

Corporate Rights and Organizational Neutrality

Vincent S.J. Buccola*

ABSTRACT: Public clamor over the Supreme Court's recent decisions in Citizens United and Hobby Lobby can be explained at least in part by the absence of any consistent rationale in corporate-rights adjudication. As many scholars have noted, the Court has never supplied a coherent explanation of corporate rights—where they come from and how to discern their existence and limits. Group rights derive from individual rights, we are told, but little other guidance is forthcoming. As a consequence each new judgment is open to the charge of unprincipled fiat.

This Article contends that, despite its opacity, the case law implies a deep and tractable logic. In particular, the Article argues that the corporate-rights jurisprudence reflects an unstated principle of “organizational neutrality.” Constitutional rights are ascribed to corporations such that entrepreneurs are neither rewarded nor punished for choosing the corporate form over other modes of coordination (for example, contract, proprietorship, partnership, or cooperative). That is, the Constitution is presumed neutral as between the form of governance through which entrepreneurs organize productive activity. The same neutrality principle explains the corporate-rights jurisprudence in statutory cases, albeit as a presumption about Congress's meaning rather than a binding constraint on its authority.

Moreover, insights from transaction-cost economics supply a ready justification of the neutrality principle. Entrepreneurs choose their governance mechanisms—ranging from the more hierarchical to the more market mediated—with an eye to minimizing the social costs of production. A group-rights jurisprudence favoring one or another mode of organization would bias this choice and encourage marginal enterprises to pick wasteful governance structures. Critiques of the Court's corporate-rights jurisprudence ought

* Assistant Professor, Legal Studies & Business Ethics Department, The Wharton School, University of Pennsylvania. The author thanks Ilya Beylin, Anthony Casey, Nico Cornell, Gwen Gordon, Todd Henderson, Sarah Light, Eric Orts, Elizabeth Pollman, Amy Sepinwall, Fred Tung, David Zaring, and participants at the annual meeting of the Canadian Law & Economics Association and the National Business Law Scholars Conference for their conversation and their criticism of previous drafts. © 2015 [Vincent S.J. Buccola].

therefore to explain why a non-neutral rule is, in a particular context, worth the measure of inefficiency it is apt to introduce.

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I. INTRODUCTION

Corporate ontology is back in vogue. The Supreme Court's recent decisions in *Citizens United v. Federal Elections Commission* ("FEC")¹ and *Burwell v. Hobby Lobby Stores, Inc.*,² have reinvigorated a century-old academic debate about the nature of the firm.³ At the same time, public reaction to the cases has underscored the practical importance of perennial questions about the attribution of rights to corporations, including the source as well as the content and limits of such rights.⁴

The Court's pronouncements have done little to resolve doubts about the extent of the corporation's legal entitlements, much less its enduring essence. Over the course of 200 years, the Court has articulated inconsistent theories of the corporation—theories which seem to yield predictably unpredictable judgments about the existence of a corporate right.⁵ When the Justices conclude that a regulation burdening incorporated firms is valid, they tend to emphasize the "artificial" nature of corporations. Because corporations come into being only by virtue of the State's affirmative charter, the State may regulate them in a way it could not regulate natural persons. The power to create implies the power to regulate. When, on the other hand, the Justices conclude that a corporation is entitled to object to government

1. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

2. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. Speculation about the nature of the corporation, as well as its implications for the potency of reformist regulatory efforts, was at the center of much academic scholarship early in the 20th century. For a history of this literature, see ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 21–51 (2013); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1517–27 (1989); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 179–83, 203–07, 216–22 (1985); and Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1467–78 (1987). See generally John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 667–69 (1926) (describing the debate and arguing its fruitlessness).

4. By "right" I mean a power to object to government regulation, including indirect regulation through the creation of private rights of action, on constitutional or statutory grounds. For reasons of economy, this Article sets aside correlative questions of corporate obligation, except in passing. As the reader might anticipate, the analysis here suggests a symmetric approach there, but one which this Article will not seek to demonstrate.

5. See, e.g., Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 98 (2014) ("What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory."); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 32 (2014) (arguing that "the Court has not developed a coherent method or test for" determining which rights corporations hold); see also Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1679 (2015) ("[T]he Court has not carefully analyzed its legal theory of corporate rights, nor has it expressly articulated a framework for thinking about corporations that could guide its decision making in a consistent way."); Bratton, *supra* note 3, at 1503 (describing the Court's approach to recognizing corporate constitutional rights as a "situational practice"); Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 908 (2011) (describing the Court's corporate-rights jurisprudence as "incoherent").

action, they typically employ the logic of the “aggregate” theory of the corporation. The State’s authority is limited because firms are composed of individuals who themselves have interests the State is bound not to trample.⁶

If the selection of one or the other trope were predictable, the Court’s inconsistent rhetoric would be unremarkable. Yet, one searches the case law in vain for a comprehensive explanation. Apparently incompatible conceptions of the firm might feature, without comment, in a single opinion. In *Hale v. Henkel*, for example, the Court held that corporations may not invoke the Fifth Amendment privilege against self-incrimination but also that they may rely on the Fourth Amendment’s protection against unreasonable searches and seizures.⁷ The Fifth Amendment was out of bounds because, after all, as the Court saw it, “the corporation is a creature of the State.”⁸ Yet, the Fourth Amendment was in play because “[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity.”⁹ Questions about the ascription of corporate rights thus continue to befuddle judges, lawyers, and the literate public at large, including students of corporate law and the Constitution. As one commentator recently opined in the corporate-rights context: “Legal scholars have long found the Supreme Court’s lack of a coherent approach or engagement with theoretical questions concerning the nature of the firm deeply disturbing, calling the Court’s rulings ‘ad hoc,’ ‘right-by-right,’ ‘arbitrary,’ ‘sporadic,’ inconsistent, and incoherent.”¹⁰

Notwithstanding the case law’s opacity, this Article points to a unifying method in the Court’s apparent madness. In particular, it argues that the great bulk of the Court’s corporate-rights jurisprudence reflects an interpretive principle that might be called “organizational neutrality.” Entrepreneurs choose from among a range of organizational forms—from a highly integrated, hierarchical corporation to a loosely coordinated web of

6. See Blair & Pollman, *supra* note 5, at 1731 (“The Court has extended constitutional protections to corporations when it is a necessary or convenient way to protect the rights of the natural persons assumed to be represented by the corporation in question, at least with respect to the issue at stake. Although never systematically explained by the Court, the associational argument clearly indicates that the Court understands corporate rights to be derivative rights, not direct or original rights.”).

7. *Hale v. Henkel*, 201 U.S. 43 (1906).

8. *Id.* at 74.

9. *Id.* at 76. The Court’s rationale has been described as “oscillat[ing] between reasoning based on the concession, aggregate and real entity views” of the corporation, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1649, and as “waver[ing] between the past and the future,” Horwitz, *supra* note 3, at 223.

10. Garrett, *supra* note 5, at 99 (citing additional scholarly literature to the same effect); see also Charles R. O’Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1348 (1979) (“Missing from the Court’s various [rights] decisions involving corporations is any expressly enunciated common rationale. Many cases appear to involve an ad hoc determination rather than the development or application of a general principle.”); sources cited *supra* note 5.

contracts—with an eye to minimizing their enterprise’s production costs. The Justices ascribe corporate rights such that entrepreneurs are neither rewarded nor punished for selecting the corporate form over other modes of coordination.¹¹ They presume the law to be neutral as between forms of organization. More precisely, the Court holds that corporations can exercise a given right otherwise attributable to natural persons if denying it would penalize entrepreneurs’ decision to integrate productive activity into an incorporated entity. Conversely, the Court holds that corporations cannot exercise a right otherwise attributable to natural persons if recognizing it would subsidize integration—if, that is, it would bias entrepreneurs toward incorporation.¹² In other words, organizational neutrality stands for the idea that the burden of actual or potential regulation should not affect the mode of organization through which entrepreneurs choose to coordinate group activity.¹³

An illustration will help to make the principle intuitive. Suppose *P*, *Q*, and *R* wish to manufacture and sell widgets and to influence public policy with respect to domestic widget production. *P* will supply the capital, a widget-making machine; *Q* and *R* will focus on marketing. They can organize their enterprise in one of two plausible ways: (1) incorporate, each holding equity shares in the venture; or (2) create a series of input contracts and profit-sharing agreements. Imagine for a moment that the entrepreneurs think either mode of governance would resolve conflicts of interest roughly as well as the other. Suppose, however, one of them, *R*, worries the government might one day seize the widget-making machine, upending the enterprise. If the three were to choose not to incorporate, machine owner *P* would be in position to demand compensation for any condemnation and could use the compensation to retool in another attractive enterprise.¹⁴ Were they instead to incorporate, such that the entity holds title to the machine, their prospects would depend on the existence of a corporate right under the Takings Clause.

11. Throughout the Article, I use the term “corporation” broadly to denote any kind of chartered entity, including chartered cooperatives and limited liability companies, in addition to standard corporate bodies.

12. Organizational neutrality is an interpretive canon. A corporation cannot invoke a statutory right if, for instance, the statute declares it available to partnerships only. But the canon is an important one, if for no reason other than the total lack of such specification in the Constitution.

13. Students of the history of corporate law might hear in these words something like an affirmation of the views of late 19th-century champions of the “aggregate” theory of the corporation. To be sure, the neutrality principle implies a certain kind of contractarian worldview, in the sense that, like the classical law of contract, it takes voluntary agreement as a matter of indifference to the state—that is, as an occasion neither enlarging nor diminishing the parties’ joint rights relative to their neighbors or the state. But neutrality does not entail any particular conception of the corporation’s metaphysical reality or structure, and I do not aim in this Article to join the metaphysical question or to defend any particular claim about what the corporation is or is not.

14. See U.S. CONST. amend. V.

In one possible world, the courts hold that corporations lack a takings remedy because their being is merely artificial. None of *P*, *Q*, or *R* could demand compensation in his individual capacity either, of course, and consequently the three would be jointly worse-off by virtue of having incorporated. A rule that corporations lack Takings Clause rights is thus non-neutral. In another possible world—ours—the courts hold that corporations may demand compensation when their property is condemned.¹⁵ The act of incorporating extinguishes *P*'s entitlement to compensation, but the enterprise faces no greater regulatory threat because the corporate entity gains what *P* loses. Organizational neutrality demands the corporation be afforded the right to compensation.

Now suppose *Q* has a different concern. She wants to enhance the trio's influence at the polls. If they organize themselves through contract, they can cast three votes in favor of widget subsidies—one for each of *P*, *Q*, and *R*. But if, on the theory that corporations are people too, their incorporated enterprise were allowed the franchise, their collective voting power would rise by one third, from three votes to four. A rule granting incorporated entities the franchise would be non-neutral, because it would make *P*, *Q*, and *R* jointly better off by virtue of having incorporated. Organizational neutrality demands the corporation not be afforded the franchise.¹⁶

This Article's central thesis, then, is that organizational neutrality predicts the vast majority of the Supreme Court's actual corporate-rights decisions—including, for example, both of *Hale*'s apparently incompatible holdings. Thus, although the Justices have invoked the rhetoric of various conceptions of the firm in the course of their many opinions, the body of the Court's corporate-rights jurisprudence, taken as a whole, can be understood to reflect to a surprising degree the contractarian premises of transaction- and agency-cost economics. This is important because a positive theory of law is only as likely as its normative implications are plausible.

Theorists of transaction-cost economics understand the organization of enterprise as an attempt to minimize the social costs of production.¹⁷ On this view, the mechanism of governance is a costly input, like raw materials, equipment, and labor, so that under competitive pressure entrepreneurs will seek to reduce their total cost. Each form of governance entails its own mix of tradeoffs. The best governance structure for any particular enterprise will therefore depend on many factors, including, for example, the possibilities

15. *E.g.*, *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 252 (1897).

16. The Supreme Court has never had occasion to address the question of a corporate right to vote, but the law's resolution of this issue is not in doubt. *But cf.* John Hasnas, *Should Corporations Have the Right to Vote?: A Paradox in the Theory of Corporate Moral Agency* (2015) (unpublished manuscript), <http://faculty.msb.edu/hasnasj/GTWebSite/Vote%20Revised.pdf> (arguing that to the extent corporations are morally responsible agents, they should be afforded the franchise).

17. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 387 (1937); *see also infra* Part III.A.

for capital intensity, the transparency of management decisionmaking, and the number of venturers. The important point is that the governance of productive activity—including the decision whether to integrate and, if so, to what degree—has a non-negligible effect on production costs. Legal rules privileging one form of organization over others threaten to induce entrepreneurs to choose relatively inefficient governance structures, a form of waste that ultimately diminishes the wealth of society at large. Organizational neutrality, then, can be understood as nothing more than the Court's recognition of such a principle. To be sure, Congress might—and from time to time does—enact laws that distort organizational decisions. But absent a compelling circumstance or controlling text, the Court will not do so of its own accord.

To the extent one finds the efficiency rationale normatively powerful, organizational neutrality offers a tractable rule against which the resolution of contemporary disputes can be measured. *Hobby Lobby* is a case in point, and this Article takes up the decision's merits as a way of illustrating both the thesis at work in a hotly contested context and the degree to which academic commentary can miss the mark when it lacks a tractable, positive theory of law. The standard view among academic commentators has the *Hobby Lobby* majority getting nearly everything wrong. This view, represented by an amicus brief signed by 44 scholars of corporate, securities, and criminal law, understands the majority to have inappropriately adopted a naive, shareholder-centric model of the corporation.¹⁸ Shareholders' free-exercise rights belong to shareholders only. By ascribing them instead to the corporate entity, the argument goes, the majority improperly conflated the entity with but one of its constituencies and therefore misapprehended the nature of the firm. Organizational neutrality, by contrast, suggests just the opposite—that, under at least one plausible reading, *Hobby Lobby* is consistent with the Court's longstanding (if poorly articulated) corporate-rights jurisprudence.

This Article proceeds as follows. Part II defends the (uncontroversial) claim that corporate-rights jurisprudence lacks a consistently articulated rationale. Part III forms the Article's analytical heart. It introduces the theory of organizational neutrality, makes the positive case that neutrality explains the vast majority of the Court's corporate-rights cases, and argues that the Court's jurisprudence in fact anticipates and reflects the economizing instincts predicted by transaction-cost economics. Part IV defends *Hobby Lobby*'s corporate law on the basis of its consistency with organizational neutrality, concluding that at least one plausible reading of the majority opinion reflects a sophisticated, contractarian theory of the firm. Part V identifies the limits of neutrality, showing that some puzzles remain and explaining why they will persist.

18. See Amicus Curiae Brief of Corp. & Criminal Law Professors in Support of Petitioners at 2–3, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356), 2014 WL 333889.

II. THE APPARENT INDETERMINACY OF CORPORATE-RIGHTS JURISPRUDENCE

Since the Republic's earliest days, the Supreme Court repeatedly has had to confront questions about the nature and status of the corporation.¹⁹ The Court has often done so in the context of disputes about whether a corporation ought to benefit from some federal right established by positive law or, alternatively, whether it ought to be burdened by some positive obligation. Answering these questions is easy enough if the source of the right or obligation specifies an answer. And some legal texts do indeed so specify. The modern tax code, to take just one example, declares rules for the calculation of corporate income tax that are quite different from the rules of partnership tax.²⁰ Frequently, however, and in a wide range of important areas, legal texts do not expressly address the corporate case. The Constitution nowhere mentions the corporation, for instance, leaving open the question of whether any or all of its restrictions on government action apply to the regulation of corporate deeds. Likewise, many important statutes declare rights or obligations that apply simply to "persons,"²¹ or else employ similarly ambiguous constructions. A difficult interpretive question lurks.

On the face of its decisions, unfortunately, the Court has never supplied a consistent answer—or even approach—to the question of whether federal rights of uncertain reach apply to corporations. No single theory of the firm obviously underlies the decisions.²² That is, the Justices do not seem to embrace a consistent understanding of the corporation's relationships to the natural persons who constitute it or to the state which imbues it with legal reality. Instead, their discussions of corporate rights tend to resort to one of several inconsistent and alternating tropes, each of which appears to capture something different about the nature of the corporation in public life. The scholarly literature tends to identify three such tropes in particular: (1) an "aggregate" theory, which emphasizes the contractual or relational aspect of the corporation; (2) a "real entity" theory, which posits an autonomous entity distinct from any of its patrons; and (3) an "artificial entity" or "concession"

19. See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (holding that a state's act of chartering a corporation was a contract for purposes of the Constitution's Contract Clause); *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) (holding that the citizenship of a corporation, for purposes of the judiciary's diversity jurisdiction, embraced the citizenship of each of the corporation's shareholders).

20. Rules concerning the pass-through of enterprise income to the enterprise's constituent members supply an important example. Compare 26 U.S.C. § 11 (2012) (establishing a tax on income earned by certain corporations prior to distribution to shareholders), with 26 U.S.C. § 701 (declaring that partnership income is attributable to the individual partners in proportion to their interest in the partnership).

21. The Religious Freedom Restoration Act of 1993, the application of which was central to the recent decision in *Hobby Lobby*, 134 S. Ct. 2751, is only the most salient recent instance. See Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–bb-4 (2012).

22. See, e.g., Miller, *supra* note 5, at 909 ("No unified theory governs when or to what extent the Constitution protects a corporation.").

theory, which focuses on the sense in which the corporation owes its very existence to the state's largesse.²³

The selection of one or another of these theories is closely correlated with the judgment in particular corporate-rights cases. When the Court ascribes to corporations a right otherwise attributable to natural persons, it typically invokes a version of the "aggregate" theory as justification.²⁴ The right is held to belong to the firm in order to further the interests of natural persons who jointly constitute it.²⁵ *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, a case concerning the application of the Fourteenth Amendment's Equal Protection Clause to corporations, is a good example.²⁶ The case's facts are straightforward. Pembina, a Colorado-chartered mining firm, maintained facilities in Pennsylvania.²⁷ Pennsylvania sought to impose on Pembina a tax for the privilege of maintaining corporate offices within its borders.²⁸ Pembina objected to the fee on equal protection grounds.²⁹ The Court ultimately sided with the Commonwealth, but in so doing it held, critically, that the form of Pembina's argument was sound: Corporations may rightly invoke the Constitution's guarantee of equal protection of the laws to all "persons" within a state's jurisdiction.³⁰ The aggregate nature of the firm dictated the Court's judgment: "[C]orporations," it explained, "are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."³¹ No further logic was needed.

When, on the other hand, the Justices are inclined to hold that a particular right inheres in natural persons only and does not extend to corporate entities, they tend to invoke the corporation's "artificiality" and, more specifically, the language of concession. Because a corporation, unlike a natural person, owes its very existence to a state privilege, namely the

23. Recent exemplary articles adopting this taxonomy include Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1033–45; Mark, *supra* note 3, at 1464–78; Joanna M. Meyer, *The Real Error in Citizens United*, 69 WASH. & LEE L. REV. 2171, 2178–82 (2012); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 211–32; and Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 97–116 (1995). *See also* Bratton, *supra* note 3, at 1475 (describing three corresponding "sets of recurring questions" about the essence of the firm, suggesting a similar—if perhaps multidimensional—taxonomy).

24. *See* Avi-Yonah, *supra* note 23, at 1016 (arguing that aggregate and real-entity theories are useful for ascribing rights and that artificial-entity theories are useful for regulating); Meyer, *supra* note 23, at 2186 ("The Court uses the aggregate view of the corporation as a means to justify its application of the personal due process protection.").

25. Two scholars have described the attribution of corporate rights on this ground as a theory of "derivative rights." *See* Blair & Pollman, *supra* note 5, at 1732–42; Pollman, *supra* note 5, at 54.

26. *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

27. *Id.* at 182.

28. *Id.* at 184.

29. *Id.*

30. *Id.* at 189.

31. *Id.*

charter, state regulation is permissible where it would not be permissible to regulate natural persons. *Paul v. Virginia*, concerning the application to corporations of the Full Faith and Credit Clause, illustrates this approach.³² In *Paul*, a group of New York-chartered firms sought to challenge Virginia's (arguably protectionist) regulation of the insurance industry.³³ Under Virginia law, insurance companies chartered out-of-state were prohibited from issuing policies without first receiving a license.³⁴ A license could be had only if, among other things, the insurer were to post a large bond.³⁵ Paul, acting as an agent for the New York-chartered insurers, was convicted of issuing a fire policy without being licensed to do so.³⁶ In challenging the conviction, he argued that Virginia's law illegally denied to foreign-chartered corporations the "privileges and immunities" of citizens. The Court rejected his argument, holding that corporations are not citizens for purposes of the Clause.³⁷ In so doing, it expressly rejected appeals to consider the privileges and immunities of the individuals who constitute corporations. Instead, the Court's reasoning focused on the corporation's artificiality:

Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a State.³⁸

This tension between rival conceptions of the firm has permeated the Court's corporate-rights jurisprudence for 200 years. Nor is it a tension that can be attributed simply to changes in the Court's composition over time. On the contrary, a single Justice can indicate sharply differing views of the firm in different cases.³⁹ Indeed, in some instances a single opinion for the Court reflects the tension disturbingly well. Probably the best illustration of such apparent, internal inconsistency is *Hale v. Henkel*, a 1906 case concerning corporations' procedural rights under the criminal law.⁴⁰ Hale was secretary and treasurer of the MacAndrews and Forbes Company. The dispute arose out of a federal investigation of MacAndrews for possible antitrust violations.

32. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

33. *Id.* at 170–73.

34. *Id.* at 168.

35. *Id.*

36. *Id.* at 169.

37. *Id.* at 180–81.

38. *Id.* at 180 (purporting to quote *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 519 (1839)).

39. Compare *id.* at 180–81 (relying on a concession theory, in an opinion authored by Justice Field, to hold that corporations lack rights under the Fourteenth Amendment's Privileges or Immunities Clause), with *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 409 (1886) (affirming the decision of Justice Field, riding circuit and relying on an aggregate theory to hold that corporations have rights under Fourteenth Amendment's Equal Protection Clause).

40. *Hale v. Henkel*, 201 U.S. 43 (1906).

The United States Attorney subpoenaed Hale and compelled him to produce company documents at, and testify during, a grand jury proceeding. Hale refused to do so, even after the judge ordered his compliance, and was held in contempt. The case reached the Supreme Court on appeal from the denial of a writ of habeas corpus.

Hale argued, among other things, that, as an officer of the company, he could assert the company's right not to produce documents that would tend to incriminate it. The Justices held that no such right exists. A corporation has no Fifth Amendment privilege against self-incrimination. After all, the Justices reasoned, "the corporation is a creature of the State."⁴¹ The law need not look upon it as upon a natural person: "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."⁴² The rhetoric of concession appeared to decide the issue.

At the same time, *Hale* decided that corporations may assert a right against unreasonable searches and seizures under the Fourth Amendment (and, indeed, that the subpoena at issue in the case was overbroad and hence unreasonable). The opinion made no effort to explain why MacAndrews' artificiality, which justified denying the company a privilege against self-incrimination, did not also justify the government's choice to search whenever and whatever it would. Instead, the Justices simply invoked the aggregate theory of the firm. The firm should be free from unreasonable searches and seizures, the Justices reasoned, because it was, at bottom, nothing but a group of individuals operating "under an assumed name and with a distinct legal entity."⁴³ The opinion's about-face is astonishing if only because it goes unremarked and takes the space of just two pages of the *United States Reports*. Thus *Hale* has been characterized, with some understatement, as introducing "an element of inconsistency into the Court's analysis."⁴⁴

The Court's invocation of one theory of the firm or another coincides almost invariably with the judgment toward which the theory points.⁴⁵ This fact is not in itself objectionable and certainly not unusual. The problem, rather, is the lack of a coherent explanation for why a particular trope is

41. *Id.* at 74. MacAndrews & Forbes was not a creature of the State investigating it—that is, the national government—but rather of New Jersey.

42. *Id.* at 75.

43. *Id.* at 76.

44. Blair & Pollman, *supra* note 5, at 1717.

45. For the view that no such correspondence is logically necessary, see Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Micah Schwartzman et al. eds., forthcoming 2016) (on file with author). See generally Dewey, *supra* note 3 (making a similar argument). The point is well taken as far as it goes. No theory of the firm is necessary or sufficient to the recognition of any particular legal right. Nevertheless, the theories do seem to *point* in different directions—to imply some normative thrust, so to speak.

selected in any given case. Instead, competing theories of the firm seem to function merely as rhetorical set pieces to be trotted out as the preferred judgment dictates. Put differently, the case law does not on its face reveal a causal or predictive theory of theories. Each new case appears ad hoc.

The Court came closest to stating a principle of decision in one of its political-speech cases, *First National Bank of Boston v. Bellotti*.⁴⁶ There, the Court suggested a rule under which corporations could exercise all rights that are not “purely personal”:

Certain “purely personal” guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the “historic function” of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is “purely personal” or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.⁴⁷

As one commentator has noted, however, the label “purely personal” is little more than a conclusion.⁴⁸ The “historic function” of a right is hardly telling, if only because even the aggregate theory of the firm premises corporate rights on the “protection of individuals.”

This Article is by no means the first to observe the Court’s apparent inconsistency when it comes to corporate rights.⁴⁹ Scholars have long recognized that the Court’s jurisprudence articulates no obvious explanation of when a corporate right will be recognized.⁵⁰ One commentator recently captured the prevailing view in bleak terms: “Legal scholars have long found the Supreme Court’s lack of a coherent approach or engagement with theoretical questions concerning the nature of the firm deeply disturbing,

46. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

47. *Id.* at 779 n.14 (citation omitted); see also Miller, *supra* note 5, at 911–13 (describing the “purely personal” test as “the closest the Court has come to creating a standard test” but noting that it provides little guidance).

48. Pollman, *supra* note 5, at 52–53; see also Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 72 (2013) (observing that “[s]orting the Amendments into the boxes ‘available to corporations’ and ‘not available to corporations’ appears to require some consideration of each Amendment’s purposes” while noting that discerning such purposes is “complex”).

49. E.g., sources cited *supra* note 5; see also Bratton, *supra* note 3, at 1503 (describing the Court’s approach to recognizing corporate constitutional rights as a “situational practice”); O’Kelley, *supra* note 10, at 1348.

50. See Pollman, *supra* note 5, at 50 (“As we have seen, the Court has confronted issues concerning the applicability and scope of constitutional protections for corporations for over two hundred years. In all of this time, it has failed to articulate a test or standard approach for its rulings. Sometimes the Court has looked to the purpose and history of the right at issue to determine whether to accord it to a corporation, while at other times the Court simply accorded a right to corporations without explanation or in a conclusory oral remark.”). See generally Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61 (2005).

calling the Court's rulings 'ad hoc,' 'right-by-right,' 'arbitrary,' 'sporadic,' inconsistent, and incoherent."⁵¹ Yet, although commentators have been quick to condemn the Court's apparent arbitrariness, they have been slow to advance plausible, alternative accounts not themselves subject to the charge of indeterminacy.

III. A THEORY OF ORGANIZATIONAL NEUTRALITY

Notwithstanding the apparently ad hoc process of corporate-rights adjudication, this Part argues that the Supreme Court's corporate-rights decisions are generally consistent with "organizational neutrality." This neutrality principle can be understood as an interpretive presumption that regulatory burdens ought to attach to cooperative activity in virtue of the activity's substance, not the mode through which entrepreneurs choose to coordinate it. To be sure, positive law might direct otherwise. A statute might declare a benefit available only to certain kinds of organizations. When it does so, the statute controls. Thus, neutrality can be understood as a canon of interpretation, albeit one with broad application. But in cases of textual ambiguity, the Court decides corporate-rights questions such that the threat of regulation falls symmetrically on enterprises irrespective of the structure of their governance. The Court holds corporations capable of exercising a right attributable to natural persons where failure to recognize the right would *penalize* the integration of productive activity into an incorporated firm. Conversely, it holds corporations incapable of exercising a right attributable to natural persons where recognizing the right would *subsidize* integration.

This thesis is empirical. My burden is to show that organizational neutrality does well at explaining the decided cases. But one cannot simply tote up the numbers because no readily verifiable metric distinguishes conforming from nonconforming decisions. The counting must be enacted, so to speak, in the reading of individual cases.

A. AN EFFICIENCY JUSTIFICATION

Before turning to the task of "counting," it is only fair to consider the normative plausibility of a neutrality canon. Law being a social enterprise, the likelihood of an explanatory principle varies with the quality of its social justification. Here, organizational neutrality fares well. The insights of transaction- and agency-cost economics suggest that, in competitive environments, a neutrality principle economizes on the social costs of production. Efficiency might not be the only value that law advances, but it is *a* value, and hence efficient rules are usually plausible candidates.

51. Garrett, *supra* note 5, at 99 (citing additional scholarly literature to the same effect); see also Bratton, *supra* note 3, at 1503; Miller, *supra* note 5, at 908; O'Kelley, *supra* note 10, at 1348.

The study of transaction-cost economics arguably began with the publication of Ronald Coase's 1937 article, *The Nature of the Firm*.⁵² The article posed a deceptively simple question: Why do firms exist? Any production that can be coordinated through the hierarchical relationships characteristic of a firm might, he saw, likewise be coordinated through spot-market transactions. An entrepreneur can instruct her firm's employee to do a task, but she can also hire an independent contractor to accomplish the same end. An entrepreneur can make use of machinery owned by her firm, but she can also rent the use of equivalent machinery on a short-term basis. Markets and firms alike can mediate the imperfectly aligned incentives of individual actors. And indeed markets have the singular advantage of explicit prices, which convey valuable but widely dispersed information about scarcity and demand.⁵³ In other words, nothing about the technology of production implies the existence of firms. Hence the puzzle. If markets are valuable because they convey information in the form of explicit prices, then it is a puzzle why production is not in fact atomized but often occurs in organized firms.

Coase hypothesized that transaction costs explain both the existence and boundaries of firms.⁵⁴ Spot markets do convey valuable information, but they entail a suite of costs, too—in particular, costs associated with search, negotiation, monitoring, and opportunism.⁵⁵ As the scale of enterprise grows, these transaction costs can swamp the informational value of prices. On the other hand, hierarchy entails its own costs, including the loss of market discipline. The integration of cooperative activity is always a matter of degree.⁵⁶ A law firm might hire attorneys and paralegals but outsource printing and janitorial services. There is no magic to one configuration of firm

52. See generally Coase, *supra* note 17. My aim here is not to give a detailed history of the economics of industrial organization, but only to summarize the development of transaction-cost economics insofar as its elaboration might help to illuminate the economic logic of organizational neutrality. For excellent, thorough accounts of the intellectual history, see generally John Armour & Michael J. Whincop, *The Proprietary Foundations of Corporate Law*, 27 OXFORD J. LEGAL STUD. 429 (2007); Bratton, *supra* note 3; and Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989).

53. See, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (describing how the price mechanism aggregates information from widely dispersed persons, each of whom has sharply circumscribed access to knowledge). For a survey of modern "information markets" and their potential applications to regulatory law, see generally Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 U. CHI. L. REV. 933 (2004).

54. Coase, *supra* note 17, at 404–05.

55. See, e.g., Oliver E. Williamson, *Markets and Hierarchies: Some Elementary Considerations*, 63 AM. ECON. REV. 316, 317 (1973) [hereinafter Williamson, *Markets and Hierarchies*] (discussing opportunism); Oliver E. Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LITERATURE 1537, 1545 (1981) (same); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 AM. ECON. REV. 112, 117 (1971) (discussing negotiation and monitoring).

56. See Oliver E. Williamson, *Intellectual Foundations: The Need for a Broader View*, 33 J. LEGAL EDUC. 210, 214 (1983). See generally Williamson, *Markets and Hierarchies*, *supra* note 55.

and market over another. The tradeoff between integration and atomization depends on the particular circumstances of an industry. According to this logic, the boundary between firm and market will tend to lie where the marginal cost of market transacting equals its marginal benefit. Coase's fundamental insight was recognizing that transaction costs are real costs of production, as real as the costs of equipment and raw materials. The participants in an enterprise maximize their joint surplus by minimizing transaction costs, which operate as an implicit tax on coordination. In search of profit, and in any event constrained by competition, entrepreneurs seek to reduce these costs and thereby preserve social value.

The theorists of transaction-cost economics came to see firms as not different "in the slightest degree from ordinary market contracting between any two people."⁵⁷ They saw the firm only as a focal point for implicit contracting, as a so-called "nexus of contracts."⁵⁸ But although the firm could be *theorized* as a series of explicit agreements, it would in fact be hopelessly expensive to coordinate complex enterprise through the use of actual bilateral contracts. By taking title to property, the firm—as a legal construct—economizes on the costs of explicit contracting.⁵⁹ Here, too, lies an opportunity for efficient tradeoffs in the Coasean tradition. The law recognizes multiple kinds of firms governed by their own characteristic default rules: the partnership, the limited partnership, the business trust, the limited liability company, the corporation, the consumer cooperative. Each could be optimal, depending on a range of factors that include, for example, the capital-intensity of the industry, the enterprise's scale, and the idiosyncratic personalities of the venturers.⁶⁰

Entrepreneurs seek to economize not only with respect to a firm's "size" (the degree of integration), but also with respect to its legal "type" (the mode of integration). Because the control rights associated with various organizational forms vary, the form entrepreneurs choose is apt to affect their cost of capital and, in many cases, labor. The organizational form that

57. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 777 (1972).

58. This turn of phrase, ubiquitous in the literature, originates with Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310–11 (1976) (identifying most organizations, including corporations, as "serv[ing] as a nexus for contracting relationships").

59. Seminal work on this idea includes, generally, OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985); OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); and Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

60. A vast literature explores the tradeoffs among organizational forms. For an insightful analysis and an extensive bibliography, see generally HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996).

minimizes net transaction costs will thus tend to minimize the total costs of production, even if material and equipment costs see no direct effect.

What is critical to see for purposes of this Article, however, is that entrepreneurs care about the total costs of an organizational form. These include the transaction and agency costs identified in the economics literature, but they also include regulatory costs, and therefore the correlative *value*, of regulatory exemptions—that is, of rights. Regulatory costs are as real as transaction or material costs. To the extent the law ascribes rights asymmetrically between organizational forms, entrepreneurs must be expected at times *not* to economize on transaction costs. Take, for example, the case of an entrepreneur who is soliciting capital and must decide between partnership and incorporation. She has read her agency-cost theory and calculates that because of inter-investor monitoring difficulties, capital costs will be ten percent greater under a partnership, a net, discounted cost of, say, \$100.⁶¹ Yet, she believes there is a good chance that the government will try to seize the enterprise's capital, and she estimates the expected cost of this possibility at \$110. If partnerships but not corporations can demand compensation under the Fifth Amendment, then she will choose partnership despite the greater agency costs she expects her choice to entail. Only a rule of organizational neutrality ensures that her choice will be calibrated to minimize transaction costs.

Organizational neutrality can thus be understood as the Court's implicit, perhaps inchoate, recognition of the insights of transaction-cost economics. Each of the various forms of organization is legally permissible. Entrepreneurs have the incentive to select the form that will minimize their enterprise's expected costs of production, and therefore to maximize the enterprise's social value. Moreover, the choice between forms typically lacks third-party effects that might justify a relative subsidy of one form over another.⁶² The intuition, then, is that industrial circumstances rather than disparate regulatory burdens ought to determine an enterprise's mode of organization. A legal rule biasing the organizational decision toward any particular form is apt to cause inefficient production precisely because the value of securing a regulatory exemption—that is, the value of a right—can outweigh the costs of productive inefficiency associated with the subsidized form.

The skeptical reader might protest that our law is full of regulatory differentiation of exactly this kind. Why, one might ask, would or should the

61. See, e.g., Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1337–43 (2006); Jensen & Meckling, *supra* note 58. For discussion of the relationship between the optimal organization of legal entities and the costs associated with monitoring specific assets used in production, see generally Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 YALE L.J. 2680 (2015); and Edward M. Iacobucci & George G. Triantis, *Economic and Legal Boundaries of Firms*, 93 VA. L. REV. 515 (2007).

62. The notable exception is the nonconsensual creditor, in particular the tort victim, who can be disadvantaged by the corporate form.

judiciary opt for a neutrality principle that other legal actors routinely disregard? Certainly the factual premise is correct. In many contexts the law does discriminate among organizational forms. Most obviously, for example, state law grants limited liability to those who provide equity capital to corporations and certain “uncorporations,”⁶³ but not to those who provide the same capital to general partnerships. Much more importantly, federal law imposes tax burdens that vary dramatically with an enterprise’s form of organization. And there are, of course, many other instances.

A complete answer would necessarily fill a volume. A short answer turns on institutional roles and capacities. Legislators have many reasons to subsidize one or another form of organization. Some of these reasons may have to do with economic efficiency; others assuredly do not. A legislator might, for example, think that limited liability encourages excessive risk-taking, and might respond by requiring corporations and only corporations to secure insurance or post a bond.⁶⁴ This would be an efficiency-enhancing reason to discriminate, because it would seek to unwind a standard moral hazard, and presumably the legislator—unlike the judge—is well situated to estimate the degree of relative penalty necessary to correct for the risk-enhancing effect of limited liability. But a legislator might also wish to trade off efficiency for other aims. For example, the legislator might value small enterprises for their own sake, and might therefore wish to penalize organizational forms, such as the corporation, that enable large-scale capital aggregation. Again, though, the legislator rather than the judge is poised to decide the appropriate degree of relative subsidy or penalty. Explicit taxes are likely to be useful in this regard. They allow precise calibration, because possible rates describe a continuum; but for exactly this reason a judge’s

63. The term “uncorporations” refers to limited liability companies, limited liability partnerships, and other innovative forms whose attributes are defined by a synthesis of traditional forms. See generally LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION* (2010).

64. Those critical of the attribution of rights to corporations often point to the implicit subsidy of limited liability and argue that entrepreneurs ought to be put to a choice between the doctrine’s benefit and the enjoyment of other rights. See, e.g., Tushnet, *supra* note 48, at 79–82. In this regard, limited liability’s importance is vastly overstated. Even absent the corporate form, entrepreneurs can create limited liability by contract and often do—hence the nonrecourse loan—except with respect to involuntary creditors. Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 286–87 (2014); see also Ribstein, *supra* note 23, 98–100. Limited liability’s effect on tort creditors is distortive, at least in theory, but positive regulation of dangerous industries arguably compensates for the distortion in many circumstances. As Professors Hansmann, Kraakman, and Squire show in their classic work, the rule prohibiting shareholders’ personal creditors from attaching enterprise assets is by far the more important corporate-law doctrine. See Hansmann et al., *supra* note 61; see also Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 391–92, 437–41 (2003); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 423–28 (2000). A partnership can create limited liability relatively easily through contract, while due to the difficulty of monitoring individual partners’ private affairs it is difficult to protect group assets against recourse by partners’ personal creditors.

imposition of a tax would be unprincipled. When judges are confronted with the question whether a particular right ought to be attributed to corporations, an efficiency-preserving neutrality rule is at least presumptively sensible.

B. ORGANIZATION-NEUTRAL ATTRIBUTIONS OF CORPORATE RIGHTS

If the thesis is correct—if, that is, the Supreme Court ascribes rights to corporations so as not to bias decisions about either the scope or mode of productive integration—then two kinds of decisions ought to be typical. One set of decisions comprises cases in which the Court ascribes a right to corporations where a contrary decision would discourage entrepreneurs from invoking the corporate form. This Subpart catalogs some of the Court’s many decisions of this vintage. The second set of decisions, considered in the next Subpart, comprises cases in which the Court declines to ascribe a right to corporations where a contrary decision would encourage entrepreneurs to invoke the corporate form.

1. Rights Against Expropriation

It is sensible to begin with the constellation of rights that prohibit government’s direct expropriation of property. The question of the corporate application of these rights—including the right to just compensation for a taking,⁶⁵ the right conditioning seizure of property on due process,⁶⁶ and the right not to have one’s contractual expectations or obligations impaired by state law⁶⁷—bear on organizational neutrality in a way that should be easy to grasp. Neutrality demands that corporations be able to exercise each of these rights. To see why, consider the right to compensation for a taking. In particular, consider an entrepreneur’s incentives in a world where only natural persons can invoke the right. As in any world, she must decide the degree to which her firm should own necessary capital (as opposed to renting its use). One of the central determinants in the own-rent calculus is the particular capital’s “specificity”—the degree to which it is unsuitable for competing uses.⁶⁸ To the extent a machine, say, is suitable only to the firm’s unique production processes, it tends to be efficient for the firm to own the machine. But the entrepreneur must also weigh the expected cost of the corporation’s regulatory burdens—in this case, the expected cost of a taking. She must compare the effect of a taking under the “own” and “rent” scenarios. If the firm were to own the taken capital, it would not be compensated. If the capital were to remain in the hands of a natural person, on the other hand, with the corporation renting its use, then the owner would be made whole

65. U.S. CONST. amend. V.

66. *Id.*

67. *Id.* art. I, § 10, cl. 1.

68. See, e.g., Michael H. Riordan & Oliver E. Williamson, *Asset Specificity and Economic Organization*, 3 INT’L J. INDUS. ORG. 365 (1985).

and the corporation could simply rent substitute capital. Thus, the entrepreneur must weigh the loss of efficiency attributable to renting firm-specific capital against the threatened cost of an uncompensated taking. In other words, a legal rule under which corporations cannot assert takings claims would bias entrepreneurs away from integrating through the corporate form.⁶⁹ Such a rule would be inconsistent with organizational neutrality. Consistent with the neutrality principle, however, the Court has in fact ascribed to corporations the right to just compensation,⁷⁰ as well as other rights against expropriation.⁷¹

2. Civil Procedural Rights

In other domains, the application of a neutrality principle might be somewhat less intuitive. Procedural rights provide a good example. Consider, for instance, the right to sue and be sued in federal court (and thereby to increase the credibility of interstate commitments in a world of possible discrimination in the state courts).⁷² Under the Constitution, the federal judiciary's diversity jurisdiction includes cases "between Citizens of different States."⁷³ The Constitution requires only "minimal diversity," meaning that at least one plaintiff must be the citizen of a state different from at least one

69. The (non)existence of a corporate-takings remedy would, in a direct sense, affect only the incorporated firm's decision whether to buy or lease capital. But a world in which corporations cannot assert takings claims would indirectly bias entrepreneurs against incorporation itself, precisely because the buy-lease option is valuable. To the extent law imposes an implicit tax on capital ownership, the value of the option decreases, and thus the value of incorporation.

70. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 256 (1897).

71. *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 176 (1893) (discussing corporations' due process rights); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 590 (1819) (discussing corporations' Contract Clause rights). One might add to the list of recognized rights against expropriation the corporation's right to equal protection under the Fourteenth Amendment. In the late 19th and early 20th centuries, Equal Protection doctrine entitled corporations to resist state laws that burdened them arbitrarily—that is, without a valid justification. *See Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (holding that corporations are persons, although not citizens, for Fourteenth Amendment purposes, because "corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 404 (1886) (invalidating California law establishing mortgage deduction generally, but not permitting "railroad and other quasi-public corporations" to use it); *see also* Horwitz, *supra* note 3. An equal protection right against impermissible regulation still exists in principle, of course, but after *Lochner* the substantive importance of the right has become minimal. *See, e.g., W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981) (upholding California's discriminatory tax scheme because the tax was "rationally related to achievement of a legitimate state purpose").

72. The power to sue is obviously a right. The capacity to be sued might be understood as a burden, but it is typically valuable because it makes contractual commitments more credible.

73. U.S. CONST. art. III, § 2.

defendant.⁷⁴ In what was arguably the first American case concerning the nature of the corporation, *Bank of the United States v. Deveaux*, the Supreme Court held that corporations are, for purposes of the diversity jurisdiction, citizens of the states in which their shareholders are citizens.⁷⁵ (As we shall see, the Court has held that corporations are not citizens for other purposes.) Although Chief Justice Marshall, writing for the Court, observed that “[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen,” he nevertheless thought it appropriate to look to the qualities of the persons who constitute it.⁷⁶ In effect, the corporation’s power to sue or be sued under the diversity jurisdiction was held identical to the power an analogous partnership would enjoy. Neutrality was preserved.⁷⁷

The Court’s organization-neutral approach to diversity jurisdiction extends to other procedural rights, for example: the right to notice, to an impartial adjudicator, and to trial by jury.⁷⁸

3. Criminal Process Rights

The rights of corporations to resist criminal investigations are relatively few.⁷⁹ But such rights as they have are consistent with organizational

74. *E.g.*, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967).

75. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–92 (1809).

76. *Id.* at 86.

77. As interpreted by *Strawbridge v. Curtiss*, the Judiciary Act of 1789 granted diversity jurisdiction to the federal courts in cases of “complete diversity” only—that is, in cases where each of multiple plaintiffs is a citizen of a state different from each of multiple defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). *Deveaux* understood corporations to have the citizenship of each member, just as a partnership would have the citizenship of each partner. With respect to small firms, this neutral rule sensibly vindicated the aims of the diversity jurisdiction, which sought to mitigate hometown bias. But as capital-intensive, interstate industry in the United States grew in the middle decades of the 19th century—especially in banking, insurance, and the railroads—the rule of *Deveaux*, in combination with *Strawbridge*, threatened to undermine the diversity jurisdiction’s utility. Most or all of the states would typically be represented among the shareholders of large firms. Consequently, corporations were in practice exiled from the federal courts even in cases where state-court bias was most likely. *See* Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 665–67 (1933) (recounting the history and contemporary criticism of this state of affairs). Recognizing the dire situation, the Court decided in a series of cases in the mid-19th century that all shareholders of a corporation would be conclusively presumed citizens of the state of incorporation. *See* *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 328 (1853); *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558–59 (1844). In one sense, these decisions could be viewed as non-neutral, because they hold that the citizenship of a corporation is to be determined by reference to different facts than the citizenship of a partnership. Yet functionally the decisions in fact reinforced an organization-neutral approach to the diversity jurisdiction by ensuring that federal courthouses would be open to business in cases where state-court bias was most likely—whether or not one of the parties was a corporation.

78. *See, e.g.*, *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012).

79. *See infra* Part III.C.2.

neutrality.⁸⁰ Corporations enjoy what might be thought of as two distinct rights under the Fourth Amendment. They can resist physical intrusions onto company property,⁸¹ and they can resist overbroad subpoenas for corporate information.⁸² Each of these rights, if denied to corporations, would discourage entrepreneurs from incorporating.

Start with the right against unreasonable physical entry. When government intrudes on a business premises—an office building, say—two kinds of privacy interests are at stake: the interest of the property owner and the interest of the persons who work there. Organizational neutrality requires that these interests receive the same weight whether or not a corporation owns the building or employs the persons working in it. Suppose that a particular building houses the offices of 100 individual lessees, each of whom has a key and can lock others out of her designated space. If the government wishes to search the offices, each lessee is entitled to refuse—even if, as it turns out, all 100 renters use their office space to make widgets that are sold to a single buyer, namely the landlord. The government may search the offices only on issuance of a warrant or in the event of an established exception to the warrant requirement. But now suppose the landlord considers integrating widget-making operations and employing the contractors through a corporate entity. If corporations were held to lack rights under the Fourth Amendment, the government would effectively extinguish the employees' privacy interests by virtue of the entrepreneur's choice to integrate. Privacy from government intrusion is valuable, so in a competitive labor market the laborers would demand compensation for relinquishing it. To the entrepreneur, this demand, and therefore the non-neutral rule, represents a cost of integration to be traded off against its efficiencies. Neutrality requires that the

80. So, as we shall see, are the decisions declining to ascribe some rights of criminal defendants to corporate defendants. I am not the first to recognize the functional parity of corporate and individual rights in this context. See Garrett, *supra* note 5, at 122 ("I argue that in fact, corporations and individuals are treated much the same for Fourth Amendment purposes; decisions that appear to limit Fourth Amendment rights of corporations relate to doctrine concerning business records and business locations that operate the same way for both individuals and corporations."). As Professor Garrett argues—correctly, in my view—the relatively poor record of corporations in the Fourth Amendment case law is a function of the substantive values at work, for example the special significance of the home, not of a bias against the corporate form as such. *Id.* at 125.

81. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978) ("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes."); *Hale v. Henkel*, 201 U.S. 43, 76 (1906). For more on corporate search-and-seizure rights, see William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 76–80 (2001); and Christopher Slobogin, *Citizens United and Corporate and Human Crime*, 41 STETSON L. REV. 127, 133–34 (2011).

82. *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946) (explaining that with respect to the State's subpoena power, the Fourth Amendment "guards against abuse only by way of too much indefiniteness or breadth").

corporation can assert a right against unreasonable physical intrusions.⁸³ A similar analysis shows why corporations likewise are able to resist overbroad subpoenas.

The skeptic might here object that in fact corporations have a relatively poor record in Fourth Amendment cases. Government's power to search commercial premises is much broader than its power to search a residence. Government agents need not even obtain a warrant to search the premises of certain heavily regulated businesses, for example.⁸⁴ But what is important to see for present purposes is that the scope of a commercial enterprise's search-and-seizure rights is a function of the tradeoff between the privacy and regulatory interests at stake in commerce. The interests are not the same as they are in family life. Critically, it is the nature of the enterprise in which the co-venturers are engaged, and not the form of their joint governance, that justifies government power in this domain. And because this is so, entrepreneurs neither gain nor lose by selecting a favored organizational mode.

4. Speech Rights

By now, the reader might anticipate where this discussion is heading. The power to speak freely is a valuable right. In some industries, such as the news, a certain type of speech is the product and restrictions on it are therefore especially risky from the entrepreneur's perspective. In other industries, advertising or marketing speech might be crucial to a particular firm's prospects. In a world where government could restrict the news reporting or advertising or marketing of corporations to a greater degree than it could the corresponding speech of unincorporated enterprises, entrepreneurs would have strong reasons to avoid incorporation. Plainly, such a world would be inconsistent with organizational neutrality. And indeed, the Supreme Court's First Amendment jurisprudence leaves no doubt that corporations are on par with other forms of enterprise when it comes to speech that is central to the enterprise's business.⁸⁵

For many years, though, the political speech rights of individuals, and therefore partners, were more extensive than the rights of corporations. *Buckley v. Valeo* held that Congress could not limit an individual's expenditures on political speech (although the amount of an individual's direct

83. See Garrett, *supra* note 5, at 128 ("Corporations have standing to litigate Fourth Amendment rights to challenge searches of corporate premises, something which individuals, such as employees and officers, would lack standing to do if they were not the target of the search.").

84. See *United States v. Biswell*, 406 U.S. 311, 316 (1972) (holding that a warrant was not needed to search the premises of a firearm dealer).

85. See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n*, 447 U.S. 557 (1980) (finding that a utility company was entitled to advertise its services); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) (holding that news corporations enjoy speech and press rights).

contributions to political candidates could be limited).⁸⁶ Meanwhile, the Court upheld Congress's restrictions on corporations' political-speech expenditures (as well as contribution limits).⁸⁷ This (non-neutral) distinction was finally laid to rest in *Citizens United v. FEC*, in which the majority opinion summarized its conclusion with a gesture toward a kind of neutrality: "The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"⁸⁸

Today the political-speech jurisprudence is organization-neutral. Yet, the tradition of regulating corporations' political speech differently from the political speech of other kinds of entities should perhaps be unsurprising, because speech rights are in an important respect different from the rights considered above. A rule disclaiming corporate speech rights does not extinguish the corresponding rights of the persons who constitute the corporation. Recall, by contrast, the discussion of rights against government expropriation. Under a non-neutral rule, the government's power to seize capital would depend dramatically on the form of enterprise. Organized as a partnership, the capital providers could demand just compensation. Organized as a corporation, the same capital providers would be out of luck. Recognition of a right in the corporation itself was needed to level the regulatory playing field. Not so with speech. Every person who supplies an enterprise with capital, labor, or any other input retains his or her individual speech rights irrespective of whether the enterprise is organized as a partnership, a corporation, or any other form.

What a corporate speech right offers is an avenue by which individuals can reduce the costs of coordinating their respective, individual speech efforts. To illustrate, consider the plight of a widget-manufacturing corporation in a world where corporations, but not others, are prohibited from advertising. Some widget advertising is presumably efficient, so an outside entrepreneur could offer the firm's shareholders a deal. If they give him money, he will use 99% of the proceeds to speak, as an individual, about the merits of widgets. In this way, the shareholders would be able to capture most of the value of advertising—if, at any rate, they could overcome the collective-action problem associated with funding the advertising entrepreneur.

The inefficiency attributable to a non-neutral rule in the domain of speech rights is at most the cost of coordinating speech through a non-corporate entity. Typically it will be much less. Consistent with the uncertain history of the jurisprudence in this area, and with the public controversy

86. *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

87. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 209 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 668–69 (1990).

88. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 343 (2010) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

surrounding *Citizens United*, one should expect that the normative force of an argument from efficiency would be particularly weak in this context.

5. Rights Against Racial Discrimination

The Court has also strongly hinted, although it has not decided, that corporations may invoke rights to racial nondiscrimination. The key case here is *Domino's Pizza, Inc. v. McDonald*.⁸⁹ McDonald, a black man, was sole shareholder and president of JWM Investments, Inc.⁹⁰ JWM and Domino's were in discussions over possible franchises in the Las Vegas area.⁹¹ Ultimately, Domino's opted not to conclude a deal, and JWM filed for bankruptcy.⁹² McDonald sued Domino's in his individual capacity, alleging that the company was liable under the Civil Rights Act of 1866 for refusing to conclude an agreed upon contract.⁹³

The Court held that McDonald had no claim because Domino's had never contemplated a contract with him personally but only with the corporation, JWM, of which he was sole shareholder.⁹⁴ At first blush, the ruling appears to have been non-neutral. Under the Court's reasoning, after all, McDonald would have had a better claim if he had run his investment company as a proprietorship. Yet in fact the decision foreshadows a deeper consistency with organizational neutrality. The Justices opined that JWM, the corporate entity, might have been the appropriate party to bring the discrimination claim.⁹⁵ The idea of a corporation being the victim of racial discrimination might sound counterintuitive, but it follows necessarily from neutrality.

Suppose that two friends are considering going into business together. One of them is a racial minority against whom, let us stipulate, there is a history of discrimination. Law gives him a right to compensation for certain

89. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006).

90. *Id.* at 472.

91. *Id.*

92. *Id.* at 473.

93. *Id.* The statute provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

42 U.S.C. § 1981(a) (2012). It has been interpreted to subject private defendants to liability for preventing a person, on racial grounds, from entering into or enforcing contractual rights. *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

94. *Domino's Pizza, Inc.*, 546 U.S. at 479–80.

95. There was no occasion for the Court to settle the question finally, but the opinion strongly hinted that the Justices would be inclined to follow the courts of appeals in so holding. *Id.* at 473 n.1 (“We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims.” (citing *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982))).

kinds of discrimination. The friends must decide between incorporating and sharing profits by contract. Now suppose that corporations were held unable to assert the kind of racial discrimination claims that individuals can assert. If the friends were to incorporate, this valuable right would be extinguished (because, to repeat, counterparties would contract, or not, with the corporation rather than the shareholder). The friends would be biased away from corporate integration. Organizational neutrality demands that corporation be able to assert the right.

C. ORGANIZATION-NEUTRAL NON-ATTRIBUTIONS OF CORPORATE RIGHTS

In some instances, the Supreme Court acts consistently with organizational neutrality by declining to recognize a corporate right. In particular, the neutrality principle demands that courts not ascribe to corporations a right otherwise attributable to natural persons where ascribing it would allow entrepreneurs to gain a regulatory advantage. This Subpart discusses instances where neutrality is achieved by declining to recognize a corporate right.

1. Franchise Rights

The Constitution refers to “[t]he right of citizens of the United States . . . to vote”⁹⁶ Might this right belong to corporations? A reader of *Deveaux* who did not know better would be forgiven for thinking so. After all, the Court there held that chartered firms are “citizens” within the meaning of the Constitution’s diversity-jurisdiction provisions.⁹⁷ If corporations are citizens for purposes of one constitutional provision, why not for purposes of another?

The question has never confronted the Supreme Court. Yet its answer, were it to give one, is beyond doubt. Corporations lack the franchise. But why? No settled understanding of the concept of the citizen can supply a justification—not, in any event, if *Deveaux* is to be taken seriously. Nor does the firm’s inhumanity obviously disqualify it from registering an opinion rationally related to its interests. Indeed, it has been argued that corporations *should be* allowed to vote if they are to be held morally culpable for wrongdoing.⁹⁸ There may, of course, be many reasons to deny corporations the franchise. My aim here is only to show why organizational neutrality is incompatible with corporations going to the polls. The reason is simple enough. A corporate franchise would increase the effective voting power of the people who constitute the corporation *by virtue of their having incorporated*. It would bias entrepreneurs toward incorporation. Organized as partners, 10

96. U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).

97. See *supra* notes 75–77 and accompanying text.

98. Hasnas, *supra* note 16, at 34–35.

individuals have 10 votes; organized as an incorporated entity, they would have 11.⁹⁹ Ascribing a corporate right would represent a non-neutral decision.

2. Criminal Process Rights

As discussed above, the Court has ascribed to corporations some of the rights natural persons enjoy in relation to government investigations and prosecutions. In two important respects, however, the Court has distinguished between corporate and individual defendants: (1) corporations may not assert the Fifth Amendment's privilege against testimonial self-incrimination;¹⁰⁰ and (2) corporations must produce potentially incriminating documents in response to a subpoena.¹⁰¹

To see why attributing rights against self-incrimination to corporations would be inconsistent with organizational neutrality, one must first understand the sense in which corporate criminal liability acts as an imperfect substitute for conspiracy liability. In general, criminal liability attaches to corporations by virtue of, and so to punish, bad acts undertaken by employees and commanded—or at least tolerated knowingly—by members of senior management.¹⁰² Hierarchy and informal interaction characterize the corporation and make the corporate form valuable, but these same features can also frustrate investigations of individual wrongdoing. It is a question of the difficulty of observation. Because management can often set policy subtly, with a wink or a nod, and because chains of interaction can take on tremendous complexity, much unlawful, concerted behavior would escape detection (or at least punishment) if the state had to prove beyond a reasonable doubt the acts and mental states of all individual employees involved. Corporate criminal liability thus acts as a stand-in for the kind of conspiracy liability that would attach to concerted, unlawful action by persons whose enterprise is coordinated through contract.¹⁰³

99. A corporate franchise would of course create other problems difficult to square with democratic theory. The creation of a corporation is cheap. Because a person may incorporate as many firms as his dollars will allow, the corporate franchise would devolve into an explicit vote-buying regime.

100. *Curcio v. United States*, 354 U.S. 118, 122 (1957) (“It is settled that a corporation is not protected by the constitutional privilege against self-incrimination.”).

101. *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (“It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.”).

102. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909) (sustaining a corporate conviction for a crime of intent).

103. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1483–84 (1996) (explaining that “[d]uring the early twentieth century courts began to hold corporations criminally liable in various areas in which enforcement would be impeded without corporate liability”).

If holding a corporation criminally liable for concerted, bad acts is roughly equivalent to holding bad actors in an unincorporated enterprise individually liable as a matter of conspiracy, the neutrality of the Court's self-incrimination doctrine is clear. Imagine that five friends, *A*, *B*, *C*, *D*, and *E*, operate an auto-body shop. *D* and *E* decide to earn extra income by fencing stolen cars. They trust each other to some extent, but, after all, each knows that the other is a thief. Rudimentary recordkeeping is necessary as between *D* and *E*, but *A*, *B*, and *C* also track the cars coming in and out of the shop. In other words, each friend has information that would tend to incriminate *D* and *E*. Now consider what rights the friends would have to resist investigation if the police, tipped off about the scheme, were to come knocking with probable cause. And suppose, first, that the auto-body shop is an unincorporated enterprise. Each friend is on the shop's lease, and they share the workload and profits by informal agreement. By hypothesis, *A*, *B*, and *C* have no potential criminal liability. They would be obliged to testify against *D* and *E*, and to supply any incriminating documents the police subpoena. Specifically, the Fifth Amendment privilege of *A*, *B*, and *C* is irrelevant because nothing they could say would tend to self-incriminate. Likewise, if the state were to immunize one of *D* or *E*, he would be obliged to incriminate the other. But now suppose the friends were to incorporate the shop, each owning a fifth of the corporation's stock, sitting on its board, and working as its employees. Nothing else changes. If the law were to recognize a corporate privilege against self-incrimination, then each of the friends could decline to give evidence on the ground that it might incriminate the firm, which, after all, could be held accountable for the concerted acts of even a minority of its members. Only a rule denying corporations the privilege against self-incrimination ensures that the government will have equal access to evidence irrespective of the form of an enterprise's organization.¹⁰⁴

3. Privacy Rights

In some instances, the Court achieves organizational neutrality not by declining outright to ascribe a right to corporations, but rather by interpreting the substance of the right so as not to subsidize incorporation. The judgment in a recent privacy case, *Federal Communications Commission v. AT&T Inc.*, is exemplary in this respect.¹⁰⁵

104. I am not the first to recognize that a rule privileging the testimony and production of corporate documents would, as a practical matter, frustrate the prosecution of large firms in a manner incongruous with the state's investigatory powers in the prosecution of individuals. See Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 818 (1996) ("A holding that permitted corporations to invoke the full protection of the Fourth and Fifth Amendments would thwart the government's enforcement effort by making investigation of a corporation's crimes virtually impossible.").

105. Fed. Commc'ns Comm'n v. AT&T Inc., 562 U.S. 397 (2011).

AT&T concerned the scope of a provision of the Freedom of Information Act (“FOIA”) that exempted from the public domain certain law enforcement records—namely, records the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”¹⁰⁶ In response to a trade organization’s request, the Federal Communications Commission (“FCC”) agreed to turn over a cache of documents relating to its investigation of *AT&T*.¹⁰⁷ The FCC withheld documents identifying sensitive information about individual employees, but it agreed to release other documents that would, *AT&T* argued, unreasonably invade the firm’s interest in privacy.¹⁰⁸ The Supreme Court agreed with the FCC’s decision. Notwithstanding that the Act defines corporations as “persons,” the Justices read the statute not to ascribe corporations an interest in “personal privacy.”¹⁰⁹

The decision was consistent with organizational neutrality. To have held that *AT&T*’s business records were a matter of *its* privacy would have subsidized incorporation. To see this, consider the status of the business records of an analogous enterprise—call it *AT&T**—coordinated entirely by contract. *AT&T**’s records would presumably be quite similar in content to *AT&T*’s, but the individual contractors who constitute *AT&T**, rather than an incorporated entity, would have their custody. In response to a FOIA request for *AT&T**’s documents, a government agency would withhold documents identifying sensitive information about individuals, as the FCC did in *AT&T* itself, but no entity would exist to claim additional, “personal” privacy. If the Court had decided the case other than it did, it would in effect have ascribed to the persons constituting *AT&T* a wider immunity from public scrutiny than to the persons constituting *AT&T**.

4. A Note on “Liberty” Rights

Commentators have noted that corporations lack the right to “liberty” that natural persons enjoy under the Fifth and Fourteenth Amendments.¹¹⁰ And, indeed, the Court has so declared, opining that the Fourteenth Amendment’s “liberty” is “the liberty of natural, not artificial, persons.”¹¹¹

It is not immediately clear how such a pronouncement relates to organizational neutrality, if only because the meaning of liberty in this context is opaque. Presumably, the disclaimed corporate liberty interest would grant wider license to persons affiliated by corporation than to persons affiliated by

106. Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (2012).

107. *AT&T Inc.*, 562 U.S. at 400.

108. *Id.* at 401.

109. *Id.* at 409.

110. See, e.g., Garrett, *supra* note 5, at 162–64; Pollman, *supra* note 5, at 88.

111. *W. Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907); *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (“The liberty referred to in that Amendment is the liberty of natural, not artificial persons.”).

partnership, by contract, or otherwise. After all, the act of incorporation in no way extinguishes the liberty of the individuals who associate with it. It would make sense to disclaim “group liberty” only if it otherwise might operate to increase private rights against regulation. To the extent this reading of the Court’s meaning is correct, the decision not to ascribe a corporate right to liberty is consistent with organizational neutrality.

Deep skepticism on this front is warranted, however, because it is doubtful that the concept of corporate liberty has, or ever had, any practical meaning. In any event, a special, *corporate* liberty nowhere features in the case law. In *Western Turf Ass’n v. Greenberg*, the source of the dictum on corporate liberty, for example, a racetrack company sought to reverse a judgment it was ordered to pay for ejecting a patron from the track.¹¹² According to the California statute under which the corporation was punished, it was unlawful not to admit any ticketed member of the public, unless he were drunk, lewd, or “guilty of boisterous conduct.”¹¹³ By its terms the prohibition extended to corporations and natural persons alike.¹¹⁴ The case had nothing to do with the inability of a corporation to assert a right to liberty that would have been available to a natural person.

Moreover, the cases disclaiming a corporate right to liberty under the Fourteenth Amendment may well be defunct. The theory by which the Supreme Court incorporated the First Amendment’s protection of the freedom of speech against the states is premised on the Fourteenth Amendment’s due process right to liberty.¹¹⁵ If the states are bound to respect corporations’ speech rights, as the Court has subsequently held, then current doctrine would seem to hold that artificial, as well as natural, persons enjoy Fourteenth Amendment liberty rights. The safest thing to say about corporate liberty rights is probably this: The Court’s approach is either organization-neutral or else meaningless.

D. “BUT SEE”: POLITICAL SPEECH, PRIVILEGES AND IMMUNITIES

During a span of more than 200 years—an interval witnessing the tenure of over 100 Justices—a remarkable proportion of the Supreme Court’s corporate-rights decisions have been consistent with organizational neutrality. But not all of them. This Subpart considers two areas in which the Court has issued non-neutral opinions. Strikingly, in both instances the non-neutral principle has been either overruled by a subsequent decision or outmoded by the passage of time.

112. *W. Turf Ass’n*, 204 U.S. at 361.

113. *Id.* at 362.

114. *Id.*

115. *Gitlow v. New York*, 268 U.S. 652, 664 (1925) (“The precise question presented, and the only question which we can consider under this writ of error, then is, whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression in violation of the due process clause of the Fourteenth Amendment.”).

1. Political Speech Rights

In *Citizens United*, the Court held that corporations can speak on political matters, and can contribute funds to support political speech, to the same degree that individuals can.¹¹⁶ The conclusion is consistent with organizational neutrality. But *Citizens United* expressly overruled earlier cases, implying that the earlier cases were themselves non-neutral. And indeed they were. The decisions in cases such as *Austin v. Michigan Chamber of Commerce*¹¹⁷ and *McConnell v. FEC*¹¹⁸ validated regulations that marginally discouraged the speech of enterprises organized as corporations.

Little else need be said of these cases, except to note that the distortionary effect of *Austin* and *McConnell* was apt to be quite small. Most business firms are uninterested in engaging in the kind of political speech legislatures or election authorities might wish to regulate. Those affiliated with a business may have conflicting views, and even where they are unanimous they will often wish to avoid alienating potential customers whose strongly held inclinations differ from their own. And because affiliation with a corporation does not extinguish one's individual right to be heard on political matters—in the sense that an individual who wishes to speak need not do so through the firm—there is usually little reason for businesses to electioneer. To the extent corporate management did wish to take political stands in the pre-*Citizens United* world, they could presumably find non-corporate mouthpieces at relatively low cost. All this is to suggest that it should be unsurprising to find a non-neutral rule in the domain of political speech rights. Where the distortionary effect of non-neutral rules is small, competing values (that is, values other than economic efficiency) loom large. Conversely, organizational neutrality is likely to be most robust in domains where the distortionary effect of a non-neutral rule would be greatest.

2. Privileges and Immunities

In 1839, the Supreme Court held that the Privileges and Immunities Clause does not protect the putative interests of corporations.¹¹⁹ *Bank of Augusta v. Earle* posed the question of whether a Georgia banking corporation could enforce a contract it made in Alabama.¹²⁰ The bank argued that the Constitution entitled it, as a Georgia citizen, to make contracts in any of the several states.¹²¹ A divided Court ultimately agreed with the bank that the contract was valid, but valid on account of Alabama's voluntary comity rather

116. See *supra* notes 87–88 and accompanying text.

117. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

118. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

119. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586–87 (1839).

120. *Id.* at 585.

121. *Id.* at 586.

than constitutional compulsion.¹²² About the privileges and immunities of citizens, the Court balked. Justice Taney, writing for the majority, acknowledged that *Deveaux* had previously ascribed citizenship to corporations for purposes of the diversity jurisdiction.¹²³ Nevertheless, he declined to look behind the corporate entity to the citizenship of the firm's members. Corporations, the Court held, are not entitled to the "Privileges and Immunities of Citizens in the several States"¹²⁴—whatever those are.

The substantive scope of the Privileges and Immunities Clause bears directly on whether and to what degree *Bank of Augusta* is inconsistent with organizational neutrality. Unfortunately, its scope is (or at least in 1839 was) questionable. Today, the Privileges and Immunities Clause is understood as a nondiscrimination rule, a guarantee that a host state will not deny to visitors from another state certain privileges, such as the right to travel freely, that citizens of the host state enjoy.¹²⁵ For nearly a century after the Constitution's ratification, however, the meaning of the Clause was in doubt. Some jurists, Justice Washington most famously among them, understood the Clause to grant certain "fundamental" privileges to all citizens in whatever state they happened to be.¹²⁶

If Justice Washington's view of the Privileges and Immunity Clause had won out—if, that is, the Privileges and Immunities Clause was read to impose a number of important limits on the states' police power—then *Bank of Augusta* might have had profoundly non-neutral consequences. Read in light of what was to come, however, the decision's ambit is narrow and of little practical moment. States in fact allow foreign corporations to enter contracts, and by the lights of modern constitutional doctrine they typically must do so.¹²⁷ In that sense, *Bank of Augusta* is nearly a dead letter. In any event, though, it does seem to have been inconsistent with organizational neutrality. A rule under which foreign states can prohibit contracting by incorporated firms, but not by natural persons, favors non-incorporation at least on the

¹²². *Id.* at 592–97.

¹²³. *Id.* at 586.

¹²⁴. U.S. CONST. art. IV, § 2.

¹²⁵. See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999).

¹²⁶. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230). Justice Washington thought it "tedious" to enumerate all of these rights, but he did list some of them:

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state

Id. at 551–52.

¹²⁷. See generally *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981) (discussing the evolution of the Commerce Clause and Equal Protection doctrines in respect to state discrimination against foreign corporations).

margin. That sounds non-neutral. Understood in light of prevailing jurisdictional norms, however, it is possible to conceive of the case differently. The Justices might simply have thought it necessary to give a state leeway to exclude from local commerce entities that the state could not practically hold to account. *Bank of Augusta* was decided more than a century before *International Shoe Co. v. Washington*, in an era when states' jurisdiction over foreign persons was sharply curtailed.¹²⁸ An alien individual doing business in the state, including as a member of a partnership, might be served process relatively easily; but an alien corporation doing business in the state through an agent might not be so easily hauled into court. Indeed, at the time *Bank of Augusta* was decided, the prevailing wisdom held that, although a corporation might do business via agents in a foreign state, it could never be sued there absent its actual consent.¹²⁹ Attachment of the corporation's assets in the host state, if any, was the only available remedy, and the law of some states was understood not even to allow this relatively meager assurance.¹³⁰ Thus, *Bank of Augusta* might in fact have represented an attempt to limit the effect of a different kind of non-neutrality founded on prevailing theories of sovereignty and the spatially bounded nature of the corporation.

A similar rationale might also explain extensions of *Bank of Augusta* epitomized by another seemingly non-neutral application of the Privileges and Immunities Clause, *Paul v. Virginia*.¹³¹ In *Paul*, a group of New York corporations challenged Virginia's regulation of its domestic insurance industry.¹³² Virginia law prohibited foreign insurance companies (but not insurers chartered in Virginia) from issuing policies without first receiving a license, one of the prerequisites to which was the posting of a bond.¹³³ Paul, an agent of the New York insurers, argued that the companies were entitled

128. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

129. See GERARD CARL HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW: A CONTRIBUTION TO THE HISTORY AND THEORY OF JURISTIC PERSONS IN ANGLO-AMERICAN LAW* 77–80 (1918) (citing authorities to this effect). The fiction of implied consent to service of process was first enunciated in a circuit court decision two years before *Bank of Augusta*, see *id.*, but its development coincided, not surprisingly, with the growth in interstate commerce associated with the mid-19th century. The Supreme Court did not validate the theory until 1855. See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 408 (1855) (holding that when a corporation sends its agent into a foreign state, it may do so only on the foreign state's conditions, including the condition that the agent act as a representative amenable to service).

130. HENDERSON, *supra* note 129, at 77–80; see also *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, 7 (N.Y. Sup. Ct. 1819) (interpreting a New York foreign attachment statute to apply to natural persons only, on the ground that “process against a corporation, must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists”).

131. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); see also *Blake v. McClung*, 172 U.S. 239, 259 (1898).

132. *Paul*, 75 U.S. (8 Wall.) at 169–70.

133. *Id.* at 168–69.

to sell policies without interference from the state.¹³⁴ The Court rejected Paul's contention, reaffirming the doctrine that the Privileges and Immunities Clause attached to natural persons only, not to corporations.¹³⁵ On first glance, the decision was evidently non-neutral. Although the Court did not reach the merits of Paul's Privileges and Immunities claim, its opinion might be read to imply that unincorporated associations of individuals have greater power to resist state business regulations than do incorporated associations. Such a rule would quite clearly be inconsistent with organizational neutrality.

Subsequent decisions along two dimensions effectively mooted *Paul's* significance for the constitutional status of corporations. The development of Equal Protection and Negative Commerce Clause jurisprudence ensured that much of what was taken from corporations with one hand would be restored with another.¹³⁶ As the Court later described, the beginning of the 20th century saw "an almost complete disintegration' of the doctrine of *Paul v. Virginia*."¹³⁷ In combination, these developments ensured that *Paul's* implications would remain forever uncertain. It is probably best understood as a non-neutral decision. But one can also read it, like *Bank of Augusta*, as a practical solution to a daunting problem of enforcement. Specifically, Virginia's bond requirement appears to have been calculated to solve a judicial dilemma. In the event of an insured's action for nonpayment on a policy, the Commonwealth's courts would have relatively little difficulty reaching the assets of Virginia-chartered insurers. Equally important, Virginia's visitatorial power over domestic corporations meant that the Commonwealth could ensure sufficient assets to pay citizens' claims. By the time *Paul* was decided, the law of personal jurisdiction had developed so that the establishment of judicial power over a foreign insurer no longer posed a serious constitutional problem. Yet ensuring that the foreign corporation could and would pay any judgment rendered by the courts was a different matter. Thus, while Virginia's bond requirement might be viewed as a species of protectionism, it also plausibly can be seen as the Commonwealth's sole practical tool to guarantee foreign insurers' solvency in the years immediately following the Civil War.

134. *Id.* at 169–70.

135. *Id.* at 180.

136. See, e.g., Mark, *supra* note 3, at 1457 n.42 (1987) ("While the privileges and immunities clause remains inapplicable to corporations, the Court eventually found limitations on state power to interfere with foreign corporations inherent in the commerce clause and the equal protection clause."). For more on the history of corporate theory in this period, see *id.* at 1455–64.

137. *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 662 (1981) (quoting HENDERSON, *supra* note 129, at 111); see also *id.* at 660 (explaining that the rise of general incorporation statutes and the development of equal-protection law "necessarily undermined" the doctrine of *Paul*).

IV. IN DEFENSE OF *HOBBY LOBBY*'S CORPORATE LAW

To the extent organizational neutrality distills the logic underlying the Supreme Court's corporate-rights jurisprudence, it also provides a framework with which to interpret and to evaluate individual cases. To illustrate the framework's contemporary utility, this Part takes up the merits of the Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*¹³⁸ The weight of scholarly opinion is critical of the case's corporate law disposition, and sharply so. On the leading view, the Court's majority badly misapprehended the separation between shareholder and firm that is a hallmark of the corporate form.¹³⁹ The Justices' misapprehension led to a misattribution of the shareholders' religious convictions to the respective corporations themselves and, therefore, to the improper recognition of a corporate right to religious accommodation. Yet, to read *Hobby Lobby*'s majority opinion in the light of organizational neutrality is to behold a very different picture. On at least one plausible reading, the Court's decision had nothing whatever to do with shareholder primacy or "reverse veil-piercing."¹⁴⁰ It had everything to do, instead, with organizational neutrality. This reading yields a more sanguine appraisal of *Hobby Lobby*'s merit and also a set of implications for the future that critics of the case have failed to see. For example, as I shall argue, the decision's logic implies that not all corporations can exercise religion and that some corporations can simultaneously exercise more than one.

A. THE DECISION

The dispute in *Hobby Lobby* is by now well-rehearsed. A provision of the Affordable Care Act mandates that employers with 50 or more full-time employees provide health insurance covering "preventive care and screenings" for women.¹⁴¹ The Department of Health and Human Services ("HHS") issued guidance interpreting the phrase to include all "contraceptive methods, sterilization procedures, and patient education and counseling"

138. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

139. An amicus brief filed in the case and signed by 44 scholars of corporate, securities, and criminal law, is representative of the dominant view but by no means its sole articulation. See generally *Amicus Curiae* Brief of Corp. & Criminal Law Professors in Support of Petitioners, *supra* note 18. Scholarly opinion is by no means unanimous, of course. See, e.g., Meese & Oman, *supra* note 64; Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015).

140. See *Amicus Curiae* Brief of Corp. & Criminal Law Professors in Support of Petitioners, *supra* note 18, at 2–3, 13–18 (suggesting that a corporate free-exercise right could be located only by embracing such a rationale and arguing that it would be inappropriate under the circumstances); see also Stephen M. Bainbridge, Essay, *A Critique of the Corporate Law Professors' Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE (2014) (reaching the opposite conclusion on the merits but arguing that reverse veil-piercing is the correct doctrine to consider).

141. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 2713(a)(4), 124 Stat. 119, 131 (2010) (codified as amended at 42 U.S.C. § 300gg–13 (2012)).

approved by the Food and Drug Administration (“FDA”).¹⁴² Most FDA-approved contraceptive methods operate to prevent fertilization of the egg. But four of the methods work by preventing a fertilized egg from implanting and developing in the uterine wall.¹⁴³

It was to the provision of these four contraceptive methods that Hobby Lobby Stores, Mardel, and the Conestoga Wood Specialties Corporation objected. Citing the Religious Freedom and Restoration Act (“RFRA”), the companies argued that they were exempt from the HHS guidelines.¹⁴⁴ Enacted in the wake of *Employment Division v. Smith*,¹⁴⁵ the RFRA prohibits the federal government from “substantially burden[ing] a person’s exercise of religion even if the burden results from a rule of general applica[tion],” unless the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”¹⁴⁶ Hobby Lobby, Mardel, and Conestoga Wood argued that the FDA’s interpretation of “preventive care and screenings” burdened their religious exercise and was not the least restrictive means of furthering a compelling governmental interest.

The case presented the Justices with two questions of far-reaching import: (1) whether the FDA’s guidelines were the least restrictive means of furthering a compelling interest; and, if not, (2) whether corporations could qualify for an exemption under the RFRA. The Court concluded that the FDA’s guidelines were not the “least restrictive means” of securing contraceptive care for women. It therefore held that the guidelines could not be applied to an employer whose religious practice is inconsistent with them.¹⁴⁷

The corporate-law question, then, was whether Hobby Lobby, Mardel, and Conestoga Wood were the kinds of entities that could exercise religion within the RFRA’s meaning. The RFRA’s prohibition of governmental burdens applies to the religious exercise of all “persons.” The Dictionary Act, applicable here, defines “person” to include corporations, a fact cited by the Court in support of the conclusion that corporations have rights under the

142. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (codified at 45 C.F.R. pt. 147 (2015)).

143. *Hobby Lobby*, 134 S. Ct. at 2762–63.

144. Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (2012)).

145. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

146. 42 U.S.C. § 2000bb–1.

147. *Hobby Lobby*, 134 S. Ct. at 2775–77. Evaluating the Court’s resolution of this aspect of the case would go far beyond this Article’s scope and its author’s ken. For present purposes, what is important is to see that the corporate-rights question in *Hobby Lobby* comes to the fore only to the extent it is agreed, as the Court decided, that a non-corporate employer, such as a sole proprietor, could insist on an exemption from the guidelines’ application.

RFRA.¹⁴⁸ But the definition could not decide the case because not all persons are necessarily capable of exercising religious scruples.¹⁴⁹ Corporations are plainly incapable of the kind of devotion individual human beings are apt to express. They may be “persons,” and the conduct of the humans who compose them may produce actions that accord with the dictates of one or another religious tradition. Yet, lacking mind, corporations lack the phenomenology of belief, hope, fear, or whatever, that constitutes religious experience.¹⁵⁰ None of the Justices in *Hobby Lobby* concluded otherwise. The relevant question, as they saw it, was not whether a firm can “have religion.” Rather, the question was whether the religion of some human or humans ought in fairness to be attributed to these firms.

The majority’s short answer was yes.¹⁵¹ The companies were closely held, and the Court looked to the religious convictions of the families who owned and managed them, holding that the companies could insist on an exemption to protect the families’ interests. It was undisputed that each of the shareholder–managers sincerely believed, on religious grounds, that he or she could not furnish insurance covering the relevant contraception methods.¹⁵² That said, the corporations themselves, not their shareholder–managers, were the “employers” whom the Affordable Care Act and the HHS rule sought to regulate. It was not obvious that the shareholder–managers’ religious beliefs, and the rights implied by such beliefs under the RFRA, should devolve onto the companies. Even after the decision, it is not obvious *why* they do. The rest of this Part turns to that question.

B. A SHAREHOLDER-PRIMACY READING

On one reading of the case, *Hobby Lobby* held that the religious convictions of a corporation’s shareholders should always be imputed to the corporation itself. The shareholders, as “owners” of the firm, are entitled to residual earnings, but also to set its policies and mission, and to control its identity. If the owners wish to run the business according to religious dictates—and so to be burdened competitively by doctrine that in some instances will be detrimental to financial returns—they ought to be allowed some exemptions from otherwise applicable regulation. To simplify only a

148. 1 U.S.C. § 1 (2012); *see also Hobby Lobby*, 134 S. Ct. at 2768 (explaining that the Dictionary Act governs interpretation of the word “person” under the RFRA).

149. *Hobby Lobby*, 134 S. Ct. at 2769.

150. For an excellent philosophical discussion of this issue, see Sepinwall, *supra* note 139, at 178–90.

151. *Hobby Lobby*, 134 S. Ct. at 2767–75.

152. *Id.* at 2764–66. In the context of closely held companies such as *Hobby Lobby*, *Mardel*, and *Conestoga Wood*, it is common for the same persons both to supply equity capital and to direct the business enterprise. *Hobby Lobby* describes these persons alternatively as the “shareholders,” the “owners,” the “owners and controllers,” and so on. As we shall see, the theoretical distinction between these roles might be important in another case.

little, the Court understood the corporation to *belong to* its shareholders. Call this the “shareholder-primacy” reading.

Most scholars have read *Hobby Lobby* this way. Before argument in the case, 44 professors filed an amicus brief framing the corporate-law question just so. As they saw it, the question was whether religious values “pass through” from a corporation’s shareholders to the corporation.¹⁵³ They answered their own question with a definitive no: “The first principle of corporate law is that for-profit corporations are entities that possess legal interests and a legal identity of their own—one separate and distinct from their shareholders.”¹⁵⁴ Even those who disagreed with the law professors’ brief on the merits assumed likewise that the decisive corporate-law question was whether and in what circumstances shareholders could, *because they were owners*, vest the corporation with their religious views.¹⁵⁵

The Court’s announcement of its decision did little to change the consensus understanding of the corporate-law features at stake in the case. The majority opinion has been described as having adopted a strong pass-through rationale: “On [Justice Alito’s] account,” one commentary declares, “the rights of for-profit companies are reducible to the rights of the ‘humans who own and control those companies.’”¹⁵⁶ Others who criticize the decision similarly assume that its significance lay in the equation of shareholders with the corporation. As one critic puts it, the Court was wrong to impute shareholder values to the firm because “the very purpose of the corporate form is to separate the shareholders from the corporate entity.”¹⁵⁷ In the opinion of another, the majority was unfortunately opaque about “why the people who count in the [rights] analysis are only those who own and control the corporations.”¹⁵⁸ If religious belief can devolve onto a corporation from those who constitute the firm, it would do as well to “consider the interests of employees.”¹⁵⁹

Although the shareholder-primacy reading of *Hobby Lobby* is, in my view, ultimately unpersuasive, parts of the majority opinion do seem to corroborate

153. Amicus Curiae Brief of Corp. & Criminal Law Professors in Support of Petitioners, *supra* note 18, at 2–3.

154. *Id.* at 3.

155. See, e.g., Bainbridge, *supra* note 140; see also Meese & Oman, *supra* note 64, at 276 (“The scholars properly assume that Hobby Lobby’s shareholders are the true source of religious exercise by the corporation.”).

156. Schragger & Schwartzman, *supra* note 45, at 33 (criticizing this putative account because it supplies no reason “why the rights of corporate owners should be identical to the rights of the corporation”).

157. Kent Greenfield, Hobby Lobby Symposium: Hobby Lobby, “Unconstitutional Conditions,” and Corporate Law Mistakes, SCOTUSBLOG (June 30, 2014, 9:07 PM), <http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes>.

158. Elizabeth Pollman, Corporate Law and Theory in Hobby Lobby, in THE RISE OF CORPORATE RELIGIOUS LIBERTY, *supra* note 45 (manuscript at 17).

159. *Id.* (manuscript at 18).

it. For example, the Court described the functional effect of its decision as vindicating shareholder–manager interests. To recognize the free-exercise rights of Hobby Lobby, Mardel, and Conestoga Wood was to protect the persons “who own and control” them.¹⁶⁰ The government’s argument was framed as interfering with the interests of this same constituency: “In holding that the HHS mandate is unlawful,” the majority explained, “we reject HHS’s argument that the owners of the companies forfeited all the RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or partnerships.”¹⁶¹ And indeed, the sheer volume of ink spent cataloging the shareholder–managers’ religious beliefs would seem to indicate the importance of their beliefs, and not others, to the Court’s reasoning.¹⁶²

To the extent *Hobby Lobby* should be understood as a statement of shareholder primacy, commentators are arguably right to reject it.¹⁶³ Shareholders are important constituents of the business corporation. They provide equity capital, and in return they typically are entitled to earnings and to vote on select matters of corporate strategy. But shareholders do not own corporations. They own shares of stock issued by the corporation. As holders of the right to residual earnings, they have a deep interest in the corporation’s activities; but so, too, do holders of fixed claims and expectancies. If theorists of the corporation of all stripes can agree on one vision, surely it is the firm as a site for cooperation among persons with imperfectly aligned aims. The allocation of decisionmaking authority in any cooperative venture—to say nothing of the attribution of identity—must be justified by circumstances and cannot simply be posited.

C. AN ORGANIZATION-NEUTRAL READING

As should now be clear, another reading of *Hobby Lobby* is possible—a reading consistent with organizational neutrality. This reading, like the shareholder-primacy reading, finds support in the majority opinion’s language. But it is also consistent with both the modern theory of the firm and the Court’s historic corporate-rights jurisprudence.

On this reading, the religious commitments of Hobby Lobby’s, Mardel’s, and Conestoga Wood’s shareholder–managers were central to the case because of the particular free-exercise claim at issue, not because of any intrinsic equation between a firm and those who provide it with equity

160. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

161. *Id.* at 2759.

162. *Id.* at 2764–66.

163. For an intriguing argument that shareholders are more responsible for corporate acts than are other constituents and thus presumptively more entitled to feel complicit in corporate acts inconsistent with their religious beliefs, see generally Sepinwall, *supra* note 139.

capital.¹⁶⁴ The regulation at issue in *Hobby Lobby* was a regulation of *employers*—in particular employers with 50 or more employees—and thus neutrality directed the Court to consider what rights such employers would have had in an analogous but unincorporated enterprise, for example in a proprietorship.¹⁶⁵ Had the companies' claims in the case instead turned on the regulation of, say, employees' headgear, the relevant inquiry would have been directed toward the laborers' putative right to a religious exemption.

To see the logic of this reading, consider the effect of the HHS regulation on a hypothetical proprietorship. Absent the regulation, the proprietor and her employees can bargain over the terms of employer-provided health insurance, just as they can bargain over most other terms of employment. Health insurance is costly to the proprietor and valuable to the employee. If, for religious reasons, the proprietor assigns an additional, nonpecuniary cost to providing insurance covering contraception; and if, as seems likely, the employee does not assign a corresponding, nonpecuniary value to having *the proprietor* provide it, then the proprietor and employee might each be made better off by agreeing to a relatively higher wage that the employee can use to cover contraception, with some left over. There are gains from trade to be had. The effect of the HHS regulation is to take off the table the parties' ability to bargain around the proprietor's idiosyncratic aversion to paying for a particular kind of good. Although the regulation directly burdens only the proprietor, it threatens the employee as well, because it takes away a bargaining chip.

The effect of an exemption under the RFRA should now be clear. Assuming the regulation applies to the proprietor, she is exempted because the RFRA certainly applies to individuals. Thus, to exempt the proprietor from these regulations is merely to return her relationship with her employees to a state of free contract. In a competitive labor market, both the proprietor and the employees are made better off.¹⁶⁶ Here lies the significance of the corporate-rights question presented in *Hobby Lobby*: namely, whether an enterprise organized as a corporation rather than as a proprietorship can seek

164. At least one other commentator reads the decision in this way. See Spencer Churchill, Recent Development, *Whose Religion Matters in Corporate RFRA Claims After Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?, 38 HARV. J.L. & PUB. POL'Y 437, 444 (2015) ("The Court's reasons for holding that corporate status did not prevent the plaintiffs from exercising religion apply with equal force to claims based on the religious beliefs of any corporate constituency.").

165. The Court could not have analogized to a radically disintegrated (market-mediated) enterprise. The Affordable Care Act singled out "employers" for special attention. A disintegrated enterprise has no employer, only contractual counterparties. Thus, the statute's express terms bias entrepreneurs away from integration. The question for the Court was whether, as between various forms of integration, the statute ought to be read also to bias entrepreneurs away from incorporation and toward the proprietorship or partnership.

166. The assumption of a competitive labor market is important to this reasoning. If the competitive wage for a job is below the legally mandated minimum wage, then employers might not need to trade off wages against health-care coverage (or any other working condition, for that matter).

an analogous exemption under the RFRA. If the Court were to decide that corporations cannot exercise religion within the statutory sense of the phrase, then our hypothetical employer and employees would jointly be better off under a proprietorship than a corporation (holding agency- and transaction-costs equal). Consistent with organizational neutrality, the majority held to the contrary—that corporations can exercise religion.

Critics of the decision have asked why the religious views of the shareholder-managers counted in the Court's analysis but not the views of other patrons, such as employees.¹⁶⁷ Organizational neutrality shows why. In the case of our hypothetical proprietorship, the religious commitments of the proprietor mattered because it was *she* whose conduct the HHS regulation touched, and therefore it was *she* who might seek relief. To preserve neutrality, the analysis in the corporate setting must look to the person or persons who function in an analogous role. Otherwise, the existence of a collective right to object to government action would often turn out to be asymmetric. To be sure, locating the analogous actor can be an imprecise task. Perfect translation is elusive precisely because legal roles are defined in part by legal form, a fact which might explain *Hobby Lobby's* inconsistent reference to the "shareholders," the "owners," the "owners and controllers," and so on.¹⁶⁸ But on an organization-neutral reading of the case, the Court was simply trying to locate the persons whom, absent the corporate form, the Affordable Care Act would have regarded as the "employers" to be regulated.

The language of the majority opinion supports an organization-neutral reading. Much of the textual evidence considered above is equally consistent with a neutrality rationale. Although the majority opinion declared that recognizing a free-exercise claim in *Hobby Lobby* would protect the companies' "own[ers] and control[lers],"¹⁶⁹ it does not logically follow that every corporate exercise of religion would protect the shareholder-managers directly. In a different case, about a different regulation, a corporation might seek a religious exemption on behalf of employees or customers. Other parts of the decision confirm this insight expressly. For example, the opinion

167. See, e.g., Eric W. Orts, *Theorizing the Firm: Social Ontology in the Supreme Court*, 65 DEPAUL L. REV. (forthcoming 2015) (manuscript at 25) (on file with author); Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications* 68–69 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 804, 2015), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Strine_804.pdf ("[I]f both *Citizens United* and *Hobby Lobby* are correct and the corporation has a multi-constituency focus, why are its religious values determined by reference to the equity owners and who they decide to elect? Why not the employees of the corporation? Or its customers? Or the communities in which it operates?" (citation omitted)); Eric Orts, *Undertheorizing the Corporation Continued: Hobby Lobby and Employees' Rights*, CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/undertheorizing-the-corporation-continued-hobby-lobby-and-employees-rights.html>.

168. See *supra* note 152.

169. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

justifies corporate rights as a general matter by reference to the interests of various patrons, including employees:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.¹⁷⁰

It would go too far to claim that the only way to understand *Hobby Lobby* is in terms of organizational neutrality. Other readings are plausible. The elaboration of the case here is meant not to condemn these readings, only to show the utility of the neutrality principle as an interpretive aid as well as (perhaps) a normative standard of judgment.

V. ENDURING PUZZLES: RELIGION AND OTHER IMMUTABLE CHARACTERISTICS

So far, this Article has discussed rights generally enjoyed by all individuals—whether or not corporate entities are entitled to exercise them. Any property owner may insist on just compensation for a public condemnation, to take just one example.¹⁷¹ Not every right works this way. Some rights privilege select persons in virtue of choice characteristics. The right to free exercise of religion, guaranteed by the First Amendment and supplemented by the RFRA, is exemplary in this regard. One's power to object to regulation on religious grounds depends on the content of one's sincere belief. And, of course, there is considerable variation in the content of religious belief. To the extent the relevant constituency of a corporation comprises persons of differing beliefs, organizational neutrality cannot yield principled guidance. More generally, rights dependent on immutable characteristics pose a conceptual limit to the domain of this Article's central thesis.

To develop the intuition, consider a variation on the facts of *Hobby Lobby*. In the actual case, no one disputed that the five shareholder-managers of Hobby Lobby Stores uniformly held a sincere belief that providing the contested insurance would violate the strictures of their religion.¹⁷² Had they operated their businesses as five closely linked, profit-sharing proprietorships,¹⁷³ their beliefs would have justified five exemptions from the

170. *Id.*

171. U.S. CONST. amend. V; *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931).

172. *Hobby Lobby*, 134 S. Ct. at 2765–66.

173. Immutable personal characteristics pose a problem not only for corporate rights, but for group-rights jurisprudence more generally, hence a counterfactual involving horizontally related proprietorships rather than a single partnership.

HHS regulation and, under a neutrality principle, it would be appropriate to transpose their individual rights to the corporation.

But suppose that two of the five family members were to lose their faith and succumb to apostasy. Call this hypothetical case *Hobby Lobby**. The implications of organizational neutrality become indeterminate. A court considering the rights of *Hobby Lobby** faces a binary decision: either the company can exercise religion or it cannot. Yet neither option yields an organization-neutral solution. In a relatively disintegrated form of enterprise—the five linked proprietorships, for example—three of the family members would be eligible for an exemption and two would not be. A rule granting *Hobby Lobby** an exemption would favor integration because two-fifths of the operations would escape regulation only on account of incorporating. On the other hand, a rule denying *Hobby Lobby** a free-exercise right would favor a disintegrated form of governance because three-fifths of operations would be subject to regulation only on account of incorporating. Neutrality is impossible.

Dilemmas of this kind are apt to surface wherever the existence of a right depends on immutable personal characteristics. The integration of productive activity into a firm is, by its nature, a synthesis of constituent members' rights, if only because integration involves the surrender of individual property rights to common control. Where the constituents' individual rights are different in kind and not only degree, synthesis is logically incoherent. Rights stemming from religious belief are but one species of this sort of right. One might expect therefore to find a limit to organizational neutrality wherever a putative corporate right arises from race, sex, age, or some other such attribute. In fact, however, this is only rarely the case. Unlike free exercise, most identity-based rights take the form of rights to nondiscrimination. Attributing a right against discrimination to a corporation poses no conceptual hurdle.

In any event, this conceptual dilemma presents a real, pragmatic challenge to a sensible corporate-rights jurisprudence. If courts were to adopt a rule under which the rights of the strongest individual devolve onto the firm, strategic acts to undermine regulation would be inevitable. Entrepreneurs would have the incentive to recruit a ringer, a person whose peculiar attributes would entitle the rest of the venturers to ignore regulations that, by hypothesis, the government is empowered to decree. Yet if courts were to adopt the contrary rule—a rule under which the weakest link breaks the chain—then persons singled out by law for particular solicitude might well find it impractical to associate in business with persons unlike themselves. The rule would encourage a kind of segregation. Neither rule is without its own characteristic distortion.

Hobby Lobby had no occasion to confront this puzzle. The shareholder-managers there were in fact unanimous in belief. They were unanimously entitled, as individuals, to exemptions under the RFRA. But the majority

opinion hints at a “weakest link” rule. Among the opinion’s features that have most perplexed scholars of corporate law is the limitation of its rationale to closely held companies.¹⁷⁴ The close company is usually an imprecise descriptor rather than a stable legal category; to the extent state laws define the term, they vary. And nothing in *Hobby Lobby*’s logic seems naturally limited to the close context. One might, however, understand the limitation as a prophecy about the facts of business in the real world, combined with an implied statement of the “weakest link” rule. It is unlikely that all persons controlling a large public company will in fact share common religious commitments. If a single co-venturer’s nonbelief suffices to break the attribution of individual rights to the corporation, then the limitation of free-exercise rights to closely held companies would amount to a functionally accurate prediction rather than a theoretically necessary constraint.

This is, of course, a speculative interpretation. At this point, little turns on its validity. It is enough for now to see that a neutrality principle will not decide whether a firm can exercise rights that, absent integration, would be attributed to some, but not all, of its relevant constituent members. Yet, courts must decide. Perhaps future research will shed light on how they do or should do so.

VI. CONCLUSION

Organizational neutrality cannot explain corporate-rights decisions in cases where the background rights of individuals affiliated with the firm vary. For such cases another theory is needed. Neutrality does, however, explain the vast majority of the Supreme Court’s actual corporate-rights decisions. Accordingly, courts should look to organizational neutrality as the guiding principle when deciding the existence and extent of corporate rights.

174. *E.g.*, *Hobby Lobby*, 134 S. Ct. at 2775 (“[W]e hold that a federal regulation’s restriction on the activities of a for-profit *closely held* corporation must comply with RFRA.” (emphasis added)). In August 2014, the FDA proposed and sought comments on rules that would seek to reflect the explicit limitation of the Court’s holding to closely held firms. Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,118, 51,121–22 (Aug. 27, 2014) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).