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THE CONSTITUTIONAL STANDING OF CORPORATIONS

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## INTRODUCTION

During the oral arguments in *Citizens United v. Federal Election Commission*, Justice Sonia Sotomayor commented that it would seem as if the Supreme Court had “imbued a creature of State law,” the corporation, “with human characteristics.”<sup>1</sup> In *Citizens United*, the Court ruled that the First Amendment prohibited restrictions on political speech of corporations.<sup>2</sup> Like no other prior decision, *Citizens United* elevated the importance of the question whether corporations and other types of organizations can assert constitutional rights. That was until the Court decided *Burwell v. Hobby Lobby Stores, Inc.*, in which three for-profit closely held corporations challenged contraceptive coverage under the Affordable Care Act of 2010.<sup>3</sup> In *Hobby Lobby*, at oral arguments, Justice Kennedy posited: “You say profit corporations just don’t have any standing to vindicate the religious rights of their shareholders and owners.”<sup>4</sup> Yet in its decision, the Court did not address the standing requirements directly, stating that because corporations protect those “associated with a corporation in one way or another,” a for-profit firm can assert free exercise rights and can itself claim to have sincere “religious beliefs.”<sup>5</sup>

Are corporations “persons” with standing to assert constitutional rights? The Court in *Citizens United* gingerly avoided addressing the issue directly;

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<sup>1</sup> Transcript of Oral Argument at 33, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (No. 08-205).

<sup>2</sup> 130 S. Ct. 876, 903 (2010).

<sup>3</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>4</sup> Transcript of Oral Argument at 75, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354).

<sup>5</sup> *Hobby Lobby*, 134 S. Ct. at 2768, 2774, 2779.

and in *Hobby Lobby*, the Court avoided the First Amendment issue, relying instead on statutory rights under the Religious Freedom Restoration Act of 1993 while evading the question of corporate standing. As I will explore in this Article, real missteps in both decisions could have been avoided by directly addressing these questions. Corporations and other types of organizations have long exercised a range of constitutional rights, including those found under the Contracts Clause,<sup>6</sup> Due Process Clause,<sup>7</sup> Fourteenth Amendment Equal Protection Clause,<sup>8</sup> First Amendment,<sup>9</sup> Fourth Amendment,<sup>10</sup> Fifth Amendment Takings and Double Jeopardy Clauses,<sup>11</sup> Sixth Amendment,<sup>12</sup> and Seventh Amendment.<sup>13</sup>

Corporate constitutional litigation is pervasive. While perhaps the most significant, *Citizens United* and *Hobby Lobby* are by no means the only recent high-profile constitutional cases involving corporate litigants. Take a few prominent examples: (1) shareholders of AIG filed two derivative actions claiming that during the global financial crisis, the government's bailout of AIG was a taking in violation of the Fifth Amendment;<sup>14</sup> (2) the Southern Union Corporation successfully won a Supreme Court victory asserting its Sixth Amendment right to have aggravating facts proven to a jury when prosecuted for environmental crimes;<sup>15</sup> and (3) the Court held that the Goodyear Dunlop Corporation's subsidiaries in Turkey, France, and Luxembourg

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<sup>6</sup> See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638-39 (1819) (finding that state law unconstitutionally interfered with an organization's contractual rights).

<sup>7</sup> See *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889) (recognizing corporations receive protection for the "enjoyment of property," including the ability to challenge "legislation injuriously affecting it").

<sup>8</sup> See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (citing the "well established" Equal Protection Clause rights of corporations); *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (noting that the Court agreed that the Equal Protection Clause applied to corporations at issue).

<sup>9</sup> See *Citizens United*, 130 S. Ct. at 903 ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity.").

<sup>10</sup> See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (declaring a statute unconstitutional because it violated the corporation's Fourth Amendment right to be free from warrantless search).

<sup>11</sup> See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (assuming corporations are protected by Double Jeopardy Clause rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (discussing the Takings Clause as applied to a foreign corporation).

<sup>12</sup> See *S. Union Co. v. United States*, 132 S. Ct. 2344, 2351-52 (2012) (holding that the Sixth Amendment can protect a corporation from criminal fines).

<sup>13</sup> See *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (holding that in a derivative shareholder action, shareholders possess the same right to trial by jury as a corporation).

<sup>14</sup> See *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 256 (S.D.N.Y. 2012) (dismissing complaint except for the takings claim, which was withdrawn); *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 71 (2012) (finding plaintiffs stated a certain Fifth Amendment takings claim).

<sup>15</sup> See *S. Union Co.*, 132 S. Ct. at 2354, 2357.

were not “essentially at home” in North Carolina under its Due Process Clause test for general jurisdiction.<sup>16</sup> Those constitutional claims have little in common with each other, but just those examples indicate the sheer breadth and importance of corporate constitutional litigation.

Responding to the long list of corporate constitutional rights the Supreme Court has already recognized, Justice Stevens went one step further in his *Citizens United* dissent to note “[u]nder the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.”<sup>17</sup> Justice Stevens suggested, no doubt tongue in cheek, that having recognized First Amendment rights, the Court would be obligated for the sake of consistency to extend all other constitutional rights to corporations. The Court has not extended all constitutional rights to corporations or to organizations more generally, such as associations, partnerships, and limited liability companies. Corporations cannot vote, and the Court has ruled that they are not citizens under the Fourteenth Amendment.<sup>18</sup> Corporations lack Fifth Amendment self-incrimination rights,<sup>19</sup> Article IV Privileges and Immunities Clause rights,<sup>20</sup> and Due Process Clause liberty rights.<sup>21</sup> Some constitutional rights are individual-centered and not plausible as rights of corporations. Unsurprisingly, courts have not recognized a right of corporations to serve on juries, run for public office, marry, procreate, or travel.

What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory. The closest the Court has come to touching the third rail of this jurisprudence was to suggest that certain “purely personal” constitutional rights cannot be exercised by corporations.<sup>22</sup> Even when the Court recognizes that a corporation does enjoy a constitutional right, it generally does so without discussion. In *Citizens United*, for example, the Court did not discuss whether a corporation is a pure creature of state law, as Justice Sotomayor suggested; a

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<sup>16</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011).

<sup>17</sup> *Citizens United*, 130 S. Ct. at 948 (Stevens, J., concurring in part and dissenting in part).

<sup>18</sup> See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (“The term citizens [in the Fourteenth Amendment] applies only to natural persons, . . . not to artificial persons created by the legislature . . .”).

<sup>19</sup> See *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (“While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation . . . may refuse to show its hand when charged with an abuse of such privileges.”).

<sup>20</sup> See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587 (1839) (remarking that corporations cannot claim “the rights which belong to its members as citizens of a state”).

<sup>21</sup> See *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (“The liberty referred to in [the Fourteenth Amendment] is the liberty of natural, not artificial persons.”).

<sup>22</sup> See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).

“real entity” that can exercise all or most of the legal rights of an individual person; or an aggregate entity that helps groups of people realize their interests. The Court noted the difficulty in categorizing firms, which range from media companies to small closely held corporations to large public companies, and recognized that they exist for a wide range of purposes. In *Hobby Lobby*, the majority called it “quite beside the point” that the plaintiffs were for-profit organizations incorporated separately from their owners, blithely offering that without the action of human beings, a corporation “cannot do anything at all.”<sup>23</sup>

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.<sup>24</sup> Scholarly objections to the Court’s rulings concerning corporate constitutional rights have only increased post-*Citizens United*.<sup>25</sup>

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<sup>23</sup> *Hobby Lobby*, 134 S. Ct. at 2768.

<sup>24</sup> See, e.g., Tom Bennisson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 399 (2006) (describing a “right-by-right” approach); Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005) (calling the Court’s approach “ad hoc” and “arbitrary,” “fundamentally flawed,” and inconsistent even within the same constitutional amendments); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 650 (1990) (calling the Court’s practical approach to corporate rights “Constitutional Operationalism”); 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, 1347-48 (1979) (calling the Court’s approach “sporadic” and noting “the artificial nature of a corporation is an inherent source of difficulty in developing an all-encompassing rationale”); Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243 (1999) (“[E]lection law has not settled on a single, coherent conception of the corporation—what it is, what values it serves, and what role it should play in politics.”); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1465 (1992) (finding that the Court’s pragmatic approach to corporate rights has left the jurisprudence “fragmentary, conclusory, and contradictory”).

<sup>25</sup> See, e.g., Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 517 (2012) (arguing that *Citizens United* characterized corporations as disadvantaged persons by upholding corporate freedom of speech against government intrusion). It is a separate question—one whose importance I do not want to minimize, although it is not the subject of this Article—whether the *Citizens United* decision “undeniably allows monied special interests to influence both elections and the elected representatives who benefit as a result.” Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 151 (2012); see also *Citizens United*, 130 S. Ct. at 931 (Stevens, J., concurring in part and dissenting in part) (“The Court’s ruling threatens to undermine the integrity of elected institutions across the Nation.”); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 583 (2011) (remarking that *Citizens United* has left incoherence in the Court’s campaign finance jurisprudence); Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 999 (2011) (discussing Justice Steven’s vigorous dissent in *Citizens*

In this Article, I part company with the many cogent critics of the Supreme Court's rulings, but also with those who conversely argue that in *Citizens United* (and perhaps now in *Hobby Lobby*), the Court has finally recognized corporations as "real entit[ies]."<sup>26</sup> The Court adopts a consistent approach, but the approach proceeds right-by-right, rather than by starting with a theory of organizations or corporations as constitutional actors. When the Court embarked on the project of incorporating the Bill of Rights against the states through the Fourteenth Amendment, as I describe in Part I of this Article, it ultimately rejected the "total incorporation" approach championed by Justice Black in favor of a "selective incorporation" approach—considering rights one at a time and asking whether each should apply to state actors.<sup>27</sup> What do the great incorporation debates tell us about the subject of constitutional rights of corporations? Critically, the Court refused to alter the *substantive content* of any Bill of Rights provision when extending it to the states; each right must "be enforced . . . according to the same standards."<sup>28</sup>

Similarly, as I detail in Part II, the Supreme Court has not extended the entire Bill of Rights to corporations. The Court has adopted a selective approach from the early Marshall Court rulings to *Citizens United*. One could imagine that each right might apply in different ways to individuals and organizations, or apply to only some types of organizations. Instead, the Court keeps constant the substantive content of rights when litigated by organizations. The Court largely avoids organizational theory and focuses on constitutional theory.<sup>29</sup>

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*United*); Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 65 (arguing that *Citizens United* is incorrect because corporations should not be afforded First Amendment protections). *But see* Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 646 (2011) ("*Citizens United* is unlikely to 'unleash' corporate campaign spending since corporate spending was not really leashed by the law prior to the decision."). In addressing this question, Ashutosh Bhagwat points to the difference between organizational and associational speakers. *See* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011) ("The key issue is not the corporate form of the speaker but what *kind* of collective entity—that is to say, association—the speaker is.").

<sup>26</sup> *See, e.g.*, Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1043.

<sup>27</sup> *See* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>28</sup> *See* *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (rejecting "the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights" (internal quotation marks omitted)); *see also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3048 (2010) ("The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle.").

<sup>29</sup> For views sympathetic with those described here, treating corporations as convenient litigation units, *see* Burt Neuborne, *Of "Singles" Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769, 771 (2012) (arguing that "the judiciary's approach to corporate

The Supreme Court's approach should be grounded in the doctrine of standing, a body of law flowing from the case-or-controversy requirement of Article III, which vests the federal judiciary with the "Power" to decide "Cases" and "Controversies."<sup>30</sup> The Court has defined the general test for standing as a question whether the organization itself can claim a "concrete injury," or an "injury in fact," that is separate from any injury to a third party.<sup>31</sup> The Court has explained that "the injury must affect the plaintiff in a personal and individual way."<sup>32</sup> Conceived as a question of standing, rather than a question of what an organization is and whether it "has" a constitutional right, the analysis is simple: once an organization has Article III standing to litigate a constitutional question, the merits analysis proceeds as for an individual litigant.

In Part III, I develop the implications of Article III standing analysis for constitutional corporate rights. Article III standing doctrine has been criticized since its inception as a highly malleable set of jurisdictional barriers contrary to congressional intent and the structure of the modern regulatory state, contrary to the text and history of Article III, and prone to particularly controversial and unjustified rulings in cases regarding public law and civil rights litigants.<sup>33</sup> Without disagreeing with each of those

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legal personality" should not "creat[e] a corporate fiction that stands apart from its human players"). For an analysis of third-party standing of family-owned corporations, see generally Matthew I. Hall & Benjamin Means, Essay, *The Prudential Third-Party Standing of Family-Owned Corporations*, 162 U. PA. L. REV. ONLINE 151 (2014).

<sup>30</sup> See U.S. CONST. art. III, § 2, cl. 1.

<sup>31</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA."); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (describing the additional "injury in fact" requirements that the injury is imminent, causally connected to the conduct, and "likely" rather than "speculative"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982) ("[O]rganizations are entitled to sue on their own behalf for injuries they have sustained.").

<sup>32</sup> *Lujan*, 504 U.S. at 560 n.1.

<sup>33</sup> See, e.g., Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1767 (1999) ("Any claim that the Constitution, the original intent of the Framers, or Anglo-American legal history and tradition compel modern standing law is undermined by the historical studies of standing."); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1466, 1480 (1988) (calling the injury-in-fact test "malleable" and the Court's private-law model one that "would also contradict the text and history of article III, fly in the face of congressional understandings and expectations, and skew administrative incentives in undesirable directions"); Mark V. Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705-06 (1980) ("Not only do the commentators note such manipulation [of standing doctrine], but members of the Supreme Court themselves routinely accuse each other of distorting the doctrine for their own purposes." (footnote omitted)); see also Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 712-13 (2004)

criticisms, some of which I have also levied, the modern body of standing doctrine provides categories for treatment of organizational litigants. The Supreme Court has set out two doctrines of Article III standing—associational and organizational standing—that, together with the prudential doctrine of third-party standing, explain when and whether entities can litigate constitutional rights. Corporations are separate legal entities that have standing to assert rights on behalf of the entity itself. Tracking the organizational standing test, a court is most likely to view corporations as having Article III standing to assert a constitutional right when that right relates to the economic interests. In contrast, associations and religious organizations have broad standing to litigate injuries of their members. The Court has also set out related prudential standing doctrines that sharply limit the ability of third parties to assert rights on behalf of another. Thus shareholders can only assert rights derivatively in the name of the corporation, and conversely, the corporation cannot litigate the separate rights of shareholders or other constituents, like officers or employees.<sup>34</sup> Those Article III tests, I argue, best explain the existing doctrine, even if some of the earlier decisions predated the Court's modern Article III decisions and do not frame their reasoning in Article III terms.

This approach toward corporate constitutional standing is normatively preferable, and I sharply criticize the Supreme Court's decision in *Hobby Lobby* for not only ignoring Article III and prudential third-party standing entirely but also for using casual language in the opinion that suggests that even outside the context of a closely held family-owned corporation, the distinctions between associations, religious organizations, and for-profit corporations simply do not matter to the analysis. Separating the question of Article III standing from the merits importantly avoids advisory opinions on constitutional claims, and such caution is particularly warranted when an entity seeks to litigate a constitutional right. One person does not normally have standing to assert the liberty interest of another. Why a corporation can assert the religious beliefs of its owners is a puzzle not clearly answered in *Hobby Lobby*. A careful Article III standing analysis could have more narrowly (if not defensibly) explained the result in the case, if limited to the

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(responding that in the eighteenth and nineteenth centuries, the concern with “private right[s]” and the public-private distinction was observed). I have previously critically analyzed the standing analysis in *City of Los Angeles v. Lyons*. See Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 634 (2012).

<sup>34</sup> I describe those standards in Part III *infra*. For a concise statement of the basic rule, see, for example, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982), where the Court declared that “organizations are entitled to sue on their own behalf for injuries they have sustained.”



circumstances of a closely held family-owned corporation and if the owners did not themselves have standing to sue. That the Court did not engage in any such analysis not only adds fuel to the criticism of its free exercise and corporate constitutional rights jurisprudence but also to the malleability of its Article III jurisprudence.

As Justice Frankfurter famously remarked, “The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene.”<sup>35</sup> Corporate litigation has long reshaped the content of constitutional rights, from the *Lochner* era to modern Commerce Clause jurisprudence. Where the corporation is the litigant, one may ask different constitutional questions, examine different facts, and perhaps reach different answers. Understanding the contours of the approach across different areas, from civil procedure to criminal procedure to speech, can help us understand the future direction of corporate constitutional litigation. I describe in Part IV how several key rulings by the Court, in part due to developments in underlying substantive law, now stand on thinner ice.

Finally, I conclude by exploring how the treatment of corporate constitutional standing helps illuminate something double-edged about constitutional rights more generally: few are framed as purely “individual” rights. Constitutional rights are framed generally, often imposing limitations on the government or recognizing general privileges or immunities, but not by creating individual-specific tests. Moreover, some of the most effective constitutional rights may be precisely those not limited by individual circumstances, and therefore readily exercised by organizations. At the same time, however, such rights may poorly protect individual dignitary interests. Individuals have long sought protection by seeking to have associations litigate to challenge constitutional violations. However, litigation by organizations can also conflict with individual interests and undermine individual rights. The *Hobby Lobby* decision contains dicta suggesting that courts need not adhere to well-established categories of Article III standing, opening the door to all manner of ill-advised corporate standing. That specter provides all the more reason to scrutinize corporate assertions of constitutional standing carefully if and when corporations act at the expense of individual rights.

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<sup>35</sup> FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 63 (1937).

## I. SELECTIVE INCORPORATION OF CORPORATE CONSTITUTIONAL RIGHTS

The debates over total and selective incorporation raged through the 1960s, and they occasionally resurface when the Supreme Court considers whether to incorporate—that is, to make applicable against the states—one of the lingering constitutional rights not already incorporated through the Fourteenth Amendment Due Process Clause during the heyday of incorporation. Debates over the proper scope of incorporation returned, for example, when the Court incorporated the Second Amendment right to bear arms against the states in *McDonald v. City of Chicago*.<sup>36</sup> Those debates focused on whether the operation and substance of constitutional provisions should be operationalized as against state actors. Although ultimately incorporating most of the Bill of Rights against the states, the Court asks whether a particular right is “fundamental to *our* scheme of ordered liberty and system of justice.”<sup>37</sup> Without making too much of the comparison, there are useful parallels to the more gradual process of recognizing—and sometimes not recognizing—corporate constitutional rights.

Most relevant is the way selective incorporation treats the underlying constitutional rights. When deciding to selectively incorporate the Bill of Rights as against the States, the Supreme Court refused to alter the *substantive content* of any Bill of Rights provision when it extended the rights to the States; the rights must all “be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”<sup>38</sup> I argue that the Court has done the same across a wide range of constitutional rights as applied to corporations.

Just as incorporating much of the Bill of Rights as against the states has reshaped constitutional litigation, permitting corporations and organizations to litigate constitutional rights has had dramatic consequences. That is the limit of the comparison. The question is whether organizations may possess constitutional protections and, if so, which ones. While the due process principle of “ordered liberty” provided a test to decide whether rights apply as against the states, that principle would not work to decide if corporations have constitutional rights. A different principle is required, and I develop in Part II how Article III standing requirements provide that general principle.

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<sup>36</sup> 130 S. Ct. 3020, 3050 (2010).

<sup>37</sup> *Id.* at 3034.

<sup>38</sup> *Malloy v. Hogan*, 378 U.S. 1, 10 (1964).

### A. *To Whom Do Constitutional Rights Attach?*

Asking whether a corporation itself has standing to litigate a constitutional right in federal court is a question that implicates the underlying legal status of the corporation and the interests accompanying it. State law defines the status of an incorporated or other form of business entity.<sup>39</sup> State or federal law may provide a natural person with some type of legal status like citizenship, domicile, or marriage. State law defines the organizational requirements for being recognized as a type of corporation or partnership, as well as the legal consequences of such status.<sup>40</sup> A corporation may have a very large group of shareholders and separate management if it is a public corporation with stock that is listed, or it may be a very large corporation with private owners. A corporation may have a small group of members (or not, if it is a sole proprietorship); in fact, the vast majority of corporations are quite small.<sup>41</sup> Other organizations include partnerships, owned by a group, and limited liability corporations (LLCs). LLCs are simple to create, like partnerships, but enjoy limited liability like corporations.<sup>42</sup> Since a corporation is a creature of state law, federal courts may be leery of interfering with the definition of its legal status under state law.<sup>43</sup>

In contrast, federal courts play an important role in defining status relating to citizenship and immigration, which are defined by the Fourteenth Amendment and federal law. The Fourteenth Amendment guarantees citizenship rights, making such questions of federal and constitutional concern. For example, the right to vote is “a citizen’s right to vote.”<sup>44</sup> Legal permanent residents and other gradations of immigration status may bring with them intermediate forms of constitutional protection.<sup>45</sup> Juveniles do

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<sup>39</sup> See Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1064 (1994) (defining a corporation as “an artificial legal person created by state law”).

<sup>40</sup> See *id.* (noting that a “corporation derives its being by concession from the State”).

<sup>41</sup> See *Statistics About Business Size (Including Small Business) from the U.S. Census Bureau*, U.S. CENSUS BUREAU (2007), <http://www.census.gov/econ/smallbus.html>, archived at <http://perma.cc/5MZ-9AHC> (providing data on average business sizes).

<sup>42</sup> See generally Daniel M. Häusermann, *For a Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIAMI BUS. L. REV. 1 (2011) (describing the mechanics of various business organization forms).

<sup>43</sup> See, e.g., *Hobby Lobby*, 134 S. Ct. at 2775 (discussing how courts will “turn to” the “underlying state” corporate law when “resolving disputes”).

<sup>44</sup> *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

<sup>45</sup> See *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (holding that noncitizens that illegally entered the United States are protected by the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953) (“While it may be that a resident alien’s ultimate right to remain in the United States is subject to alteration by statute or authorized regulation . . . , it does not follow that he is thereby deprived of his constitutional right to procedural due process.”). *But see*

not enjoy the same constitutional rights as adults, although they will with age become full rights-bearing citizens.<sup>46</sup> Criminal convictions may cause citizens to lose the right to vote or serve on juries, and prisoners may have altered constitutional rights as well.<sup>47</sup> Those questions about altered constitutional rights as connected to citizenship status do not affect domestic corporations (though perhaps they could affect foreign corporations) because corporations are not citizens, as the Supreme Court has held since Chief Justice John Marshall's decision in *Bank of the United States v. Deveaux*.<sup>48</sup> As a result, as Amy J. Sepinwall puts it, "[c]orporations, it goes without saying, are neither expected nor entitled to vote, perform jury duty, or serve in the military."<sup>49</sup>

That said, in other contexts in which state law defines legal status, the Court has set out constitutional limits on the degree to which a state may limit access to that status or burden it. For example, the Court has recognized a fundamental right to access to marriage.<sup>50</sup> The Court has recognized certain rights of parents, including that parents may constitutionally challenge state decisions to remove children from their custody, while non-parents do not enjoy the same constitutional rights to seek custody of a child.<sup>51</sup> A married couple may enjoy joint rights as well as obligations of the marital status. A state adoption judgment may create parental status.<sup>52</sup> Nor is there anything unusual about shared property interests, or multiple

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United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (concluding that noncitizens with no "substantial connections" to the United States lack Fourth Amendment protection).

<sup>46</sup> See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[J]uvenile offenders constitutionally may be treated differently from adults."); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (recognizing that although everyone is entitled to constitutional rights, states generally have more power to regulate activities of children).

<sup>47</sup> See *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (holding that a prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system").

<sup>48</sup> 9 U.S. (5 Cranch) 61, 86 (1809).

<sup>49</sup> Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 604 (2012).

<sup>50</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.").

<sup>51</sup> See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.").

<sup>52</sup> See Pamela K. Terry, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 FORDHAM L. REV. 3093, 3113 (2012) ("Although an agency or individuals may now 'arrange' an adoption, the legal relationship of parent and child cannot be created without a judicial decree." (footnote omitted)).

people bringing legal actions asserting shared or competing property interests.<sup>53</sup>

In *Levy v. Louisiana*, making the connection between corporate persons and cases regarding the status of individuals, Justice Douglas famously wrote that illegitimate children are persons, rhetorically asking: “would a corporation, which is a ‘person’ . . . be required to forgo recovery for wrongs done its interests because its incorporators were all bastards?”<sup>54</sup> As with other forms of legal status, the corporation includes a defined bundle of legal rights and obligations. Although those rights are defined by state law, a state may violate the constitutional rights of a corporate “person” by unconstitutionally limiting access to those goods. As I will explain, however, calling corporations “persons” may not be a helpful usage. I argue that corporations litigate constitutional rights because they have standing to litigate an injury to the entity and associations have standing to litigate on behalf of their members, while organizations generally lack standing to litigate on behalf of other constituents such as employees and officers.

### B. *Theories of Corporate Personhood*

There is no one single approach to constitutional personhood of corporations. Nor is there a single theory that enjoys universal acceptance of what kind of person or entity a corporation or organization is. Early Supreme Court cases, discussed in sections that follow, placed some emphasis on the “artificial” nature of firms as fictional legal creations. Chief Justice John Marshall, for example, famously called a corporation “an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>55</sup> However, far from characterizing a corporation as a mere legal fiction, Chief Justice Marshall also placed great emphasis on the remarkable ability of corporations to realize the “charitable or other useful” and “beneficial” goals of their creators.<sup>56</sup> Relatedly, as at common law, early courts emphasized the “grant” or “concession” theory, recognizing that corporations owe their existence to the state, and therefore serve at the pleasure of the state.<sup>57</sup> Other courts and

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<sup>53</sup> See, e.g., 26 C.J.S. *Declaratory Judgments* § 38 (2014) (noting that in a declaratory judgment action, “[a]ny person having an interest under a . . . legal instrument, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity . . . and obtain a declaration of rights, status, or other legal relations thereunder”).

<sup>54</sup> *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

<sup>55</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

<sup>56</sup> *Id.* at 637-38.

<sup>57</sup> See Phillips, *supra* note 39, at 1064-65 (noting that a “corporation derives its being by concession from the State”).

commentators have long viewed such entities as “aggregate” in nature, since they involve groups of people who contract together, and some, like partnerships, are governed by a group of owners.<sup>58</sup> By the turn of the twentieth century, courts and commentators increasingly emphasized that corporations should be treated as “real” or independent legal persons with some of the same rights as natural persons, but separate and distinct from their members.<sup>59</sup>

The selective incorporation approach adopted by the Court avoided questions relating to the nature of states as sovereigns and whether constitutional rights apply differently to the states. Instead, the approach focused on whether each right was so important that it deserved protection from violation by state actors.<sup>60</sup> The approach toward constitutional rights of corporations has some parallels.

Some have argued that the Court should start by defining what a corporation or organization is and then build a theory of constitutional rights from that underlying definition. Does it take a theory of corporate constitutional rights? For example, Carl Mayer has argued that “[a]fter 1960, the Court abandoned theorizing about corporate personhood.”<sup>61</sup> I am not convinced the Court was in that business either before or after 1960. To be sure, theorists in corporate law, corporate governance, philosophy, and organizational behavior have debated for over a century how best to define a corporation. Corporations and other organizations each have a complex range of legal duties and rights under the statutes, procedures, and case law regulating their creation. It is difficult and perhaps unnecessary to decide which are most salient. Different characteristics are salient for different purposes. For constitutional purposes, different characteristics may be salient depending upon the constitutional right in question.

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<sup>58</sup> As I will discuss, I view modern corporations and limited liability corporations, though not consisting of equal partners, as forms of aggregate or group governance. There are questions regarding which individuals are to be considered part of the aggregate entity. For example, one may consider whether shareholders, directors, officers, and employees should also be viewed as part of the entity. See Phillips, *supra* note 39, at 1065-67 (describing various aggregate entity theories and their inclusion of different players in the corporate structure).

<sup>59</sup> See, e.g., William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1507-08 (1989) (exploring the changing views of corporations during this period); Phillips, *supra* note 39, at 1064-70 (setting forth three conceptions of a corporation that competed for acceptance from the 1890s to the 1930s).

<sup>60</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010) (noting that selective incorporation first requires an examination of whether the “particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice”).

<sup>61</sup> Mayer, *supra* note 24, at 620.

The idea that corporations may exercise constitutional rights is nothing new. The Supreme Court has struggled with the constitutional status of corporations since the Marshall Court. Corporate personhood itself evolved in the late nineteenth and early twentieth centuries as a complex and powerful legal concept. Yet neither judges nor scholars during this period could reconcile whether corporations were simply legal creations, “persons” with real rights, aggregations that protected rights of their individual members and shareholders, or some combination of those ideas.<sup>62</sup> While debates about the nature of the firm raged for decades in the early twentieth century, those debates eventually cooled.

One reason may have been the intervention of pragmatists, or legal realists, who were unconcerned with whether there was any true “essence” of what a corporation is. Most famously, perhaps, John Dewey, the pragmatist philosopher, wrote in 1926 that we should be “eliminating the *idea* of personality until the concrete facts and relations involved have been faced and stated on their own account: retaining the *word* will then do no great harm.”<sup>63</sup> Accompanying (or even driving) this change in outlook was an increasingly national and international economic interconnectedness, along with the rise of the modern regulatory state, which together caused corporations and business organizations to be viewed quite differently. Far more typical of the Supreme Court’s “realist” view of the status of corporations was language in the famous *International Shoe* decision regarding personal jurisdiction, which notably did not dwell on the formal status of incorporation, “[s]ince the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact.”<sup>64</sup> Instead, the Court focused its due process analysis on the “activities” and “contacts” of a corporation with a state, whether “it enjoys the benefits and protection of the laws of that state,” and whether jurisdiction over such business activity is “reasonable.”<sup>65</sup> Avoiding questions whether a corporation is a “real” or an “artificial” legal creation, an aggregate, or some of each, the question the

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<sup>62</sup> See Bratton, *supra* note 59, at 1484 (advancing the various theories for how to conceive of corporations); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1445 (1987) (noting that “[s]everal conceptions of the corporation were available to theorists and policy makers” in the late nineteenth and early twentieth centuries).

<sup>63</sup> John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926).

<sup>64</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>65</sup> *Id.* at 317-19. For an argument that the status of a corporation as a network of underlying contracts, as opposed to a legal entity, supports constitutional rights of corporations, see Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995).

Court addressed was how law should regulate the entity and what practical effects follow.

Some critics of the Court's approach in such rulings, who wish that the Court would directly engage more in questions of theory of the firm, do concede, as Carl Mayer does, that "[t]he Court is on much safer ground looking to the purpose of the first, fourth, or fifth amendments than attempting to define the relationship of corporations to the state."<sup>66</sup> A "pragmatic methodology" does not, as Mayer argues, obscure an "antecedent, and theoretical, question of what is the nature and purpose of a corporation."<sup>67</sup> Such methodology avoids that question because it is not properly a constitutional question, but instead one defined by state law. Now, there may be different types of questions in the context of a particular constitutional right whether the Court has sufficiently avoided intervening in questions of corporate governance or instead alters the constitutional analysis. As Justice Rehnquist explained:

Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality. . . . The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.<sup>68</sup>

Whether or not organizations and business corporations can be conceived as possessing individual freedom of conscience or liberty rights, it is a separate question whether they can effectively litigate those issues on behalf of individuals.

## II. A TAXONOMY OF CORPORATE CONSTITUTIONAL RIGHTS

In this Part, I argue that for each constitutional right the Supreme Court has considered, the Court has adopted a consistent approach by largely avoiding questions concerning the inherent nature of different types of entities. Instead, the Court focuses on the consequences of finding that an organization has standing to assert the right by examining the purposes of

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<sup>66</sup> Mayer, *supra* note 24, at 646. However, he then argues that the Court "engages in Constitutional Operationalism by suggesting that a corporation is only entitled to the guarantees of a certain amendment if, by so awarding the protection, the amendment's purposes are furthered." *Id.* at 650.

<sup>67</sup> *See id.*

<sup>68</sup> *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 33, 35 (1986) (Rehnquist, J., dissenting).



the particular constitutional right to decide if entities have asserted a sufficient injury creating standing to litigate the right. I will describe how the Court and lower courts have grappled with whether, and under what circumstances, a wide range of constitutional rights can attach to organizations.

### A. *The Contract Clause*

What did the Framers think about corporations? Perhaps not much. The word corporation does not appear in the Constitution.<sup>69</sup> Justice Scalia has argued corporations were familiar as a part of economic life by the time of the founding and that much of the disapproval of state-chartered corporations related to grants of monopolies and special privileges, which would not apply to generally chartered modern corporations.<sup>70</sup> To be sure, as Justice Brandeis put it, “at first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.”<sup>71</sup>

Early Supreme Court rulings dealt with the Bank of the United States, highly controversial in both of its incarnations, and also less controversial corporations for the time, including charitable organizations such as universities. In *Bank of the United States v. Deveaux*, the Supreme Court called corporations “a mere creature of the law, invisible, intangible, and incorporeal.”<sup>72</sup> Yet the Court treated them as “citizens” for diversity under Article III, since “corporations have been included within terms of description appropriated to real persons.”<sup>73</sup> The Court recognized that there was no reason not to give corporations legal standing to litigate in federal court.

In a far more significant ruling, Chief Justice Marshall wrote in *Trustees of Dartmouth College v. Woodward* how the Contract Clause of the Constitution protects corporate charters from alteration by state legislation.<sup>74</sup> Chief

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<sup>69</sup> Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 232 (2011).

<sup>70</sup> *Citizens United*, 130 S. Ct. at 926 (Scalia, J., concurring).

<sup>71</sup> *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).

<sup>72</sup> 9 U.S. (5 Cranch) 61, 86 (1809).

<sup>73</sup> *Id.* at 88. However, the Court did so by asking that courts “look to the character of the individuals who compose [it].” *Id.* at 91-92. Adopting a different approach, the Court in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, held that a corporation is “capable of being treated as a citizen of [the state which created it], as much as a natural person.” 43 U.S. (2 How.) 497, 558 (1844). The Court has declined to extend similar treatment, however, to a partnership. *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185, 192 (1990) (holding that the citizenship of both general and limited partners controls the question of diversity); *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 454 (1900) (refusing to treat a limited partnership association as a corporation for purposes of jurisdiction).

<sup>74</sup> 17 U.S. (4 Wheat.) 518, 630 (1819).

Justice Marshall emphasized that corporations were an “artificial being” that existed “only in contemplation of law.”<sup>75</sup> That language regarding artificiality is often taken out of context to suggest that the Court adopted an “artificial entity” view that corporations exist only as creatures of law. However, the word artificial did not necessarily have a negative connotation at the time: human artifice and creativity was something to be admired.<sup>76</sup> Indeed, much of the language of the opinion went on to say that corporations are designed for the “beneficial” purposes of holding and protecting the private property of individual people. Chief Justice Marshall celebrated the importance of this human creation as a means to accomplish charitable and educational goals that could not be attained otherwise.<sup>77</sup> Corporations may be created by law, but they accomplish important goals of individuals, such as protecting property and furthering the public good. The reasoning was consequentialist and pragmatic, and it set the tone for the Court’s jurisprudence that followed.

### B. *The Equal Protection Clause*

Following Reconstruction, the Court held that corporations are not citizens under the Privileges and Immunities Clause of the Fourteenth Amendment.<sup>78</sup> In contrast, in 1886, the Court noted that it did not wish to hear argument in *Santa Clara County v. Southern Pacific Railroad Co.* on the question whether corporations were protected by the Equal Protection Clause of the Fourteenth Amendment, since the Justices “[we]re all of opinion that it does.”<sup>79</sup> That statement has been reaffirmed in a series of opinions since, such that the Court in 1985 called the principle that corporations have Equal Protection Clause rights “well established.”<sup>80</sup> The view was

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<sup>75</sup> *Id.* at 636.

<sup>76</sup> I am grateful to John O’Brien for making this important point.

<sup>77</sup> See *Woodward*, 17 U.S. (4 Wheat.) at 638 (describing the various benefits that corporations confer upon the public).

<sup>78</sup> See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (“The term citizens [as used in the Fourteenth Amendment] applies only to natural persons, . . . not to artificial persons created by the legislature . . .”). The Court had earlier reached the same conclusion as to the Article IV Privileges and Immunities Clauses. See *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839).

<sup>79</sup> 118 U.S. 394, 396 (1886).

<sup>80</sup> See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *S. Ry. Co. v. Greene*, 216 U.S. 400, 412 (1910) (“That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion.”); see also Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 177-78 (1985) (explaining the context leading up to the *Santa Clara* decision). But see *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-77 (1949) (Douglas, J., dissenting) (noting that “[t]here was no history, logic, or reason given

that corporations exist to protect the property interests of their owners and can therefore assert those interests in litigation.<sup>81</sup>

### C. *The Due Process Clause*

The conventional understanding of the due process rights of corporations is compatible with corporations litigating these rights—at least in regard to property rights and not liberty rights. The Court held early on, in 1906, that corporations may not litigate liberty rights under the Due Process Clause because it protects “the liberty of natural, not artificial persons.”<sup>82</sup>

Corporations have exercised due process rights regarding property, however, for over a century. In the 1893 *Noble v. Union River Logging Railroad Co.* decision, the Court first extended due process protections to a corporation.<sup>83</sup> The Due Process Clause would come into its own in the *Lochner* era, deployed by corporations to challenge regulations.<sup>84</sup> Those substantive rulings were quite controversial. They permitted corporations to overturn regulations with public interest goals, and the Court would ultimately reconsider that substantive due process jurisprudence. That a corporation had standing to raise attacks on statutes in litigation itself was not controversial; instead, it was the way that the Court interpreted the Due Process Clause to protect corporate freedom to contract. Corporate standing to challenge regulations should not be controversial. If corporations could not do so, then regulations chiefly intended to regulate corporations could be drafted in arbitrary ways. Corporations and other business entities are the logical entities to have standing to litigate such issues.

The Due Process Clause also regulates personal jurisdiction. That area provides the most difficult questions concerning “where” a corporation is and where it is “at home.”<sup>85</sup> Corporations are frequent litigants and frequently on the receiving end of litigation. Federal judges have no choice but

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[in *Santa Clara*] to support [the] view”); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting) (“I do not believe the word ‘person’ in the Fourteenth Amendment includes corporations.”).

<sup>81</sup> See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1649 (1988) (concluding “the corporate personhood doctrine of *Santa Clara* represented an efficient way for the corporation to assert the property rights of its shareholders”).

<sup>82</sup> *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

<sup>83</sup> 147 U.S. 165, 176 (1893).

<sup>84</sup> See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932) (“Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business . . . cannot be upheld consistently with the Fourteenth Amendment.”).

<sup>85</sup> See generally Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527 (2012) (citing challenges inherent in deciding where a corporation is “essentially at home”).

to conceptualize a corporation and its litigation expectations when deciding whether and when it is appropriate to find personal jurisdiction over a corporation. Rather than limit litigation against corporations to the state in which they are domiciled or have their principal place of business, federal judges focus more broadly on what “minimum contacts” and “purposeful availment” a business has with another state, together with other features of those contacts, including the reasonableness of the jurisdiction, the benefits the corporation receives from business in the state, the burdens and inconvenience of litigation in the state, and the foreseeability of litigation in the state.<sup>86</sup>

A corporation may be sued for all purposes, under the due process heading of “general jurisdiction,” in limited circumstances, even outside of its state of incorporation. General jurisdiction is a concept that does not arise for individuals, who can be domiciled in at most one state, but it does for artificial entities that may be “present” in multiple states.<sup>87</sup> Although this corner of the personal jurisdiction jurisprudence has garnered attention in recent Supreme Court interventions regarding when a corporation has so much continuous contact so as to be “essentially at home” in a state and subject to suit for activities unrelated to those in-state,<sup>88</sup> courts have rarely needed to rule on general jurisdiction over corporations. After all, the modern personal jurisdiction test is so broad that specific jurisdiction is usually straightforward to obtain. Corporations with broad business dealings can use contractual forum selection clauses to minimize inconvenience of litigation, while states can make consent to jurisdiction a condition of incorporation.<sup>89</sup> It was modern commerce that caused the Supreme Court to modernize the personal jurisdiction test and adopt the “minimum contacts” framework for individuals and corporations alike.

The Supreme Court has also long allowed corporations to challenge criminal statutes. Since a corporation may be prosecuted for the acts of its employees, it should be able to assert due process objections to a criminal

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<sup>86</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-20 (1945) (discussing each of these factors).

<sup>87</sup> See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”).

<sup>88</sup> See, e.g., *id.* at 2850; *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (referring to general jurisdiction as perhaps limited to the state of “incorporation or principal place of business for corporations”).

<sup>89</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (upholding a forum selection clause contained within a ticket-purchase contract).

statute as a defense to its prosecution.<sup>90</sup> Landmark criminal procedure rulings by the Court have occurred in cases brought by corporations as litigants. The issues in those cases may be little different than if an individual had challenged the statute, although corporations may have more resources to mount costly appellate litigation. In doing so, corporations may create important precedent for individual defendants as well.

#### D. *The First Amendment*

The constitutional rights of corporate persons have become a subject of popular and political debate in the wake of the Supreme Court's 2010 decision in *Citizens United*. There, the Court ruled in favor of a nonprofit corporation that brought a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA), which had barred corporations and unions from making direct contributions or from using independent expenditures for "electioneering communication" or speech expressly advocating election or defeat of a political candidate.<sup>91</sup> As Robert Sprague and Mary Ellen Wells put it: "To say that *Citizens United*'s holding is controversial is an understatement."<sup>92</sup> This Section tackles why I think some of the conventional understanding of *Citizens United* is wrong.

Some argue that *Citizens United* changed the entire map of corporate constitutional rights. They view the case as creating a presumption in favor of corporations possessing all constitutional rights, even liberty-oriented speech rights.<sup>93</sup> I disagree with such characterizations of the ruling. The Court's ruling may very well have a dramatic impact on elections, and it may be wrong as a matter of policy, and even as a matter of First Amendment interpretation. What the Court did not do, however, was depart from its prior rulings regarding whether organizations have constitutional rights. Indeed, neither the majority nor the dissent questioned that corporations have First Amendment rights. Where they disagreed was whether a compelling state interest justified restricting corporate political donations.

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<sup>90</sup> See, e.g., *Armour Packing Co. v. United States*, 209 U.S. 56, 83-86 (1908) (considering due process defense by a corporation charged for violating the Elkins Act).

<sup>91</sup> 130 S. Ct. at 911 (interpreting 2 U.S.C. § 441b(b)(2) (2012)). Media corporations were exempted from the BCRA's coverage. See 2 U.S.C. § 431(9)(B)(i) (2012). The Court emphasized that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not." *Citizens United*, 130 S. Ct. at 905.

<sup>92</sup> Sprague & Wells, *supra* note 25, at 508.

<sup>93</sup> See, e.g., Joanna M. Meyer, Note, *The Real Error in Citizens United*, 69 WASH. & LEE L. REV. 2171, 2187-88 (2012) (suggesting that *Citizens United* is problematic because it does not conduct a careful analysis about why a corporation is entitled to First Amendment protection).

The Court's broader First Amendment jurisprudence helps to explain why it was not controversial to conclude that corporations have First Amendment rights, which the Court first recognized in its 1978 *First National Bank of Boston v. Bellotti* decision.<sup>94</sup> While critics find it objectionable that corporations benefit from a right as "personal" as the First Amendment free speech right, the First Amendment protects "speech" and not persons.<sup>95</sup> In addition, the First Amendment mentions the "press," which some scholars have argued indicates an understanding of the crucial role that media organizations play in promoting speech.<sup>96</sup> In First Amendment cases, the Court is focused on the marketplace of ideas,<sup>97</sup> which then leads to a broad notion of corporate standing to litigate participation in that marketplace.

The Supreme Court has interpreted the underlying speech protection to protect speech and not speakers. In *Bellotti*, the Court noted speech does not lose First Amendment protection "simply because its source is a corporation."<sup>98</sup> The Court rejected arguments that special dangers of corporate participation in the political process, or the rights of shareholders that might disapprove of the corporate speech, were implicated by the particular statute, and so could not suffice as a compelling state interest to justify restricting corporate speech.<sup>99</sup>

Following that ruling, the Court attempted to fashion a taxonomy of types of organizations, and in a series of rulings, developed a complex approach in which regulations could bar some corporate political donations but not others, depending on the type of corporation or organization. This approach began in 1982 in *FEC v. National Right to Work Committee* where the Court found that a federal campaign statute restricting which persons could be solicited to contribute to segregated corporate funds "reflect[ed] a legislative judgment that the special characteristics of the corporate structure

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<sup>94</sup> 435 U.S. 765, 777 (1978). The Court did not reach the issue in earlier cases. See, e.g., *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 399-400 (1972) ("This disposition makes decision of the constitutional issues premature, and we therefore do not decide them."); *United States v. UAW*, 352 U.S. 567, 591 (1957) (noting the Court's "[r]efusal to anticipate constitutional questions").

<sup>95</sup> See U.S. CONST. amend. I.

<sup>96</sup> See, e.g., Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 848 (2008) (discussing the "institutionally aware" First Amendment); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1274 (2005) ("I want to suggest that a certain number of existing social institutions in general, even if not in every particular, serve functions that the First Amendment deems especially important . . .").

<sup>97</sup> See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (framing the protections of the First Amendment as covering anyone who wishes to enter the "marketplace of ideas").

<sup>98</sup> 435 U.S. at 784.

<sup>99</sup> *Id.* at 789-92.

require particularly careful regulation.”<sup>100</sup> In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court ruled that a federal statute requiring corporations to make independent political expenditures only through special segregated funds, 2 U.S.C. § 441b, unduly burdened corporate freedom of expression as applied to a small nonprofit corporation, which would not be able to afford to comply, in part because it was not a business corporation and did not accept contributions from business corporations.<sup>101</sup> However, the Court emphasized in contrast that business corporations can use “resources amassed in the economic marketplace” to obtain “an unfair advantage in the political marketplace.”<sup>102</sup> Further, the Court emphasized corporate resources “are not an indication of popular support for the corporation’s political ideas; they reflect instead the economically motivated decisions of investors and customers.”<sup>103</sup> Similarly, in *FEC v. National Conservative Political Action Committee*, the Court recognized a compelling government interest in “preventing corruption,” but in that case struck down a statute as overbroad.<sup>104</sup>

The taxonomy approach, permitting legislation to distinguish types of organizations and corporations, appeared ascendant. Its apogee was the Court’s 1990 ruling, *Austin v. Michigan Chamber of Commerce*, which followed those prior decisions to hold that political donations could be limited if the speaker was an entity, but only depending on the type of company at issue.<sup>105</sup> The *Austin* Court adopted a fine-grained view of how corporations might be affected by speech-restricting regulations. Although the Michigan law distinguished between business corporations and unions, the Court noted that the distinction was appropriate given that federal law limits political spending by unions to segregated funds raised through voluntary contributions.<sup>106</sup> Similarly, the Court explained that the Michigan statute could sensibly exclude media corporations, given the “unique role” the press

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<sup>100</sup> 459 U.S. 197, 209-10 (1982).

<sup>101</sup> 479 U.S. 238, 264 (1986).

<sup>102</sup> *Id.* at 257.

<sup>103</sup> *Id.* at 258. For additional discussion of stockholder’s rights, see Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 *YALE L.J.* 235, 247 (1981).

<sup>104</sup> 470 U.S. 480, 500-01 (1985).

<sup>105</sup> 494 U.S. 652, 661-62 (1990).

<sup>106</sup> *See id.* at 665-66 (“An employee who objects to a union’s political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union’s performance of its duties as the exclusive representative of the bargaining unit on labor-management issues.”). For a criticism of *Austin*, see Larry E. Ribstein, *Corporate Political Speech*, 49 *WASH. & LEE L. REV.* 109, 156 (1992), where the author argues that modern economic theory undercuts arguments in favor of regulating corporate speech.

plays in informing the public.<sup>107</sup> In contrast, business organizations could be regulated, based on “the compelling state interest of eliminating from the political process the corrosive effect of political ‘war chests’ amassed with the aid of the legal advantages given to corporations.”<sup>108</sup> The *Austin* Court also emphasized that the Michigan statute that limited independent expenditures supporting candidates affected corporations—but corporations were themselves a creature of state statutes and derived special advantages from them.<sup>109</sup> (In dissent, Justice Scalia protested that it would be an unconstitutional condition to limit speech based on granting privileges to corporations.<sup>110</sup>)

The very provisions challenged in *Citizens United* had been upheld in the 2003 *McConnell v. FEC* decision, which noted how the Court had repeatedly upheld such restrictions on corporate spending.<sup>111</sup> *Citizens United* marked a sharp break from those earlier decisions. The Court emphasized that despite not being “natural persons,” corporations have First Amendment rights.<sup>112</sup> That part of the ruling should not be controversial. Corporations have long been held to have various constitutional rights—as well as First Amendment rights.

The change was that the Court rejected the taxonomy-based approach distinguishing among organizations. The Court abandoned the nuanced approach involving the application of narrow tailoring and compelling state interest law that had developed over the prior decades. Under *Austin*, the Court might have narrowly ruled that as a nonprofit organization, *Citizens United* was the type of entity to which people donate money to promote their speech, and therefore it should be given an exception from the relevant provisions.<sup>113</sup> It did not matter what kind of corporation *Citizens United* was—the Court rejected its earlier “intricate case-by-case determinations” entirely, electing instead to use a categorical approach finding all such

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<sup>107</sup> *Austin*, 494 U.S. at 667.

<sup>108</sup> *Id.* at 666.

<sup>109</sup> *See id.* at 658-59 (highlighting some of the advantages conferred upon corporations by the states).

<sup>110</sup> *See id.* at 680 (Scalia, J., dissenting) (“It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”).

<sup>111</sup> 540 U.S. 93, 205, 209 (2003) (stating that the Court has “repeatedly sustained legislation” that limits corporations’ ability to participate in political advocacy).

<sup>112</sup> *Citizens United*, 130 S. Ct. at 900 (“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.’”).

<sup>113</sup> *Id.* at 938 (Stevens, J., concurring in part and dissenting in part) (“[T]he Court nonetheless turns its back on the as-applied review process that has been a staple of campaign finance litigation since [1976] . . .”).



restrictions facially invalid.<sup>114</sup> The Court also rejected the “antidistortion” rationale of *Austin*, suggesting that it is irrelevant that money from the marketplace may not come from the speaker and reasoning that all speakers make use of money from the marketplace.<sup>115</sup> Finally, the Court rejected the exemption of media corporations, reasoning they are no different, and can even be controlled by business corporations.<sup>116</sup>

Two years after *Citizens United*, in *American Tradition Partnership, Inc. v. Bullock*, the Court struck down a Montana state law regulating corporate political expenditures in a brief, less-than-one-page per curiam opinion<sup>117</sup>—there was little to say once *Citizens United* had adopted a categorical approach to restrictions on corporate spending.

The Court’s decision to treat corporations as no different from any other speaker has attracted attention to the case (though Justice Stevens’s dissent chiefly focused on *stare decisis*). Justice Sotomayor anticipated such criticism at oral argument, stating that it would seem as if “the Court imbued a creature of State law,” the corporation, “with human characteristics.”<sup>118</sup> Judges and scholars have long debated what a corporation is—whether it is an artificial legal entity, an aggregate of individual people, or a real entity. For example, Justice White dissented in *First National Bank of Boston v. Bellotti*, arguing “when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.”<sup>119</sup> Justice Stevens’s *Citizens United* dissent instead emphasized that “[t]he financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.”<sup>120</sup> He asked “‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate.”<sup>121</sup>

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<sup>114</sup> *Id.* at 892 (majority opinion). The majority opinion treated *Austin* as a break from prior precedent, distinguishing the 1980s rulings as either upholding challenged regulations, or dealing with soliciting contributions and not limiting the speech itself. *Id.* at 909, 912. Those efforts to distinguish the Court’s pre-*Austin* rulings ignore how each of the prior decisions adopted a case-specific compelling interest test—it was not correct to attribute that test to *Austin*; more accurately, in *Citizens United*, the Court simply rejected that prior test. The dissent in *Citizens United* argued that “the majority blazes through our precedents” and marked a “dramatic break” from prior holdings. *Id.* at 930 (Stevens, J., concurring in part and dissenting in part).

<sup>115</sup> *Id.* at 905 (majority opinion).

<sup>116</sup> *Id.* at 905-07.

<sup>117</sup> 132 S. Ct. 2490, 2491 (2012) (per curiam).

<sup>118</sup> Transcript of Oral Argument at 33, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

<sup>119</sup> 435 U.S. 765, 806 (1978) (White, J., dissenting).

<sup>120</sup> *Citizens United*, 130 S. Ct. at 930 (Stevens, J., concurring in part and dissenting in part).

<sup>121</sup> *Id.* at 972.

Some scholars argue that the *Citizens United* Court endorsed a real or natural entity view that a corporation is like an individual human person in the way that it can exercise First Amendment rights. Most prominently, Reuven S. Avi-Yonah argued that *Citizens United* meant the “real entity view prevail[ed].”<sup>122</sup> I view *Citizens United* very differently. The Court took great pains not to say what a corporation is or is not. The Court was meticulous in abandoning a taxonomy-type approach permitting different types of organizations to be treated differently. As in other areas of constitutional law, the result sought a single answer, all or nothing, as to whether corporations and other entities can litigate the constitutional right in question.

Interestingly, in a brief statement in his concurring opinion, Chief Justice Roberts treated the question as one of standing, as part of a discussion whether the case raised a question of an as-applied or facial challenge to the statute. Chief Justice Roberts said: “Citizens United has standing—it is being injured by the Government’s enforcement of the Act.”<sup>123</sup>

Put that way, the question of Article III standing to litigate a constitutional right seems an easy one. One can imagine *some* organizations that should be able to make political statements free from restriction; the Supreme Court had said for decades that many entire categories of organizations should be immune from regulation of their political speech. As noted, under the Court’s precedents, the First Amendment protects such speech as part of an effort to promote an entire marketplace of speech. As I have already argued, the approach that preserves one single constitutional test as applicable to all or no organizations may do a better job of preserving consistency in the application of the constitutional right. The Court was clearly frustrated that a complex hodgepodge of regulatory and First Amendment treatment depended on the type of organization, such as whether it was a media organization, a union, or a nonprofit. Standing for the corporation would only be problematic if the organization’s interest might be in conflict with those of its constituents. The Court addressed the question whether shareholders might object to corporate speech by noting

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<sup>122</sup> See Avi-Yonah, *supra* note 26, at 1032 (“Why does the real entity view prevail? This is no doubt due in part to the fact that it represents the most congenial view to corporate management, because it shields management from undue interference from both shareholders and the state.”). Avi-Yonah concluded that “[c]orporate management wields political power and it influences the outcome of the debate; judges again and again refer to the importance of corporations, by which they mean corporate management.” *Id.* at 1032. But “there is another reason why the real entity view prevails: it fits reality much more than the other [theories]. . . . The real entity view prevailed because it was more *real* than the others.” *Id.* at 1032-33.

<sup>123</sup> *Citizens United*, 130 S. Ct. at 919 (Roberts, C.J., concurring).

that “[s]hareholder objections” can be “raised through the procedures of corporate democracy.”<sup>124</sup>

Of course, the Court in *Citizens United* did not need to say much to explain a decision that organizations can assert First Amendment rights because the principle had been well established in decisions reaching back decades. The Court briefly noted that it “has recognized that First Amendment protection extends to corporations,” followed with a lengthy citation to decisions reaching back to the 1930s.<sup>125</sup> Having concluded that corporations have First Amendment rights, the question that provoked disagreement was whether the government had a substantial interest in regulating corporate expenditures in the way that it did. That analysis was also consequentialist, as the Court engaged with the government’s claim that permitting such corporate independent expenditures could cause corruption in the political process.<sup>126</sup> However, the question whether it is good litigation policy to permit a corporation to assert a constitutional right is a very different question, and conversely, broader social policy will influence how one interprets the underlying substance of the constitutional right.

Deciding that all organizations can litigate their First Amendment speech right still does not answer the second and perhaps more important question whether certain types of entities might not be able to overcome a compelling government interest in regulating their speech. That is a question of substantive First Amendment law over which judges and scholars can and should disagree.

A broader question, however, is whether *Citizens United* and other recent decisions by the Supreme Court shed light on which constitutional rights corporations may assert and which they may not. What *Citizens United* does suggest is that the Court will analyze the issue by asking the general question whether organizations can benefit from the constitutional right. The analysis implies that a corporation or organization can effectively assert the interests of its members or constituents. The Court assumes that the organization has standing as long as it might be an effective constitutional litigator, without asking what type of organization it is or what role the rights of stakeholders inside and outside the firm have. The question is whether all organizations have standing or not. However, as discussed next, in contexts seen as more closely connected to government regulation of

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<sup>124</sup> *Id.* at 916 (majority opinion).

<sup>125</sup> *Id.* at 899-900 (citing, for example, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), in which the Court noted that a corporation is a “person” under the Due Process Clause, which incorporated the First Amendment right in question as against the states).

<sup>126</sup> *See id.* at 908-11.

corporations, the Court may view the policy question whether to permit organizational standing to litigate constitutional rights differently.

#### E. *The Fourth Amendment*

In the Fourth Amendment context, criminal procedure scholars have typically observed that corporations have fewer privacy rights as compared with individuals. For example, Professor Christopher Slobogin puts it this way: “corporations have virtually no Fourth Amendment rights where it really counts.”<sup>127</sup> 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.

Although we may think of the Fourth Amendment as involving a quintessentially individual right, the Supreme Court has interpreted the Fourth Amendment to protect collective interests, and has balanced those interests against government interests.<sup>128</sup> The Court emphasized in *Atwater v. City of Lago Vista* that “sensitive, case-by-case determinations” may not be required, where instead a “reasonable Fourth Amendment balance” should involve “sufficiently clear and simple” standards and “readily administrable rules.”<sup>129</sup> As Thomas Clancy has argued, the “‘right of the people to be secure’ is a collective right, not an individual one.”<sup>130</sup> As a result, the Fourth Amendment cases come out in a similar place as the Court’s opinion in *Citizens United*, treating the right as collective and its assertion by organizations as straightforward.

Long lines of precedent have grappled with Fourth Amendment rights of corporations and what expectations of privacy exist in places of business, both as to the first Fourth Amendment clause concerning freedom from “unreasonable searches and seizures” and the second clause prohibiting issuance of warrants except “upon probable cause.”<sup>131</sup> Some of the Court’s statements suggest a special concern that corporations cannot resist requests by regulators and prosecutors for documents; the regulatory state requires

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<sup>127</sup> Christopher Slobogin, *Citizens United and Corporate and Human Crime*, 41 STETSON L. REV. 127, 133 (2011).

<sup>128</sup> See Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 263 (2010) (arguing that, despite the “depth of precedent for the view that the Fourth Amendment protects individual rights,” the Court has “increasingly . . . support[ed] a collective security model”).

<sup>129</sup> 532 U.S. 318, 347 (2001).

<sup>130</sup> Clancy, *supra* note 128, at 296.

<sup>131</sup> See U.S. CONST. amend. IV.

compliance with subpoenas for regulation to be effective. Indeed, perhaps no area of constitutional law has affected the modern regulation of corporations more than the Court's Fourth Amendment rulings. Those rulings have not received the attention they deserve, perhaps because the practice that administrative agencies have broad power to investigate organizations and request documents is so longstanding.

However, early on, the Supreme Court took a very different approach. In its 1886 decision in *Boyd v. United States*, the Court held that a person did not need to respond to a subpoena for customs invoices, since it sought "a man's private papers."<sup>132</sup> Yet those were not particularly "personal" or private papers; they were business invoices that were needed to show whether a company was illegally importing goods into the country.<sup>133</sup> That was a case involving an individual person, not a corporate defendant. But that interpretation of Fourth Amendment law made any kind of an investigation into business conduct very difficult. With the rise of more modern federal agencies designed to regulate commerce, the Court, without extensive discussion, abandoned that notion by 1906 in *Hale v. Henkel*, ruling that a corporation has Fourth Amendment rights, and must comply with reasonable subpoena requests.<sup>134</sup>

The Supreme Court in a series of rulings subsequently made clear that extremely broad subpoenas did not violate the Fourth Amendment reasonableness requirements. Some of the Court's language might be taken to suggest that corporations were being treated differently. In 1911, the Court ruled in *Wilson v. United States* that a broad request that the company president turn over all letters and documents he signed during a certain period of time did not violate either the Fourth or Fifth Amendments.<sup>135</sup> As the Court put it in 1946 in *Oklahoma Press Publishing Co. v. Walling*, "corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters."<sup>136</sup> The Court noted that historically corporations had been subject to "visitorial power" and, in a rare instance of reasoning across corporate constitutional rights, the Court noted that entities lack the Fifth Amendment privilege against self-incrimination (as discussed in the next Section).<sup>137</sup> Only in extreme cases of overreaching and overbroad searches did the Court approve Fourth Amendment

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<sup>132</sup> 116 U.S. 616, 622 (1886).

<sup>133</sup> *See id.* at 636.

<sup>134</sup> *See* 201 U.S. 43, 73 (1906).

<sup>135</sup> 221 U.S. 361, 375-76 (1911).

<sup>136</sup> 327 U.S. 186, 205 (1946).

<sup>137</sup> *Id.* at 204-05.

challenges by corporations to subpoenas seeking documents.<sup>138</sup> In *Walling*, the Court explained that “the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described,’ if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.”<sup>139</sup>

In perhaps the best known of this line of Fourth Amendment cases involving subpoenas for corporate records, *United States v. Morton Salt Co.*, the Court treated as unsettled whether corporations had Fourth Amendment rights, stating “[i]t is unnecessary here to examine the question of whether a corporation is entitled to the protection of the Fourth Amendment.”<sup>140</sup> But the Court went on to emphasize that “corporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>141</sup> Further, the Court was tolerant of a quite broad federal search by the Federal Trade Commission; even if it was “caused by nothing more than official curiosity,” the FTC could satisfy itself that the company was “consistent with law and the public interest.”<sup>142</sup>

What may have been animating those decisions was a generally deferential interpretation of the Fourth Amendment’s role in regulating administrative subpoenas, replacing the *Boyd* rule with a new rule that applied to both individuals and corporations. The new and more forgiving rule was grounded in an approach supporting the interests of regulators in supervising businesses by examining business records. For regulators, information is “the fuel without which the administrative engine could not operate.”<sup>143</sup> And similarly in criminal prosecutions, as Professor William Stuntz put it, “[i]n antitrust or mail fraud or tax evasion cases, the damning documents may be everything—there is no equivalent to crime scene evidence, and witnesses

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<sup>138</sup> See, e.g., *Essgee Co. v. United States*, 262 U.S. 151, 156 (1923) (stating that unreasonable searches “against which the corporation was protected by the Fourth Amendment” work to “vitiate[] all the subsequent proceedings to compel production”); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 390-92 (1920) (rejecting government’s desire to keep documents obtained during blatantly unreasonable search). *But see* *Brown v. United States*, 276 U.S. 134, 142-43 (1928) (finding that a broad subpoena asking for a large range of documents covering a large time period was not overly broad); *Fed. Trade Comm’n v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924) (suggesting that Congress might be able to permit a “fishing expedition” into the private papers of a company to search for evidence of a crime).

<sup>139</sup> 327 U.S. at 208.

<sup>140</sup> 338 U.S. 632, 651 (1950).

<sup>141</sup> *Id.* at 652.

<sup>142</sup> *Id.*

<sup>143</sup> BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 3.1 (3d ed. 1991).

are typically involved in the crime.”<sup>144</sup> However much animated by concerns of effective regulation of business, it is not a different rule regarding Fourth Amendment rights of corporations—the Court decided as early as *Hale* that corporations do have Fourth Amendment rights—but limited rights to challenge the “reasonableness” of subpoenas.

Moreover, it is nothing foreign to Fourth Amendment law to consider, by way of interpreting “reasonableness,” regulatory or law enforcement interests. The Court has created Fourth Amendment rules to balance privacy interests against the interest of law enforcement in solving crimes: there is the exclusionary rule that prohibits the use at trial of illegally seized evidence. However, the rule incorporates all sorts of detailed exceptions, including rules that allow police to search evidence in “plain view,” or due to “exigency,” or to search someone as part of an arrest, or if the suspect provides consent. It should be no surprise that Fourth Amendment rules for searches of businesses and regulated industries would include similar types of balancing. Nor should it be surprising that based on standard Fourth Amendment doctrine, individuals’ homes receive more protection, while business premises would not be treated the same way.<sup>145</sup> Corporations may have standing to litigate Fourth Amendment rights, but the underlying right may not benefit corporations to the same degree.

Nevertheless, the same rules formally apply to corporations and individuals when the government wants to do a physical search. Does the government need to get a warrant before it searches a business? The answer is yes—usually. While the typical rule is that searches conducted without a warrant “are *per se* unreasonable under the Fourth Amendment,”<sup>146</sup> the Court has crafted exceptions. One large exception is for suspicionless checkpoints or police roadblocks. The Court has approved warrantless check point stops near borders to search vehicles for illegal aliens, as well as checkpoints for checking drivers’ licenses, checking for sobriety, conducting agricultural inspections, checking for fleeing fugitives, or checking for “safety requirements, weight limits, and similar matters.”<sup>147</sup> A second exception is for routine inventory searches of impounded vehicles.<sup>148</sup>

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<sup>144</sup> William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 859-60 (2001).

<sup>145</sup> See Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 921-22 (2010) (arguing that robust Fourth Amendment protection of the private residence served to decrease protection of other spaces, such as businesses).

<sup>146</sup> See *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>147</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 n.14 (1976) (finding border checkpoints constitutional); see also *Illinois v. Lidster*, 540 U.S. 419, 423 (2004) (finding highway checkpoints to ask for information about a recently committed crime constitutional); *City of*

Another narrow exception, however, is for warrantless searches of certain pervasively regulated industries. The Court held in *Camara v. Municipal Court* in 1967 that the Fourth Amendment protects individuals against unreasonable searches and seizures and warrantless searches in both civil and criminal investigations.<sup>149</sup> That same year, in *See v. City of Seattle*, the Court held that the Fourth Amendment protects against warrantless inspections of commercial premises.<sup>150</sup> In *Marshall v. Barlow's, Inc.*, the Court examined a provision in the Occupational Safety and Health Act of 1970 (OSHA Act) that allowed agents of the Secretary of Labor to conduct warrantless searches of covered employment facilities.<sup>151</sup> The president of Barlow's, Inc. refused to allow the inspectors to enter the premises, citing his Fourth Amendment rights.<sup>152</sup> The Court emphasized that "the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods."<sup>153</sup> The "particular offensiveness" of the general warrant and writ of assistance "was acutely felt by the merchants and businessmen whose premises and products were inspected" under their authority.<sup>154</sup> The Court concluded that "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence."<sup>155</sup>

The Court has only created very limited exceptions from the search warrant requirement for "pervasively regulated business"<sup>156</sup> and for "closely regulated" industries that have been "long subject to close supervision and inspection."<sup>157</sup> In *Biswell*, the Court sustained warrantless searches of firearms dealers under the Gun Control Act of 1968, reasoning that the regulatory inspections "further[ed] urgent federal interest."<sup>158</sup> The Court

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*Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (suggesting roadblocks for fleeing felons are constitutional); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (finding sobriety checkpoints constitutional); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion) (upholding driver's license checkpoints); *United States v. Brignoni-Ponce*, 422 U.S. 873, 887-88 (1975) (Rehnquist, J., concurring) (arguing that agricultural checkpoints should be constitutional).

<sup>148</sup> *Martinez-Fuerte*, 428 U.S. at 568 (Brennan, J., dissenting) (discussing previous cases in which the Court approved inventory searches of vehicles in police custody).

<sup>149</sup> 387 U.S. 523, 528-29 (1967).

<sup>150</sup> 387 U.S. 541, 543-44 (1967).

<sup>151</sup> 436 U.S. 307, 309 (1978).

<sup>152</sup> *Id.* at 309-10.

<sup>153</sup> *Id.* at 311 (alternations in original) (quoting *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 312.

<sup>156</sup> *See United States v. Biswell*, 406 U.S. 311, 316 (1972).

<sup>157</sup> *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970).

<sup>158</sup> 406 U.S. at 317.



noted in *Barlow's* that in those industries, "when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation," but seemed to cabin the exception to state-licensed industries like firearms and liquor stores.<sup>159</sup> Similarly, the Court held in *Donovan v. Dewey* in 1981 that federal mine inspectors may conduct warrantless inspections.<sup>160</sup> The Court noted that "it is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."<sup>161</sup>

Thus, the pervasively regulated industry exception is quite narrow, and largely limited to a few industries that have long been subject to regulation. Most recently, in *New York v. Burger* in 1987, the Court held that an automobile junkyard could be subject to warrantless regulatory searches but reaffirmed that such warrantless searches are only acceptable for a select few narrow, pervasively regulated industries.<sup>162</sup> Outside the exception, regulators must use a warrant (unless, which is often the case, statutes or regulations require the company to maintain records and examine transactions, without necessarily disclosing them).<sup>163</sup> The exception is not different in kind from the situations (including border checkpoints and impounded vehicles) in which individuals may be subject to warrantless searches. The exception is limited and related to certain regulated and carefully defined areas.

One of the most interesting Fourth Amendment cases was brought to challenge a search and seizure of a company. The Dow Chemical Company opposed the EPA's use of aerial surveillance to inspect a massive 2000-acre chemical manufacturing complex in Michigan for compliance with environmental laws and regulations.<sup>164</sup> The Court found that manufacturing sites do not enjoy the same privacy protections as the area around a home—and

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<sup>159</sup> 436 U.S. at 313.

<sup>160</sup> 452 U.S. 594, 605 (1981).

<sup>161</sup> *Id.* at 606.

<sup>162</sup> 482 U.S. 691, 702 (1987).

<sup>163</sup> In *California Bankers Ass'n v. Shultz*, bankers challenged the Bank Secrecy Act, which regulates banks and requires adequate records to be kept on certain types of financial transactions—including those that might be important in criminal, tax, and regulatory investigations and proceedings. 416 U.S. 21, 25-26 (1974). For example, automatic reports are to be generated when large amounts of currency are deposited or withdrawn, out of a concern that such transactions may involve money laundering or other forms of criminality. *Id.* at 26-27. Among the many constitutional challenges, the Court found the reporting provisions reasonable under the Fourth Amendment. *Id.* at 67. The Court also found the provisions to be reasonable and constitutional under the Due Process Clause of the Fifth Amendment, noting that these were "artificial entities." *Id.* at 49, 66. The Court also held that it did not violate the rights of third-party customers for banks to be required to maintain these records. *Id.* at 52-53.

<sup>164</sup> *Dow Chem. Co. v. United States*, 476 U.S. 227, 229-30 (1986).

that, in particular, private homes have the most heightened privacy protections.<sup>165</sup> The Court did note that “[a]ny actual physical entry by EPA into any enclosed area would raise significantly different questions, because ‘[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.’”<sup>166</sup> The decision appeared to give less Fourth Amendment protection to a business because, after all, a person’s home is a far more private place. However, the Court suggested that the interior portions of the factory would have protection.<sup>167</sup> Moreover, just a few years later, the Court held that it was not unreasonable when police flew a helicopter over a person’s backyard without a warrant to determine whether he was growing marijuana.<sup>168</sup>

Once again, maybe people and corporations are not treated so differently for Fourth Amendment purposes. 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. Once the corporation asserts a challenge, it does not appear to benefit from special Fourth Amendment rules, and, if anything, the justifications for substantive Fourth Amendment doctrine have led the Court to craft interpretations of the Fourth Amendment that are adapted for investigations of business misconduct and white collar crime. The criminal procedure rules would not likely look any different if corporations lacked Fourth Amendment rights and only employees could individually assert Fourth Amendment rights at their workplaces.

#### F. *The Fifth Amendment*

The *Citizens United* Court noted that the relevant election laws contained criminal prohibitions.<sup>169</sup> Does *Citizens United* mean “the final blow against those who resist criminal liability for corporations,” as Professor Christopher Slobogin puts it?<sup>170</sup> Perhaps not, precisely because prosecutions of corporations have long been thought important. Corporations may not

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<sup>165</sup> *See id.* at 237-38.

<sup>166</sup> *Id.* at 237 (alteration in original) (quoting *See v. City of Seattle*, 387 U.S. 541, 543 (1967)).

<sup>167</sup> *See id.* at 239 (“An electronic device to penetrate walls or windows . . . would raise very different and far more serious questions . . .”).

<sup>168</sup> *Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (plurality opinion).

<sup>169</sup> 130 S. Ct. at 888-89. The criminal provisions were not directly at issue there because *Citizens United* had affirmatively sought to enjoin application of the statute.

<sup>170</sup> Slobogin, *supra* note 127, at 129.

take the Fifth. The Court held in *Hale v. Henkel* that a corporation's agent may not assert a corporation's Fifth Amendment right against self-incrimination in response to a government subpoena.<sup>171</sup> The Court explained that "the corporation is a creature of the State" and in addition, "[w]hile 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."<sup>172</sup> The ruling focused on the inability of individuals to assert the corporation's Fifth Amendment rights to justify not testifying, explaining that the right not to testify is purely personal.<sup>173</sup> Yet the Court also noted that "[i]n organizing itself as a collective body [the corporation] waives no constitutional immunities appropriate to such body."<sup>174</sup>

The reasoning of the Supreme Court was not that corporations inherently lack criminal procedure rights, given that the Court in that same opinion importantly recognized a Fourth Amendment right of corporations to resist overbroad subpoenas. Instead, the Court's rationale was that corporations should not be permitted to entirely shield individual conduct from regulators and that individual employees should not be able to derivatively assert the corporation's rights to themselves refuse to comply with official requests. The Court's reasoning was consequentialist.<sup>175</sup>

In adopting this consequentialist approach when denying organizational standing to assert a right, the Supreme Court has subsequently refused to distinguish among most (but not all) types of corporations, rejecting the *Austin*-type fine-grained taxonomy approach. The Court's Fifth Amendment doctrine in this area has been termed the "collective entity rule," since the rule applies not just to corporations. In addition, an individual may not assert the Fifth Amendment rights of any organization defined functionally as one that "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."<sup>176</sup> The Court subsequently made clear

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<sup>171</sup> 201 U.S. 43, 69-70 (1906).

<sup>172</sup> *Id.* at 74-75.

<sup>173</sup> *Id.* at 69.

<sup>174</sup> *Id.* at 76.

<sup>175</sup> For a brief defense of this reasoning as additionally consistent with the Supreme Court's rationale for criminal liability of corporations generally, see BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 217 (2014).

<sup>176</sup> *United States v. White*, 322 U.S. 694, 701 (1944); *see also Bellis v. United States*, 417 U.S. 85, 100 (1974) (quoting *White*, 322 U.S. at 701).

that, since the records are corporate in nature, corporate officers could not resist process.<sup>177</sup> The blanket rule that organizations have no Fifth Amendment rights has led to some complications, including whether one-person corporations also lack Fifth Amendment rights. The Court has ruled that sole proprietorships are not collective entities and do have Fifth Amendment rights.<sup>178</sup>

The Supreme Court has also highlighted that organizations simply do not have the personal privacy interests that individual people have. The Fifth Amendment “respects a private inner sanctum of individual feeling and thought” and seeks to protect it from state compulsion.<sup>179</sup> That reasoning adds something else to the consequentialist justification that corporate Fifth Amendment rights would impair government investigations. It suggests that the self-incrimination right simply cannot be delegated from the individual to the corporation. One person cannot refuse to speak to police under the Fifth Amendment by asserting the potential to incriminate another person. That said, even if a corporation had Fifth Amendment rights, an individual officer could not claim the self-incrimination right of a corporation, and as I will discuss, the practical consequences might not be nearly so great as the Court supposed in *Hale*.

The Supreme Court reaffirmed that line of reasoning in 2010 in a Freedom of Information Act case, *FCC v. AT&T Inc.*, where AT&T objected to the FCC disclosing, pursuant to a trade association’s FOIA request, documents it had provided to the FCC.<sup>180</sup> AT&T argued that it had “personal privacy” as a corporation, and that it should be protected by a FOIA exception, which says that, based on Fourth Amendment principles, law enforcement records should not be disclosed if they “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>181</sup> The Court, in an

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<sup>177</sup> *Essgee Co. v. United States*, 262 U.S. 151, 158 (1923) (holding that a corporate officer, “as agent of the corporation,” is not protected against a request to produce corporate documents); *Dreier v. United States*, 221 U.S. 394, 400 (1911) (“[Because the corporate records] were the documents of the corporation in his custody, and not his private papers, [the defendant] was under obligation to produce them when called for by proper process.”); *Wilson v. United States*, 221 U.S. 361, 383-84 (1911) (reasoning that a corporation, because it is a creature of the state, must be amenable to inquiry by the state into its operations and accounts); *In re Harris*, 221 U.S. 274, 279 (1911) (requiring bankrupt to forfeit books even if they contained evidence of criminal activity).

<sup>178</sup> See *United States v. Doe*, 465 U.S. 605, 606, 611-12 (1984); Shauna J. Sullivan, Comment, *Fifth Amendment Protection and the Production of Corporate Documents*, 135 U. PA. L. REV. 747, 754 (1987) (reviewing cases wherein courts held that an individual involved in a sole proprietorship was protected from self-incrimination).

<sup>179</sup> *Bellis v. United States*, 417 U.S. 85, 91 (1974) (quoting *Couch v. United States*, 409 U.S. 322, 327 (1973)).

<sup>180</sup> 131 S. Ct. 1177, 1180-81 (2011).

<sup>181</sup> Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (2012).

opinion written by Chief Justice Roberts, joined by all of the justices but Justice Kagan who was recused, rejected that argument and said that “personal” (as opposed to “person”) normally refers to individuals, and not corporations.<sup>182</sup> Thus, “[w]e do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities.”<sup>183</sup> Quite the contrary, “we often use the word ‘personal’ to mean precisely the *opposite* of business-related: [w]e speak of personal expenses and business expenses, personal life and work life, personal opinion and a company’s view.”<sup>184</sup> In a charming final note, Chief Justice Roberts concluded: “The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.”<sup>185</sup>

A separate concern cited in the Fifth Amendment context relates to criminal investigations, which requires the balancing of privacy interests against the effectiveness of law enforcement. As the Supreme Court put it in *United States v. White* in 1944, “[w]ere the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.”<sup>186</sup> Unlike other criminal investigations, in corporate crime or white collar cases the most crucial evidence may be in the possession of the corporation. Early cases required production if the documents in question were corporate rather than personal, meaning that a custodian of business records serving the corporation could not object to turning such documents over.<sup>187</sup> Later cases abandoned that distinction and found that collective entities were simply not entitled to Fifth Amendment protection.<sup>188</sup> Nor, moreover, could the members of an entity claim privilege as to materials owned by the entity. Members could, however, claim *individual* privilege if asked to testify.<sup>189</sup>

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<sup>182</sup> *AT&T*, 131 S. Ct. at 1182.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 1185.

<sup>186</sup> 322 U.S. 694, 700 (1944).

<sup>187</sup> See *Braswell v. United States*, 487 U.S. 99, 109-10 (1988); see also *Bellis v. United States*, 417 U.S. 85, 90 (1974) (“[R]ecognition of [an] individual’s claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations.”).

<sup>188</sup> See *Braswell*, 487 U.S. at 104-12 (describing evolution of the collective entity doctrine).

<sup>189</sup> See *Curcio v. United States*, 354 U.S. 118, 128 (1957) (holding that a corporate custodian cannot be compelled to give oral testimony about where business records are located if the information would be self-incriminatory).

The Court ruled in *Fisher v. United States* in 1976 that the contents of business records are not ordinarily regarded as privileged because they are created voluntarily and without state compulsion.<sup>190</sup> However, such records may be the subject of testimony if the custodian is asked to identify or authenticate the documents; if so, then this “act of production” may be protected by the Fifth Amendment.<sup>191</sup>

The rule in *Fisher* obviates the need for the *Hale* rule that corporations lack Fifth Amendment rights. If business records themselves lack Fifth Amendment protection, then giving a corporation Fifth Amendment protection would have little practical meaning, since a corporation cannot itself be interrogated and cannot “speak” during an investigation. Moreover, the other privileges that a corporation does possess—such as attorney-client privilege, as the Court recognized in *Upjohn Co. v. United States*<sup>192</sup>—do not pose significant practical obstacles to law enforcement, which can reward cooperation, or even the waiver of privilege, when considering whether to provide a firm with leniency.<sup>193</sup>

In 1988, the Supreme Court ruled in *Braswell v. United States* that the president of a company could be held in contempt for refusing to produce corporate records.<sup>194</sup> As custodian, he could have immunity from testifying but not from producing document.<sup>195</sup> The Court reiterated that giving corporations Fifth Amendment rights “would have a detrimental impact on the Government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.”<sup>196</sup> Thus, in some respects, the Court’s refusal to apply the Fifth Amendment to entities eroded the rights of an organization’s individual members.

Individuals have more protection against self-incrimination when they are called to testify about requested documents. In the more recent case of *United States v. Hubbell*, the Supreme Court stated that if officials do not

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<sup>190</sup> 425 U.S. 391, 409-10 (1976).

<sup>191</sup> See *id.* at 412-13 (noting that the production of documents could violate the Fifth Amendment if the production implicated authentication but finding it did not in this case).

<sup>192</sup> 449 U.S. 383, 397 (1981).

<sup>193</sup> See Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 927 (2008) (describing practices of prosecutors and agencies that may use cooperation, or the waiver of privilege, as a factor in deciding which firms should be treated with leniency).

<sup>194</sup> 487 U.S. 99, 117 (1988) (affirming corporate custodians cannot resist subpoenas “on the ground that [the] act of production will be personally incriminating”).

<sup>195</sup> *Id.* at 116-17.

<sup>196</sup> *Id.* at 115. For criticism of the Court’s reasoning, see Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 648 (1986) (“Because the fifth amendment is concerned with the integrity of the *process* of law enforcement, its effect on the success of prosecutions should be relatively unimportant.”).

know the precise location of documents, providing a response to a subpoena might be self-incriminating since the very act of production would disclose “the mental and physical steps necessary” to provide that “accurate inventory.”<sup>197</sup> However, the act-of-production defense still does not apply to a corporate officer asked to produce records.<sup>198</sup> The “collective entity” rule still governs,<sup>199</sup> preventing corporations from shielding themselves or their employees from criminal exposure.

This reasoning simply does not fit the Supreme Court’s approach to other constitutional rights, particularly in the way that the corporations’ lack of constitutional protection also has the potential to deprive *individuals* of constitutional protection. In Part III, I argue that the Court has it wrong, since its analysis should focus on whether organizational standing interferes with effective litigation of individual rights, especially because extending Fifth Amendment rights to corporations will not meaningfully impede civil or criminal investigations.

### G. *The Double Jeopardy Clause*

Outside of the Self-Incrimination Clause, the Supreme Court has extended other Fifth Amendment protections to corporations. The Court held in *Russian Volunteer Fleet v. United States* in 1931 that the Takings Clause extended to a Russian corporation, entitling it to just compensation.<sup>200</sup> As noted, the Due Process Clause of the Fifth Amendment applies to corporations the same as it applies to individuals. Further, the Supreme Court held in 1977 in *United States v. Martin Linen Supply Co.* that prosecuting a corporation for a second time after the reversal of an acquittal would violate the Double Jeopardy Clause.<sup>201</sup> (The Court has never addressed whether the Double Jeopardy Clause applies to corporations, but seems to have assumed it.<sup>202</sup>) The Court in *Martin Linen* cited to the purposes of the Double Jeopardy Clause: to protect one from “personal strain,”<sup>203</sup> the “embarrassment,

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<sup>197</sup> 530 U.S. 27, 42-43 (2000).

<sup>198</sup> *See id.* at 36 (“[Respondent] could not avoid compliance with the subpoena served on him merely because the demanded [corporate] documents contained incriminating evidence . . .”).

<sup>199</sup> *See Braswell*, 487 U.S. at 104 (explaining collective entities such as corporations are not treated like individuals).

<sup>200</sup> 282 U.S. 481, 489 (1931).

<sup>201</sup> 430 U.S. 564, 567 (1977).

<sup>202</sup> *See Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam) (concluding that trying the petitioners, one of which was a corporation, for a second time after acquittal would violate the Fifth Amendment).

<sup>203</sup> 430 U.S. at 569 (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971)).

expense and ordeal,”<sup>204</sup> and “anxiety and insecurity” of another trial,<sup>205</sup> without justifying how those reasons could or should apply to corporations.

#### H. *Fines: The Sixth Amendment, Eighth Amendment, and Due Process*

The story of jury trial rights of corporations is consistent with the larger story I tell in this Article. Federal courts have recognized both Sixth Amendment jury trial rights in criminal cases and Seventh Amendment jury trial rights in civil cases.<sup>206</sup> One could argue that corporations do not require a jury of their peers or a community voice in a civil or a criminal trial. On the other hand, when a corporation can sue and be sued, perhaps having decided the question of standing, we can see why the court would then assume that any litigant should receive the same trial protections. The principle of jury trial rights for organizations has been extended in both the civil and criminal contexts, but in ways that limit fines in cases of particular interest to corporations.

The jury trial right itself is unexceptional. The substantive interpretation of the Sixth Amendment, though, provides more meaningful protections to corporations, but it does not arise at all from the fact that corporations have Sixth Amendment rights. It arose first in the Court’s landmark 2000 decision *Apprendi v. New Jersey*, which interpreted the Sixth Amendment to require certain sentencing facts to be charged to the jury.<sup>207</sup> The Supreme Court in its 2012 decision *Southern Union Co. v. United States* held that a criminal fine imposed on a corporation for environmental violations violated the Sixth Amendment rights of the corporation, where the fine was imposed in excess of the statutory maximum based on facts not charged to the jury.<sup>208</sup>

The case involved illegal storage of a hazardous material, liquid mercury, under environmental statutes that based the fine on the number of days that

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<sup>204</sup> *Id.* (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)).

<sup>205</sup> *Id.* (quoting *Green*, 355 U.S. at 187-88).

<sup>206</sup> See *United States v. R. L. Polk & Co.*, 438 F.2d 377, 380 (6th Cir. 1971) (reducing the penalty on a corporation because a jury trial had not been granted nor the right to a jury trial waived); *United States v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252, 1261 (S.D. Fla. 2004) (assuming corporations have the right to trial by jury, but ultimately rejecting the right in this case because the potential penalty was not severe enough); see also *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 838 (1994) (“We conclude that the serious contempt fines imposed here were criminal and constitutionally could not be imposed absent a jury trial.”); *Ross v. Bernhard*, 396 U.S. 531, 542 (1970) (noting that a shareholder would have the same right to a jury trial as a corporation); *Armour Packing Co. v. United States*, 209 U.S. 56, 73 (1908) (discussing the Sixth Amendment right to have a jury trial in the state where the alleged crime occurred).

<sup>207</sup> 530 U.S. 466, 490 (2000).

<sup>208</sup> 132 S. Ct. 2344, 2357 (2012).



the violation lasted.<sup>209</sup> The number of days in question was not included in the indictment, and the judge did not ask the jury to make a finding on the precise number of days.<sup>210</sup> The Supreme Court had never said before that criminal fines must be calculated based on a jury finding facts “beyond a reasonable doubt.” The Government argued that the reasoning of *Apprendi* was based on the idea that the role of the jury is crucial where there is a “physical deprivation of liberty.”<sup>211</sup> Unlike individuals, companies can only be fined, not jailed. However, the Court noted that “[w]hile the punishments at stake in those [prior] cases were imprisonment or a death sentence, we see no principled basis under *Apprendi* for treating criminal fines differently.”<sup>212</sup> The Court added that “[c]riminal fines, like these other forms of punishment, are penalties inflicted by the sovereign for the commission of offenses. Fines were by far the most common form of noncapital punishment in colonial America.”<sup>213</sup> The Court found that fines are particularly important in prosecutions of “organizational defendants who cannot be imprisoned.”<sup>214</sup> The Court noted that in 2011, “a fine was imposed on 9.0% of individual defendants and on 70.6% of organizational defendants in the federal system.”<sup>215</sup>

That ruling also impacts cases in which an individual is sentenced and must pay a large fine. The case happened to involve a corporation, and the Court noted that corporations chiefly pay fines, but the interpretation of the Sixth Amendment was formally neutral.<sup>216</sup> Other rulings proceed similarly when examining constitutional questions surrounding fines. Do corporations have Eighth Amendment rights to be free from cruel and unusual punishment? The Court has not reached that question.<sup>217</sup> Instead, the Court has extended the Due Process Clause to regulate “fines” in the civil context

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<sup>209</sup> *Id.* at 2349.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 2351.

<sup>212</sup> *Id.* at 2350.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 2350 n.2.

<sup>216</sup> For a more in-depth discussion of *Southern Union* and its implications for corporate criminal prosecutions and white collar prosecutions more broadly, see GARRETT, TOO BIG TO JAIL, *supra* note 175, at 196-200.

<sup>217</sup> See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (“We shall not decide . . . whether the Eighth Amendment protects corporations as well as individuals.”). *But see id.* at 285 (O’Connor, J., concurring in part and dissenting in part) (suggesting that the Excessive Fines Clause applies to corporations).

by placing constitutional limits on punitive damages awards.<sup>218</sup> The Court's rulings do not ask whether corporations have standing to challenge arbitrary jury awards of punitive damages. The Court nevertheless comes close to considering corporate-specific factors when assessing excessiveness of punitive damages awards.<sup>219</sup>

### I. Structural Provisions

Finally, corporations have asserted challenges based on structural provisions of the Constitution. In these cases, where a company raises a separation-of-powers issue as a defense in litigation, courts have entertained the challenges without comment.<sup>220</sup>

### III. INCORPORATION OF SUBSTANTIVE CORPORATE RIGHTS

When can an organization litigate an injury to the entity? The question should be viewed as a threshold question of Article III standing. The Supreme Court has not often articulated the question in standing terms—recall the very brief reference to standing by Chief Justice Roberts in *Citizens United*<sup>221</sup>—but many of its corporate constitutional rights rulings predate modern standing jurisprudence. I argue that an Article III standing framework provides a useful guide to understanding whether an organization can litigate constitutional rights.

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<sup>218</sup> See generally *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 428 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991).

<sup>219</sup> For example, the bar on permitting the jury to consider “harm caused strangers to the litigation” for purposes of assessing injuries, but permitting those considerations measuring reprehensibility, would tend to arise far more often with an organizational defendant. *Philip Morris*, 549 U.S. at 357; see also *State Farm*, 538 U.S. at 424 (calling evidence concerning reprehensibility “tangential,” including investigation regarding “the manner in which State Farm’s policies corrupted its employees”).

<sup>220</sup> See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56-57 (1982) (considering a corporation’s Article III separation-of-powers challenge to the structure contemplated by the Bankruptcy Act of 1978). For discussion of the case, see Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing*, 91 TEX. L. REV. 1447, 1455 (2013) (reviewing TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012)) (“The holding that an injured corporation has standing to object to a constitutional violation of the separation of powers was so well established that the Court took plaintiff’s standing for granted.”). For a general discussion of standing for individual litigants to raise challenges regarding structural provisions of the Constitution, see generally Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013).

<sup>221</sup> See 130 S. Ct. at 919 (Roberts, C.J., concurring) (mentioning that *Citizens United* had standing because it was injured by enforcement of the statute).

The Supreme Court has held that a plaintiff must be able to show a cognizable “injury in fact” to have a case or controversy that may be heard by an Article III court.<sup>222</sup> The Court recently summarized its Article III test as follows: an injury must be “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.”<sup>223</sup> Moreover, the Court has emphasized that “[t]he party invoking federal jurisdiction bears the burden of establishing these elements.”<sup>224</sup>

Two lines of cases are particularly crucial to the question of constitutional litigation by organizations. First, one line of cases holds that organizations can raise constitutional rights by asserting a concrete injury to its own interests but not those of others. Second, and in contrast, the Supreme Court adopts a more flexible test for associations and membership organizations that permits standing to assert the potentially broader interests of individual members. Relatedly, in a line of prudential third-party non-Article III standing cases largely developed in the context of individual litigation, the Court has long held that a litigant typically does not have standing to vindicate the constitutional rights of a third party absent some special relationship and some special barrier to the non-party litigating the right.<sup>225</sup> There are complexities to that body of Article III and prudential standing doctrine, and there are resulting questions over what qualifies as an organization versus an association and how to treat nonprofit corporations or religious nonprofits. I will address those questions in turn.

#### A. *Associational Standing*

The Supreme Court’s test for associational standing remains permissive and broad. The Court in *NAACP v. Alabama ex rel. Patterson* emphasized the common interests of members of an association and described how the association is “but the medium through which its individual members seek to make more effective the expression of their own views.”<sup>226</sup> The Court

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<sup>222</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that Article III requires that a plaintiff show he has suffered an injury in fact).

<sup>223</sup> *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010).

<sup>224</sup> *Lujan*, 504 U.S. at 561.

<sup>225</sup> See *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“In the ordinary course, a litigant must assert his or her own legal rights and interests . . . .”); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (“In the ordinary case, a party is denied standing to assert the rights of third persons.”).

<sup>226</sup> 357 U.S. 449, 459 (1958); see also *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (“The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.”).

directed the judge to focus on whether the relief sought would reasonably benefit the members of the organization, whether “the interests it seeks to protect are germane to the organization’s purpose,”<sup>227</sup> whether one or more members would have standing to sue individually, and whether there are issues of “individualized proof,” permitting the claims to be “properly resolved in a group context.”<sup>228</sup> Thus, the Court has emphasized that it can be preferable to have an association sue for consequentialist reasons. The Court in *UAW v. Brock* noted that “an association suing to vindicate the interests of its members can draw upon a pre-existing reservoir of expertise and capital.”<sup>229</sup>

The test for associational standing does not closely examine the governance of the group. The association need not even be a traditional membership organization. It may sue if “for all practical purposes” it serves the interests of others.<sup>230</sup> As the Court put it in *Brock*, “[t]he very forces that cause individuals to band together in an association will thus provide some guarantee that the association will work to promote their interests.”<sup>231</sup>

What Article III limit is there on the ability of an association to stand in for the constitutional rights of its members? The Court has merely noted that if there was evidence that an association did not “represent adequately the interests of all their injured members,” then there would be a due process problem with permitting a judgment by the association to bind the members in subsequent litigation.<sup>232</sup> Further, the Court has held that if the underlying claim or relief requested requires individual participation, then associational standing is not proper.<sup>233</sup> As a result, there may be sound reasons to treat nonprofit organizations and other types of organizations as associations if they, like membership organizations, represent the viewpoints of individuals. However, as discussed next, a for-profit corporation cannot do so given its legal structure and lacks the ability to litigate injury to others.

Some have criticized decisions like *Citizens United* for appearing to privilege associations and organizations. For example, Professor Wayne Batchis

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<sup>227</sup> *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

<sup>228</sup> *Id.* at 343-44 (describing three-part test for associational standing).

<sup>229</sup> 477 U.S. 274, 289 (1986).

<sup>230</sup> *Hunt*, 432 U.S. at 344; see Karl S. Coplan, *Is Voting Necessary? Organizational Standing and Non-Voting Members of Environmental Advocacy Organizations*, 14 SOUTHEASTERN ENVTL. L.J. 47, 75 (2005) (noting that the holdings of the Court suggest there can be associational standing even “without a formal voting membership”).

<sup>231</sup> 477 U.S. at 290.

<sup>232</sup> *Id.*

<sup>233</sup> *Hunt*, 432 U.S. at 343; see also *Harris v. McRae*, 448 U.S. 297, 321 (1980).

complains, “the freedom of association has become a freedom of *the* association.”<sup>234</sup> However, there are policy reasons that support allowing an association to stand in for the interests of members.<sup>235</sup> The reasons are similar to the reasons why class action practice permits injured individuals to gather together and sue in the aggregate.<sup>236</sup> Aggregate litigation can provide more effective representation, attract better resources for the litigation, and make it feasible to litigate individual injuries that would not be economically feasible to litigate individually.<sup>237</sup>

### B. Organizational Standing

Organizational standing analysis is quite different than associational standing analysis. When an organization sues to assert its own interests, which are necessarily distinct from those of its shareholders or owners, the Article III inquiry proceeds by asking whether the entity itself suffered a “concrete injury” to its own interests, apart from any separately identified injury to third parties, such as employees, officers, owners, or shareholders.<sup>238</sup> To be sure, more is required than an abstract “interest in a problem,” in order to satisfy the first “concrete injury” element of the analysis. For example, the Court famously held in *Sierra Club v. Morton* that under the Administrative Procedure Act, “a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself.”<sup>239</sup> As a matter of Article III standing, the Court in *Lujan v. Defenders of Wildlife* held that a

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<sup>234</sup> Wayne Batchis, *Citizens United and the Paradox of “Corporate Speech”: From Freedom of Association to Freedom of the Association*, 36 N.Y.U. REV. L. & SOC. CHANGE 5, 7 (2012).

<sup>235</sup> See Garrett, *Aggregation and Constitutional Rights*, *supra* note 33, at 637-38 (describing individualized constitutional remedies and their impact); see also Heidi Li Feldman, Note, *Divided We Fall: Associational Standing and Collective Interest*, 87 MICH. L. REV. 733, 744-45 (1988) (advocating theory of “collective standing”).

<sup>236</sup> See FED. R. CIV. P. 23(b)(3) advisory committee’s note to the 1966 amendments (“Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . . . A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s . . . labor.”).

<sup>237</sup> See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.03 (2010) (supporting aggregate treatment under given conditions).

<sup>238</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982) (“[O]rganizations are entitled to sue on their own behalf for injuries they have sustained.”).

<sup>239</sup> 405 U.S. at 739.

plaintiff organization must provide the court with “a factual showing of perceptible harm.”<sup>240</sup>

A second related principle has been less well developed in the case law. Not only must the organization claim an injury to the interests of the organization, but the particular harm that the corporation suffers must also implicate or be caused by the violation of the right being asserted by the entity. This is where, I argue, the Supreme Court’s decision in *Hobby Lobby* began to get it wrong by ignoring such requirements and casting further doubt on whether prior rulings in cases like *Sierra Club* and *Lujan* were so principled after all.

### 1. The *Hobby Lobby* Decision

In *Hobby Lobby*, the Supreme Court ruled on the question whether the contraception mandate in the Patient Protection and Affordable Care Act burdens a corporation’s right to religious exercise under the Religious Freedom Restoration Act of 1993.<sup>241</sup> The status of corporate standing was prominent in the confusion in the pre-*Hobby Lobby* lower court rulings concerning challenges to the Affordable Care Act’s contraception mandate. Some lower courts had held that free exercise claims, although only individuals can themselves exercise religious practices, can be asserted by organizations on a derivative or third-party theory of prudential standing,<sup>242</sup> while others disagreed and held that free exercise claims are purely personal or cannot be litigated by secular organizations.<sup>243</sup> Some opinions instead emphasized that

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<sup>240</sup> 504 U.S. 555, 566 (1992).

<sup>241</sup> 134 S. Ct. 2751, 2765 (2014).

<sup>242</sup> See, e.g., *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 212 (2d Cir. 2012) (finding no Free Exercise Clause violation when the challenged act is “neutral, generally applicable, minimally burdensome, and has a rational basis”); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 & n.9 (9th Cir. 2009) (“We have held that a corporation has standing to assert the free exercise right of its owners. . . . [A]n organization that asserts the free exercise rights of its owners need not be primarily religious. . . .”). The Tenth Circuit badly fractured in a decision concerning the standing of a corporation to assert free exercise rights in opposing contraception coverage for employees, including under the Religious Freedom Restoration Act (RFRA), but there was somewhat more agreement on the question of standing. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1154 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) (“I do not understand the government or any of my colleagues to dispute the Greens’ Article III standing.”). *But see id.* at 1162 (Bacharach, J., concurring) (“I believe we should instruct the district court to dismiss the Greens’ claims under the shareholder-standing rule.”); *id.* at 1177 (Briscoe, C.J., concurring in part and dissenting in part) (agreeing with Judge Bacharach’s concurring opinion on the issue of standing).

<sup>243</sup> See, e.g., *Gilardi v. U.S. Dep’t of Health & Human Servs.*, 733 F.3d 1208, 1214 (D.C. Cir. 2013) (“When it comes to corporate entities, only religious organizations are accorded the protections of the [Free Exercise] Clause.”); *Conestoga Wood Specialties Corp. v. Sec’y of U.S.*

if a regulation costs money for a corporation to comply with or creates financial penalties for noncompliance, then the company may challenge the regulation, even if the particular constitutional right is not one that relates to a financial interest.<sup>244</sup> Several lower courts had also addressed whether the ACA burdens a First Amendment religious exercise right: the Seventh and Tenth Circuits have entertained the claim,<sup>245</sup> while the D.C. Circuit has found “no basis for concluding a secular organization can exercise religion.”<sup>246</sup> The Tenth Circuit in *Hobby Lobby* briefly stated that the companies had standing to litigate the First Amendment and statutory claims because they “face an imminent loss of money, traceable to the contraceptive-coverage requirement,” but that court did not describe any harm to the plaintiff corporation’s asserted right to free exercise.<sup>247</sup> That reasoning instead corresponded with the government’s position in the Affordable Care Act litigation, which asserts that only the owners of companies can claim an injury to free exercise rights, on their own behalf, while the corporation must comply with the Act.<sup>248</sup>

Writing for the majority in *Hobby Lobby*, Justice Alito rejected that reasoning initially by stating that “[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.”<sup>249</sup> Others may debate, as Justice Ginsburg

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Dep’t of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013) (holding, without conducting a standing analysis, that “the free exercise claims of a company’s owners cannot ‘pass through’ to the corporation”). The Supreme Court expressed doubt on the subject in *Harris v. McRae*, 448 U.S. 297, 321 (1980), where the Court noted that a free exercise challenge in the context of associational standing analysis is “one that ordinarily requires individual participation.”

<sup>244</sup> See *Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013) (“The threat of financial penalty and other enforcement action is easily sufficient to establish standing to challenge the mandate prior to its enforcement.”); *Hobby Lobby*, 723 F.3d at 1126 (finding Article III standing, noting that “[b]oth companies face an imminent loss of money, traceable to the contraceptive-coverage requirement”).

<sup>245</sup> See *Hobby Lobby*, 723 F.3d at 1135 (“We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”); see also *Grote v. Sebelius*, 708 F.3d 850, 854-55 (7th Cir. 2013) (holding that the plaintiffs, a family and its private business, had a likelihood of success under the Religious Freedom Restoration Act and would not be forced to follow the contraception mandate in the ACA).

<sup>246</sup> See *Gilardi*, 733 F.3d at 1215; see also *Conestoga*, 724 F.3d at 385 (determining that for-profit, secular corporations cannot exercise religion).

<sup>247</sup> See *Hobby Lobby*, 723 F.3d at 1126.

<sup>248</sup> See Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Preliminary Injunction at 18, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. Civ. 12-1000) (arguing plaintiff “cannot establish a substantial burden on his religious exercise by invoking [a] trickle-down theory”).

<sup>249</sup> 134 S. Ct. at 2759.

did in dissent, whether that is a correct reading of RFRA's text, which uses the term "persons" but does not detail which types of entities have standing to raise religious exercise objections to regulations.<sup>250</sup>

However, what was a particularly stark departure was that the majority in *Hobby Lobby* acted as if answering the question of statutory standing (whether Congress intended to allow for-profit corporate persons to sue) was sufficient, without so much as addressing the question of the Article III organizational standing of the three plaintiff corporations. The Court not only avoided reaching the First Amendment claim raised by the parties,<sup>251</sup> but the Court was completely silent on the question of Article III standing. The issue was not strongly pressed by the parties, but it was mentioned at oral arguments,<sup>252</sup> and it was an important subject of lower court rulings, as described.<sup>253</sup>

Moreover, it is a federal court's Article III obligation to ensure that standing is present, while it is the plaintiff's burden to show standing. None other than Chief Justice Roberts, then a practicing lawyer, defended the Court's decision in *Lujan v. Defenders of Wildlife* in a lengthy law review article by pointing out that, even though Congress provided statutory standing under the Endangered Species Act, the plaintiffs lacked Article III standing, and citing to the importance of the "injury in fact" requirements as part of an important "judicial self-restraint" and reliance on precedent.<sup>254</sup>

If so, then by way of contrast, *Hobby Lobby's* failure to address whether the three for-profit corporations could make out an "injury in fact" was inconsistent with precedent. In order to have corporate standing, the company itself must articulate more than a "mere interest" in the subject matter of contraceptive coverage, and more than the fact that complying with the regulation costs money, since complying with all regulations cost money. The majority opinion did address cost, calling compliance with the regulations "costly," with "severe" economic consequences, and calling it "far from clear" that a company might actually save money by paying the penalty under the statute and dropping coverage.<sup>255</sup> To be sure, the statute

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<sup>250</sup> *Id.* at 2794 (Ginsburg, J., dissenting) ("Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. . . . [T]he exercise of religion is characteristic of natural persons, not artificial legal entities.").

<sup>251</sup> *Id.* at 2785 (majority opinion) ("Our decision on that statutory question makes it unnecessary to reach the First Amendment claim . . .").

<sup>252</sup> See Transcript of Oral Argument at 75-79, *Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354).

<sup>253</sup> See *supra* notes 242, 244, 247 and accompanying text.

<sup>254</sup> John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1229 (1993).

<sup>255</sup> *Hobby Lobby*, 134 S. Ct. at 2775, 2777.



does regulate insurance coverage by corporations. But again, that compliance with a statute or regulation costs money does not give rise to a claim, unless there is a separate constitutional or statutory deficiency with the statute or regulation. In *Hobby Lobby*, the corporations would have to show some “injury” to their religious exercise. How could they do so, except by invoking the beliefs and rights of the separate owners of the corporation?

The dissent argued, citing to Justice Stevens’s opinion in *Citizens United*, that corporations literally “have no consciences, no beliefs, no feelings, no thoughts, no desires.”<sup>256</sup> Justice Ginsburg argued: “the exercise of religion is characteristic of natural persons, not artificial legal entities.”<sup>257</sup> Furthermore, the majority in *Hobby Lobby* addressed the separate claims brought by the individual owners themselves;<sup>258</sup> the notion that the owners could sue on behalf of legally separate corporations would raise still more problematic issues of third-party standing.

## 2. *Hobby Lobby*’s Implications for Corporate Standing

Without actually addressing Article III standing, Justice Alito did suggest that the corporations themselves could possess “religious beliefs” that would be harmed by regulations that “in effect tell the plaintiffs that their beliefs are flawed.”<sup>259</sup> Throughout the majority opinion, Justice Alito emphasized that both the owners “and their companies sincerely believe” that providing contraceptive coverage violates “their religious beliefs.”<sup>260</sup> On the thinnest ground of all, Justice Alito cited to the 1961 *Braunfeld v. Brown* decision as an example of the Court’s supposed recognition that “a sole proprietorship that seeks to make a profit may assert a free exercise claim.”<sup>261</sup> That was the only effort to suggest that the Court had found standing to assert free exercise claims by a for-profit. *Braunfeld* involved five merchants, all sole proprietors, challenging a Sunday business closing law.<sup>262</sup> A sole proprietorship is nothing like a corporation; it is unincorporated, run by a single person, and is not in any way separate from that single owner.<sup>263</sup>

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<sup>256</sup> *Id.* at 2794 (Ginsburg, J., dissenting) (quoting *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in part and dissenting in part)).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 2764-65 (majority opinion).

<sup>259</sup> *Id.* at 2778.

<sup>260</sup> *Id.* at 2779.

<sup>261</sup> *Id.* at 2770.

<sup>262</sup> *Id.* at 2767.

<sup>263</sup> See, e.g., *Sole Proprietorship*, U.S. SMALL BUSINESS ADMINISTRATION, <http://www.sba.gov/content/sole-proprietorship-0> (last visited Dec. 15, 2014), archived at <http://perma.cc/9EH2-BY6E>.

Moreover, *Braunfeld* never discussed the fact that any of the merchants were sole proprietors and neither did another 1961 case cited by the majority, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*<sup>264</sup> In that case, which included a corporation and five individual challengers,<sup>265</sup> the Court had no reason to discuss standing. The decision pre-dated modern Article III standing jurisprudence, and, in contrast to the misleading way that Justice Alito quoted from the case, the Court in *Braunfeld* had dismissed the free exercise claims of the merchants finding insufficient injury where the law only made business “more expensive” for them.<sup>266</sup> The Court in *Gallagher* simply relied on the reasoning in *Braunfeld* without addressing standing.<sup>267</sup>

The *Hobby Lobby* majority suggested that corporations can exercise religion on behalf of their owners, or as a pass-through for the rights of the owners. Justice Alito emphasized that the purpose of a corporation “is to provide protection for human beings,” adding that “[a] corporation is simply a form of organization used by human beings to achieve desired ends.”<sup>268</sup> Justice Alito’s discussion of corporate constitutional rights is particularly troubling for its potential implications in cases in which a court reaches the substance of a constitutional claim. The reasoning suggests that a corporation may claim a constitutional right so long as individuals might indirectly benefit from the litigation, regardless of whether there is any direct injury to the corporate litigant itself.<sup>269</sup> Such an approach ignores the corporate form and would undo Article III standing (and in the process, call into question the occasions in which the Court has denied standing to, for example, nonprofit organizations).

Justice Alito then noted that Fourth Amendment protection of corporations can also protect privacy interests of employees.<sup>270</sup> That much is partially accurate; in fact, the Supreme Court has long ruled that under the Fourth Amendment “neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret.”<sup>271</sup> Justice Alito then cited to the Takings Clause, stating that protecting corporations

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<sup>264</sup> 366 U.S. 617 (1961).

<sup>265</sup> *Id.* at 618.

<sup>266</sup> 366 U.S. 599, 605 (1961).

<sup>267</sup> *Gallagher*, 366 U.S. at 631 (“Since the decision in that case rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions.”).

<sup>268</sup> *Hobby Lobby*, 134 S. Ct. at 2768.

<sup>269</sup> *See, e.g., id.* (“When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

<sup>270</sup> *See id.*

<sup>271</sup> *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

from “seizure of their property without just compensation” also protects the financial stake of the owners.<sup>272</sup> To be sure, as described in Part I, the Supreme Court has found that a wide range of constitutional rights apply to corporations, including rights that might typically be litigated by individuals.

The real leap in *Hobby Lobby* occurred where Justice Alito concluded that protecting free exercise rights of corporations also protects “the religious liberty of the humans who own and control those companies.”<sup>273</sup> That reasoning conflates associational and organizational standing, and it assumes that corporations and individuals can have common “beliefs” just as they can have common privacy or financial interests. A corporation itself is injured if its premises are searched as part of a civil or criminal investigation targeting the corporation itself or if its property is taken without compensation. A separate corporation lacks the relevant free exercise injury, since it lacks “religious liberty” as a for-profit corporation; Justice Alito would have had to do hard work to justify such a claim, beyond citing to views of the owners. In contrast, a nonprofit religious organization, functioning in effect as an association, exists to permit religious exercise of members<sup>274</sup>: as the Court puts it, “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community.”<sup>275</sup> For the Court to suggest that a for-profit company is no different than a non-profit or an association or a religious entity, and that these distinctions are “quite beside the point,”<sup>276</sup> ignores the relevance of the corporate form entirely.

In the process of making these unfounded claims, the Supreme Court suggested that the corporate form itself is irrelevant to the question of Article III standing, calling into question each of the entrenched distinctions in the case law between associational and organizational standing. Moreover, the Court disregarded the fundamental feature of state corporate law: separation of ownership from the entity. The corporation is legally separate from owners, officers, employees, shareholders, or other constituents; the corporation does not litigate on behalf of its owners’ personal interests, but rather out of a duty to maximize corporate profits, returns to owners or

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<sup>272</sup> See *Hobby Lobby*, 134 S. Ct. at 2768.

<sup>273</sup> *Id.*

<sup>274</sup> See Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 957 (2013) (arguing that churches should be treated as voluntary associations rather than corporations for purposes of standing).

<sup>275</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

<sup>276</sup> *Hobby Lobby*, 132 S. Ct. at 2768.

shareholders generally, or other corporate goals.<sup>277</sup> To be sure, at times the Court suggested that its holding was limited to for-profit and closely held corporations, taking pains to emphasize that for-profit companies may pursue “worthy objectives” like charitable causes or the public interest, in addition to profit-seeking.<sup>278</sup> The Court suggested that any contrary argument “flies in the face of modern corporate law.”<sup>279</sup>

However, nothing could be more fundamental to modern corporate law than the complete separation of the owners from the legal entity itself. As the Supreme Court put it in *J. J. McCaskill Co. v. United States*, “[u]ndoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers.”<sup>280</sup> Similarly, as the Court stated in *Cedric Kushner Promotions, Ltd. v. King*, “incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.”<sup>281</sup> Contrary to the majority’s statement in *Hobby Lobby*, there is a “sharp line” between nonprofits, religious organizations, and for-profits, and the Court attempted to blur that line in ways that have very troubling implications for corporate law generally.<sup>282</sup> Far from being “quite beside the point,” legal separateness is the point of creating a corporation.

To be sure, the Supreme Court could have made far better supported arguments, limiting the reasoning perhaps to family-owned closely held corporations. Several lower courts did so, addressing the standing question in careful detail;<sup>283</sup> as discussed, however, that reasoning would likely have to rely on a notion of prudential third-party standing, which itself poses real problems given the potentially conflicting interests of third parties to the litigation. The Court should have engaged in the required Article III analysis as the lower courts had more conscientiously done, perhaps avoiding unnecessary language suggestive of standing for corporations generally.

A brief analogy to representation in aggregate litigation may also be helpful. A showing limited to a financial interest in the litigation would not be sufficient to establish standing under the class action rules because a

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<sup>277</sup> See, e.g., AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(a) (1994) (describing how “a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain” (citation omitted)).

<sup>278</sup> *Hobby Lobby*, 134 S. Ct. at 2770-71.

<sup>279</sup> *Id.* at 2770.

<sup>280</sup> 216 U.S. 504, 514 (1910).

<sup>281</sup> 533 U.S. 158, 163 (2001).

<sup>282</sup> *Hobby Lobby*, 134 S. Ct. at 2771.

<sup>283</sup> See generally *Beckwith Elec. Co. v. Sebelius*, 2013 WL 3284604, at \*4-11 (M.D. Fla. June 25, 2013); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 115-19 (D.D.C. 2012).

court would be obligated to scrutinize adequacy of representation by the representative litigants based on due process concerns.<sup>284</sup> Class actions raise different issues than organizational litigation, and to be sure, state corporation law separately defines and protects the interests of owners and shareholders in an organization. Whether an organization or association should add something to the question of standing, as the Court has often held, is very difficult to square with the treatment of class actions by individuals, which in contrast, the Court has suggested adds nothing to the question of standing.<sup>285</sup> Perhaps the Court should revisit organizational standing jurisprudence to ensure that there is in fact adequacy of representation comporting with Article III and due process requirements. Such due process principles concerning exercise of organizational rights in conflict with, or even at the expense of, an individual's day in court still operate tacitly, even if not fully developed in the doctrine. In certain situations in which the underlying constitutional right creates tension between an association or organization and individuals, the Supreme Court has been unwilling to permit litigation by the organization. Prudential standing concerns, as well as concerns regarding the due process rights of individual litigants, may also explain why the Court should be unwilling to so broadly recognize constitutional rights of organizations in the additional contexts to which I turn next.

### C. *Third-Party Standing*

Some rights may not be asserted by an organization, and the Supreme Court's prudential or non-Article III third-party standing doctrine helps to explain why. The Court has articulated its test as follows: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party,"<sup>286</sup> but a third party has standing when there is (1) some injury to the party litigating the right, (2) a close relationship to the

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<sup>284</sup> See FED. R. CIV. P. 23(a)(4). If individual people joined together to seek damages, they must show that common issues of law and fact predominate, among other requirements in Rule 23. See FED. R. CIV. P. 23(b)(3). In contrast, such a showing is not required in a suit seeking to enjoin an unconstitutional government action or policy. See FED. R. CIV. P. 23(b)(2). In damages actions, as the Advisory Committee noted when the modern federal class action rule was adopted in 1966, "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device." FED. R. CIV. P. 23(b)(3) advisory committee's note to the 1966 amendments.

<sup>285</sup> See Garrett, *Aggregation and Constitutional Rights*, *supra* note 33, at 637 ("There is a great deal of tension between the Court's treatment of associations and with class actions."). In cases requesting equitable remedies, the Court has often insisted that a class action "adds nothing to the question of standing." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)).

<sup>286</sup> *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

nonparty whose rights are directly being litigated, and (3) some obstacle to that nonparty litigating, such that fundamental rights might otherwise go unprotected.<sup>287</sup>

The Supreme Court has permitted parties to assert the rights of third parties with whom they have a close relationship, including permitting doctors to sue to assert constitutional rights of patients and vendors the rights of customers.<sup>288</sup> In such cases, the litigants first had to show sufficient injury in fact to themselves, that is, a claim that their own constitutional rights were impaired. Those were not typically cases involving organizations (although one example, *Craig v. Boren*, is a case involving a bar owner's equal protection challenge to a liquor law<sup>289</sup>). One might expect a court to rule that because individuals who suffer the injury directly can sue, there is no need to permit a third-party organization to sue unless it is an association, or unless there is some special justification for permitting third-party standing. Examples include the special nature of the doctor-patient relationship, an advocacy relationship combined with a strong assurance that the third party is "fully, or very nearly" as effective an advocate for the constitutional right, or some reason why a claim by the individual party would evade review.<sup>290</sup> One can imagine that an owner of a closely held corporation might be an effective advocate for the corporation itself, but what about the health benefits of the employees and their dependents?

A mere economic effect of a regulation on the corporation should not permit the corporation to assert the constitutional rights of third parties

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<sup>287</sup> See 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9.3 (3d ed. 2008) ("[I]t is increasingly common to state that third-party standing requires three elements: an injury in fact to a party, a close relationship to the nonparty whose rights are asserted, and some significant obstacle that impedes the nonparty's assertion of his own rights."); see also *Campbell v. Louisiana*, 523 U.S. 392, 397-400 (1998) (permitting third-party standing where the three preconditions had been satisfied).

<sup>288</sup> See, e.g., *Miller v. Albright*, 523 U.S. 420, 433 (1998) (granting standing to daughter to pursue father's gender discrimination claim); *Craig v. Boren*, 429 U.S. 190, 195 (1976) (allowing vendor to bring action to protect rights of vendee); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (allowing physician to litigate on behalf of patient for right to abortion).

<sup>289</sup> *Craig v. Boren* involved a business owner of a bar protesting unequal treatment of 18-20 year-old males under an Oklahoma liquor law. 429 U.S. at 192. The appellant Craig turned 21 before the case reached the Court; it was a case that might otherwise evade review. *Id.* The Court noted that the statute was directed toward compliance by such vendors, but more importantly, that the vendor would be an effective "advocate[]" for the separate interests of the third parties. *Id.* at 195-97.

<sup>290</sup> See *Singleton*, 428 U.S. at 115; *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972) ("[T]he relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so.").

absent a strong showing that the harm affected the close relationship.<sup>291</sup> Moreover, not only must there be a showing that there is no conflict between the interests of, say, the seller and buyer,<sup>292</sup> but there must be a showing that the third prong of the prudential standing test is met: that the third party faces some obstacle to litigating the rights on his own.<sup>293</sup>

The prudential standing test is discretionary and is not a model of clarity, but its application is dependent on the suitability of the particular constitutional rights for assertion by others. As to the second prong of the test, corporations are not likely to be effective advocates of a range of constitutional rights in which they cannot share an interest. As the Supreme Court noted in *First National Bank of Boston v. Bellotti*, “[c]ertain ‘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.”<sup>294</sup> What explains the characterization of certain rights, such as self-incrimination liberty rights, citizenship rights, and Privileges and Immunities Clause rights as “purely personal?” The organization may not itself have standing to assert a harm if, for example, harm suffered by employees or other constituents typically cannot be delegated to the legal entity based on underlying substantive law. Some rights are not delegable to organizations or to other individuals. Property is delegable. Voting rights are not delegable to third parties. Jury service is not delegable. Marriage rights are not delegable. The Court, as discussed, has held Fifth Amendment self-incrimination rights are not delegable. If the Court recognized Fifth Amendment rights of corporations, the corporation still would not be able to assert the Fifth Amendment rights of an individual employee, who after all, could be separately prosecuted, and unlike the corporation, could be sentenced to a prison term. Not only is a corporation legally separate, but courts should not recognize third-party standing if doing so would undermine rights of individuals.

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<sup>291</sup> This is where I part company with the general claim that any economic injury to a corporate plaintiff provides Article III standing, briefly made in Hall & Means, *supra* note 29, at 154. Their focus, however, is the more limited claim that the owners of a “family-owned business” have special status and ability to litigate on behalf of the corporation. *Id.* That argument also hinges on whether there are in fact “significant obstacles” to others separately litigating any violations of their own constitutional rights. *Id.* at 157-59.

<sup>292</sup> For examples, see WRIGHT & MILLER, *supra* note 287, at § 3531.9.3 nn.46-57.

<sup>293</sup> See *id.* § 3531.9.3 (noting that “[a] party may be denied the opportunity to advance another’s interests when courts doubt the quality of the relationship, fear the party’s interests may diverge from the nonparty’s interests, suspect the party may be seeking general public-interest standing, or believe that specific rights are not suited to third-party standing”).

<sup>294</sup> 435 U.S. 765, 778 n.14 (1978).

The *Hobby Lobby* decision raises troubling questions concerning the prudential doctrine of third-party standing. The Supreme Court, unlike many of the lower courts, failed to engage in any third-party standing analysis, treating the separate owners and the corporations as joined at the hip. However, the corporations were, on one theory, asserting the free exercise interests of third parties: the owners of a for-profit corporation. To properly address the question, the Court had to do more than show some injury to the party litigating the right; the Court also had to show (2) a close relationship to the nonparty, and (3) some obstacle to that party litigating such that the rights might otherwise go unprotected.

Perhaps only a closely held family-owned corporation could show such a close relationship; that would be the narrower reading of *Hobby Lobby*, and that was how some lower courts approached the question.<sup>295</sup> As the Court put it in *Lujan v. Defenders of Wildlife*, “much more is needed” to show standing if the particular injury asserted by a plaintiff affects “*someone else*.”<sup>296</sup> This is so where the injury can “hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well.”<sup>297</sup> In *Lujan*, the “special interest” of the members of the organization was not sufficiently “directly” or “imminent[ly]” affected by the action of the federal agency.<sup>298</sup> And yet in *Hobby Lobby*, there was no organization with members, but rather it was the religious beliefs of the separate owners that gave rise to the claim. The Court did not discuss third-party standing or reach the question whether the owners could bring separate claims. If the owners could not separately sue, perhaps due to a lack of the requisite injury in fact, then there would be a stronger argument for prudential third-party standing.<sup>299</sup> However, there were separate interests requiring consideration: those of nonparty employees and their dependents.

The interests of nonparty employees raise particularly troubling questions in the *Hobby Lobby* case. As Justice Ginsburg forcefully emphasized in the dissent, free exercise jurisprudence recognizes that accommodations to religious beliefs “must not significantly impinge on the interests of third

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<sup>295</sup> See, e.g., *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 118 (D.D.C. 2012) (“Tyndale and the Foundation are closely-linked entities that share common religious objections . . .”).

<sup>296</sup> 504 U.S. 555, 562 (1992).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 563-64.

<sup>299</sup> See *Tyndale*, 904 F. Supp. 2d at 119 (“The third-party standing doctrine serves to avoid such conundrums.”).



parties.”<sup>300</sup> The employers could “deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure,” as well as harming the interests of the dependents of employees.<sup>301</sup> Moreover, only the independent decision by employees to seek out coverage implicates the supposed harm to religious beliefs; all that the employer is obligated to do is pay money into an undifferentiated fund.<sup>302</sup> Conflicts of interest are inherent in recognizing free exercise rights of for-profit companies, Justice Ginsburg suggested, when those companies cannot by law discriminate in hiring based on religion.<sup>303</sup> In contrast, religious organizations “exist to foster the interests of persons subscribing to the same religious faith.”<sup>304</sup> Somehow that fundamental distinction simply “escapes the Court’s attention.”<sup>305</sup>

The *Hobby Lobby* ruling also runs counter to the Supreme Court’s own prior statements regarding third-party suits by shareholders, although to be sure, the Court in *Hobby Lobby* delicately avoided the topic of public companies (calling free exercise litigation by “corporate giants” an “unlikely” event<sup>306</sup>), as well as the question whether the owners of the closely held corporations in the case could separately sue. State incorporation law protects rights of individuals with a stake in a corporation by permitting shareholders standing to litigate injuries to the corporation in derivative lawsuits, brought not on their own behalf, but on behalf of the corporation.<sup>307</sup> In federal court, such actions are regulated to ensure the plaintiff really was a shareholder at the relevant time, to ensure fair and adequate representation of other shareholders, and other requirements imposed by Rule 23.1.<sup>308</sup> The Supreme Court considered such rules for shareholder suits in *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, suggesting without reaching the question that even if there is Article III standing, the “prudential requirements of the standing doctrine” might counsel against permitting standing by a corporation’s owners, if under state law those shareholders may not pursue an action where the management have declined to do so in exercise of good-faith business judgment.<sup>309</sup>

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<sup>300</sup> *Hobby Lobby*, 134 S. Ct. at 2790 (Ginsburg, J., dissenting).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 2799.

<sup>303</sup> *Id.* at 2795-96.

<sup>304</sup> *Id.* at 2795.

<sup>305</sup> *Id.* at 2796.

<sup>306</sup> *Id.* at 2774 (majority opinion).

<sup>307</sup> For a digest of state law on the subject, see 18 C.J.S. *Corporations* § 484 (2013).

<sup>308</sup> See FED. R. CIV. P. 23.1 (describing prerequisites to filing a derivative action in federal court).

<sup>309</sup> 493 U.S. 331, 336-38 (1990).

Shareholders are considered separate and unable to generally sue for injuries to the company; corporations cannot litigate the separate interests of shareholders and associations can only litigate the interests of members. For constitutional rights, when would delegation undermine the adequacy of an organization's representation or conflict with the interests of the individuals for whom a right is primarily designed to protect or raise still additional prudential standing concerns? Consider the Fifth Amendment, defined by the Court as a person-specific privilege against self-incrimination. As described, the Court held in *Hale v. Henkel* that the Fifth Amendment cannot be asserted by an organization on behalf of individuals.<sup>310</sup> Indeed, assertion of such a privilege by the organization might conflict with the rights of an individual facing prosecution. However, as noted, denying a corporate representative the right to assert the Fifth Amendment can take the rule so far so as to harm individual rights.

In a class action, such a conflict might make the representation inadequate. The Supreme Court has been extremely vigilant in policing due process concerns in class action litigation, as well as compliance with the commands of Rule 23. Indeed many commentators argue that the Court has gone too far in unduly hampering effective class action litigation, with particular criticism directed toward the Court's 2011 ruling in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).<sup>311</sup> In associational standing cases, however, as discussed, the Supreme Court has noted that a representative suit does not bind nonmembers, and if there was a lack of adequacy of representation, the ruling might not preclude subsequent suits by members of the association for due process reasons.<sup>312</sup> Similar due process concerns

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<sup>310</sup> 201 U.S. 43, 70 (1906).

<sup>311</sup> See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 776 (2013) (arguing that the decision in *Wal-Mart* "cannot be squared with the text, structure, or history of Rule 23(a)(2)"); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. 34, 45 (2011) (stating that *Wal-Mart* "reversed almost a half-century of Title VII jurisprudence"); Erwin Chemerinsky, *New Limits on Class Actions*, TRIAL, Nov. 2011, at 54 (noting that "*Wal-Mart* has significant implications for all class action litigation in federal court"); David G. Savage, *Supreme Court Blocks Huge Class-Action Suit Against Wal-Mart*, L.A. TIMES, June 21, 2011 (quoting law professor John Coffee's comment that "it largely eliminates the monetary threat facing big employers").

<sup>312</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992) (noting that the nonparty agencies could not be bound by the decision in the suit); see also *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 556 n.6 (1996) ("The germaneness of a suit to an association's purpose may, of course, satisfy a standing requirement without necessarily rendering the association's representation adequate to justify giving the association's suit preclusive effect as against an individual ostensibly represented."); Donald F. Simone, Note, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U. L. REV. 174, 181 (1981) ("Due process mandates that in an associational suit an individual member must either be adequately represented or be permitted to relitigate his claim in a subsequent suit.").

animate the class action certification requirements under the Federal Rules of Civil Procedure.<sup>313</sup>

For still additional constitutional rights, the injury to the corporation is not concrete under existing constitutional law. Thus, it would take an additional development in the underlying doctrine to clarify what would constitute a sufficient injury and why a corporation would have standing. In such cases, the question of standing does not simplify the inquiry because the constitutional right is unclear or requires development. For example, Darrell Miller has argued that corporations might have Second Amendment rights to bear arms after *Citizens United*.<sup>314</sup> It is unclear why or what corporate interest would be harmed by a gun regulation. An individual person, such as an employee of a corporation, could bring a challenge under the Second Amendment to a firearms regulation, and perhaps an association could do the same on behalf of members. What corporate injury could exist is less clear, unless it was a firearms regulation that economically impacted the corporation—for example, a limit on the types of firearms that can be carried by a licensed private security firm or armored transport company.<sup>315</sup>

#### D. Consequentialism and Not Reciprocity

In corporate constitutional litigation, the Supreme Court has cited a reciprocity element to the analysis, drawing from the tradition of treating corporations as conditioned in their existence on the state: “businessmen engaged in such federally licensed and regulated enterprises accept the

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<sup>313</sup> See FED. R. CIV. P. 23(g)(4); FED. R. CIV. P. 23(a); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (finding error where nonparties were not adequately represented); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (holding that class action settlements must provide “structural assurance of fair and adequate representation for the diverse groups and individuals affected”); *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (citing *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940)) (recognizing an exception to promissory estoppel where the nonparty’s interests are “adequately represented” by a party); see also Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366 (“[A]dequate representation is a prerequisite for binding individuals to the outcome of a case . . . .”); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 84-96 (1991) (discussing the contours of the adequacy requirement to ensure proper due process protections); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 481 (1994) (comparing the obligations to claimants, defendants, and the public in class actions and mass tort litigation).

<sup>314</sup> See generally Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011) (analyzing the extent of corporate Second Amendment rights under a range of different analytical perspectives).

<sup>315</sup> See *id.* at 942-43 (discussing various situations in which a corporation might have an interest in, and the potential to challenge, certain gun regulations).

burdens as well as the benefits of their trade.”<sup>316</sup> In *United States v. Morton Salt Co.*, the Court similarly noted that corporations “have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.”<sup>317</sup> Some scholars have viewed this as a matter of reciprocity, in the “grant” tradition. As Professor Andrew Taslitz has put it: “As long as corporations are treated like persons, corporations must endure . . . the same duties and penalties—including criminal punishment—that the rest of us do.”<sup>318</sup>

I view such language slightly differently, not as about an implied condition of reciprocity, in the sense that corporations owe the state their existence and have privileges conditioned on legal behavior, but rather that litigation by and against organizations accomplishes consequentialist ends. Some have criticized such a view of reciprocity as suggesting unconstitutional conditions on constitutional rights, including Justice Scalia in *Citizens United*. I view the problem in light of the rationale for corporate constitutional standing, which exists in the first place because corporations may litigate regulations that apply to them, and then they may or may not be able to assert a constitutional defense to the regulation. In constitutional cases, a corporation does not represent the constitutional rights of individuals; only an association, or perhaps a nonprofit or religious organization serving a similar role, may do so. Similarly in criminal cases, corporate criminal liability is intended to hold corporations accountable, in order to make criminal laws effective in their enforcement, and concerns of the effectiveness animate the interpretation of underlying constitutional criminal procedure rights.

The Supreme Court’s ruling that corporations may be criminally prosecuted in *New York Central & Hudson River Railroad Co. v. United States* emphasized that the acts of an employee should be imputed to the corporation for entirely consequentialist reasons.<sup>319</sup> *New York Central* buttresses a consequentialist account of organizational standing. There, the railroad’s managers had offered rebates to sugar refining companies on railroad freight rates, in violation of the Elkins Act, which prohibited such special treatment in railroad rates.<sup>320</sup> The Act included a provision creating liability for a

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<sup>316</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973).

<sup>317</sup> 338 U.S. 632, 652 (1950).

<sup>318</sup> Andrew E. Taslitz, *Reciprocity and the Criminal Responsibility of Corporations*, 41 STETSON L. REV. 73, 95 (2011).

<sup>319</sup> 212 U.S. 481, 494-95 (1909).

<sup>320</sup> *Id.* at 489.

corporation under a respondeat superior standard adopted from tort law, in which the entity's liability is derivative of the crime of an employee.<sup>321</sup> In other words, the corporation was strictly liable for a crime by an employee acting within the scope of employment.

The Supreme Court upheld the statute, citing to "the interest of public policy."<sup>322</sup> Corporate criminal liability makes regulation more effective. Quoting a criminal law treatise, the Court said: "If, for example, the invisible, intangible essence of air, which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously."<sup>323</sup>

The Court explained there might be some crimes that cannot be committed by corporations, but a range of statutory regulatory offenses can readily be applied to corporations to make the regulation more effective:

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions enured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins Law, making corporations criminally liable.<sup>324</sup>

The Court concluded in still stronger language that to give corporations "immunity" from responsibility for crimes "because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."<sup>325</sup> Thus, the Court approved as constitutional a statute holding a corporation separately criminally liable, but derivatively, for the acts of officers or employees in the scope of their duties. That respondeat superior standard now applies in federal criminal cases.

In both civil rights and criminal cases, a corporation can provide a convenient litigation unit. For an example, take the 1910 case *J. J. McCaskill Co. v. United States*, in which the Supreme Court dealt with the status of corporations as property holders in a dispute about a federal land patent deeded to a homesteader, acting as a corporate agent, who conveyed the

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<sup>321</sup> *Id.* at 491.

<sup>322</sup> *Id.* at 494.

<sup>323</sup> *Id.* at 493.

<sup>324</sup> *Id.* at 495.

<sup>325</sup> *Id.* at 496.

land to the corporation.<sup>326</sup> The Court cited to corporate law principles and noted “[a] growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose.”<sup>327</sup> While acts and knowledge of employees may not always be attributed to the corporation, this agent was not an “innocent purchaser,” and criminal law need not “enable the corporation to become a means of fraud or a means to evade its responsibilities.”<sup>328</sup>

The Supreme Court relied on the respondeat superior rule that a corporation is bound by acts of its agents. There is no converse relationship; the corporation cannot vindicate rights on behalf of individuals. Constitutional criminal procedure in particular sheds light on something else about the constitutional status of corporations: permitting corporations to assert constitutional rights does not necessarily insulate them from government power but can flow from how they may be the direct targets of civil and criminal enforcement. Thus, during criminal trials, in which corporations and employees may be jointly prosecuted, extending constitutional rights to corporations permits them to present a separate defense. In that defensive context, extending constitutional rights to corporations may not only protect the fairness of adversary proceedings, but also can enable corporations to trade on their rights to obtain leniency with prosecutors by cooperating to ensure that individual wrongdoers are punished.<sup>329</sup>

#### IV. THE FUTURE OF CORPORATE CONSTITUTIONAL RIGHTS

This Part turns to the areas in which constitutional rights of corporations could be reconsidered, as well as the need to examine more carefully the adequacy of organizational standing to assert constitutional rights on behalf of others. Finally, I conclude by discussing an extremely broad question: the possible impact of the Supreme Court’s evolving approach toward corporate constitutional standing on constitutional litigation generally and on the substance of constitutional rights.

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<sup>326</sup> 216 U.S. 504, 505 (1910).

<sup>327</sup> *Id.* at 515.

<sup>328</sup> *Id.* at 514-15.

<sup>329</sup> For a detailed treatment of corporate criminal litigation, prosecution practices, and possible conflicts with employees during such litigation, as well as evidence concerning how often prosecutors successfully rely on corporate cooperation in order to prosecute employees and officers, see generally GARRETT, TOO BIG TO JAIL, *supra* note 175.

A. *Reconsidering Constitutional Non-Protection of Corporations*

I argue that in several of its rulings on the constitutional rights of corporations, the Supreme Court has it wrong. Each area is far less prominent than *Citizens United* or *Hobby Lobby*. In that context, I have argued that a for-profit corporation cannot assert derivatively the free exercise or conscience rights of owners, particularly given conflicts with rights of employees. The separate cost of complying with the regulation is not the constitutional injury that the First Amendment protects, and regardless, neither corporations nor associations can litigate the rights of constituent owners or employees, although an association or religious organization can litigate on behalf of members.

In addition, I argue the Supreme Court should reconsider its Fifth Amendment “collective entity” decisions. The lack of a corporate Fifth Amendment right can directly impact the rights of individual employees. The Court reasoned in *Braswell v. United States* that as corporate officers serving in that capacity, an employee cannot assert Fifth Amendment privilege on behalf of the corporation, even in the situation in which complying might be incriminating.<sup>330</sup> Justice Kennedy dissented in *Braswell*, citing the concern that individuals can be personally incriminated for refusing to comply with corporate subpoenas.<sup>331</sup> However, even in that dissent, Justice Kennedy affirmed the general principle that corporations lack Fifth Amendment rights, noting:

Our long course of decisions concerning artificial entities and the Fifth Amendment served us well. It illuminated two of the critical foundations for the constitutional guarantee against self-incrimination: first, that it is an explicit right of a natural person, protecting the realm of human thought and expression; second, that it is confined to governmental compulsion.<sup>332</sup>

The general principle may not be as important as the *Braswell* Court suggested. Suppose the Supreme Court reversed *Hale v. Henkel*. Matters would not change dramatically since, as noted, the Court has held that business records themselves are not testimonial, and thus there could be no

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<sup>330</sup> 487 U.S. 99, 110 (1988).

<sup>331</sup> See *id.* at 128 (Kennedy, J., dissenting); see also Scott D. Price, Note, *Braswell v. United States: An Examination of a Custodian's Fifth Amendment Right to Avoid Personal Production of Corporate Records*, 34 VILL. L. REV. 353, 379-80 (1989) (detailing the concerns with subpoenas of businesses implicating personal Fifth Amendment rights discussed in Justice Kennedy's dissent in *Braswell*).

<sup>332</sup> *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting).

Fifth Amendment objection to the demand for their production by a corporation.<sup>333</sup> Neither individuals nor the corporation could object to the production of business records unless the person being asked to produce the records could self-incriminate through the act of production. By designating another officer to produce the records, there could be no legitimate objection to a subpoena request.

In a far more obscure area, some courts hold corporations lack Sixth Amendment rights to have an adequate defense lawyer represent them in a criminal matter. Circuits are split on whether corporations have a right to adequate defense counsel, which individuals undoubtedly retain.<sup>334</sup> I see it as a straightforward question, with a different answer. Because corporations may be separately prosecuted for crimes of employees, they are entitled to have counsel represent them when they stand in for aggregate interests not adequately represented by those of employee-defendants and that may outright conflict with employees charged with crimes (and after all, organizations cannot represent themselves *pro se*). Organizations should therefore be entitled to the basic assurances of a fair trial, including the Sixth Amendment right to adequate representation by defense counsel.

### B. Organizational Rights Taxonomies

The most prominent alternative approach to theorizing more broadly about the constitutional rights of corporations is Professor Meir Dan-Cohen's approach, which resembles in its general outlines that of the Supreme Court in its pre-*Citizens United* corporate speech cases.<sup>335</sup> Dan-Cohen created a rich and detailed taxonomy of types of organizations that indicates whether a particular organization is of the type that should enjoy a particular constitutional protection.<sup>336</sup> While an admirable and useful approach, I have argued it is unnecessarily complex from the perspective of the existing tests for organizational and associational standing. That said, the distinctions that

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<sup>333</sup> See *Fisher v. United States*, 425 U.S. 391, 409 (1976).

<sup>334</sup> Compare *United States v. Rad-O-Lite of Phila., Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (“[A]n accused has no less of a need for effective assistance due to the fact that it is a corporation.”), and *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) (“It appears beyond sensible debate that corporations, in our society, do indeed enjoy the right to retain counsel.”), with *United States v. Unimex, Inc.*, 991 F.2d 546, 550 (9th Cir. 1993) (“Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel.”), and *United States v. Hartsell*, 127 F.3d 343, 350 (4th Cir. 1997) (finding “no suggestion” that corporations are entitled to publicly appointed counsel under 18 U.S.C. § 3006A).

<sup>335</sup> See generally MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986).

<sup>336</sup> See generally *id.*



Dan-Cohen explores do matter, and they help to explain why organizational standing is different as between corporations and associations; standing is neither unrestricted nor entirely indifferent to the type of organization and the type of constitutional injury litigated. In any number of cases, an association may diverge from the interests of members, whether due to the particular constitutional right being litigated or the posture of the litigation. As discussed, for-profit corporations typically lack standing to litigate on behalf of individuals (and if one did so in a case involving money damages, individuals might not be bound by the result).

Due to the manner in which the Supreme Court defined the underlying substance of the speech right in *Citizens United*, the type and form of the organization did not affect the standing analysis. A for-profit corporation, unlike the nonprofit at issue in *Citizens United*, would not typically represent effectively or adequately the interests of individuals for whom the constitutional right is intended to protect. James Nelson has forcefully and convincingly argued, for example, that for-profit entities should not have standing to litigate First Amendment right of conscience claims, but the Court did not, unfortunately, carefully engage with his argument in the *Hobby Lobby* ruling.<sup>337</sup> Corporations lack the ability to assert liberty rights under the Due Process Clauses, for reasons that can be articulated in standing terms, and prior to *Hobby Lobby*, one would have supposed religious liberty was something “personal” for which business corporations, at least, would not be adequate representatives for purposes of litigation, while nonprofits and associations should be treated differently under standing law, as I have described.

What the Supreme Court has not carefully defined in associational standing case law is what threshold of adequacy permits the association to assert an injury on behalf of its constituents, members, or other individuals. While Rule 23 standards for civil class action litigation are not adapted to those ends, they provide an area in which the Court has engaged (and controversially so) with questions concerning adequacy of representation of a group of individuals in litigation. The Court has not done the same in associational standing cases, except to note that adequacy concerns and prudential concerns exist, and by implication, to decline to recognize

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<sup>337</sup> See James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1609-10 (arguing that for-profit corporations are usually not connected to individual members and so should not be able to assert free exercise claims). Nelson also provides an excellent discussion of treatment of close corporations, noting that the shareholder wealth maximization norm or fiduciary duty norms apply to close corporations as well. See *id.* at 1591-95 (arguing that close corporations also foster detachment because they are bound by fiduciary duty norms).

standing of organizations to litigate certain constitutional rights.<sup>338</sup> In addition, the Supreme Court has been highly reluctant to examine whether an association is an adequate proxy for the interests of its members: most notably in cases involving challenges to political parties and their primaries. The Court has emphasized deference to political parties in the design of their voting procedures,<sup>339</sup> although the assumption that political parties are defined private organizations that deserve such deference, or have “rights” as part of the electoral process, has been criticized.<sup>340</sup>

A clearer standard should be developed, focusing on whether the substantive constitutional right can be adequately and effectively litigated by the association. If it is a corporation, then its structure permits standing to litigate concrete interests of the entity to improve its profitability, but not on behalf of other constituents. If it is an association, then it may litigate on behalf of injury to members. Individual officers or employees require separate representation and litigation because their rights are distinct. In addition, a conflict between rights of individuals should tend to bar associational standing, and the benefits to the group from organizational litigation should predominate or outweigh any concerns regarding issues better litigated individually, just as in class action litigation. Whether added precision can be supplied to the tests for associational and organizational standing I leave to future work. Given the manner in which the lower courts had divided over the questions pre-*Hobby Lobby*, the Supreme Court will likely have to attend to these important questions in the future.

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<sup>338</sup> See *supra* note 312.

<sup>339</sup> See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (“The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.”); see also *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000) (worrying that forcing association with a particular party puts a “burden on a political party’s associational freedom” by changing the party’s message); Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CALIF. L. REV. 69, 83-91 (2012) (describing the importance of political parties in shaping governance, elections, and citizenship).

<sup>340</sup> See, e.g., Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 820-26 (2001) (examining the changes in political parties since the founding of the country and explaining why the political parties do not need constitutional protections); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 293-94 (2001) (describing the broader problem of state attempts to legally regulate political parties); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 105-08 (2004) (disagreeing with the Court’s conclusion that political parties have constitutional rights not to associate because it interferes with states structuring elections). *But see* Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 794-805 (2001) (explaining the benefits of party autonomy and arguing that judges should actively protect their rights against intrusion).

### C. Individualized and Group-Based Constitutional Rights

Does theorizing corporate constitutional rights require an account of group rights? Some argue it is improper to reach decisions about constitutional rights “in terms of the rights of corporate persons.”<sup>341</sup> I have argued that the Supreme Court does not do so and need not do so. Organizations and corporations have standing to assert rights only as a defense to regulation that affects the economic interests of the entity; by contrast, associations and nonprofits can represent the rights of members or constituents. The Court carefully avoids interpreting rights as different based on the artificial nature of the defendant. That said, one reason that so many constitutional rights are readily amenable to corporate litigation is in part because so many constitutional rights are not strictly personal and instead apply generally, whether conceived as duties of government or privileges against government conduct and regulation.<sup>342</sup> In a sense, no criminal procedure rights are purely personal since they are defined generally as immunities from certain government investigation or prosecution conduct.<sup>343</sup>

Due process and other Bill of Rights protections may safeguard individual rights, but at a highly general level of abstraction the Court typically balances the state’s interests against fundamental interests of individuals. Corporations and organizations may be perfectly able to assert those interests on behalf of the organization’s interests, and many regulations impacting individual rights may also cause injury to organizations, including business organizations. Ideological organizations may be little different than ideological individual plaintiffs.<sup>344</sup> Indeed, broader definitions of constitutional rights may create more opportunity for non-business citizens groups to assert constitutional challenges, and doing so may improve the quality of constitutional litigation.<sup>345</sup> Highly individualized or context-specific

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<sup>341</sup> Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1658 (1982).

<sup>342</sup> Adam Cox’s article nicely makes this point regarding the aggregate character of voting rights and the temporal dimension of that right. See generally Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007).

<sup>343</sup> Exclusionary remedies, for example, are not personal since they are designed to deter unconstitutional law enforcement conduct and not improve the accuracy of results in a particular case. See *Herring v. United States*, 555 U.S. 135, 141 (2009) (explaining that the primary purpose of the exclusionary rule is deterrence, even if it leads to the release of guilty defendants in some cases).

<sup>344</sup> See Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1043 (1968) (“It is almost impossible any longer to contend that a Hohfeldian plaintiff is a necessary element of a case or controversy.”).

<sup>345</sup> See Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 396 (2009) (discussing some of the major strides organizations have made in civil rights, non-discrimination, and environmental cases); Glenn D. Magpantay,

constitutional rules may not help many individuals, as I have argued elsewhere,<sup>346</sup> and tend to frustrate aggregate litigation of constitutional rights, including by organizations.

On the other hand, those more generalized rights may do a poor job of protecting individuals from harm, recognizing individual dignity interests, or remedying the particular circumstances of individual rights violations.<sup>347</sup> There is a real tradeoff between the general and the individual. General rights may lead to higher quality constitutional litigation, but they may more poorly capture individual dignitary values. Where recognizing general rights outright conflicts with individual rights, though, the problem of corporate constitutional standing becomes particularly acute.

### CONCLUSION

Is the problem with recognizing corporate constitutional rights that corporations can abuse their rights to frustrate important regulations or criminal law enforcement as Professor Peter Henning has forcefully argued?<sup>348</sup> Or is the problem that corporations simply are not appropriate vehicles for individual rights? I argue corporations are, more often than appreciated, appropriate constitutional litigators. Whether the substance of any particular constitutional right should be interpreted in a way that privileges business organizations is a separate question, which can raise profound grounds for disagreement. But it is a preliminary question, separate from the merits, whether an organization has Article III standing to assert constitutional rights on its own behalf. The standing analysis provides important tools—distinct from the merits inquiry—to evaluate whether a corporation, as opposed to an association, can litigate a given constitutional injury.

Taking account of the doctrine through the lens of Article III, there has been some rhyme to the Supreme Court's varying reasons for denying or

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*Associational Rights and Standing: Does Citizens United Require Constitutional Symmetry Between the First Amendment and Article III?*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 667, 687 (2012) (noting that Asian Americans have been able to vindicate their voting rights through associational challenges under the First Amendment).

<sup>346</sup> See Garrett, *Aggregation and Constitutional Rights*, *supra* note 33, at 598 ("A litigation system that prioritizes the aggregate may better address systemic constitutional violations.").

<sup>347</sup> See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity"*, 66 STAN. L. REV. 987, 1021-22 (2014) (arguing that the strict legal rules of the Supreme Court's Fourth Amendment jurisprudence do not adequately protect human dignity).

<sup>348</sup> 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, 801 (1996) (proposing that a court weigh the effects of "an abuse of power" to then "determine the degree of protection a corporation merits under the Constitution in a criminal prosecution").

granting corporate constitutional rights. Far from being ad hoc or formulaic, I argue that the Court's approach toward recognizing constitutional rights for corporations and other organizations, including associations, can be understood to reflect a coherent if not consistent expressed view of when an organization can exercise constitutional rights on behalf of others—although, to be sure, I have identified important areas in which prior rulings should be reconsidered. Most troubling, in its *Hobby Lobby* ruling, the Court did not directly address Article III standing and appeared to cast to the side each of the relevant distinctions in the existing doctrine.

Organizations, including corporations, long have had Article III standing to challenge government acts harming the entity's interests. In contrast, associations have long litigated constitutional rights affecting rights of individual members. Religious organizations have long litigated on behalf of the beliefs of their members. Courts have recognized how such groups can bring more resources and better representation to constitutional litigation. For rights tied to citizenship or purely individual subject matter, or where organizations' interests are in conflict with or do not adequately represent individuals, however, an organization should lack standing to litigate.

The substance of a particular constitutional right may benefit some types of organizations more than others, just as some individuals might be more affected by an interpretation of constitutional doctrine, given individual preferences and actions. But constitutional rules of recognition should be drawn broadly and evenhandedly. One might fully disagree with ways that the Court interprets the substance of particular constitutional rights after having decided to give an organization standing to litigate. Still more controversial aspects of the Court's rulings, such as in *Citizens United*, have to do with a business-friendly understanding of the First Amendment equating money with speech—not with the recognition of corporate constitutional standing. Adopting a consequentialist appreciation that constitutional standing of organizations accomplishes practical goals does not mean that the substance of constitutional rights should be interpreted solely or even partially based on consequences. The fact that an organization has standing to assert a constitutional right does not mean that it will obtain relief on the merits.

Nor should courts ignore questions of individual rights that flow from permitting organizational litigation. I have argued that due process and prudential concerns with organizational and associational standing must be far more carefully scrutinized—just as the Supreme Court can be zealous in policing due process in class action litigation. In *Hobby Lobby*, not only was Article III standing ignored, all the while equating religious beliefs of

owners with that of a for-profit corporation, but the effect on third-party employees and dependents was not carefully considered either. Associations lay a broader claim to represent the interests of members, but the Court has been clear that even for such an organization, standing requires more than just an “interest in a problem.”<sup>349</sup> Apart from the substance of constitutional rights, if the goal of permitting corporate constitutional litigation is to make litigation of the underlying constitutional rights more effective, then tension between individual and organizational rights, or failure of the organization to adequately represent its constituents, should be carefully scrutinized for due process violations or prudential considerations counseling against standing.

Chief Justice John Marshall called a corporation “an artificial being, invisible, intangible, and existing only in contemplation of law.”<sup>350</sup> That is precisely why judges must carefully examine whether an organization has Article III standing to litigate constitutional rights. If in the past standing doctrine has been “one of the most criticized aspects of constitutional law,” then a selective application of that doctrine raises still more cause for concern.<sup>351</sup> A central lesson from the jurisprudence of constitutional litigation by organizations—perhaps sobering to those who value the individual’s day in court—is that constitutional rights may be at their strongest when non-individualized and readily litigated by groups and not just individuals. Conversely, the cost of allowing an “artificial being,” an organization, to assert rights at the expense of individuals or without adequately representing individuals can be too great for a constitutional democracy to permit. As the Court has stated, the law of standing “is founded in concern about the proper—and properly limited—role of the courts in a democratic society.”<sup>352</sup> A focus on the constitutional standing of organizations serves to ensure that artificial entities themselves play a valuable and proper, but limited, role in our democratic society.

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<sup>349</sup> *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

<sup>350</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

<sup>351</sup> See 1 LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 390 (3d ed. 2000).

<sup>352</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).