time, corporations often enjoy favorable procedural rules and interpretations of regulatory constraints.

This Comment's aim has been to examine a variety of cases through the lens of corporations and to highlight this "pro-business" pattern as well as its contradictory relationship with counter trends in corporate law and governance. If "business" is equated with corporate profit-seeking, private ordering, or managerial power, then it might appear there is no paradox. But if one digs beneath the surface of these concepts, or takes a more capacious view of "business," a deep and growing contradiction emerges between the Court's business-related decisions and other currents in business law. The exploration reveals that the Court's failures to account for the realities of corporations and their governance contributes to reasoning that empowers corporations and erodes their external constraints, but these "pro-business" decisions do not benefit the business world writ large. The Court's approach to corporations may be a detriment to many people who actually participate in them. Further, this jurisprudence might ultimately undermine key mechanisms that have developed to balance the various interests at stake in corporations and temper their negative externalities. The insights interspersed throughout various dissents and concurrences in recent cases suggest that a more coherent approach to conceptualizing corporations and their legal rights and responsibilities is possible. A richer understanding and accounting for the spectrum of corporations, and their internal laws and governance, could contribute to a different kind of business-oriented jurisprudence that would serve a broader group of participants and support their efforts in shaping corporate activity and accountability.