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Some Musings as LLCS Approach the Fifty-Year Milestone

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SOME MUSINGS AS LLCs APPROACH THE FIFTY-YEAR MILESTONE

SUSAN PACE HAMILL*

*Our ability to create has outreached our ability to use wisely the products of our invention.***

I. AIRPLANE VIEW OF LLCs AT THE CLOSE OF THE SECOND DECADE OF THE TWENTY-FIRST CENTURY

In less than twenty years, limited liability companies, or LLCs, became the fastest growing business organization form in the United States and indisputably emerged in the mainstream alongside corporations and partnerships. In 2017, the most recent year for which IRS Statistics of Income figures were available, 2,696,149 LLCs filed returns with the Internal Revenue Service (the “IRS”).¹ This number represents well over three times the number of LLCs that filed returns in 2000.² In 2017, over one-fourth of the more than ten million total

*Professor of Law and Honors Professor, University of Alabama School of Law. I appreciate the support of Dean Mark Brandon, the University of Alabama Law School Foundation, the staff at the Bounds Law Library, especially Casey Duncan, Emily Mayers-Twist, and Christopher Collins, and my research assistants Hugh Warren, Reed Norris, and Caity French. I have been a part of the LLC’s development for over thirty years. In 1989, I published my first law review article exploring the LLC’s potential as an attempt to boost my chances to “make partner” at a large New York City law firm. Instead, my article led me to the Passthroughs Division in the Chief Counsel’s Office of the Internal Revenue Service. My work there advising state legislative committees and the National Conference of Commissioners on Uniform State Laws drafting limited liability company statutes facilitated my entrance into the legal academy.

**WHITNEY M. YOUNG, JR., TO BE EQUAL 233 (1964). Whitney M. Young, Jr. was a civil rights leader whose substantial efforts building bridges with the white establishment sought to increase economic opportunities for the black community. See NANCY J. WEISS, WHITNEY M. YOUNG, JR., AND THE STRUGGLE FOR CIVIL RIGHTS (1989).

¹ Letter from David Nimmo, FOIA Public Liaison, to Hugh Warren, Research Assistant, Univ. of Ala. School of Law (Dec. 11, 2019) (on file with author) [hereinafter FOIA Request] (letter responding to a Freedom of Information request dated October 28, 2019, asking for the total number of returns filed by corporations, limited liability companies, general partnerships, and limited partnerships from 2014 to 2018).

² See INTERNAL REVENUE SERVICE, STATISTICS OF INCOME: NUMBER OF RETURNS, NET INCOME AND DEFICIT BY FORM OF BUSINESS, TAX YEARS 1980-2013 [hereinafter STATISTICS OF INCOME], <https://www.irs.gov/statistics/soi-tax-stats-integrated-business-data>

business organizations were LLCs,³ an impressive increase when compared to LLCs accounting for 10% of all business organizations in 2000.⁴ Over this period, general and limited partnerships became less significant.⁵ Although corporations still accounted for the majority of business organizations filings in 2017, the percentage of business organizations filing as corporations dropped by almost 10% when compared to the 2000 filings,⁶ and many of those businesses chose to become corporations before LLCs became widely available and are now stuck there—a situation I describe as the “Hotel California effect.”⁷ These figures, along with the explosive growth of LLCs compared to an overall decrease of corporations, predict that the gap between the number of businesses conducted as corporations and LLCs will continue to close in the future.⁸

[<https://perma.cc/5N8K-VLWU>] (showing that 718,704 LLCs filed returns in 2000).

³ See FOIA Request, *supra* note 1 (showing that of the 10,005,526 business organizations in 2017, 2,696,149 (27%) were LLCs).

⁴ See STATISTICS OF INCOME, *supra* note 2 (showing that of the 7,102,773 business organizations that filed returns in 2000, 718,704 (10%) were LLCs).

⁵ See *id.* (showing that of the 7,102,773 business organizations that filed returns in 2000, 936,564 (13%) were general partnerships and 402,232 (6%) were limited partnerships); see FOIA Request, *supra* note 1 (showing that by 2017, both general and limited partnerships each accounted for approximately 5% (516,229 and 468,034, respectively) of the 10,005,526 business organizations filing returns); see also *infra* notes 52, 60, 156 and accompanying text (discussing general and limited partnerships before LLCs became a viable choice and the emergence of LLPs and LLLPs).

⁶ See STATISTICS OF INCOME, *supra* note 2 (showing that of the 7,102,773 business organizations that filed returns in 2000, 5,045,273 (71%) were corporations); FOIA Request, *supra* note 1 (showing that by 2017, of the 10,005,526 business organizations filing returns, 6,325,114 (63%) were corporations).

⁷ If a corporation owning significant appreciated assets liquidates, which includes converting to an unincorporated business organization, substantial built-in gain will be triggered. See *infra* notes 11–13 (discussing the federal income tax differences between corporations and partnerships, particularly the liquidation provisions that make it prohibitively tax expensive for many existing corporations to become LLCs). I tell my students, “When in doubt, don’t incorporate,” and describe this as the “Hotel California” phenomena, referring to the lyrics of a popular song by the *Eagles* (“you can check out anytime you’d like, but you can never leave”).

⁸ See *supra* notes 3–4, 6 (showing that in comparing 2000 and 2017, the percentage of business organizations filing returns as corporations dropped by 8%, while the percentage of business organizations filing as LLCs increased by 17%). Although when comparing 2000 and 2013, the most recent year STATISTICS OF INCOME broke down corporation filings between subchapter C and subchapter S, the number of business organizations filing as subchapter S corporations did grow, LLCs displayed greater growth. See STATISTICS OF INCOME, *supra* note 2 (showing that of the 7,102,773 and 9,152,752 business organizations filing returns in 2000 and 2013, respectively, 2,860,478 (40%) and 4,257,909 (47%), respectively, were S corporations, while 718,704 (10%) and 2,285,420 (25%), respectively, were LLCs). LLCs not only grew significantly faster than S corporations during the period between 2000 and 2013, during that same period the actual number of LLC filings

Primarily aimed at readers who are not experts, this article identifies what makes LLCs so special and how they traveled from obscurity to the mainstream so quickly. It also highlights business law issues and abusive practices exposed by the current use of LLCs and explains why these problems are not caused by LLCs. Finally, this article demystifies the challenges of teaching and understanding LLCs within the framework of all business organizations.

Simply put, LLCs are the first domestic business organization form to combine direct corporate limited liability and partnership tax status.⁹ The LLC's creation and characteristics can be best understood as a dance between state and federal law. Despite broad federal power under the Commerce Clause and business being a quintessential example of interstate commerce, state law authorizes business organization forms and dictates the provisions in each business organization statute, and state courts interpret those laws.¹⁰ When determining the federal income tax consequences to the business organization and its owners, federal tax law largely yields to state law, notwithstanding the spirit of the Supremacy Clause. Business organizations designated by state law as corporations are taxed at both the entity and shareholder levels¹¹ or,

(1,566,716 more LLCs than in 2000) grew more than the actual number of S corporation filings (1,397,431 more S corporations than in 2000). *Id.*

⁹ See Susan Pace Hamill, *The Limited Liability Company: A Possible Choice for Doing Business?*, 41 FLA. L. REV. 721, 722 & n.9 (1989) [hereinafter Hamill, *Possible Choice*] (discussing that before LLCs were invented, limited partnership associations in a few states provided direct limited liability protection and partnership tax status but were seldom used because of restrictions requiring either the principal place of business or principal office to be in the state of organization).

¹⁰ See generally Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81 (1999) [hereinafter Hamill, *Special Privilege*] (documenting historical circumstances that led to the foundation of business organizations law and its evolution as controlled by state law).

¹¹ The Revenue Act of 1913, which created the first federal income tax that carries forward to this day, taxes the net income of "every corporation . . . or association . . . organized in the United States . . . not including partnerships . . ." Revenue Act of 1913, ch. 16, § II(G)(a), 38 Stat. 114, 172. See I.R.C. § 11(a) (stating that corporations are taxed as entities); § 1363(b) (stating that the taxable income of a corporation is generally determined in the same manner as an individual); § 7701(a)(2)–(3) (establishing the per se rule, which taxes business organizations that have incorporated under a state's law as "corporations"). To the extent the corporation has earnings and profits, distributions to a shareholder with respect to their stock is taxed to the shareholder as a dividend, thus resulting in double taxation of corporate profits. See I.R.C. §§ 301, 312. Operating and liquidating distributions of appreciated property result in the corporation recognizing the built-in gain. See § 311. A corporation that converts to an unincorporated business organization, such as an LLC, is treated as making liquidating distributions of all of its assets to the shareholders (and recognizing built-in gain), and the shareholders are treated as contributing the assets to the unincorporated business organization for commensurate economic shares of the new business organization. See §§ 336, 361, 721; see 1 BORIS I. BITTKER ET AL., FEDERAL

if the corporation qualifies for and properly elects to be taxed as a small business corporation, at the shareholder level under a modified flow-through regime with many restrictions.¹² Business organizations designated by state law as “unincorporated,” including partnerships and LLCs, are almost always taxed as partnerships under a complete flow-through regime free of the many traps that plague corporations.¹³

TAXATION OF CORPORATIONS AND SHAREHOLDERS (7th ed. 2000) (leading treatise detailing subchapter C, the provisions dictating the tax treatment of incorporated business organizations and their shareholders that have not made a valid election to be taxed as a small business corporation under subchapter S).

¹² Corporations that qualify and properly elect to be taxed as small business corporations under the subchapter S provisions are generally not taxed at the corporate level. I.R.C. § 1363(a)–(b). Unlike subchapter C corporations and unincorporated business organizations, such as LLCs, that are taxed as partnerships, subchapter S corporations cannot have more than 100 shareholders, shareholders that are nonresident aliens, or shareholders that are entities (other than certain trusts and tax-exempt entities), and they are forbidden from having more than one class of stock. *See* §§ 1361(b)(1), (c)(2), 1362. The S corporation’s income and losses pass through to the shareholders according to their common stock ratios. § 1366(a)–(c). Unlike unincorporated business organizations, such as LLCs, that are taxed as partnerships, the S corporation’s liabilities (other than liabilities resulting from a shareholder making a loan to the corporation) do not pass through and increase the basis of the shareholder’s stock. § 1366(d)(1). This often causes deductions of losses and expenses financed by the S corporation’s third-party debt to be suspended until the S corporation pays back the principal of the loan. *See* § 1366(d)(2) (permitting indefinite carryover of disallowed losses and deductions). These restrictions, as well as many others, result in the LLC being favored over S corporations in most situations. However, S corporations offer greater opportunities to minimize self-employment taxes than exist in partnerships and LLCs, which is why well-advised new businesses choose to incorporate and elect subchapter S. *See* JAMES S. EUSTICE ET AL., *FEDERAL TAXATION OF S CORPORATIONS* (5th ed. 2015). I tell my students that minimizing self-employment taxes is the only rational reason for a new business to incorporate and elect subchapter S. I also advise my students to carefully and clearly explain to their clients, who choose the S corporation for this reason, the long-term consequences of “checking in to the Hotel California,” and to document in writing that this warning was explicitly given. *See supra* note 7 (explaining the “Hotel California” analogy). Although a liquidating subchapter S corporation (including an S corporation converting to an LLC) will not pay corporate tax on the built-in gain of the assets deemed distributed, such gain will passthrough and will be taxed to the shareholders in accordance with their common stock ownership ratios. I.R.C. §§ 1366(a)–(b), (f)(2)–(3), 1371(e).

¹³ Unincorporated business organizations, including LLCs that are not publicly traded, are taxed as partnerships under the subchapter K provisions. *See* I.R.C. §§ 701–761. The LLC itself is never subject to income tax at the entity level, and the LLC’s income and losses flow through to the members and the member-managers. *See* §§ 701, 702(a)–(b); *see also* §§ 1374(a), (d)(5), 1375(a), (b)(4) (stating that subchapter S corporations are subject to an entity level tax on certain built-in gains and passive activity income). Unlike S corporations, which mandate the passthrough of income and loss to mirror the shareholders’ common stock ownership ratios (the one class of stock requirement), members and member-managers of LLCs have total flexibility to allocate the LLC’s distributive shares of tax income and tax losses in any ratio if their agreed allocations have substantial economic effect. *See* § 704(a)–(b). Although the regulations establishing safe harbors for substantial economic effect are quite complex, at their core these standards seek to ensure that those

II. BACK WHEN LLCs BELONGED TO INVENTIVE RISK-TAKERS

If necessity is the motherhood of invention, then the LLC can be viewed as its child. In the late 1960s, Frank M. Burke, Jr.¹⁴ wanted a

members or member-managers receiving distributive shares of the LLC's taxable income also have economic rights to that income, and those receiving distributive shares of the LLC's taxable losses also bear the economic burden for such losses if economic losses occur. See Treas. Reg. § 1.704-1(b)(1)(i). Unlike S corporation shareholders, whose stock basis is not increased for a share of the S corporation's third-party debt, all debt incurred by the LLC increases the basis of the member's or member-manager's LLC interest, which means there usually will be sufficient basis to avoid the tax deductions from distributive shares of tax losses being suspended. See I.R.C. § 752(a)–(b). Because LLCs provide limited liability protection for all members and member-managers (as distinguished from traditional general and limited partnerships, which deem general partners personally liable for the recourse debts of the partnership), all third-party debts of the LLC are treated as nonrecourse for tax purposes unless a member or member-manager personally guarantees the loan. See I.R.C. § 752; Treas. Reg. § 1.752-1 to -3. Allocations of losses attributable to nonrecourse debt and the income restoring such losses cannot have substantial economic effect because only the lender can bear the economic burden if the unincorporated business organization fails to pay the loan; consequently, the income offsetting the loan also has no substantial economic effect. Treas. Reg. § 1.704-1(b)(2)(ii)(a)–(b) (describing how to calculate substantial economic effect). The safe harbor in the regulations for allocations attributable to nonrecourse debt is quite complex but, at its core, requires losses attributable to nonrecourse debt to be allocated in a manner that either mirrors loss allocations that have substantial economic effect or reflect the profit-allocation ratio; the safe harbor also requires income restoring such losses (the minimum gain chargeback) to be allocated at defined milestones. See Treas. Reg. § 1.704-2; see also Susan Pace Hamill, *Final Regulations Concerning Liabilities Join Substantial Economic Effect Rules*, 9 J. P'SHIP TAX'N 99 (1992) (summarizing important details of the § 752 regulations and the § 704(b) regulations); Christine Rucinski Strong & Susan Pace Hamill, *Allocations Attributable to Partner Nonrecourse Liabilities: Issues Revealed by LLCs and LLPs*, 51 ALA. L. REV. 603 (2000) (detailing nuances caused by the limited liability protection when applying the regulations to LLCs and LLPs). Unlike corporations, LLCs (and all other unincorporated business organizations taxed as partnerships) do not have a "Hotel California" problem. LLCs that convert to corporations are treated as liquidating tax-free, with the members and member-managers receiving the assets with a carryover basis followed by a tax-free contribution to the corporation and receipt of corporate stock, also with a carryover basis, in exchange for the LLC's former assets. See I.R.C. §§ 721(a)–(b), 722–723, 732, 351(a)–(b). Unless 90% or more of the LLC's income is certain passive investment income, such as interest, dividends, and rents from real property, LLCs that are publicly traded are automatically taxed as C corporations. See § 7704(a), (c)(2); see also WILLIAM S. MCKEE ET AL., *FEDERAL TAXATION OF PARTNERSHIPS AND PARTNERS* (4th ed. 2007); 1 ARTHUR B. WILLIS ET AL., *PARTNERSHIP TAXATION* (8th ed. 2017) (covering the details of the partnership tax provisions under subchapter K).

¹⁴ In 1975, when Burke created the first proposed LLC statute, he was associated with an international firm of certified public accountants. From 1984 until his death in 2010 at age 70, Burke was the chairman and managing partner of Burke, Mayborn Company, Ltd., a private investment company in Dallas. See *Frank Burke Obituary*, DALLAS MORNING NEWS, July 29, 2010, at 10B. Through my connection with John Dzienkowski, a law professor at the University of Texas, I was able to secure from Burke copies of his files documenting all the unpublished letters, memos, and other information providing an inside

business organization with direct limited liability protection and partnership tax status for his client, an independent oil explorer. At that time, only domestic corporations provided direct limited liability, but they were unsuitable for Burke's client because the tax law prevented drilling and other expenses from passing through to the investors. Only domestic partnerships allowed the investors to deduct these losses, but they exposed at least one partner to personal liability. For a few years, Burke met his client's needs using foreign entities that provided direct limited liability protection and still qualified for partnership taxation under the then-in-effect partnership classification regulations. In the early 1970s, the demand for crude oil spiked, increasing potential profits for Burke's client, but by then Burke could no longer use foreign entities. He needed a domestic business organization because the foreign governments were imposing new capital and quota limitations, and there were increasing concerns that the foreign-based liability shield would not be respected by U.S. courts.¹⁵

Burke could have recommended a domestic limited partnership, which provided direct limited liability protection for all limited partners and easily qualified for partnership taxation. Although the general partner was personally liable for the debts of the partnership, limited partnerships at this time routinely created substantive limited liability protection by minimally capitalizing a corporate general partner.¹⁶ Instead of settling for this standard technique and paying a tax lawyer for a partnership classification opinion, Burke invented something new—he drafted the first proposed statute creating the LLC.¹⁷

Burke only had to approach the legislature in one state. He chose sparsely populated rural states—first Alaska and then Wyoming—undoubtedly due to their informal and accessible channels to the legislature, a situation that does not exist in states like New York.¹⁸ In 1975

picture of the LLC's creation and the first battle with the IRS. Burke generously read drafts and commented on my 1998 article about the LLC's origins. Burke and I reconnected over a decade later when, less than a year before his death, he contributed \$500 to my 2010 campaign for the Alabama legislature.

¹⁵ Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1463–64 & nn.14–16 (1998) [hereinafter Hamill, *Origins*] (documenting, with primary sources, the story of Burke inventing the LLC).

¹⁶ Susan Pace Hamill, *The Taxation of Domestic Limited Liability Companies and Limited Partnerships: A Case for Eliminating the Partnership Classification Regulations*, 73 WASH. U. L. Q. 565, 585–86 & nn.96–99 (1995) [hereinafter Hamill, *Classification*] (noting that net worth requirements at that time failed to create any meaningful liability exposure).

¹⁷ See Hamill, *Origins*, *supra* note 15, at 1464 & n.17 (“Frank Burke . . . drafted the terms of the original proposal.” (quotations omitted)).

¹⁸ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 12–37

and 1976, Burke's attempts in Alaska were unsuccessful, but in 1977, he convinced the Wyoming legislature to pass the first statute authorizing LLCs. Expecting scrutiny under the IRS's then-in-effect partnership classification regulations, Burke made sure his newly invented LLC more strongly resembled a classic general partnership than the limited partnership, easily qualifying for partnership taxation.¹⁹ Unlike limited partnerships, Wyoming LLCs dissolved if any member withdrew from the business and required consent of all members to transfer a complete interest to a new member.²⁰

Burke and his client never benefitted from Burke's invention. Even though Wyoming LLCs clearly met the partnership classification regulations, for three frustrating years the IRS stalled Burke's request for a private letter ruling.²¹ The LLC ultimately remained in tax limbo for over ten years while the IRS studied whether limited liability should cause a business organization to be taxed as a corporation.²² Other than Florida, no other states enacted LLC legislation.²³ Expectations that the Florida LLC would spark significant economic development in the state were disappointed.²⁴ While the LLC's partnership tax status remained in question, fewer than one hundred businesses formed as LLCs.²⁵

The official files contained no information as to why the IRS held LLCs tax hostage for so long.²⁶ Shortly after he became the Chief

(1991) (discussing factors influencing legislative forums).

¹⁹ See Wyoming Limited Liability Company Act, 1977 Wyo. Sess. Laws 537; see also Hamill, *Origins*, *supra* note 15, at 1464–66 nn.17–24 (documenting, with primary sources, partnership classification being of central concern).

²⁰ See Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 378, 423–27 (1992) [hereinafter Keatinge et al.] (stating that dissolution and transferability provisions in the first Wyoming LLC statute were immutable, rendering Wyoming LLCs effectively bullet proof, meaning the partnership classification regulations would be complied with regardless of the operating agreement).

²¹ Hamill, *Origins*, *supra* note 15, at 1467.

²² *Id.* at 1466–68 nn.26–33 (documenting, with primary sources, this struggle).

²³ See Florida Limited Liability Company Act, 1982 Fla. Laws 580.

²⁴ See Richard Johnson, *The Limited Liability Company Act*, 11 FLA. ST. U. L. REV. 387, 387–88 nn.5–6 (1983) (stating that the purpose behind Florida's LLC statute was to lure capital into the state and noting that the predicted positive impacts of the LLCs, including a substantial increase of Florida's economic base, failed to materialize when only two Florida LLCs were formed a year after the Florida legislature authorized LLCs).

²⁵ See Susan Pace Hamill, *The Limited Liability Company: A Catalyst Exposing the Corporate Integration Question*, 95 MICH. L. REV. 393, 402–03 n.46 (1996) [hereinafter Hamill, *Catalyst*] (documenting filings by conducting telephone interviews with the Wyoming Secretary of State's office and using that data to estimate the Florida filings in the pre-Revenue Ruling 88-76 years).

²⁶ After I joined the Passthroughs Division of the Chief Counsel's Office of the Internal Revenue Service, I examined the file for Revenue Ruling 88-76. Other than confirming

Counsel of the IRS, William F. Nelson, a nationally known partnership tax expert, recognized that there was no good reason to continue holding up the Wyoming LLC revenue ruling.²⁷ Under Nelson's authority, on September 2, 1988, the IRS issued Revenue Ruling 88-76, which stated that LLCs formed under Wyoming's statute were taxed as partnerships, thereby allowing other states to contemplate LLC legislation and businesses to consider choosing the LLC form.²⁸

Probably due to the scarce legal precedent and experience with LLCs, additional states did not enact LLC statutes until 1990. Like Wyoming, the next two pioneers, Colorado and Kansas, had informal and accessible legislatures.²⁹ Also in 1990, Barbara C. Spudis and Robert R. Keatinge,³⁰ the two individuals most responsible for the rise of the LLC during its second phase of development,³¹ formed American Bar Association-sanctioned subcommittees to study the LLC's potential.³² These subcommittees identified major issues impeding the LLC's growth, the most important of which were the provisions rendering LLCs significantly more dissolvable and less transferable than

the timeline discussed in *supra* note 22 and accompanying text, the file contained no explanation as to why it took over ten years to confirm that Wyoming LLCs qualified for partnership tax status under the regulations. See *infra* note 64 and accompanying text (speculating that LLCs exposing the inconsistencies of the business tax structure in light of the corporate integration question prompted the delay).

²⁷ E-mail from William F. Nelson, former Chief Counsel of the IRS, to author (June 13, 2019, 5:02 PM) (on file with author) (Nelson recalling discussions with attorneys from the Passthroughs Division about the proposed revenue ruling recognizing Wyoming LLCs were taxed as partnerships, and, although the issue was hot, stating that he had no doubt that the answer was clear).

²⁸ Rev. Rul. 88-76, 1988-2 C.B. 360.

²⁹ See Colorado Limited Liability Company Act, 1990 Colo. Sess. Laws 414; Kansas Limited Liability Company Act, 1990 Kan. Sess. Laws 585. See also Hamill, *Origins*, *supra* note 15, at 1473-74 n.59 (stating that in 1991, four states—Virginia, Utah, Texas and Nevada—enacted LLC statutes).

³⁰ Barbara Spudis (now Barbara De Marigny) is currently a partner in the Houston office of Baker Botts. Bob Keatinge is currently Of Counsel at Holland & Hart in Denver. I thank both of them for sharing their substantial files, which made it possible for me to write the inside story of LLCs during the first half of the 1990s. See also e-mail from William J. Callison to author (June 26, 2019, 3:10 PM) (on file with author) (stating that Keatinge participated in drafting Colorado's original LLC statute).

³¹ See Hamill, *Origins*, *supra* note 15, at 1470-84 nn.44-52, 61-71, 79-110 (showing that virtually all unpublished letters and memos documenting the behind-the-scenes efforts to promote LLCs in the 1990s are authored by, or at least mention, Barbara Spudis and Bob Keatinge); see also Susan Pace Hamill, *The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure*, in BUSINESS TAX STORIES 295, 301 (Steven A. Bank & Kirk J. Stark eds., 2005) [hereinafter Hamill, *Story*] ("No two individuals are more responsible for the rise of the LLC during the 1990s than Barbara Spudis and Bob Keatinge.").

³² See Hamill, *Origins*, *supra* note 15, at 1470-71 n.44.

limited partnerships.³³ They also spearheaded other important tasks, such as creating a clearinghouse to encourage the legislatures in all states to enact LLC statutes.³⁴

While there were still only a handful of statutes, some commentators identified the LLC as “one of the most important developments in business law today” and predicted that, “[y]ears from now, this may be viewed as the dawn of a new era in business entities.”³⁵ On July 22, 1992, Delaware became the seventeenth state to jump on the LLC bandwagon, and the frenzy of LLC statutes stampeding across the country continued.³⁶ By the summer of 1996, all fifty states had passed their first LLC statute.³⁷

Although LLCs still accounted for a small percentage of the business organizations filings,³⁸ the trajectory showed unmistakable signs that LLCs would join the mainstream of business organizations by the twenty-first century. In 1996, well over two hundred thousand businesses filed returns as LLCs—almost twice the number of LLC filings in 1995.³⁹ Although the number of business organizations filing as corporations and partnerships grew as well, the degree of their growth did not even remotely approach the rapid upward trend of LLCs.⁴⁰

At the same time the states were enacting their first LLC statutes, Spudis, Keatinge, and their persistent squad of LLC allies, as well as a drafting committee preparing the first Uniform LLC statute, relentlessly lobbied the IRS, arguing that LLCs, which were less dissolvable

³³ *Id.* at 1470, 1472–73 nn.49–50 (documenting, with primary sources, these subcommittees’ strategies to make LLCs less dissolvable and more transferable without jeopardizing partnership tax status).

³⁴ *Id.* at 1471–72 n.48.

³⁵ Richard M. Phillips, *From the Editor*, 47 *Bus. LAW.*, Feb. 1992, at xiii, xiii; see also Hamill, *Possible Choice*, *supra* note 9, at 771 (“[I]f more states adopt limited liability company acts, the LLC’s popularity will likely flourish.”).

³⁶ Limited Liability Company Act, 68 Del. Laws 1329 (1992).

³⁷ See Hamill, *Origins*, *supra* note 15, at 1476–77 nn.72–75 (documenting, with dates of enactment, the first LLC statutes passed in ten states in 1992, eighteen states in 1993, twelve states (including New York and California) in 1994, one state in 1995, and the final two states in 1996).

³⁸ See *STATISTICS OF INCOME*, *supra* note 2 (showing that of the 6,173,626 business organizations filing returns in 1995, 118,559 (2%) were LLCs; of the 6,507,123 business organizations filing returns in 1996, 221,498 (3%) were LLCs).

³⁹ *Id.* (showing that the number of LLC filings increased from 118,559 in 1995 to 221,498 in 1996).

⁴⁰ See *id.* (showing that the number of business organizations filing as corporations increased from 4,474,167 in 1995 to 4,631,369 in 1996, and the number filing as partnerships increased from 1,580,900 in 1995 to 1,654,256 in 1996; the increased filings of 157,202 for corporations and 73,356 for partnerships was not nearly as dramatic as the rise of LLCs).

and more transferable like limited partnerships, should still qualify for partnership tax status.⁴¹ After mulling it over for a few years, the IRS eventually agreed.⁴² Shortly thereafter, on December 17, 1996, the IRS declared that all unincorporated business organizations that were not publicly traded would be automatically taxed as partnerships, thus permanently eliminating all partnership classification issues for most LLCs and other unincorporated business organizations.⁴³ Commentators at the time credited the rise of the LLC for the demise of the partnership classification regulations.⁴⁴

III. LLCs EXPOSE FLAWS CAUSED BY DANCE BETWEEN STATE AND FEDERAL LAW

During the 1990s, not everyone embraced LLCs with open arms. One respected tax commentator claimed that LLCs would cause “big holes in the federal corporate tax base,”⁴⁵ while a prominent state tax administrator more colorfully complained that “[t]he federal government ha[d] opened up a candy store.”⁴⁶ These and other critics expressed concern that the LLC would cause a state law-driven and, therefore, inappropriate end-run around the two-tier federal income tax imposed on corporations and shareholders, commonly referred to as corporate integration.⁴⁷

Burke’s invention of the LLC in 1975 and Spudis’s and Keatinge’s

⁴¹ See Hamill, *Origins*, *supra* note 15, at 1472–75, 1478–80 nn.51–58, 61–100.

⁴² See Rev. Proc. 95-10, 1995-1 C.B. 501.

⁴³ See Treas. Reg. §§ 301.7701-1 to -4 (1996).

⁴⁴ See Rod Garcia et al., *LLCs, or How the Government Got to Check-the-Box Classification*, 67 TAX NOTES 1139, 1139 (1995) (“Three years ago . . . , sponsors of the limited liability company structure peddled their product at several committee sessions Now it’s 1995, and times have indeed changed. Almost every state . . . has a statute dealing with LLCs. . . . [T]he government [has] proposed to throw in the towel on trying to define the lines that distinguish partnerships from corporations No single entity is more responsible . . . than the LLC, which just a few years ago was a new idea to many practitioners.”).

⁴⁵ See Marlis Carson, *Tax Revenues Will Suffer, But Limited Liability Companies May Be Here to Stay*, 92 TAX NOTES TODAY 233, 233–34 (1992) (quoting Lee A. Sheppard, Contributing Editor, TAX NOTES).

⁴⁶ Lee A. Sheppard, *New York Contemplates Cost of Partnership Treatment for Limited Liability Companies*, 92 TAX NOTES TODAY 243, 243–44 (quoting James W. Wetzler, New York State Commissioner of Taxation and Finance).

⁴⁷ See Lee A. Sheppard, *The Dark Side of Limited Liability Companies*, 92 TAX NOTES TODAY 123 (1992); Bureau Nat’l Affs., *Use of Limited Liability Companies Seen Not Jeopardizing Corporate Tax Base*, DAILY TAX REP., Mar. 30, 1993, at J-3 (stating that the LLC “ha[d] opened the floodgates to do-it-yourself integration, [which] is not the proper way to approach the question of integrating the corporate tax” (quoting Donald Alexander, former IRS Commissioner)); James W. Wetzler, *Federal Tax Policy and the States: Corporate Integration*, 46 NAT’L TAX J. 393 (1993).

relentless advancement of its development in the 1990s were indeed completely tax motivated. They and hundreds of other LLC proponents were seeking to improve the overall fairness of the business tax system by leveling the playing field between businesses that could afford the legal advice needed to substantively enjoy limited liability and partnership taxation and businesses either unwilling or unable to incur these transaction costs.⁴⁸ Although the LLC superficially appeared to achieve some form of corporate integration, as part of my scholarship supporting my promotion and tenure, I conducted an extensive empirical study and proved that LLCs pose no genuine threat to the corporate tax.⁴⁹

The rise of LLCs does expose deep flaws in the business tax system, which are caused by state law designations dictating federal income tax consequences—a situation that existed long before the LLC was invented.⁵⁰ Historical circumstances explain why the state law designations of “corporation” or “partnership” result in stark differences under the federal income tax law.⁵¹ In 1913, when the Sixteenth Amendment authorized the first federal income tax, Congress had to identify which business organizations would be taxed at the entity level. At that time, the most significant business organizations on the landscape were the classic general partnership—the home of most small businesses—and corporations—the ancestors of today’s big business.⁵² Congress understandably chose not to tax partnerships but opted to tax corporations.⁵³ It would have been politically unthinkable

⁴⁸ See Hamill, *Story*, *supra* note 31, at 299–303, 309–10. Some early commentators lamented the tax-driven motivation behind key business provisions in LLC statutes, while others boldly embraced this reality. See *AALS Tax Section Looks at LLCs, Taxation of Business Enterprises*, 96 TAX NOTES TODAY 17 (1996) (“LLCs must be recused from the grasp of the tax lawyers” (quoting Professor Larry Ribstein, arguing that business policy should take center stage)); *id.* (“Everything is driven by tax and the rest of the world will accommodate” (quoting Professor Jerry Kurtz’s response to Professor Ribstein’s comment)).

⁴⁹ See generally Hamill, *Catalyst*, *supra* note 25.

⁵⁰ *Id.*; see also Hamill, *Story*, *supra* note 31, at 310–13; and see *supra* notes 10–13 and accompanying text (discussing that substantial differences in partnership and corporate tax provisions invoked by state law labels result in business organizations that are essentially the same having radically different tax consequences).

⁵¹ “The rational study of law is still to a large extent the study of history. History must be part of the study, because without it we cannot know the precise scope of rules which it is our business to know.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁵² See Hamill, *Story*, *supra* note 31, at 303–06; Hamill, *Special Privilege*, *supra* note 10.

⁵³ See Hamill, *Origins*, *supra* note 15, at 1501–03; see also 26 CONG. REC. 6866–67 (1894) (statement of Sen. Vest) (articulating corporation’s status as a legal entity with government protection and privileges as justification for imposing an income tax); Patrick E. Hobbs,

not to impose the federal income tax on these largely unregulated and increasingly unpopular corporate giants, which were harshly criticized in the early decades of the twentieth century.⁵⁴ One professor even analogized corporations to Mary Shelley's fictional monster Frankenstein.⁵⁵ Moreover, in the early twentieth century, the state law designations of "partnership" and "corporation" did confer material, substantive differences as to the nature of the business organization, so a reasonable argument could be made that the state law labels justified the tax distinctions.⁵⁶

By the middle and later decades of the twentieth century, the state law designations of "partnership" or "corporation" by themselves did not even remotely justify the major differences between the corporate and partnership tax regimes. Closely held corporations emerged in the early twentieth century as a means of securing limited liability protection from the businesses' debts, and such corporations became the preferred business organization for small businesses by the second half of the twentieth century.⁵⁷ Closely held corporations substantively resembled general partnerships because typically the shareholders also actively managed and controlled the corporation's business.⁵⁸ Although these incorporated partnerships, as they were sometimes described, were taxed as corporations, shareholders avoided the sting of the

Entity Classification: The One-Hundred Year Debate, 44 CATH. U. L. REV. 437, 441, 446 (1995) (speculating that the separate income tax on corporations was implemented solely to "soothe the psyche of the American public").

⁵⁴ For criticism of predatory corporate practices, see James B. Dill, *National Incorporation Laws for Trusts*, 11 YALE L.J. 273 (1902); Horace LaFayette Wilgus, *Need of a National Incorporation Law*, 2 MICH. L. REV. 358 (1904); J. Newton Baker, *The Evil of Special Privilege*, 22 YALE L.J. 220 (1913); WILLIAM Z. RIPLEY, *MAIN STREET AND WALL STREET* (1927).

⁵⁵ I. MAURICE WORMSER, *FRANKENSTEIN, INCORPORATED* (1931).

⁵⁶ See Hamill, *Story*, *supra* note 31, at 310–11.

⁵⁷ See F. HODGE O'NEAL & ROBERT THOMPSON, *O'NEAL AND THOMPSON'S CLOSE CORPORATION AND LLCs: LAW AND PRACTICE* § 1:24 (rev. 3d ed. 2004) [hereinafter O'NEAL & THOMPSON]; see also Hamill, *Catalyst*, *supra* note 25, at 404–05, 411–12, 405 nn.56–58, 412 n.97 (documenting the rise of close corporations); ALFRED F. CONARD, *CORPORATIONS IN PERSPECTIVE* 118 (1976) (discussing that in 1970 over 90% of American corporations had fewer than ten shareholders).

⁵⁸ See O'NEAL & THOMPSON, *supra* note 57, § 1:3 ("[O]ne of the most significant characteristics of many closely held entities [is] one in which 'management and ownership are substantially identical.'"); *id.* § 1:13 ("[A]ll or most of the participants [in a close corporation] are active in the business, usually serving as directors, managers, or officers . . . [I]n a close corporation, the power to control corporate activities or at least to veto changes in directors, officers and employees and in the methods of operating the business may be vital to the shareholder-owner."); *id.* § 1:14 ("[P]articipants in a closely held company often are not just investing their money as are purchasers of shares in a publicly held corporation; they may also expect to be employed by the entity and participate in its management.").

corporate tax by either engaging in strategic tax planning or by electing to have the corporation taxed as a small business corporation.⁵⁹

As closely held corporations displaced general partnerships in the small business arena, large, syndicated tax shelters organized as limited partnerships proliferated in the early 1970s. These limited partnerships, which easily qualified for partnership taxation, substantively resembled classic corporations because the limited partners tended to rely on the general partners to manage and control the partnership similar to a corporation's board of directors and officers.⁶⁰ The elimination of the partnership classification regulations changed nothing, because those regulations failed to meaningfully distinguish between unincorporated business organizations resembling a classic corporation and those resembling a classic general partnership.⁶¹

Especially among small businesses, the major differences between taxation of corporations and partnerships due to state law labels perpetuate gross violations of horizontal equity—the tax policy goal of

⁵⁹ *Id.* § 2:5 (noting that the strategy of paying shareholders in non-dividend form was “widely employed” in the late twentieth century); *id.* § 1:24 (remarking that the increasing impact of income taxes during the twentieth century encouraged the use of close corporations, especially election of subchapter S); see also Hamill, *Catalyst*, *supra* note 25, at 413–18 (documenting empirically that small-asset corporations contribute only a negligible amount to corporate tax revenues when compared to their total receipts, and illustrating that this is largely accomplished by either making deductible payments to the shareholders or electing subchapter S).

⁶⁰ See Hamill, *Classification*, *supra* note 16, at 574, 581–88, 574 n.38. In 1822, New York created the first limited partnership statute to provide business participants an alternative to a special corporate charter. The limited partnership statute treated the investors, known as limited partners, like corporation shareholders, while the business was managed by the general partners. See Hamill, *Special Privilege*, *supra* note 10, at 172 & n.328. By 1875, over 80% of the states authorized the formation of limited partnerships by state filings outside of the legislatures, while many corporations were still being created by special charters issued by the state legislatures. *Id.* at 173 & n.331. Unlike the corporation, which by the 1830s had emerged as the dominant business organization, limited partnerships experienced significant hostility from nineteenth century courts. *Id.* at 174 & n.333. In 1916, the Uniform Law Commissioners sponsored a Uniform Limited Partnership Act to improve the viability of limited partnerships. *Id.* at 175 & n.335. However, their growth continued to be stymied by difficulties qualifying for partnership taxation under the federal income tax authorized in 1913 by the Sixteenth Amendment. The 1914 partnership classification regulations simply stated that all limited partnerships are taxed as corporations, and, despite subsequent amendments, for many years it remained difficult for limited partnerships to be taxed as a partnership. It took until 1960, when the IRS overhauled these regulations and made it easy for limited partnerships to be taxed as partnerships, for the limited partnership to start emerging as one of the dominant business organizations. See Hamill, *Origins*, *supra* note 15, at 1504–08.

⁶¹ See Hamill, *Classification*, *supra* note 16, at 598–608 (arguing for the elimination of partnership classification regulations).

treating similarly-situated taxpayers the same.⁶² The rise of the LLC did not cause or aggravate these violations of horizontal equity.⁶³ However, it is reasonable to speculate that the LLC exposing these horizontal equity violations in the business tax world partially explains why it took the IRS more than ten years to recognize that Wyoming LLCs were taxed as partnerships and almost ten years after that to eliminate the partnership classification regulations.⁶⁴

The demise of the partnership classification regulations gave state legislatures an opportunity to have sound business policy guide the LLC statutory default provisions addressing dissolution triggers and a member's ability to withdraw and be bought out, commonly referred to as dissociation rights. On balance, when choosing the best default LLC provisions governing dissolution and dissociation rights, sound business policy supports LLC default provisions eliminating dissolution triggers but leaving dissociation with buyout rights in place. Such provisions allow unsophisticated minority members who have fallen out of favor with the majority group some bargaining power to avoid litigation while preserving the ability of more sophisticated business planners who wish to eliminate dissociation rights to do so in the operating agreement.⁶⁵ Although a number of theories exist to help guide default

⁶² See JOEL SLEMROD & JOHN BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 133–37, 141–42, 239 (5th ed. 2017) (discussing the concept of horizontal equity in the tax law area).

⁶³ See Hamill, *Catalyst*, *supra* note 25, at 431–38; Hamill, *Story*, *supra* note 31, at 310–13.

⁶⁴ See Hamill, *Origins*, *supra* note 15, at 1466–67 & nn.27–28 (Although the IRS had issued favorable partnership classification private letter rulings to foreign entities offering direct limited liability, letters between Frank Burke and his colleagues documented their three-year ordeal. In the letters, the parties discussed that “[w]ithout some outside encouragement, [their] ruling could be hung-up in the Chief Counsel’s office for months,” that there was “no justification for [the] two-year delay,” and “[the] reasons for delay include ‘the usual buck passing’”); *id.* at 1473, 1478–82, 1473 n.52, 1478 nn.79–82, 1479–82 nn.87–90, 93–100 (documenting extensive meetings over a five-year period where Spudis, Keatinge, and their colleagues struggled to get the IRS to apply the partnership classification regulations to LLCs in the same manner as limited partnerships, and the IRS’s elimination of those regulations not even a year after finally granting this request).

⁶⁵ See Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 968 (2005) [hereinafter Moll] (noting that the statutory default provision matters a great deal because, due to lack of advanced planning, “default rules will become the operational provisions for a substantial number of enterprises [and if] those statutes provide little or no default protections for minority owners, a breeding ground for oppression is created.”); see generally Laurel Wheeling Farrar & Susan Pace Hamill, *Dissociation from Alabama Limited Liability Companies in the Post Check-the-Box Era*, 49 ALA. L. REV. 909 (1998) [hereinafter Farrar & Hamill, *Dissociation*]; Sandra K. Miller, *What Buy-Out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply in the Case of the Minority Owner of a Limited Liability Company*, 38 HARV. J. ON LEGIS. 413 (2001); Tanya Simpson, *Have Estate*

provisions, some of which would favor eliminating all dissociation rights with buyout rights in the LLC default provisions, no debate occurred that focused on business policy principles.⁶⁶ Instead, during the LLC's third phase of development, another part of federal tax law—the gift and estate tax valuation rules—dictated this very important LLC statutory provision.

Generally, the inability to transfer or liquidate an ownership interest in a business organization results in discounting its true fair market value, which means diminished gift and estate tax potential.⁶⁷ However, gifts and bequests among family in family-controlled businesses have additional requirements to achieve discounted valuation. The recipient must not only be unable to transfer or liquidate their interest, but the statutory default provision itself must also deny these rights.⁶⁸ Consequently, family-controlled businesses will only choose LLCs if the LLC's statutory default provision provides no rights for owners to dissociate and be bought out. If the LLC statutory default provides for these rights, then the value of gifts and bequests to family members of the LLC's shares never qualifies for discounted valuation. This is true even if the LLC's operating agreement eliminates these rights, which would render this LLC substantively indistinguishable from an LLC with no default statutory dissociation and buyout rights. For this reason, practitioners involved in family gift and estate tax planning successfully lobbied state legislatures to eliminate dissociation and buyout

Planners Hijacked the LLC? How Restrictions on Dissolution Have Crippled the LLC as a Viable Small Business Entity, 34 FLA. ST. U. L. REV. 573 (2007) [hereinafter Simpson].

⁶⁶ Although no evidence exists indicating that business policy concerns played any role in the movement to eliminate statutory dissociation rights with buyout rights in LLC default provisions, prominent law and economics scholars believe that this represents superior business policy. See Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 286–90 (1986) [hereinafter Easterbrook & Fischel] (assuming that shareholders in closely held corporations possess enough sophistication to contract for buyout rights, thereby rendering it both unnecessary and undesirable to provide for such rights in a statutory default; because Delaware's and many other LLC statutes emphasize freedom of contract, it is highly likely that Easterbrook and Fischel would also agree with the elimination of dissociation rights with buyout rights in LLCs); Larry E. Ribstein, *Close Corporation Remedies and the Evolution of the Closely Held Firm*, 33 W. NEW ENG. L. REV. 531, 560 (2011) (arguing that dissociation remedies of all types in LLCs should be worked out by parties in their agreement and should not be provided in a statutory default); see also Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) [hereinafter Ayres & Gertner] (discussing several theories for guiding default provisions and arguing in favor of “penalty defaults,” or default provisions that provide at least one party an incentive to contract around the default rule).

⁶⁷ I.R.C. § 2703(b).

⁶⁸ I.R.C. § 2704(b).

rights in the LLC statutory default provisions.⁶⁹

By the early twenty-first century, LLCs had swung from overwhelmingly mirroring general partnerships to largely mirroring corporations.⁷⁰ This tax law-driven development in the dissociation with buyout rights area essentially imported into LLCs the same vulnerability to oppression, squeeze-outs, and freeze-outs that minority shareholders in closely held corporations had been struggling with for years.⁷¹ It also meant that the courts and state legislatures in fifty states needed to decide how to respond to minority LLC members experiencing these problems.⁷²

IV. STATE LAW RESPONSES TO MINORITY SHAREHOLDERS

By the time LLCs joined the corporation side of the fence, all states had long been dealing with the plight of aggrieved minority shareholders in close corporations. Leading off with *Donahue v. Rodd Electrotype Co.* and *Wilkes v. Springside Nursing Home, Inc.*, the Massachusetts Supreme Judicial Court in the 1970s was among the first and most well-known states to judicially create partnership-flavored fiduciary duties among shareholders, thus providing closely held minority shareholders significant remedies.⁷³ To varying degrees, the highest

⁶⁹ See Farrar & Hamill, *Dissociation*, *supra* note 65, at 935–38; Simpson, *supra* note 65, at 578–80.

⁷⁰ Only three states (Maryland, Montana, and New Mexico) provide withdrawing LLC members dissociation rights in the default provisions that include buyout rights, and only if the withdrawing member is not wrongful. See MD. CODE ANN., CORPS. & ASS'NS § 4A-605; MONT. CODE ANN. § 35-8-804; N.M. STAT. ANN. § 53-19-24. These three LLC statutes still differ materially from general partnership statutes. For general partnerships governed by the Revised Uniform Partnership Act, not only are dissociation and liquidity rights immutable, even if a partner wrongfully dissociates such partner still must be bought out with damages subtracted from the price, albeit not until the end of any term or undertaking. See RUPA §§ 602(c), 701(c) (1994).

⁷¹ See *infra* notes 73–81 and accompanying text.

⁷² See O'NEAL & THOMPSON, *supra* note 57, § 9:45 (warning that “an individual participant left in a minority ownership position after a falling out among parties in a LLC may find himself or herself in a position similar to that of the minority shareholder in the close corporation”); see also Moll, *supra* note 65, at 956 (concluding, after an exhaustive study of close corporations and LLCs, that “[a]lthough generalizations are dangerous due to the wide variety of LLC statutes, the ‘seeds’ of oppression are, in many jurisdictions, present in the LLC setting”); Hamill, *Story*, *supra* note 31, at 314–15 (noting that the estate tax-driven elimination of dissociation rights in LLC default provisions have made LLCs “more perilous for many informal business arrangements”).

⁷³ *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 520 (Mass. 1975) (holding that a minority shareholder in a closely held corporation must have the same rights to sell her shares back to the corporation as those offered to a controlling shareholder); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661–65 (Mass. 1976) (holding that a shareholder could not be excluded from enjoying his share of the corporate profits unless

courts in other states also recognize that fiduciary duties exist among close corporation shareholders.⁷⁴ Well over two-thirds of the state legislatures also provide aggrieved minority shareholders statutory rights to sue for involuntary judicial dissolution due to oppression or similar grounds.⁷⁵ Although the scope of these statutory and common law remedies are far from uniform,⁷⁶ these state law responses prove that

there was a business purpose that could not be otherwise achieved in a less harmful way); see also Mark J. Loewenstein, *Wilkes v. Springside Nursing Home, Inc.: A Historical Perspective*, 33 W. NEW ENG. L. REV. 339 (2011) [hereinafter Loewenstein] (arguing that these cases rested on shaky grounds and are at least partially explained by the backgrounds of their authors, Chief Justices Tauro and Hennessey, respectively—both progressive judges interested in modernizing the law to be more fundamentally fair).

⁷⁴ See, e.g., *Fulton v. Callahan*, 621 So. 2d 1235 (Ala. 1993); *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270 (Alaska 1980); *Thomas v. Dickson*, 301 S.E.2d 49 (Ga. 1983); *Rosenthal v. Rosenthal*, 543 A.2d 348 (Me. 1988); *Crosby v. Beam*, 548 N.E.2d 217 (Ohio 1989); *Delaney v. Georgia-Pacific Corp.*, 564 P.2d 277 (Or. 1977); *In re Jones & Laughlin Steel Corp.*, 412 A.2d 1099 (Pa. 1980); *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997); *Masinter v. WEBCO Co.*, 262 S.E.2d 433 (W. Va. 1980).

⁷⁵ The corporation statutes of thirty-five states provide aggrieved minority shareholders involuntary judicial dissolution rights due to oppression or similar grounds (statutory language that varies from “oppression” is indicated in parenthesis following the cite). See ALA. CODE § 10A-2-14.30(2)(ii); ALASKA STAT. § 10.06.628(b)(4) (“those in control of the corporation have been guilty of . . . persistent unfairness towards shareholders”); ARIZ. REV. STAT. ANN. § 10-1430(B)(2); ARK. CODE ANN. § 4-27-1430(2)(ii); CAL. CORP. CODE § 1800(b)(4) (“Those in control of the corporation have been guilty of . . . persistent unfairness toward any shareholders”); COLO. REV. STAT. § 7-114-301(2)(b); CONN. GEN. STAT. § 33-896(a)(1)(B); HAW. REV. STAT. § 414-411(2)(B); IDAHO CODE § 30-29-1430(a)(2)(ii); 805 ILL. COMP. STAT. 5 / 12.50; IOWA CODE § 490.1430(2)(b); ME. STAT. tit. 13-C, § 1430(2)(B); MD. CODE ANN., CORPS. & ASS’NS § 3-413(b)(2); MINN. STAT. § 302A.751(b)(3) (“those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders”); MISS. CODE ANN. § 79-4-14.30(a)(2)(ii); MO. REV. STAT. § 351.494(2)(b); MONT. CODE ANN. § 35-14-1430(b)(ii); NEB. REV. STAT. § 21-2,197(2)(i)(B); N.J. STAT. ANN. § 14A:12-7(1)(c); N.Y. BUS. CORP. LAW § 1104-a(a)(1); N.C. GEN. STAT. § 55-14-30(2)(ii) (“liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder”); N.D. CENT. CODE § 10-19.1-115(2)(b)(3) (“those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders”); OR. REV. STAT. § 60.661(1)(b)(B); 15 PA. CONS. STAT. § 1981(a)(1); 7 R.I. GEN. LAWS § 7-1.2-1314(a)(1)(ii); S.C. CODE ANN. § 33-14-300(2)(ii); S.D. CODIFIED LAWS § 47-1A-1430(2)(b); TENN. CODE ANN. § 48-24-301(2)(B); UTAH CODE ANN. § 16-10a-1430(2)(b); VT. STAT. ANN. tit. 11, § 4101(a)(5)(A); VA. CODE ANN. § 13.1-747(A)(1)(b); WASH. REV. CODE § 23B.14.300(2)(b); W. VA. CODE § 31D-14-1430(2)(B); WIS. STAT. § 180.1430(2)(b); WYO. STAT. ANN. § 17-16-1430(a)(ii)(B).

⁷⁶ A fifty-state survey of the court decisions defining the parameters of judicially created fiduciary duties among close corporation shareholders and interpreting exactly what conduct constitutes “oppression” (or meets the articulated similar grounds) under each statute is beyond the scope of this article. Secondary sources indicate that these remedies are widespread and vary significantly. See F. HODGE O’NEAL & ROBERT THOMPSON, O’NEAL AND THOMPSON’S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS §§ 7:5, 7:17 (describing courts’ application of partnership fiduciary duty principles in a variety of close corporation settings and applying a variety of interpretations as to what constitutes

closely held corporations indeed materially differ from their widely held and publicly traded counterparts and that corporate law was initially framed around a big business model.⁷⁷

Delaware corporate shareholders have no statutory involuntary judicial dissolution remedies due to oppression or similar grounds.⁷⁸ A leading Delaware case, *Nixon v. Blackwell*,⁷⁹ which has facts remarkably similar to the *Donahue* case but reaches the opposite result,⁸⁰ is often invoked to show that Delaware does not recognize special common law fiduciary duties for shareholders in close corporations.⁸¹

oppression under the statutes); see also John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657 (2007) [hereinafter Matheson & Maler] (presenting a fifty-state survey of corporate statutes and case law that reveals that many states offer aggrieved minority shareholders remedies, although the scope of the remedies varies greatly from state-to-state).

⁷⁷ See O'NEAL & THOMPSON, *supra* note 57, § 1:24 (showing that most corporate statutes fail to distinguish between widely held and close corporations, with the statutory default provisions largely oriented toward the needs of widely held corporations with a market for the shares that "reflected little concern for the needs of small corporations"); see also Hamill, *Special Privilege*, *supra* note 10, at 91 (discussing that the principal legal benefits offered by the earliest corporations that were not available to partnerships "revolved around the corporation's ability to exist beyond the natural life of the shareholders, to pool large amounts of capital, and to own property"); *id.* at 106–07 (describing early general incorporation laws).

⁷⁸ See DEL. CODE ANN. tit. 8, §§ 273, 275 (stating that dissolution of a Delaware corporation requires a resolution adopted by a majority of the board and majority vote of the shareholders or unanimous vote of the shareholders if there has been no board action; if there are only two shareholders, each owning 50% of the stock, either may petition for dissolution on the grounds of deadlock).

⁷⁹ See *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993).

⁸⁰ In *Nixon*, minority shareholders alleged that the directors/majority shareholders breached their fiduciary duties by allowing employee shareholders buyout rights while denying nonemployee shareholders the same rights. *Id.* at 1370. In applying an "entire fairness" analysis to the directors/majority shareholders' conduct, the Delaware Supreme Court noted, "it is well established in our jurisprudence that stockholders need not always be treated equally for all purposes," *id.* at 1376, and then held that the nonemployee shareholders had been treated fairly. *Id.* at 1379. In contrast, in *Donahue*, a minority shareholder who was not an employee of the corporation successfully argued that she must be offered the same terms to sell her shares back to the corporation that were offered to a controlling shareholder, who was retiring from running day-to-day corporate affairs. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975).

⁸¹ Commenting on whether Delaware common law should recognize special fiduciary duties protecting minority shareholders, the Delaware Supreme Court stated:

It would run counter to the spirit of the doctrine of independent legal significance, and would be inappropriate judicial legislation for this Court to fashion a special judicially-created rule for minority investors when the entity does not fall within those statutes, or when there are no negotiated special provisions in the certificate of incorporation, by-laws, or stockholder agreements.

Although the key language of the *Nixon* opinion is technically dicta,⁸² it is highly unlikely that the Delaware Supreme Court would create special fiduciary duties between close corporation shareholders, along the lines of *Donahue* and *Wilkes*.⁸³ Consequently, minority shareholders in closely held Delaware corporations are basically on their own to contractually establish in advance any desired rights and protections.⁸⁴

Like Delaware, fourteen other state legislatures have chosen not to include involuntary judicial dissolution remedies for oppression or similar grounds in their corporation statutes.⁸⁵ The absence of this

Nixon, 626 A.2d at 1380–81.

⁸² See *Clemmer v. Cullinane*, 815 N.E.2d 651 (Mass. App. Ct. 2004). In a dispute involving a Delaware close corporation, a minority shareholder alleged that the controlling shareholders “initiated a course of conduct which resulted in the plaintiff being wrongfully frozen out.” *Id.* at 651–52. A Massachusetts court, technically applying Delaware law, refused to dismiss the minority shareholder’s complaint and stated that, “[d]espite the sweeping dicta, the *Nixon* decision did not preclude a cause of action for minority shareholder freezeout in close corporations.” *Id.* at 652. This interpretation, which is not binding on a subsequent Delaware court, is not surprising given Massachusetts’ commitment to protecting minority shareholders and in no way increases the likelihood that the Delaware Supreme Court will judicially create special fiduciary duties among close corporation shareholders along the lines of *Donahue* and *Wilkes* or similar cases.

⁸³ See *In re U.S. Eagle Corp.*, 484 B.R. 640, 652 (Bankr. D.N.J. 2012) (“Read as a whole, the *Nixon* holding and its dicta evidence that the Delaware Supreme Court would not recognize a judicially-created cause of action where there are no special provisions in the certificate of incorporation, by-laws, or shareholder agreements.”); Easterbrook & Fischel, *supra* note 66, at 270–80 (discussing that Delaware’s commitment to law and economics theory and freedom of contract assumes that close corporation shareholders are not entitled to rights and protections for which they have not bargained); see also Matheson & Maler, *supra* note 76, at 683–88 (describing *Nixon* as “[b]ucking the national trend,” and demonstrating through a subsequent Delaware Supreme Court case, *Riblet Products Corp. v. Nagy*, as well as debates among academics that “Delaware has not recognized the doctrine of oppression in closely held corporations . . . [and] it seems fair to state that the Delaware approach is outside of the mainstream.”); *Riblet Prods. Corp. v. Nagy*, 683 A.2d 37, 39–40 (Del. 1996) (holding, after denying fiduciary duty protections to a minority shareholder/employee for claims related to employment, that, although “*Wilkes* has not been adopted as Delaware law,” had Nagy alleged “that his termination amounted to a wrongful freeze out of his stock interest,” “the Majority Stockholders may well owe [him] fiduciary duties . . . as a minority shareholder.”).

⁸⁴ Although special statutory provisions apply to Delaware close corporations that are both eligible and follow detailed procedures, those provisions merely provide the shareholders greater contractual freedom; therefore, aggrieved minority shareholders enjoy no special fiduciary duty protections or involuntary dissolution rights on the grounds of oppression unless an agreement establishes those rights. See DEL. CODE ANN. tit. 8, § 350 (stating that a written agreement can eliminate the power of board); *id.* § 351 (stating that a certificate of incorporation can provide management by shareholders); *id.* § 354 (stating that a written agreement can provide partnership-style economic and management rights); *id.* § 355 (stating that a certificate of incorporation can establish shareholder dissolution rights upon a specified event or contingency).

⁸⁵ In addition to Delaware (see *supra* note 78), several other states offer aggrieved

statutory remedy does not necessarily mean an aggrieved minority shareholder has no other remedies.⁸⁶ At least four of these fourteen states, including Massachusetts,⁸⁷ recognize common law fiduciary duties between close corporation shareholders, despite the absence of oppression-style remedies in their statutory involuntary judicial dissolution provisions.⁸⁸

When viewing corporate law across the states as whole, the remedies of aggrieved minority shareholders differ substantially depending on the state of incorporation.⁸⁹ A strong argument can be made that this fifty-state approach is inefficient.⁹⁰ However, different responses by individual states to the same legal issue have been a feature of business organizations law since the nineteenth century, when the states

minority shareholders no statutory involuntary judicial dissolution remedies due to oppression or similar grounds. See FLA. STAT. § 607.1430; GA. CODE ANN. § 14-2-1430; IND. CODE § 23-1-47-1; KAN. STAT. ANN. § 17-6804; KY. REV. STAT. ANN. § 271B.14-300; LA. STAT. ANN. § 12:1-1430; MASS. GEN. LAWS ch. 156D, § 14.30(2); MICH. COMP. LAWS § 450.1823; NEV. REV. STAT. § 78.620; N.H. REV. STAT. ANN. § 293-A:14.30; N.M. STAT. ANN. § 53-16-13; OHIO REV. CODE ANN. § 1701.91; OKLA. STAT. tit. 18, § 18-381-62; TEX. BUS. ORGS. CODE ANN. § 11.301.

⁸⁶ See Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 700 (1993) ("In some states, the enhanced fiduciary duty has evolved in the absence of an oppression statute.").

⁸⁷ Compare MASS. GEN. LAWS ch. 156D, § 14.30(2) (allowing shareholders to petition for involuntary judicial dissolution only due to deadlock), with *supra* note 73 and accompanying text (discussing the *Donahue* and *Wilkes* cases, which provide common law fiduciary duty remedies for aggrieved minority shareholders); see also Loewenstein, *supra* note 73, at 359 ("[I]n Massachusetts it is fair to say that the statute contemplates a special role for the judiciary in terms of protecting minority stockholders.").

⁸⁸ Compare GA. CODE ANN. § 14-2-1430(2) (allowing shareholders to petition for judicial dissolution due to deadlock, illegality, fraud, or waste), with *Thomas v. Dickson*, 301 S.E.2d 49 (Ga. 1983) (recognizing a right of a minority shareholder experiencing an improper freeze-out to bring a direct action); and compare OHIO REV. CODE ANN. § 1701.91 (allowing shareholders to invoke involuntary dissolution for deadlock only), with *Crosby v. Beam*, 548 N.E.2d 217 (Ohio 1989) (allowing a shareholder to bring a direct action for breach of fiduciary duty); see also *Hollis v. Hill*, 232 F.3d 460 (5th Cir. 2000) (noting that the Nevada corporate statute does not offer an involuntary dissolution remedy on grounds of oppression, but concluding that the Nevada Supreme Court would find a common law fiduciary duty breach by a close corporation shareholder against another and ordering a buyout as the remedy).

⁸⁹ See *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (explaining that the internal affairs doctrine provides that the state of incorporation governs the regulations of a corporation's internal affairs, and the internal affairs of a corporation include the fiduciary duties owed to a corporation by its officers and directors, as well as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . .").

⁹⁰ See Hamill, *Special Privilege*, *supra* note 10, at 115-17 (describing business growing geometrically during the last few decades of the nineteenth century and the early twentieth century beyond the ability of the states to regulate and control).

conclusively established foundational legal authority over business organizations, and this is highly unlikely to change.⁹¹

V. MINORITY LLC MEMBERS SHOULD BE TREATED THE SAME AS MINORITY SHAREHOLDERS

When deciding on statutory and common law remedies available to minority owners of a closely held business organization experiencing oppression, freeze-outs, or squeeze-outs from the controlling majority group, no good business reasons exist for a particular state to treat minority corporation shareholders and minority LLC members differently.⁹² If the default provisions in the state statutes contain no buyout rights, as is the case for all corporation statutes and most LLC statutes, minority LLC members are vulnerable to the same oppression, freeze-outs, and squeeze-outs from the controlling majority group as minority shareholders in close corporations.⁹³ Although the scope of the remedies available to minority LLC members will inevitably differ depending on the state in which the LLC was formed,⁹⁴ principles of fairness, equity, and justice strongly demand that, within an individual state, the law should show parity between minority shareholders and minority LLC members.⁹⁵

Almost three-fourths of states provide LLC members statutory remedies for involuntary judicial dissolution that broadly mirror that state's corporation statute.⁹⁶ Twenty-one of these states offer LLC members essentially the same right to sue due to oppression or similar

⁹¹ *Id.* at 96 (discussing the defeat of the Bonus Bill in 1817, which would have interjected federal control over the nation's first major transportation effort, and that the defeat marks when state legislatures assumed primary power over corporations); *id.* at 118–22 (describing how the defeat of federal proposals in the first three decades of the twentieth century required corporations to secure a federal license or federal charter, which marked when state law power over corporations became “irreversibly entrenched”).

⁹² See *infra* notes 106–11 and accompanying text.

⁹³ See *supra* notes 70–72 and accompanying text.

⁹⁴ See *infra* notes 96–106 and accompanying text.

⁹⁵ See *infra* notes 112–23 and accompanying text.

⁹⁶ A detailed comparison of each of these individual state's involuntary judicial dissolution corporate and LLC statutory provisions and any court decisions interpreting these provisions to determine how closely corporate and LLC remedies actually mirror each other is beyond the scope of this article. See, e.g., Paul T. Geske, *Oppress Me No More: Amending the Illinois LLC Act to Provide Additional Remedies for Oppressed Minority Members*, 90 CHI.-KENT L. REV. 185, 208 (2015) (recognizing that the involuntary judicial dissolution remedy on the grounds of oppression exists in both the Illinois corporation and LLC statutes, but also arguing that the oppression remedy in Illinois's LLC statute is inadequate and should be amended to more closely reflect the expansive provisions in Illinois's corporation statute).

grounds that exist in that state's corporation statute.⁹⁷ Fifteen states, including Massachusetts and Delaware, deny involuntary judicial dissolution remedies due to oppression or similar grounds in both their corporation and their LLC statutes.⁹⁸

In its response to minority LLC members experiencing oppression, squeeze-outs, or freeze-outs from the controlling group, Massachusetts law offers a model of perfect parity. Over thirty years after the *Donahue* and *Wilkes* decisions, the Massachusetts Supreme Judicial Court recognized that minority LLC members enjoyed the same common law fiduciary duty remedies as minority shareholders.⁹⁹ Minority members of closely held Delaware LLCs will likely find the law just as

⁹⁷ The LLC statutes of twenty-one states provide statutory involuntary judicial dissolution rights due to oppression or similar grounds (statutory language that varies from "oppression" is indicated in parenthesis following the cite). See CALIF. CORP. CODE § 17707.03(b)(2) (allowing involuntary dissolution if "[d]issolution is reasonably necessary for the protection of the rights or interests of the complaining members"); CONN. GEN. STAT. § 34-267(5)(B); HAW. REV. STAT. § 428-801(4)(E); IDAHO CODE § 30-25-701(a)(4)(C)(ii); 805 ILL. COMP. STAT. 180 / 35-1(a)(5)(B); IOWA CODE § 489.701(1)(e)(2); MINN. STAT. § 322C.0701(1)(5)(ii); MISS. CODE ANN. § 79-29-803(1)(b) (allowing dissolution "[w]henever the managers or the members in control of the limited liability company have been guilty of or have knowingly countenanced persistent and pervasive fraud or abuse of authority"); MONT. CODE ANN. § 35-8-902(1)(e); NEB. REV. STAT. § 21-147(a)(5)(B); N.J. STAT. ANN. § 42:2C-48(a)(5)(b); N.C. GEN. STAT. § 57D-6-02 (allowing dissolution if "liquidation of the LLC is necessary to protect the rights and interests of the member"); N.D. CENT. CODE § 10-32-119(1)(b)(2); (allowing dissolution when "those in control of the limited liability company have acted fraudulently, illegally, or in a manner unfairly prejudicial toward one or more members"); 15 PA. CONS. STAT. § 8871(a)(4)(iii)(B); S.C. CODE ANN. § 33-44-801(4)(e); UTAH CODE ANN. § 48-3a-701(5)(b); VT. STAT. ANN. tit. 11, § 4101(a)(5)(B); WASH. REV. CODE § 25.15.274 (allowing dissolution when "other circumstances render dissolution equitable"); W. VA. CODE § 31B-8-801(b)(5)(v); WIS. STAT. § 183.0902(3); WYO. STAT. ANN. § 17-29-701(a)(v)(B). The corporation statutes of these twenty-one states also provide shareholders statutory involuntary judicial dissolution rights for oppression or similar grounds. See *supra* note 75.

⁹⁸ The LLC statutes of fifteen states offer no statutory involuntary judicial dissolution remedies due to oppression or similar grounds. See DEL. CODE ANN. tit. 6, § 18-802; FLA. STAT. § 605.0702; GA. CODE ANN. § 14-11-603; IND. CODE § 23-18-9-2; KAN. STAT. ANN. § 17-76,117; KY. REV. STAT. ANN. § 275.290; LA. STAT. ANN. § 12:1335; MASS. GEN. LAWS ch. 156C, § 43; MICH. COMP. LAWS § 450.4802; NEV. REV. STAT. § 86.495; N.H. REV. STAT. ANN. § 304-C:134; N.M. STAT. ANN. § 53-19-40; OHIO REV. CODE ANN. § 1705.47; OKLA. STAT. tit. 18, § 2038; TEX. BUS. ORGS. CODE ANN. § 11.314. The corporation statutes in these fifteen states also offer no statutory involuntary judicial dissolution remedies due to oppression or similar grounds. See *supra* notes 78, 85.

⁹⁹ *Pointer v. Castellani*, 918 N.E.2d 805, 815–17 (Mass. 2009) (citing *Donahue* and *Wilkes* and holding that majority members of an LLC wrongfully froze-out a minority member when they removed him as president of the LLC); *Allison v. Eriksson*, 98 N.E.3d 143, 152 (Mass. 2018) (holding that, in connection with a merger of a Massachusetts LLC into a Delaware LLC that had the effect of diluting the minority member's interest and significantly reducing the minority member's rights under the operating agreement, citing *Donahue*, the majority member violated the duty of loyalty owed to the minority member).

harsh as their minority shareholder counterparts.¹⁰⁰ Even though Delaware and Massachusetts radically diverge, further illustrating the downside of the foundation of business law residing at the state level, nevertheless, these two high-profile states offer the best examples of minority LLC members and minority shareholders experiencing oppression, freeze-outs, and squeeze-outs being treated consistently.¹⁰¹

In fourteen states, the involuntary judicial dissolution corporation statute allows shareholders to sue due to oppression or similar grounds, while those same states' LLC statutes deny any semblance of that same remedy to LLC members.¹⁰² Like the corporation arena, the lack of an

¹⁰⁰ The Delaware LLC statute cryptically establishes fiduciary duties in its default provision. See DEL. CODE ANN. tit. 6, § 18-1104 (“In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law of merchant shall govern.”). A Delaware court is unlikely to apply LLC fiduciary duties in a partnership-flavored fashion similar to Massachusetts. See *Nightingale & Assocs., LLC v. Hopkins*, No. 07-4239, 2008 WL 4848765 (D.N.J. 2008) (applying Delaware law and dismissing minority LLC member’s cause of action for oppression because “Delaware does not have a statutory cause of action for minority shareholder oppression” and then, citing *Nixon v. Blackwell*, stating that “the Delaware Supreme Court has refrained from applying remedies for alleged oppression, finding that a person buying into a minority position can bargain for certain protections.”); see also *supra* notes 79–84. The Delaware Supreme Court affirmed the Chancery Court’s holding that a duty of loyalty breach occurred when two managers of a three-person manager-managed LLC merged the LLC into a Delaware corporation, which diluted the LLC’s former majority member-manager (who also had the authority to appoint himself and one other person to the LLC’s three-person management team) into a minority position in the corporation. Despite having the authority to accomplish the merger by majority vote through the written consent procedure, by deliberately concealing the planned merger from the third member-manger (which would have alerted him to replace one of the two breaching managers with an ally), they breached their duty of loyalty to that majority member-manager. See *VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. 2000). The duty of loyalty breach in *Castiel* involved the deliberate withholding of information under circumstances that deprived the majority member-manger from invoking his majority rights; therefore, the opinion does not serve as binding or even persuasive authority for future Delaware courts to judicially create partnership-flavored fiduciary duties to minority LLC members along the lines of *Donahue*, *Wilkes*, or similar cases.

¹⁰¹ See *supra* notes 73, 79–83 and accompanying text.

¹⁰² The LLC involuntary judicial dissolution provisions of fourteen states provide no remedy for oppression or similar grounds (statutory language requirements of LLC members petitioning for involuntary judicial dissolution are indicated in parenthesis following the cite). See ALA. CODE § 10A-5A-7.01(d) (allowing dissolution on the grounds that “it is not reasonably practicable to carry on the limited liability company’s activities and affairs in conformity with the limited liability company agreement”); ALASKA STAT. § 10.50.405 (allowing dissolution “if the court determines that it is impossible for the company to carry on the purposes of the company”); ARIZ. REV. STAT. § 29-785(A) (allowing dissolution on the grounds that “[i]t is not reasonably practicable to carry on the limited liability company business in conformity with an operating agreement,” “the members or managers are deadlocked,” “the members or managers of the limited liability company have acted or are acting in a manner that is illegal or fraudulent,” or “substantial assets of the limited liability

explicit oppression-style remedy in a state's LLC involuntary judicial dissolution provision does not preclude the state's courts from judicially fashioning a common law remedy or interpreting the involuntary judicial dissolution grounds the LLC statute does offer in a sympathetic way to create a measure of parity with minority shareholder counterparts.¹⁰³ However, the prima facie inequitable statutory treatment of

company are being wasted, misapplied or diverted for purposes not related to the business of the limited liability company"); ARK. CODE ANN. § 4-32-902 (allowing dissolution on the grounds that "it is not reasonably practicable to carry on the business of the limited liability company in conformity with the operating agreement"); COLO. REV. STAT. § 7-80-810(2) (allowing dissolution "if it is established that it is not reasonably practicable to carry on the business of the limited liability company in conformity with the operating agreement of said company"); ME. STAT. tit. 31, § 1595(1)(D)-(E) (allowing dissolution "on the grounds that it is not reasonably practicable to carry on the limited liability company's activities in conformity with the limited liability company agreement," or "the members in control of the limited liability company have acted, are acting or will act in a manner that is illegal or fraudulent"); MD. CODE ANN., CORPS. & ASS'NS § 4A-903(2) (allowing dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or the operating agreement"); MO. REV. STAT. § 347.143 (allowing dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the operating agreement"); N.Y. LTD. LIAB. CO. LAW § 702 (allowing dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement"); OR. REV. STAT. § 63.661(1)(b) (allowing dissolution if "it is not reasonably practicable to carry on the business of the limited liability company in conformance with the articles of organization or any operating agreement"); 7 R.I. GEN. LAWS § 7-16-40 (allowing dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement"); S.D. CODIFIED LAWS § 47-34A-801(a)(4)(iii) (allowing dissolution when "[i]t is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement"); TENN. CODE ANN. § 48-245-902(a) (allowing dissolution "whenever it is not reasonably practicable to carry on the business in conformity with the articles and/or the operating agreement"); VA. CODE ANN. § 13.1-1047(A) (allowing dissolution when "it is not reasonably practicable to carry on the business in conformity with the articles of organization and any operating agreement"). The corporation statutes in these states provide statutory involuntary judicial dissolution rights due to oppression or similar grounds. See *supra* note 75.

¹⁰³ See *supra* notes 86–88 and accompanying text. The South Dakota Supreme Court's interpretation of that state's LLC involuntary judicial dissolution statute arguably creates a measure of parity with the state's corporation counterpart. See *Kirksey v. Grohmann*, 754 N.W.2d 825, 826 (S.D. 2008). In *Kirksey*, four sisters formed an LLC to hold title to the family ranch, which they had inherited in equal shares. *Id.* The relationship between the two sisters responsible for day-to-day operations and the two sisters who lived out-of-state soon deteriorated, resulting in the two sisters managing the ranch continuing the LLC's ranching and livestock operations under the lease, despite the objections of the two out-of-state sisters. *Id.* Although the LLC's operating agreement contained no procedure to break a tie and there "was no dispute that the ranching and livestock operation, as a business can continue," the court granted the out-of-state sisters' petition for involuntary judicial dissolution on the grounds it was not "reasonably practicable to carry on the company's business in accordance with the articles of organization and the operating agreement" because the four sisters had intended to have an equal voice in the LLC's affairs. *Id.* at 827, 830.

these fourteen states is greatly aggravated if those states' courts decline to judicially fashion common law fiduciary duties among LLC members¹⁰⁴ and also interpret the statute in a way that creates no parity between minority LLC members and minority shareholders.¹⁰⁵ Although it is grossly inequitable for a particular state to provide minority corporation shareholders significantly greater remedies than minority LLC members, state law control over business law allows this dichotomy between corporations and LLCs.¹⁰⁶

Arguments suggesting that business policy justifies providing minority members of LLCs weaker remedies than minority shareholders¹⁰⁷ fail to recognize that the invention of LLCs was completely tax-driven.¹⁰⁸ As the LLC developed, business policy played no role in

Because the four sisters failed to ensure that the operating agreement protected this intended equal voice, the court's ruling arguably stretches the "reasonably practicable" concept beyond the four corners of the operating agreement to consider relationships among the LLC members that encompass oppression-related concerns, which are explicit grounds for involuntary judicial dissolution in the corporation statute.

¹⁰⁴ A survey of any court decisions in these fourteen states defining the parameters of judicially-created fiduciary duties among close corporation shareholders and LLC members is beyond the scope of this article.

¹⁰⁵ In at least two of these fourteen states—New York and Virginia—courts have interpreted their LLC statutory involuntary judicial dissolution standards on "not reasonably practicable to carry on the business" grounds in a strict fashion that focuses on being able to continue the business as opposed to a particular member claiming unfair treatment or objecting to the strategy of the continued business. *See* *Horning v. Horning Constr., LLC*, 816 N.Y.S.2d 877, 884 (N.Y. Sup. Ct. 2006) (in dismissing involuntary judicial dissolution petition of a one-third minority member, court acknowledged sympathy for petitioner's plight, noted that their corporate statute offers "more liberal involuntary dissolution standards designed to protect minority interests," and then concluded the business can continue despite minority member's disagreement); *Dunbar Grp., LLC v. Tignor*, 593 S.E.2d 216, 219 (Va. 2004) (denying involuntary dissolution petition of a member who was removed from his managerial role and relegated to a passive investor role because the remaining managing-member could continue the business). A complete survey of the court decisions interpreting the involuntary judicial dissolution provisions of these fourteen states is beyond the scope of this article.

¹⁰⁶ *See supra* notes 10, 89–91, 94 and accompanying text.

¹⁰⁷ For an argument justifying disparate treatment of minority shareholders and LLC members, see Loewenstein, *supra* note 73, at 365 ("In the world of business entities . . . , statutory corporate law should provide any protections to which shareholders are entitled, while members of a limited liability company should look to the terms of the operating agreement for their protection."); *id.* at 366 (arguing it is "troubling" that the *Pointer* court "summarily concluded that the LLC met the definition of a 'close corporation'" and "never considered whether a limited liability company should be treated differently than a corporation and, indeed, never acknowledged that the parties to this litigation had formed a limited liability company.").

¹⁰⁸ The evidence conclusively establishes that combining limited liability and partnership tax status was the sole motivation behind the invention of the LLC. *See supra* notes 19–20 and accompanying text (illustrating that partnership classification was of central

framing exit rights in LLCs. The first generation LLC dissociation and dissolution provisions totally revolved around complying with the then-in-effect partnership classification regulations for federal income tax purposes.¹⁰⁹ The elimination of LLC dissociation rights with buy-out rights after the IRS repealed those regulations was motivated by gaining access to favorable valuation discounts under the federal gift and estate tax rules.¹¹⁰ At no time did a reasonable debate based on sound business policy principles ever guide the extremely important business law question as to whether LLC statutory default provisions should contain dissociation rights that include buyout rights. Instead, the proverbial tax tail wagged the business dog.¹¹¹

An aggrieved minority LLC member denied remedies in a particular state that provides remedies to similarly situated aggrieved minority shareholders might be tempted to challenge this discriminatory treatment as violating the Constitution's Equal Protection Clause. However, such a challenge would likely fail. The minority LLC member would not be able to invoke strict scrutiny because that only applies if the challenged law allegedly discriminates based on race or national origin or discriminates against aliens.¹¹² Similarly, intermediate scrutiny would not apply because the challenged law must allegedly discriminate based on gender or nonmarital children.¹¹³ All other laws will survive an equal protection challenge if the government can show that the law has a rational basis.¹¹⁴

Only in circumstances involving sympathetic plaintiffs has a law been deemed unconstitutional if it is evaluated in the rational basis

concern when Frank Burke drafted the first LLC proposal). The evidence also proves that until partnership tax status was assured, LLCs stood no chance of becoming a viable business organization. See *supra* notes 24–25 (discussing that only two LLCs were formed within a year of Florida passing its LLC statute, and fewer than 100 businesses filed as LLCs when partnership tax status was still questionable). The evidence also indicates that after LLCs were recognized as partnerships for tax purposes, in addition to the states rapidly passing their first LLC statute, the number of businesses filing as LLCs exploded when compared to meager filings of the earlier years. See Hamill, *Catalyst*, *supra* note 25, at 440–46 & nn.215–27 (documenting, with primary sources, that new LLC filings between September 2, 1988—the date Wyoming LLCs secured partnership tax status—and the middle 1990s grew from fewer than 100 filings to well over 200,000); *supra* notes 1–8 and accompanying text (showing through LLC filings from 2000 to 2017 that LLCs entered the mainstream of business organizations).

¹⁰⁹ See *supra* notes 19–20 and accompanying text.

¹¹⁰ See *supra* notes 67–69 and accompanying text.

¹¹¹ See *supra* notes 67–69 and accompanying text.

¹¹² See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9:1 (5th ed. 2015).

¹¹³ *Id.*

¹¹⁴ *Id.*

scrutiny category.¹¹⁵ While “sympathetic plaintiffs” have not been precisely defined, examples where the Supreme Court has identified “sympathetic plaintiffs” include intellectually disabled persons¹¹⁶ and indigent criminal defendants.¹¹⁷ It is highly unlikely that the Supreme Court would view a minority LLC member as a “sympathetic plaintiff” similar to an intellectually disabled person or an indigent criminal defendant, because, unlike those plaintiffs, minority LLC members possess an opportunity to establish rights and protections in advance using freedom of contract.¹¹⁸

Nevertheless, a particular state that provides minority LLC members fewer remedies than similarly situated minority corporation shareholders still violates the spirit of the Equal Protection Clause. For both close corporations and LLCs, the elimination of default buyout rights was an unintended side effect of securing strategic advantages that were unrelated to the question of whether the default provisions should contain buyout rights. Small business owners abandoned general partnerships and incorporated to achieve limited liability protection from the businesses’ debts, which resulted in majoritarian-based management structures and the elimination of default buyout rights.¹¹⁹ This necessitated a state law response to aggrieved minority shareholders who failed to bargain in advance for buyout rights and protections from majoritarian control.¹²⁰ Garnering favorable tax treatment under the estate and gift tax rules motivated the elimination of default buyout rights in most LLC statutes, rendering aggrieved members of closely held LLCs who also failed to invoke freedom of contract in the same position as aggrieved close corporation shareholders.¹²¹

The foundation of business organizations law residing at the individual state level guarantees that different states will reach different conclusions when deciding what, if any, remedies exist for minority shareholders and minority LLC members who fail to bargain for rights and protections in advance. This does not violate the spirit of the Equal Protection Clause because Congress has chosen not to federalize the law of business organizations.¹²² Although different legal remedies provided by different states’ laws remain an inevitable feature of the nationwide picture of business organizations law, principles of justice,

¹¹⁵ *Id.*

¹¹⁶ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

¹¹⁷ See *Griffin v. Illinois*, 351 U.S. 12 (1956).

¹¹⁸ See *supra* notes 65–66 and accompanying text.

¹¹⁹ See O’NEAL & THOMPSON, *supra* note 57, § 1:6.

¹²⁰ See *supra* notes 57–58, 73–88 and accompanying text.

¹²¹ See *supra* notes 67–72 and accompanying text.

¹²² See *supra* notes 10, 89–91 and accompanying text.

fairness, and horizontal equity strongly urge the courts and legislatures of a particular state to establish parity under that state's law between minority LLC members and minority shareholders.¹²³

VI. LLCs OFFER MORE OPPORTUNITY TO ELIMINATE FIDUCIARY DUTIES THAN CORPORATIONS

The ability to contractually eliminate fiduciary duties is another controversial area in which corporations and LLCs are treated differently under some state laws. Legal standards that cannot be contractually altered—known as immutable provisions—reflect an important policy that must prevail.¹²⁴ The fiduciary duties owed by directors to a

¹²³ Justice is defined as “[t]he fair treatment of people [and] [t]he fair and proper administration of laws.” *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019). Equal Justice Under the Law is “[t]he principle that all persons should be treated the same by the judicial system.” *Equal Justice Under the Law*, BLACK’S LAW DICTIONARY (11th ed. 2019). Fairness is defined as “[t]he quality of treating people equally or in a reasonable way.” *Fairness*, BLACK’S LAW DICTIONARY (11th ed. 2019); see Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595–96 (1987) (explaining that there must be consistency in the law to avoid it being applied in a manner that is “arbitrary, and consequently unjust or unfair.”). Horizontal Equity is a principle “that people in similar circumstances should be treated equally.” *Horizontal Equity*, OXFORD DICTIONARY OF ECONOMICS (5th ed. 2017). Horizontal equity has been extensively explored in the law of personal injury and damage awards. See, e.g., PRINCIPLES OF AGGREGATE LITIGATION § 1.04 cmt. f (“Ideally, the amount of compensation a claimant receives should reflect the merits of the claim itself” in order to “ensure horizontal equity (similarly situated claimants receive similar amounts)”); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, C.J., concurring) (stating that class actions help achieve horizontal equity among injured plaintiffs); Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*, 55 DEPAUL L. REV. 489, 514 (2006) (discussing personal injury damage awards, noting, “There are few more fundamental principles of justice than the principle that like cases should be treated alike. It is not easy to justify substantial horizontal inequity in any area of the law.”). The principle of horizontal equity has also been invoked in other areas of the law, including tax law (see *supra* note 62 and accompanying text (a fair tax system treats similarly situated taxpayers the same)); environmental law (see *Nat. Res. Def. Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 200 (D.C. Cir. 1988) (discussing that Congress intended to “maximize horizontal equity”)); and federal courts (see Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 231 (1999) (arguing that circuit court panels should balance judges appointed by Democrat and Republican presidents, stating that “[h]orizontal equity demands that similar cases be resolved the same way, insofar as humanly possible. . . . When the outcome of cases is highly contingent upon whether a panel is politically unified or split, the arbitrariness is apparent.”)).

¹²⁴ See Ayres & Gertner, *supra* note 66, at 88 (stating that immutable provisions are only appropriate if parties internal or external to the contract cannot adequately protect themselves). General partnerships governed by the Revised Uniform Partnership Act impose strong fiduciary duties among general partners and allow only limited contractual freedom to narrow the scope of these duties. See RUPA §§ 103(b)(3)–(b)(5) (1994). See also Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

corporation have both default and immutable components. Led by Delaware, most corporate statutes allow the fiduciary duty of care to be exculpated.¹²⁵ This means grossly negligent directors likely will not be liable for breaching their duty of care.¹²⁶ Although the requirement to act in good faith cannot be exculpated, case law illustrates that this standard provides shareholders very little protection.¹²⁷

Delaware corporate law forbids exculpating the duty of loyalty.¹²⁸ This renders the corporate opportunity doctrine immutable.¹²⁹ It also means that directors engaging in transactions with the corporation or making decisions on behalf of the corporation involving a conflict of

¹²⁵ See DEL. CODE ANN. tit. 8, § 102(b)(7). The Delaware legislature enacted the first corporate exculpatory provision in response to a Delaware Supreme Court decision holding that directors, although acting in good faith, can be held liable for breaching their duty of care if they arrive at a decision in a grossly negligent fashion. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). State legislatures all over the country and the Model Business Corporation Act followed Delaware's lead and amended their corporate statutes to permit the duty of care to be exculpated. See also Stephen A. Radin, *The Director's Duty of Care Three Years After Smith v. Van Gorkom*, 39 HASTINGS L.J. 707 (1988); Douglas S. Wilson, *Director and Officer Liability: State Legislative Reaction to Smith v. Van Gorkom*, 22 CREIGHTON L. REV. 747 (1988).

¹²⁶ See *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001) (dismissing, due to the exculpatory clause, plaintiffs' claim alleging a breach of the duty of care based on gross negligence).

¹²⁷ See *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005); *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006); JAMES B. STEWART, *DISNEY WAR* 213–14, 222 (2005) (discussing that directors approving an executive's employment contract with no fault termination clauses that ultimately cost the company \$140 million were held to meet the minimum good faith standard despite the deal being put together over a weekend under circumstances in which, contrary to Disney's by-laws, neither the compensation committee nor the full Disney board reviewed the agreement over that weekend, only three board members knew any details before the agreement was approved, and no board member asked any relevant questions).

¹²⁸ DEL. CODE ANN. tit. 8, § 102(b)(7).

¹²⁹ The corporate opportunity doctrine, which defines the scope of the duty of loyalty directors owe the corporation, like other state law-controlled areas of business law, varies significantly from state-to-state. Delaware's approach allows directors considerable leeway, especially when the corporation faces significant financial challenges in taking advantage of the opportunity. See *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148 (Del. 1996) (holding that there was no requirement that an opportunity within the corporation's line of business be presented to the board if the director reasonably concludes the corporation has no financial ability to take advantage of the opportunity); see also, *Pers. Touch Holding Corp. v. Glaubach*, No. 11199-CB, 2019, 2019 WL 937180 (Del. Ch. Feb. 25, 2019) (holding that director usurped a corporate opportunity when he purchased real estate that met the line of business standard under circumstances in which the corporation was both interested in the opportunity and had the financial ability to acquire it); *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 833 A.2d 961, 972 (Del. Ch. 2003) (dismissing, for failure to plead sufficient facts supporting the claims, shareholder's claims that directors usurped a corporate opportunity and breached the general duty of loyalty by conducting personal and financial affairs in a way that harmed the corporation).

interest must receive disinterested ratification to enjoy the business judgment rule presumption and avoid the fairness-to-the-corporation heightened scrutiny.¹³⁰

Delaware's LLC statute permits the elimination of all fiduciary duties within the agreement, except for the implied covenant of good faith and fair dealing.¹³¹ Consequently, the duty of loyalty, including the requirement of disinterested ratification to avoid heightened scrutiny of conflict of interests, is no longer immutable for Delaware LLCs as well as other states following Delaware's LLC statute.¹³² Moreover, the Delaware Supreme Court has explicitly stated that LLC members cannot challenge duty of loyalty breaches and unratified conflicts of interest if those duties were properly eliminated in the LLC.¹³³ Delaware courts have also recognized that a far-reaching provision that "effectively eviscerate[s] the duty of loyalty," while permissible under Delaware's LLC Act, would not be enforceable under Delaware corporate law.¹³⁴

¹³⁰ DEL. CODE ANN. tit. 8, § 144.

¹³¹ DEL. CODE ANN. tit. 6, § 18-1101(e); see also Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 226–27 (2009) (discussing the 2004 amendments to Delaware's limited partnership and LLC statutes that allowed complete contractual freedom to waive fiduciary duties).

¹³² See 2 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 12:1 (2020 update) (identifying twenty-five states (Alabama, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Mississippi, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Tennessee, Washington, and Wisconsin) in which the LLC statute broadly authorizes the waiver of fiduciary duties); see also H. Justin Pace, *Contracting Out of Fiduciary Duties in LLCs: Delaware Will Lead, but Will Anyone Follow?*, 16 NEV. L.J. 1085, 1135–39 (2016) (arguing that contractual waiver of fiduciary duties should be permitted in LLCs).

¹³³ See *Wood v. Baum*, 953 A.2d 136 (Del. 2008); *Wiggs v. Summit Midstream Partners, LLC*, No. 7801-VCN, 2013 WL 1286180 (Del. Ch. Mar. 28, 2013) (holding that specific language in Delaware LLC management agreement eliminating fiduciary duties resulted in dismissal of complaints alleging failures to disclose material information and self-interested acts); see also *Zimmerman v. Crothall*, 62 A.3d 676 (Del. Ch. 2013) (dismissing plaintiff's challenge of self-dealing transactions because the LLC agreement allowed for fair self-dealing transactions and plaintiff was unable to meet the burden of proving unfairness to the company).

¹³⁴ *Sutherland v. Sutherland*, No. 2399-VCL, 2009 WL 857468, at *4 (Del. Ch. Mar. 23, 2009) (stating that corporate exculpatory clauses that "eviscerate the duty of loyalty" are not enforceable under Delaware law, and "such a provision is permissible under the Delaware Limited Liability Company Act"); see *In re Fitbit, Inc.*, No. 2017-0402-JRS, 2018 WL 6587159, at *18–19 (Del. Ch. Dec. 14, 2018) (rejecting the argument that an exculpatory clause used by a Delaware corporation protects directors from breach of duty of loyalty claims resulting from certain directors using their inside knowledge of problems with a corporate product to gain an advantage when selling their shares in conjunction with an

The growing number of publicly traded LLCs suggests that in the future the LLC could be used in the big business arena as an end-run around the immutable duty of loyalty that still exists in corporations. An empirical study of eighty-five publicly traded Delaware limited partnerships and LLCs indicates that the contractual waiver of fiduciary duties is widespread, and there are no meaningful contractual substitutes to protect investors.¹³⁵ Most of these publicly traded limited partnerships and LLCs are in passive asset management businesses, such as collecting interest, dividends, rents, and income derived from natural resources, which allows the entity and the investors to benefit from the favorable partnership tax rules despite being publicly traded.¹³⁶ Businesses engaged in active enterprises that choose a LLC when going public or convert to a LLC if already or soon to be publicly traded will be taxed as a corporation under the publicly traded partnership rules.¹³⁷ However it is not unreasonable to predict that at least some active enterprise-oriented businesses that otherwise would be publicly traded corporations may gravitate toward the LLC solely to free the managers from owing the immutable fiduciary duty of loyalty.¹³⁸

Many corporate scholars argue that a widespread ability to eliminate fiduciary duties is detrimental, while others claim contractual freedom should allow the opting-out of fiduciary duties.¹³⁹ At the very

initial public offering).

¹³⁵ Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 558 (2012) [hereinafter Manesh].

¹³⁶ See *supra* note 13 (discussing the publicly traded partnership rules taxing all publicly traded unincorporated businesses as corporations, which carve out at an exception that allows publicly traded partnerships engaged in managing certain passive assets to continue benefitting from the partnership tax rules); Manesh, *supra* note 135, at 598–603 (showing that only three of the eighty-five publicly traded limited partnerships and LLCs listed in Appendix A are in businesses not categorized as passive asset management).

¹³⁷ See *supra* note 13; Manesh, *supra* note 135, at 573.

¹³⁸ See Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477, 490 (2000) (explaining that after the Delaware legislature amended its corporate statute to add the exculpatory provision, the board of directors serving Delaware's largest corporations enthusiastically embraced this opportunity to eliminate their duty of care, with ninety-eight out of a sample of 100 Fortune 500 companies adopting an exculpatory provision).

¹³⁹ In 1989, a symposium issue of the *Columbia Law Review* with prominent scholars, including Frank Easterbrook, Daniel Fischel, Jeffrey Gordon, and John Coffee, explored tensions in corporate law between contractual freedom and mandatory provisions. See Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989). This debate has continued. See, e.g., Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989); Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990); Robert

least, within a particular state, a dichotomy in fiduciary duty waiver potential between corporations and LLCs makes no more sense than providing oppressed minority LLC members fewer remedies than comparable minority shareholders in closely held corporations.¹⁴⁰

If, in the future, LLCs become an instrument perpetuating a widespread elimination of fiduciary duties, LLCs cannot be criticized as causing these consequences. Like all other evolutions in business organizations law, state law control over the foundation of business organizations law would be the cause.¹⁴¹ Since the early decades of the twentieth century, federal law has stepped in to address harmful consequences in the business world caused by the inadequacy of state law.¹⁴² Federal law could overrule state law-sanctioned elimination of fiduciary duties in LLCs and harmonize the standard for corporations, perhaps by creating nationally defined mandatory fiduciary duties, at least for SEC reporting companies.¹⁴³

VII. OTHER UNFORTUNATE STATE LAW-SANCTIONED USE OF LLCs

The changes in LLC business law that eliminated dissociation rights with buyout rights while in some states providing fewer remedies to oppressed minority LLC members and also created greater opportunities to waive fiduciary duties in LLCs than exist in corporations are not the only examples of questionable state law-sanctioned uses of LLCs thwarting the honorable intentions behind its creation and early development. By the second decade of the twenty-first century, devious connivers were using LLCs to purchase real estate and hide their true identities behind the LLC while controlling the real estate. The first-generation LLC statutes were not designed particularly for real estate and tended to require some level of transparency regarding who controlled the LLC.¹⁴⁴

B. Thompson, *The Law's Limits on Contracts in a Corporation*, 15 J. CORP. L. 377 (1990).

¹⁴⁰ See *supra* notes 92–95, 107–11, 120–23 and accompanying text.

¹⁴¹ See *supra* notes 10, 72, 76, 89–91, 94, 106 and accompanying text.

¹⁴² Hamill, *Special Privilege*, *supra* note 10, at 169 & nn.322–23 (discussing the National Transportation Act of 1920, the Securities Acts of 1933 and 1934, and the National Banking Act of 1935 as representing the first effective uses of federal law to curb corporate abuses that were beyond the power of the states to collectively stop).

¹⁴³ See Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1484 (1992) (discussing the expansion of federal law to govern the fiduciary duties of managers and controlling shareholders); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 701 (1974) (arguing that minimum federal legal standards should apply to companies doing business across state lines in order to foster uniformity and consistent public policy).

¹⁴⁴ See Keatinge et al., *supra* note 20, at 410–11, 419.

Although LLCs are required to list a registered agent, over time state laws made it easier to conceal who actually controls the LLC. A *New York Times* article focusing on condominium units at the Time Warner Center on Central Park in Manhattan revealed a number of wealthy foreigners, many of whom were being investigated for housing and environmental violations as well as financial fraud, owned units with an LLC concealing their identity.¹⁴⁵ Other vigorous investigative reporting revealed a rash of blighted properties in Memphis, Atlanta, and Philadelphia owned by LLCs, resulting in tenants and others in the community unable to discover who is responsible for the properties' upkeep and taxes.¹⁴⁶

Unlike other financial transactions, public policy surrounding the ownership of real estate has always required transparency regarding who owns and controls property.¹⁴⁷ By not requiring this transparency, the LLC is clearly being used in a manner that thwarts a bedrock public policy of property law. Like all other developments surrounding LLCs, the problem lies with state law having control over the law of business organizations.¹⁴⁸ On January 1, 2021, the Corporate Transparency Act, which requires certain corporations and LLCs to identify their beneficial owners to the Treasury Department, provided the kind of necessary federal law that hopefully will thwart this use of LLCs to obscure the true owner of real property. The Corporate Transparency Act defines beneficial owners as individuals owning 25% or more of the entity's equity as well as individuals with significant responsibility to control,

¹⁴⁵ See Louise Story & Stephanie Saul, *Hidden Wealth Flows to Elite New York Condos*, N.Y. TIMES, Feb. 8, 2015, at A1; see also Áine Cain, *LuLaRoe's Founders Have Been Linked to 31 LLCs Set Up During the Last 3 Years—and a Lawsuit Alleges They're Attempting to Shield Assets like a Gulfstream Jet, a Ranch in Wyoming, and a World-Record-Breaking Supercar Named Ruthie*, BUS. INSIDER (Jan. 5, 2019, 11:01 AM), <https://www.businessinsider.com/lularoe-lawsuit-founders-llcs-2018-11> [<https://perma.cc/V5WT-BLEY>].

¹⁴⁶ See Emily Badger, *The Opaque World of Ownership by L.L.C.*, N.Y. TIMES, May 1, 2018, at B1 [hereinafter Badger]; Willoughby Mariano, *How Corporate Secrecy Can Harm Neighborhoods*, ATLANTA J. CONST., June 13, 2016, at A11; see also e-mail from Caitlin McCabe, *The Philadelphia Inquirer* Reporter, to author (Mar. 1, 2019 and May 1, 2019) (on file with author) (discussing LLCs disguising real estate transactions in the Philadelphia housing market).

¹⁴⁷ See Charles Szypszak, *Real Estate Records, The Captive Public, and Opportunities for the Public Good*, 43 GONZ. L. REV. 5, 5 (2007) (discussing how public property records provide owners and investors a source to view their rights, noting that "owners and investors depend on the legal effect" of public records, which "sustain a trillion-dollar real estate market"); see also Badger, *supra* note 146, at B1 ("We basically have a property system where you're supposed to be able to look up who owns what property," quoting Dan Immergluck, a professor at Georgia State University).

¹⁴⁸ See *supra* notes 10, 72, 76, 89–91, 94, 106 and accompanying text.

manage or direct the entity. Although generally not publicly available, the Corporate Transparency Act provides numerous avenues to obtain this information, including rights of state or local agencies conducting criminal or civil investigations to petition a court to authorize access to the identity of beneficial owners.¹⁴⁹

VIII. CHALLENGES TEACHING AND UNDERSTANDING LLCs IN THE BUSINESS ORGANIZATIONS WORLD

An effective strategy for teaching business organizations, including the LLC's place within that plan, is the key to understanding both LLCs and business organizations in general. The challenge is how to make sense of a body of law that looks like a random mass of statutes and cases. On my first day of class, I metaphorically describe the world of business organizations as "a tossed salad with many ingredients."

Before LLCs became prominent, the business organizations curriculum I adopted focused on the classic general partnership (with a small addendum mentioning limited partnerships), the classic corporation, and the closely held corporation.¹⁵⁰ Despite having to deal with state law producing fifty statutes and court decisions, this curriculum was reasonably manageable on a macro level because, regardless of which state was involved, general partnerships materially differ from widely held and publicly traded corporations.¹⁵¹ Moreover, despite micro differences among the different states, at the broadest level general partnerships and corporations have dominant characteristics that do not significantly vary among the states.¹⁵² Although the states responded in different ways to the problems caused by the hybrid nature of closely held corporations, I was still able to easily cover this material because

¹⁴⁹ See Robert W. Downes et al., *The Corporate Transparency Act—Preparing for the Federal Database of Beneficial Ownership Information*, AMERICAN BAR ASSOCIATION: BUSINESS LAW SECTION (Apr. 16, 2021), <https://businesslawtoday.org/2021/04/corporate-transparency-act-preparing-federal-database-beneficial-ownership-information/#> [<https://perma.cc/WHV3-2927>] (discussing in detail this legislation, which when fully implemented in 2023 will create a database of beneficial ownership information to "crack down on anonymous shell companies, which have long been the vehicle of choice for money launderers, terrorists, and criminals."). A complete discussion of the Corporate Transparency Act is beyond the scope of this article.

¹⁵⁰ The early editions of my business organizations casebook mentioned LLCs only briefly. See CHARLES R. O'KELLEY, JR. & ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS* (1st ed. 1992, 2d ed. 1996, & 3d ed. 1999). During the first decade of the twenty-first century, the casebook increased its coverage of LLCs as a subset of corporations and partnerships and included several LLC cases. See CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, *supra* (4th ed. 2003 & 5th ed. 2006).

¹⁵¹ See Hamill, *Story*, *supra* note 31, at 310–11.

¹⁵² See *supra* notes 52, 56 and accompanying text.

close corporation issues predictably arose in a uniform way across the fifty states, and close corporations materially differ from both general partnerships and widely held and publicly traded corporations.¹⁵³

The rise of the LLC changed everything.¹⁵⁴ Especially in the fiduciary duty area, LLC law further blurred the lines between corporations and partnerships, causing the neatly organized macro structure I had perfected in my early Business Organizations classes to break down. Moreover, I could no longer totally ignore the other unincorporated business organizations, notably limited liability partnerships, referred to as LLPs, and limited liability limited partnerships, referred to as LLLPs, which the state legislatures had created on the heels of LLCs.¹⁵⁵ LLPs and LLLPs are state law general and limited partnerships where the general partners have registered to enjoy limited liability protection.¹⁵⁶ Although LLPs and LLLPs are far less significant than LLCs, the range of choices of unincorporated business organizations, with LLCs at the center, plus the widely different uses of both corporations and LLCs have caused significant challenges in my teaching and my students' understanding of business organizations.¹⁵⁷ Indeed, on my first day of class, as I provide the students copies of selected provisions of Alabama's General Partnership, Corporation, and LLC statutes, several students always ask, "Are these all the same?"¹⁵⁸

¹⁵³ See *supra* notes 57–59 and accompanying text.

¹⁵⁴ See Hamill, *Story*, *supra* note 31, at 303. By the second decade of the twenty-first century, my business organizations casebook elevated the LLC to its own unit. See CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS* (6th ed. 2010, 7th ed. 2014, & 8th ed. 2017).

¹⁵⁵ See Hamill, *Story*, *supra* note 31, at 313.

¹⁵⁶ *Id.* at 313–15 (discussing the rise of LLPs and LLLPs); see also Fallany O. Stover & Susan Pace Hamill, *The LLC Versus LLP Conundrum: Advice for Businesses Contemplating the Choice*, 50 ALA. L. REV. 813, 821 (1999) (discussing differences between LLCs and LLPs that should be considered when deciding between the two).

¹⁵⁷ Scholars have criticized the number of business organization choices as confusing and inefficient and have offered suggestions of how to streamline these choices. See Carol Goforth, *Too Many Cooks Spoil the Cake, and Too Many Statutes Spoil the LLC: A Plea for Uniformity*, 46 SW. L. REV. 63, 68–69 (2016); Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 575–78 (2016); Harry J. Haynsworth, *The Unified Business Organizations Code: The Next Generation*, 29 DEL. J. CORP. L. 83, 90 (2004); Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business "Limited Liability Entity" Statute (With Three Subsets of Default Rules)*, 32 WAKE FOREST L. REV. 101, 104 (1997); John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1, 2–3 (1996). Even before the rise of the LLC and the creation of the LLP and the LLLP, at least one scholar argued for combining the business organizations statutes into one. See Harry J. Haynsworth, *The Need for a Unified Small Business Legal Structure*, 33 BUS. LAW. 849, 853 (1978).

¹⁵⁸ I use the Alabama statutes to avoid the students having to incur the costs of purchasing a statutory supplement, which contains substantially more material than is possible to refer

At least one professor has argued that at least half of the basic business organizations class should be devoted to LLCs.¹⁵⁹ Lamenting that legal education in the business organizations area is “mired in the past,” he correctly points out that of all the business organizations, LLCs are by far the fastest growing, and partnerships are declining.¹⁶⁰ However, this plan disregards the fact that the creation of LLCs was completely tax-driven, and the evolution of LLCs has also been largely tax-driven.¹⁶¹ Moreover, LLCs are among the newest business organizations to join the panoply of choices, and, at the business core, LLCs reflect partnership or corporate characteristics or serve as a vehicle to push corporate characteristics beyond the moorings of corporate law.¹⁶² Simply put, it is impossible to understand LLCs without understanding partnership and corporate law, or what I describe to my students as “your partnership and corporate roots.”

In the post-mainstreamed LLC world, to make sense of the unwieldy assortment of business organizations statutes and cases, I now organize my three-hour Business Organizations class in a jurisprudential style wherein the evolution of United States business organizations guides the structure of the class.¹⁶³ Although declining in numbers, I start with general partnerships (calling them “granddaddy general partnerships”), because they are the oldest and most basic business organization form that requires no formal filing to materialize. I spend just over one-fourth of the class on this unit because, in addition to providing an overview of the class and the law of agency, I am introducing the students to fundamental concepts that will come up throughout the class. The most important of these concepts are fiduciary duties, which general partners owe to each other, and dissociation rights with buyout rights, both of which originated in the earliest general partnerships when corporations still required a special charter.¹⁶⁴

to in class. The casebook adequately covers the most important provisions in the Delaware and other state statutes.

¹⁵⁹ See Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 71 (2004).

¹⁶⁰ *Id.* at 36–38, 49, 58; see also *supra* notes 1–8 and accompanying text.

¹⁶¹ See Hamill, *Catalyst*, *supra* note 25, at 395; see also *supra* notes 14–20, 67–69 and accompanying text.

¹⁶² See *supra* notes 14–20, 67–72, 131–40 and accompanying text.

¹⁶³ See Susan Pace Hamill, *Untangling the Mystery of Teaching Business Organizations*, 59 ST. LOUIS U. L.J. 793, 813 (2015) [hereinafter Hamill, *Teaching Business Organizations*] (detailing my strategy for teaching Business Organizations after I added significant coverage of LLCs to my Business Organizations class).

¹⁶⁴ *Id.* at 793–803; see also Hamill, *Special Privilege*, *supra* note 10, at 97–118 (discussing that special charters were the primary vehicle for sanctioning corporations through 1875 despite the widespread availability of general laws); *id.* at 139–68 (discussing that special

I then move to the other side of the spectrum and spend just over one-third of the class on the classic corporation (calling them “grand-mamma corporations”). I first briefly provide some historical background on how early corporations evolved as state law creatures that had to be formally sanctioned by the state legislatures and were the ancestors of big business today.¹⁶⁵ I then highlight the shareholder perspective—formation, election and removal of directors, access to the corporation’s proxy materials, and an introduction to the 1933 and 1934 federal securities laws.¹⁶⁶ I then move on to the director perspective, which heavily focuses on the business judgment rule, fiduciary duties, and exculpatory clauses, as well as the corporate opportunity doctrine and conflicts of interest.¹⁶⁷ The historical background explains why the law evolved in a manner in which corporate directors generally owe fiduciary duties to the corporation, not to the shareholders, and shareholders have no statutory rights to dissociate and be bought out.¹⁶⁸

I spend just over one-third of the class on close corporations and LLCs, allocating equal time between the two. I start with close corporations, because they appeared in the third and fourth decades of the twentieth century and by the 1970s had become the primary choice for small businesses.¹⁶⁹ I emphasize that small businesses operating like general partnerships chose to incorporate to obtain the holy grail of limited liability protection, which created the potential of minority shareholder oppression, freeze-outs, and squeeze-outs due to the majoritarian-based management structure and the lack of dissociation rights with buyout rights, both features of traditional corporate law that evolved for the classic corporation.¹⁷⁰ From there, I ease into the various state court responses to minority shareholder grievances,

charters remained common after 1875 through the early years of the twentieth century).

¹⁶⁵ Hamill, *Special Privilege*, *supra* note 10, at 88–122 (discussing that states assumed primary power over issuance of special charters sanctioning corporations by the early nineteenth century; states passed the first general corporation law by 1875; in the early twentieth century, Delaware established itself as the favored state of incorporation, triggering a flurry of liberal general corporation laws; and by the 1930s, state law power over corporate law became irreversibly entrenched, causing the need for federal law to step in through enactment of the Securities Acts of 1933 and 1934 in order to curb abuses of the corporate giants, which are the ancestors of big business today).

¹⁶⁶ See Hamill, *Teaching Business Organizations*, *supra* note 163, at 803–04.

¹⁶⁷ *Id.* at 804–10.

¹⁶⁸ See Hamill, *Special Privilege*, *supra* note 10, at 88–94 (discussing motivations behind the earliest special charters issued to sanction the use of corporations as creating an entity that did not dissolve upon the death or withdrawal of one of the sponsors (as occurred in general partnerships) and had the ability to centralize management to conduct large projects, the first being educational institutions, churches, banks, turnpikes, and canals).

¹⁶⁹ See *supra* notes 57–59 and accompanying text.

¹⁷⁰ See *supra* notes 73–91 and accompanying text.

contrasting Massachusetts and Delaware,¹⁷¹ and highlight cases interpreting what constitutes oppression for purposes of involuntary judicial dissolution provisions. I also discuss the opportunity (and perils) of share repurchase agreements as a tool to create liquidity. I conclude my coverage of close corporations with piercing the corporate veil—a judicial remedy for creditors that initially evolved as a response to abuse of the liability shield by shareholders of closely held corporations.¹⁷²

I save the LLC unit for last because the students will have all the tools they need to sift through the issues, despite the lack of uniformity among LLC statutes and cases. I start by quickly highlighting limited partnerships as a preview to LLCs. At their core, limited partnerships are the closest ancestor to LLCs because, by the second half of the twentieth century, numerous limited partnerships combined favorable partnership tax treatment with substantive limited liability protection.¹⁷³ I then provide the story behind LLCs entering the landscape and how LLCs inspired LLPs and LLLPs, which I easily connect to their general and limited partnership roots.¹⁷⁴ Next, I zone in on business issues posed by LLCs, starting with the trend of many LLC statutes to give maximum deference to freedom of contract. I provide examples of what typical member-managed and manager-managed LLCs look like and cover a case establishing that no reasonable justification exists to apply the doctrine of piercing the corporate veil any differently to an LLC than that particular state applies the doctrine to corporations.¹⁷⁵

I spend at least one class on fiduciary duties in LLCs and the ability to eliminate fiduciary duties. Since the students have already been exposed to partnership and corporation law, they have the tools to explore the key issues: to whom are the duties owed (general partners owe

¹⁷¹ Indeed, the major business organizations casebooks on the market use Massachusetts and Delaware to illustrate the opposite responses to the perils of close corporation minority shareholders. For discussions of Massachusetts and Delaware law in *Donahue, Wilkes*, and *Nixon*, see CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, *CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS* 476–85, 491–99 (8th ed. 2017); JONATHAN R. MACEY, DOUGLAS K. MOLL & ROBERT W. HAMILTON, *THE LAW OF BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS* 577–85, 590–96, 612–13 (13th ed. 2017); WILLIAM A. KLEIN, J. MARK RAMSEYER & STEPHEN M. BAINBRIDGE, *BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, LLCs, AND CORPORATIONS* 644–51, 665–66 (10th ed. 2018).

¹⁷² See Hamill, *Teaching Business Organizations*, *supra* note 163, at 810–12.

¹⁷³ See *supra* note 60 and accompanying text; Hamill, *Teaching Business Organizations*, *supra* note 163, at 813.

¹⁷⁴ Hamill, *Teaching Business Organizations*, *supra* note 163, at 813–15.

¹⁷⁵ *Id.* at 815–16.

duties to each other, while directors generally owe duties to the corporation), and to what degree can the duties be eliminated (much less freedom of contract in general partnerships than corporations). Even though LLC fiduciary duty law is not uniform, students can navigate any state's LLC fiduciary duty law with confidence. I conclude my discussion of LLC fiduciary duties with the trend started by Delaware allowing LLCs the ability to contractually eliminate fiduciary duties beyond what is permitted for corporations.¹⁷⁶

I spend at least one class on exiting the LLC, buy-sell agreements, oppression, freeze-outs and squeeze-outs, and the involuntary judicial dissolution remedy. I begin by explaining that the elimination of dissociation rights with buyout rights in LLC default provisions was motivated by estate and gift tax advantages. As a result, closely held minority LLC members are just as vulnerable to oppression, freeze-outs, and squeeze-outs as closely held minority shareholders; yet, in some states, the involuntary judicial dissolution remedy due to oppression or similar grounds is not available to minority LLC members despite that state's corporate statute providing such remedy for minority shareholders.¹⁷⁷

The fiduciary duty and exit rights issues nicely transition to the grand finale of the class, "Major Policy Issues Revealed by the Rise of LLCs." In class I criticize trends discussed previously in this article—why would a particular state allow LLCs a greater ability to eliminate fiduciary duties than corporations? And why would a particular state provide fewer remedies for aggrieved closely held minority LLC members than aggrieved closely held minority shareholders? I also encourage students to think about the policy issues revealed by LLCs from a broader perspective—given that the unwieldy number of business organization forms is confusing and inefficient and results in business participants in similar situations being treated differently under the law, does state law's control over the foundation of business organizations make sense? Given that any effort to completely federalize the law of business organizations would probably fail, what should thoughtful lawyers and policymakers do to make the laws in the business organizations area fairer and more effective?

IX. FINAL COMMENTS AS LLCs APPROACH THE FIFTY-YEAR MILESTONE

At its core, business law is about fostering the creation of new wealth. If the laws equitably allow for risk and innovation, more

¹⁷⁶ *Id.* at 816–17.

¹⁷⁷ *Id.* at 817–18.

wealth will be created, which will benefit everyone. However, if the laws inequitably protect those with the most power, thereby stifling the opportunity of those with less power to participate in the grand pursuit of creating new wealth, capitalism will devour itself. The intentions of the early LLC proponents—to level the playing field between business participants that could afford expensive legal advice and those that could not—were honorable and consistent with the goal of enhancing the creation of new wealth. Unfortunately, the combination of the LLC's most desired traits—joining limited liability and partnership tax status—and the ability of unscrupulous lobbyists to encourage state legislators to adopt, at best, questionable and, at worst, abusive LLC statutory provisions has resulted in the LLC becoming a dark tool used in ways that its early proponents never intended.

Arguably, the fiduciary duties of directors serving public corporations with exculpatory clauses are too weak.¹⁷⁸ A further widespread erosion of managerial accountability along the lines of the Delaware LLC model may very well have future negative repercussions in the capital markets. In any publicly traded business organization, the managers are charged with the important responsibility of creating new wealth from capital invested by others. It is unconscionable that the good faith standard owed by these managers requires so little and that it is possible to totally eviscerate the duty of loyalty, which allows such managers unfettered ability to compete with the public company they are charged to serve and engage in unexamined conflicts of interest.¹⁷⁹ Using LLCs to hide the true owner of real estate has threatened the well-being of tenants in low-rent housing and is undermining the confidence in our real estate system. Although the recently enacted Corporate Transparency Act shows promise towards neutralizing this threat, significant parts are unclear (thereby providing opportunities to plan around), including calculating the 25% equity ownership threshold in complex capital structures and setting boundaries as to what constitutes exercising substantial control over the entity. Regulations clarifying these as well as many other unclear parts of the Corporate Transparency Act must be promulgated by January 1, 2022.¹⁸⁰ The

¹⁷⁸ See *supra* notes 125–27 and accompanying text.

¹⁷⁹ See *supra* notes 131–38 and accompanying text.

¹⁸⁰ See *supra* notes 144–49 and accompanying text. On May 5, 2021, the American College of LLC and Partnership Attorneys submitted comments responding to the request by the Advanced Notice of Proposed Rulemaking regarding the Corporate Transparency Act. This professional organization, made up of lawyers from all over the United States, elects fellows of the college on the basis of their professional reputation and ability regarding LLCs and partnerships due to their substantial contributions through lecturing, writing, teaching and bar activities, as well as extensive experience providing advice to clients on

potential discrepancy in remedies available to aggrieved minority LLC members as compared to minority shareholder counterparts is less of a public matter than elimination of fiduciary duties in publicly traded LLCs and using LLCs to obscure the true owner of real estate, but nevertheless still poses troublesome possibilities of unequal treatment under the law.¹⁸¹

When Whitney M. Young, Jr. observed that “[o]ur ability to create has outreached our ability to use wisely the products of our invention,”¹⁸² he was concerned that the post-World War II explosive economic growth had also fostered significant economic inequality, especially for African Americans. Young could not have foreseen the honorable intentions behind the invention of the LLC leading to the problematic developments springing from the LLC. However, at the broadest level, his comment should resonate among LLC proponents who are dismayed by how the use of LLCs has strayed beyond the honorable intentions behind its invention and early development.

I predict that as LLCs cross the half-century threshold, they will become an instrument of additional schemes making the business world worse off and creating the need for further federal intervention. Such future schemes can no more be blamed on LLCs than other business problems occurring long before LLCs joined the business organization landscape, all of which are caused by state law control over the foundation of business organizations and the flawed business tax structure. Or, stated another way, “The more things change, the more they remain the same.”¹⁸³

structuring, drafting and governance of LLCs and partnerships. See *Comment on FR Doc # 2021-06922*, REGULATIONS.GOV (May 5, 2021), <https://www.regulations.gov/comment/FINCEN-2021-0005-0112> [<https://perma.cc/YL9S-QXJT>].

¹⁸¹ See *supra* notes 92–123 and accompanying text.

¹⁸² WHITNEY M. YOUNG, JR., *TO BE EQUAL* 233 (1964).

¹⁸³ JOHN BARTLETT, *FAMILIAR QUOTATIONS* 443, ¶ 19 (16th ed. 1992) (quoting Jean-Baptiste Alphonse Karr, *Les Guêpes*, January 1849).

