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Theorizing the Firm: Organizational Ontology in the Supreme Court

Abstract

In two leading cases in the last several years, the U.S. Supreme Court revitalized interest in questions of “legal personality,” specifically with respect to business firms. Some legal theorists believe that the realist tradition, culminating in a seminal article by the philosopher John Dewey, disposed of the need to inquire very deeply into the “nature” of organizations, notwithstanding their legal attributes as “persons”—including various rights and duties, not least the ability to be represented in litigation.² Writing during the legal realist period in American jurisprudence, Dewey believed that questions of legal personality should turn not on any inquiry “regarding the nature of things” (such as corporations) but rather on an examination “in terms of consequences” (such as determining what it would mean practically to recognize corporations as having rights or duties in particular circumstances).

Given that the law designates organizations, such as corporations and other business firms, as having various attributes, including rights and duties, it then follows from Dewey’s pragmatic approach that the idea of a legal person “signifies what law makes it signify.”⁴ He advocates for an analysis based on the likely social consequences of recognizing one feature or another of an organization, such as a business corporation, and he declares that nothing much turns of the use of “person” in this context.⁵ For example, a “right-and-duty bearing unit” would be an adequate, though perhaps awkward, synonym for an organizational “person.”

As Gregory Mark has rightly observed, the realist critique of the legal personality of corporations and other business firms freed modern jurisprudence from long-standing debates among competing theories (e.g., firms as “real entities” or “fictions”), but it did so at a cost. The realists—and the contemporary scholars following them— “robbed corporation theory of its larger intellectual content” and “failed to replace the rhetorical tradition of personification because it had nothing to replace it with.”⁷

Citizens United v. Federal Election Commission⁸ and *Burwell v. Hobby Lobby Stores, Inc.*⁹ are two recent and iconic cases in which the U.S. Supreme Court follows in the realist tradition of leaving theories of the firm underpinning its decisions relatively unspoken and unexamined. As I argue in this Article, the opinions in these cases tend to follow pragmatic arguments to reach opposing points of view concerning whether business corporations should be permitted to hold and assert certain kinds of legal “rights” as organizational persons.¹⁰ *Citizens United* addresses the scope of the ability of corporations to assert political rights and claim the protection of freedom of speech under the First Amendment against campaign finance restrictions.¹¹ *Hobby Lobby* concerns the question of whether business corporations can assert religious rights to claim exemptions from otherwise generally applicable laws regarding health care insurance coverage for certain methods of contraception.

My main argument here is that in both cases—which may illustrate a more general contemporary analytical bias—the Supreme Court has undertheorized the nature of business firms and, therefore, missed some important implications that would have helped to clarify the legal analysis if not change the eventual results. Closer attention to a legal theory of the firm reveals the complexity surrounding the contemporary structures of business organizations and their interactions with other major institutions in modern society. A better appreciation of the theoretical canvas on which the Court is painting would help to guide, or at least better understand, future decisions that will inevitably follow in the areas of institutional crossover between the worlds of business and government (as in *Citizens United*) and business and religion (as in *Hobby Lobby*).

Although Dewey was correct to point out that the legal personality of firms is highly flexible and variable, he emphasized that corporations and other organizational persons were created by law as “concrete facts and relations.”¹³ Recent philosophical works by John Searle, Philip Pettit, and others also suggest that

the law contributes to the construction of a “social ontology,” which includes a world populated by various kinds of organizational persons.¹⁴ I suggest that it is useful—indeed “realistic” in the deepest sense of the word—to revisit the legal and social ontology of business firms. Better understanding what these business firms are in terms of their legal and social construction will put the Supreme Court, as well as legislators and other policy makers, in a better position to make decisions concerning them, rather than taking a view that organizational ontology doesn’t matter.¹⁵ To ignore organizational ontology is actually to adopt one or another ontological view unconsciously, ignorantly, or manipulatively.

This Article proceeds as follows. Part II provides a brief philosophical account of a legal and social ontology of business firms, drawing in particular on arguments by Dewey. The main argument is to recognize that social constructions of “business persons” exist and have a legal ontology by which they can be described and understood.¹⁶ Some amendments and extensions of Dewey’s views are suggested in light of Searle’s, Pettit’s, and others’ recent scholarship in what has been called “social metaphysics.”¹

Part III then reexamines the opinions in *Citizens United* and *Hobby Lobby*. I show how the majority and the principal dissenting opinions in these cases tend to undertheorize the legal nature of the firm and why this failure of theory matters.¹⁸ In particular, I suggest that the results in both cases might be called into question with a more robust theoretical grounding based on conceptions of the legal structure of business firms and their role in modern society. Closer attention to “the concrete facts and relations” that underlie the construction and existence of organizations such as business firms allows for a clearer view of legal and policy alternatives available for their governance.

Disciplines

Business | Law

THEORIZING THE FIRM: ORGANIZATIONAL ONTOLOGY IN THE SUPREME COURT

*Eric W. Orts**

Imaginary creatures are notoriously nimble.

—John Dewey¹

INTRODUCTION

In two leading cases in the last several years, the U.S. Supreme Court revitalized interest in questions of “legal personality,” specifically with respect to business firms. Some legal theorists believe that the realist tradition, culminating in a seminal article by the philosopher John Dewey, disposed of the need to inquire very deeply into the “nature” of organizations, notwithstanding their legal attributes as “persons”—including various rights and duties, not least the ability to be represented in litigation.² Writing during the legal realist period in American jurisprudence, Dewey believed that questions of legal personality should turn not on any inquiry “regarding the nature of things” (such as corporations) but rather on an examination “in terms of consequences” (such as determining what it would mean practically to recognize corporations as having rights or duties in particular cir-

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1. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926).

2. Consider, for example, the following observation by a leading constitutional scholar: I do not address . . . the formerly much-mooted question of whether corporations “are” persons in some ontological sense, whether because aggregating individuals into the corporate form somehow transforms the latter into a “person” or because they are “real” in some other sense. I am too much of a legal realist to think that these questions hold any interest after John Dewey.

Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 *CORNELL L. REV. ONLINE* 70, 70 n.3 (2013) (citing Dewey, *supra* note 1). Tushnet goes on to recognize, however, that recent cases appear to be “reviving interest” in these questions. *Id.* Gregory Mark also accurately diagnosed the historical decline regarding theoretical interest in questions of the personality of corporations and other organizational entities. See Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 *U. CHI. L. REV.* 1441 (1987).

cumstances).³ Given that the law designates organizations, such as corporations and other business firms, as having various attributes, including rights and duties, it then follows from Dewey's pragmatic approach that the idea of a legal person "signifies what law makes it signify."⁴ He advocates for an analysis based on the likely social consequences of recognizing one feature or another of an organization, such as a business corporation, and he declares that nothing much turns of the use of "person" in this context.⁵ For example, a "right-and-duty bearing unit" would be an adequate, though perhaps awkward, synonym for an organizational "person."⁶

3. Dewey, *supra* note 1, at 660. Dewey follows in the tradition of the American pragmatism and quotes Charles S. Peirce: "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." *Id.* at 661 (quoting CHARLES S. PEIRCE, CHANCE, LOVE, AND LOGIC: PHILOSOPHICAL ESSAYS 45 (Morris R. Cohen ed., 1923)). More broadly, Dewey argues that this approach is consistent with the scientific principle known as "extensive abstraction," which provides that "what really matters to science is . . . that any set of terms with the right mutual relations will answer all scientific purposes as well as any other set with the same sort of relations." *Id.* (quoting C.D. BROAD, SCIENTIFIC THOUGHT 39 (1923)); see also W.V. Quine, *Russell's Ontological Development*, 63 J. PHIL. 657, 667 (1966) (describing Bertrand Russell's "definition by abstraction" as related to "what [Alfred Whitehead] came to call *extensive abstraction*, and [Rudolf Carnap] *quasianalysis*").

4. Dewey, *supra* note 1, at 655.

5. In Dewey's words:

Molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties. Molecules and trees would continue to behave exactly as they do whether or not rights and duties were ascribed to them; their consequences would be what they are anyway. But there are some things, bodies singular and corporate, which clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed upon them. If the logical principle be granted, it is a factual matter what bodies have the specifiable consequences and what these consequences are; but it becomes a verbal matter whether we call them all "persons" or whether we call some of them persons and not others—or whether we abandon the use of the word entirely.

Id. at 661–62.

Note that one scholar has famously taken the flexibility of legal definition suggested by Dewey to recommend that the law should in fact occasionally recognize "trees" and other natural objects as legal persons with rights. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 456 (1972); see also CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?: LAW, MORALITY, AND THE ENVIRONMENT (3d ed. 2010) (revising and expanding on the original thesis). The legal recognition of ships as "persons" in admiralty law is another example of the extension of the concept to inanimate objects. See, e.g., O.W. HOLMES, JR., THE COMMON LAW 26–27 (1881) ("It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.").

6. Dewey, *supra* note 1, at 656–58 (citing 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 307 (H.A.L. Fisher ed., 1911)).

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As Gregory Mark has rightly observed, the realist critique of the legal personality of corporations and other business firms freed modern jurisprudence from long-standing debates among competing theories (e.g., firms as “real entities” or “fictions”), but it did so at a cost. The realists—and the contemporary scholars following them—“robbed corporation theory of its larger intellectual content” and “failed to replace the rhetorical tradition of personification because it had nothing to replace it with.”⁷

*Citizens United v. Federal Election Commission*⁸ and *Burwell v. Hobby Lobby Stores, Inc.*⁹ are two recent and iconic cases in which the U.S. Supreme Court follows in the realist tradition of leaving theories of the firm underpinning its decisions relatively unspoken and unexamined. As I argue in this Article, the opinions in these cases tend to follow pragmatic arguments to reach opposing points of view concerning whether business corporations should be permitted to hold and assert certain kinds of legal “rights” as organizational persons.¹⁰ *Citizens United* addresses the scope of the ability of corporations to assert political rights and claim the protection of freedom of speech under the First Amendment against campaign finance restrictions.¹¹ *Hobby Lobby* concerns the question of whether business corporations can assert religious rights to claim exemptions from otherwise generally applicable laws regarding health care insurance coverage for certain methods of contraception.¹²

My main argument here is that in both cases—which may illustrate a more general contemporary analytical bias—the Supreme Court has undertheorized the nature of business firms and, therefore, missed some important implications that would have helped to clarify the legal analysis if not change the eventual results. Closer attention to a *legal theory of the firm* reveals the complexity surrounding the contemporary structures of business organizations and their interactions

7. Mark, *supra* note 2, at 1482. An exception, as Mark noted, was the legal realist Thurman Arnold who continued to address questions of corporate personification and autonomy as prominent. *Id.* (citing THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937)). More recently, legal scholars who adopted economics as their preferred mode of analysis rushed into the theoretical vacuum, fitting economic theories of the firm to legal purposes with economic efficiency as their pragmatic guide. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991), for the most influential example.

8. 558 U.S. 310 (2010).

9. 134 S. Ct. 2757 (2014).

10. I have inquired elsewhere, along with a co-author, about the nature of the “organizational rights” illustrated in these cases and others. See Eric W. Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275, 2275–76, 2286–96, 2318–19 (2015).

11. *Citizens United*, 558 U.S. at 318–19.

12. *Hobby Lobby*, 134 S. Ct. at 2759.

with other major institutions in modern society. A better appreciation of the theoretical canvas on which the Court is painting would help to guide, or at least better understand, future decisions that will inevitably follow in the areas of institutional crossover between the worlds of business and government (as in *Citizens United*) and business and religion (as in *Hobby Lobby*).

Although Dewey was correct to point out that the legal personality of firms is highly flexible and variable, he emphasized that corporations and other organizational persons were created by law as “concrete facts and relations.”¹³ Recent philosophical works by John Searle, Philip Pettit, and others also suggest that the law contributes to the construction of a “social ontology,” which includes a world populated by various kinds of organizational persons.¹⁴ I suggest that it is useful—indeed “realistic” in the deepest sense of the word—to revisit the legal and social ontology of business firms. Better understanding what these business firms are in terms of their legal and social construction will put the Supreme Court, as well as legislators and other policy makers, in a better position to make decisions concerning them, rather than taking a view that organizational ontology doesn’t matter.¹⁵ To ignore organizational ontology is actually to adopt one or another ontological view unconsciously, ignorantly, or manipulatively.

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Part III then reexamines the opinions in *Citizens United* and *Hobby Lobby*. I show how the majority and the principal dissenting opinions in these cases tend to undertheorize the legal nature of the firm and

13. Dewey, *supra* note 1, at 673.

14. See *infra* notes 35–61 and accompanying text (discussing the works of these philosophers).

15. Other scholars have also observed that *Citizens United* and *Hobby Lobby* have put questions about the ontology of firms back on the table. See, e.g., Vincent S.J. Buccola, *Corporate Rights and Organization Neutrality*, 101 IOWA L. REV. 499, 501 (2016) (“Corporate ontology is back in vogue.”).

16. For this connection, I also draw on previous work. See ERIC W. ORTS, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 40–41 (rev. ed. 2015).

17. See *SOCIALIZING METAPHYSICS: THE NATURE OF SOCIAL REALITY* (Frederick F. Schmitt ed., 2003) (collecting essays by some leading philosophers on the topic, including Margaret Gilbert, Philip Pettit, John Searle, and Raimo Tuomela).

why this failure of theory matters.¹⁸ In particular, I suggest that the results in both cases might be called into question with a more robust theoretical grounding based on conceptions of the legal structure of business firms and their role in modern society. Closer attention to “the concrete facts and relations” that underlie the construction and existence of organizations such as business firms allows for a clearer view of legal and policy alternatives available for their governance.

II. THE LEGAL AND SOCIAL ONTOLOGY OF THE BUSINESS FIRM

Competing theories of firms, including business corporations, have been around since leading jurists traded alternative ideas in ancient Rome.¹⁹ The main variants see business firms and other associational organizations as either creations of the political state (i.e., “top-down” or “concession” theories) or constructions of individual participants (i.e., “bottom-up” or “aggregate” theories).²⁰ Examples illustrating a mostly top-down description include the historical East India Company sponsored by England (and another by Holland) in the early seventeenth century and contemporary state-owned enterprises in China. Examples illustrating a mostly bottom-up description include the many and highly complex private business enterprises that are constantly created and operated by business participants in most, if not all, countries today (including China).²¹ The bottom-up construction of firms of many varieties is enabled by modern organizational

18. I have previously suggested that the Supreme Court has “undertheorized” the firm in the two cases, and I extend that argument here. See ORTS, *supra* note 16, *passim*; Eric Orts, *Undertheorizing the Corporation Continued: Hobby Lobby and Employees’ Rights*, CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/undertheorizing-the-corporation-continued-hobby-lobby-and-employees-rights.html>. R

19. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 773–75 (2005) (reviewing three theories of the corporation that originated in Roman jurisprudence). I appreciate that “firm” is a relatively recent concept, which embraces various different legal forms of enterprise. Although commonly associated with economic theories, the origin of the term lies in the Italian word *firma*, which refers to the legal entity of a business enterprise as opposed to the accounting entity (*ragione*) or credit entity (*ditta*). ORTS, *supra* note 16, at 34. R

20. For a further discussion of these theories, see ORTS, *supra* note 16, at 9–14, 13 tbl.1.1. R

21. The English East India Company was originally chartered in 1600, and its Dutch counterpart was first established in 1602. DAVID B. ABERNETHY, *THE DYNAMICS OF GLOBAL DOMINANCE: EUROPEAN OVERSEAS EMPIRES, 1415–1980*, at 61–62 (2000); NORMAN DAVIES, *EUROPE: A HISTORY* 513 (1996); JOHN KEAY, *THE HONOURABLE COMPANY: A HISTORY OF THE ENGLISH EAST INDIA COMPANY* 18 (1991). See ORTS, *supra* note 16, at 111–12, for more information on Chinese enterprises, both state-owned and privately organized. See *id.* at 194–200, for more information on state-owned enterprises as a type of firm. R

law granting and recognizing extensive powers and capacities of individuals to self-organize.²²

In my view, the best answer to the apparent divide between the top-down concession and bottom-up aggregate theories is to say that both are right. An institutional theory argues that most business firms are both created by government (which is the source of law made either by statutes or judicial decisions) and organized by people utilizing the individualized powers and capacities provided to them under the law.²³ This institutional view follows John Dewey and the legal philosopher H.L.A. Hart in abjuring demands to choose strictly between a “concession” or an “aggregate” view of the firm.²⁴ Instead, both views are correct: the law says whether a particular firm in a particular context is mostly a creature of the government (e.g., a state-owned Chinese enterprise or Amtrak) or mostly an aggregate construction comprised of business participants putting capital and labor into a private organizational structure (e.g., everyday partnerships, limited liability companies, and business corporations).²⁵ An institutional theory holds that the law provides a social matrix in which most business firms and other organizations are both top-down creations of law and bottom-up constructions of individual participants.²⁶

A related jurisprudential debate has been waged concerning whether firms (including corporations) should be considered “real entities” or “artificial fictions.”²⁷ Here again, Dewey’s seminal contribu-

22. The key legal innovation has been the adoption of “enabling rules” for organizational construction. See ORTS, *supra* note 16, *passim* (citing various scholars); see also Henry Hansmann & Reinier Kraakman, *The Essential Role of Organization Law*, 110 YALE L. J. 387, 390 (2000) (providing an economic explanation for the development of organizational law, including the organizational “entity” or “person”); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1336 (2006) (same).

23. ORTS, *supra* note 16, at 13 tbl.1.1, 14.

24. *Id.* at 17–19 (citing Dewey, *supra* note 1, and H.L.A. Hart, *Definition and Theory in Jurisprudence*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21, 21–48 (1983)).

25. An important dimension in legal theory concerns the distinction between “private” and “public” organizations. See ORTS, *supra* note 16, at 109–31. Recently, the U.S. Supreme Court provided an example of the practical importance of this distinction when it unanimously held that Amtrak was essentially a “governmental entity” rather than a “private corporation” for “purposes of determining the validity of the metrics and standards” that Amtrak had promulgated. *Dep’t of Transp. v. Ass’n of Am. R.R.s.*, 135 S. Ct. 1225, 1228 (2015).

26. A full-fledged institutional theory of this kind also requires an account not only of firms as legal persons, fictions, and entities but also as combinations of organizational contracts, property relationships, and internal agency structures. See ORTS, *supra* note 16, at 30–105. See *id.* at 73, 225, 254, for the description of the law as a social “matrix” for firms.

27. A shorthand description of this debate refers to “nominalists” (believing in the fiction theory) and “realists”—but realists in the sense of real entity theory rather than legal realism. To avoid confusion, I will not use the term “realists” to refer to “real entity” proponents. I believe a contemporary legal realist perspective is consistent with the “institutional theory” of

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tion cut through the metaphysical fog of this longstanding debate, arguing that philosophical, theological, and other nonlegal conceptions of corporate personality are not determinative.²⁸ In particular, Dewey argues that theological arguments insisting on the “fictional” nature of corporations (originally important in ecclesiastical debates) do not determine contemporary legal questions.²⁹ Political arguments insisting on “real entity” theories are similarly indeterminate.³⁰

Dewey’s breakthrough insight places the burden and responsibility squarely on the legal definition of organizational personality, which, in turn, derives from political and other institutional pressures that make and form the law over time. For Dewey, legal definitions of organizational personality are the product of “struggles and movements of immense social import, economic and political.”³¹ These larger historical “struggles and movements” include:

the conflict of church and empire in the middle ages; the conflict of rising national states with the medieval Roman empire; the struggle between dynastic [monarchical] and popular [democratic] representative forms of government; the conflict between feudal institutions . . . and the economic needs produced by the industrial revolution and the development of national territorial states; the conflict of the “proletariat” with the employing and capitalist class; the struggle between nationalism and internationalism, or trans-national relations, to mention only a few outstanding movements.³²

In a nutshell, Dewey replaces ahistorical, conceptual debates about organizational persons with an argument emphasizing historical context and practical considerations of contemporary social and political consequences regarding various legal ideas and definitions. Although some contemporary legal theorists fall victim to appealing to a new nonlegal source for an “essentialist” view of the firm—most influen-

the firm described here. In other words, firms are both fictions and real—or what I call “real fictions.” *See id.* at 31–33.

28. In Dewey’s words, “non-legal considerations” include “considerations popular, historical, political, moral, philosophical, metaphysical and, in connection with the latter, theological.” Dewey, *supra* note 1, at 655.

29. As Dewey observed, “the ‘fiction’ theory of the personality of corporate bodies . . . was promulgated if not originated, by Pope Innocent IV” and subsequently elaborated by Thomas Aquinas. It is “hardly a coincidence,” Dewey pointed out, that “Pope Innocent was one of the strongest upholders of the supremacy of spiritual over the temporal power[s].” *Id.* at 665.

30. Dewey conflates real entity and concession theories somewhat, but his main point still holds. Theorists who designate corporations (and other entities) as creations or concessions of political states tend to have a result-oriented perspective. In particular, political states wishing to regulate (or even eliminate) separate organizational persons emphasize that organizations are mere “creatures” of government. At the same time, real entity theories are often used to argue against the imposition of political state power over organizations.

31. Dewey, *supra* note 1, at 664.

32. *Id.*

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tially in the form of neoclassical economics³³—others follow and update Dewey’s historical and law-focused thesis.³⁴

Contemporary philosophers such as John Searle reinforce Dewey’s arguments that organizational persons are legally constructed yet have a social reality. Searle distinguishes between “brute facts,” which are the subject of scientific inquiry concerning the physical and material substance of the universe, and “institutional facts,” which human beings create through language and through institutions that language enables human beings to establish (such as governments and legal systems).³⁵ He develops “a general theory of the ontology of social facts and social institutions.”³⁶

For Searle, a business firm is an example of a socially constructed and defined institution.³⁷ It does not exist in “nature” in the same sense that human beings, other animals, plants, or other parts of the material world objectively exist. It also does not exist in an objective metaphysical ideal realm separated from human society.³⁸ Nevertheless, the business firm exists as a social entity in practical reality. It develops as a social institution in the course of history and through complex interactions of law, economics, and politics. It is constructed, defined, and instantiated through social practice. Human beings acting in society invent the business firm and establish it over time. Therefore, it is an artificially created fictional institution that nevertheless has “real” social effects and consequences.

As Searle argues, an objective “social reality” exists in addition to the objective material reality of physics, chemistry, and biology. “Social facts,” which are only “facts by human agreement,” do not exist in the same sense as atoms, mountains, plants, and animals, but they are nonetheless “epistemically objective.”³⁹ We know social facts exist

33. See *supra* note 7 and accompanying text.

34. See, e.g., William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989); David Millon, *Theories of the Corporation*, 1990 DUKE L. J. 201 (1990); Mark, *supra* note 2.

35. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 2 (1995).

36. *Id.* at xii; see also JOHN R. SEARLE, *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* at ix, 3–5, 10–11 (2010) (explaining the ontology of institutional facts and social facts).

37. As I have examined elsewhere, business firms come in many different legal forms and combinations. See ORTS, *supra* note 16, at 175–222.

38. In this respect, Searle’s view is consonant with Dewey’s. See *supra* notes 28–32 and accompanying text. These institutional theories (as I would describe them) are therefore not liable to the charge leveled at some real entity theories, which posit a metaphysical existence in a supernatural or theological sense.

39. SEARLE, *supra* note 35, at 1–13. Searle’s distinction here is similar to the distinction made by other philosophers between “natural kinds” and “functional kinds.” For a classic account of “natural kinds,” see SAUL A. KRIPKE, *NAMING AND NECESSITY* (1980). For a contemporary

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because we live in a society that constructs them and gives them meaning. Searle explains this phenomenon by describing social and institutional facts in contrast with the “brute facts” of physical reality.

Simple social facts include everyday examples of human cooperation, such as two people agreeing to push a car to get it started or deciding to take a walk together. Margaret Gilbert, another contemporary philosopher of social ontology, gives the example of two people who are traveling independently and then decide to share the adventure through a tacit or explicit agreement to “join forces,” coordinate, and travel together rather than separately.⁴⁰ Their agreement creates a transitory group with a shared purpose.⁴¹ Friendships and love relationships are created and sustained in a similar fashion, though often with a longer duration. Mutual interactions and choices transform some aspects of life from solitary into collective projects. Long-term and relatively permanent social groups are possible when people commit (or tacitly agree) to form relationships to act together and share responsibility for long-run objectives, such as raising children in a family, worshiping in a religious community, joining an army or political bureaucracy, or binding together to share the benefits and burdens of working collectively in a business enterprise. A contribution of law is to reinforce some of these organizational group structures through the adoption of various formal rules and practices—often with a normative view in mind of the intrinsic values or objectives pursued by particular groups.

Searle makes a distinction between everyday informal social facts, such as going for a walk together, going on a date, or hosting a party, as compared with institutional facts, such as war, marriage, money, or business firms. These institutional facts involve the creation and maintenance of various social rules, including legal rules, which in turn create and reinforce background understandings among people

argument that law (and its creations and entities) are “functional kinds,” see Michael S. Moore, *Legal Reality: A Naturalist Approach to Legal Ontology*, 21 *LAW & PHIL.* 619, 620–23, 684–93 (2002).

40. MARGARET GILBERT, *ON SOCIAL FACTS* 161–64 (1989).

41. In this context, Gilbert refers to the creation of a “plural subject.” *Id.* at 18, 199–200. A related philosophical concept is the feasibility of the formation of “collective intentionality” of social groups or plural subjects. See SEARLE, *supra* note 35, at 23–51 (explaining collective intentionality); see also Michael E. Bratman, *Shared Cooperative Activity*, 101 *PHIL. REV.* 327 (1992) (discussing group intentions); Raimo Tuomela & Kaarlo Miller, *We-intentions*, 53 *PHIL. STUD.* 367 (1988) (same). For two of the most recent contributions, see MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014) and MARGARET GILBERT, *JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD* (2014).

living together in a society.⁴² More complex institutional facts are therefore a subset of social facts that are created and maintained over time through conventions such as language, political structures, legal definition, economic ordering, and other patterns of human interaction.⁴³

Social and institutional facts are built on the brute facts of physical reality (e.g., human beings and material objects), but they also objectively exist in themselves “on top of brute physical facts.”⁴⁴ Searle argues that complex institutional facts—such as money, property, marriage, and business firms—objectively exist because they are created and maintained through the social use of rules and language in an ongoing and established manner.⁴⁵ Social facts recursively depend on other institutions. Social facts are self-referential and reflexive in the sense that they are created and maintained through institutionalized social practices and beliefs. The primary constitutive institutions are language and behavioral social norms.⁴⁶

Social facts interact with brute facts. A coin has an objective physical reality, but it is designated as “money” through institutional definition: a social agreement about what the coin represents in terms of an institutional fact, namely, a certain value as property (or a symbol of property) guaranteed by legal and political institutions (such as the U.S. Treasury) and used in economic transactions in markets.⁴⁷ A business firm also combines elements of an objective reality—namely, people working together, property collectively owned, and products

42. See SEARLE, *supra* note 35, at 113–47. For a description of the complexity of rules in social life, see FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991). R

43. See SEARLE, *supra* note 35, at 31–51. For brevity’s sake, I am oversimplifying Searle’s theory, which also depends on understanding the role of collective intentionality, the use of rules, and the attribution of “status functions.” *Id.* at 13–26, 43–57. R

44. *Id.* at 29–35. The “brute facts” of physical reality are logically prior to, and partial components of, “institutional facts.” *Id.* at 34–35, 55–56, 120–25.

45. *Id.* at 34–35, 55–56. Examples of institutional facts include money (Searle’s main illustration) as well as “marriage, property, hiring, firing, war, revolutions, cocktail parties, governments, meetings, unions, parliaments, *corporations*, laws, restaurants, vacations, lawyers, professors, doctors, medieval knights, and taxes.” *Id.* at 79 (emphasis added).

46. See *id.* at 32–37, 52–53. See also ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 3–5, 26–28 (1984), for an additional discussion of the idea of “reflexivity” in the structure of human relationships and society.

47. On the social and institutional fact of money, see SEARLE, *supra* note 35, *passim*. Money itself is a phenomenon often taken for granted and deserving of more extended philosophical and sociological analysis. For a classic source expounding on this idea, see GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* (David Frisby ed., Tom Bottomore & David Frisby trans., 3d ed. 2004). For a more recent examination of this idea, see GEOFFREY INGHAM, *THE NATURE OF MONEY* (2004). R

or services offered for sale—within an institutional definition of an organizational entity or person.⁴⁸

In his more recent work, Searle has also recognized that institutional facts are possibly “freestanding” in the sense that no material object or brute fact of the material world is required as a reference.⁴⁹ In Searle’s terms, a “status function” is established when a constitutive rule holds that “X counts as Y in context C.” For example, natural person (X) becomes king (Y) in context (C) when his father dies.⁵⁰ A freestanding Y occurs when constitutive rules create an institutional fact in the abstract without a corresponding X as a material reference.⁵¹ Examples of a freestanding Y include some business corporations and electronic money.

When a corporation posits limited liability (as the law allows), it cannot be reduced to actual human shareholders or other participants. In Searle’s words:

[T]he whole idea of the limited liability corporation is that there need not be any person or group of persons who is the corporation because those persons would have to accept the liability of the corporation if they were indeed identical with or constituted the corporation. But [if] they are not identical with the corporation, the corporation can exist, and continue to exist, even if it has no physical reality.⁵²

A corporate lawyer may point out that Searle’s description of a corporation is somewhat oversimplified, but Searle is right in the general thrust of his argument. Legal principles of limited liability for the corporate entity mean, at least in some circumstances, that there is a conceptual separation of the corporation from its participants.⁵³ Another clear example is the use of a purely conceptual corporation when organizing a triangular merger, such as when Target Corporation X sets up Subsidiary Corporation Y, which is then purchased by Acquiring Corporation Z.⁵⁴ In this legal sleight of hand, Subsidiary Corporation

48. A theory of the firm that describes how the law binds together property and people into relationships of organizational governance, including agency relationships such as employment, therefore stands within the same philosophical territory as charted by Dewey and Searle. ORTS, *supra* note 16, at 9–105.

49. SEARLE, *supra* note 36, at 20–21.

50. *See id.* at 19–20.

51. *Id.* at 20 (citing Barry Smith, *John Searle: From Speech Acts to Social Reality*, in JOHN SEARLE 1 (Barry Smith ed., 2003)).

52. *See SEARLE, supra* note 36, at 20.

53. *See ORTS, supra* note 16, at 32–40, 133–73 (describing the use of legal entities, principles of liability, and limited liability regarding business firms).

54. *Id.* at 38, 39 fig.1.1.

Y is entirely abstract and nonmaterial, which is an example of Searle's freestanding Y.

Similarly, electronic money exists only as bits and symbols in computers without a material representation in paper bills or metal coins. "[I]n the case of electronic money," Searle writes:

what exists are electronic *representations* of money; for example, magnetic traces on computer disks in banks. There need be no physical realization of the money in the form of currency or specie; all that exists *physically* is the magnetic traces on the computer disks. But these traces are *representations* of money, not money.⁵⁵

These examples attest to the institution-building power of language and rules.

If one accepts Searle's account, then a conceptual starting point is established that business firms exist as real fictions.⁵⁶ The business enterprise objectively exists as an institution through a combination of collective intentionality, constitutive rules, the use of language, and other socially created institutions (e.g., money, markets, law, and government).⁵⁷ Social and institutional facts are complex and changeable, but they exist as "socially real."⁵⁸

Other contemporary philosophers make broadly similar arguments in support of an organizational ontology of business firms. Philip Pettit, for example, draws on Thomas Hobbes' theory of representation to argue that legal persons, such as corporations, are constructed by law and require human beings to act as their representatives. In this sense, business corporations (as well as political commonwealths) are "made with words."⁵⁹ This is consistent with the operation of the law of agency within organizations.⁶⁰ Human beings "personate" themselves in collective groups, and the law recognizes the existence and

55. SEARLE, *supra* note 36, at 20.

56. See ORTS, *supra* note 16, at 33 (describing the business firm as a real fiction).

57. See generally SEARLE, *supra* note 35, at 23–29, 37–51, 59–63, 76–78, 113–20 (explaining each of these socially created institutions).

58. Searle gives an introductory example of a French restaurant as an illustration of what he calls the "complex structure of social reality," much of which is "weightless and invisible." The nature of a restaurant, the role of a waiter, and the use of money are institutional parts of this social complexity of everyday life. *Id.* at 3–4.

59. PHILIP PETTIT, MADE WITH WORDS: HOBBS ON LANGUAGE, MIND, AND POLITICS 70–81, 115–16 (2008).

60. As I have previously argued, agency law is a neglected but essential legal component of business firms. ORTS, *supra* note 16, at 54–62; see also CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011) (arguing for the existence of "group agents" from a legal, political, and moral perspective). Note that "agency" is a term often used differently in law, philosophy, politics, and economics.

representative structures of these groups, including the selection of leaders to speak on behalf of the group.⁶¹

The foregoing account of the social ontology of business firms is very much abbreviated. However, it is sufficient for the current purpose of proposing a foundational basis for inquiring into the organizational ontology of firms recently employed by the U.S. Supreme Court in cases such as *Citizens United* and *Hobby Lobby*. Unfortunately, these cases exhibit a failure to think clearly about the legal and social ontology of firms, including “the concrete facts and relations” that Dewey and other theorists have encouraged us to examine.⁶²

III. ORGANIZATIONAL ONTOLOGY IN THE U.S. SUPREME COURT

Citizens United and *Hobby Lobby* implicitly involve conceptions or theories of the business corporation and have a continuing interest with respect to the use (and misuse) of these theories. In addition, these cases are particularly important because they involve an attribution of rights to organizational persons, such as corporations, which strike at core conceptions of the place of business firms in society. Theories of the firm therefore matter to the extent that they are used (or misused) to justify the results reached in these cases or accepted as justifications in the future. As others have also observed, Supreme Court Justices have been notorious for their result-oriented selections of a legal theory of the firm (i.e., top-down concession theory or bottom-up participant theory) to fit preordained conclusions. One scholar writes:

Over the course of 200 years, the Court has articulated inconsistent theories of the corporation—theories which seem to yield predictably unpredictable judgments about the existence of a corporate right. When the Justices conclude that a regulation burdening incorporated firms is valid, they tend to emphasize the “artificial” nature of corporations. Because corporations come into being only by virtue of the State’s affirmative charter, the State may regulate them in a way it could not regulate natural persons. The power to create implies the power to regulate. When, on the other hand, the Jus-

61. PETTIT, *supra* note 59, at 55–81 (describing two steps in the process: (1) using words to personate and (2) using words to incorporate); *see also* ORTS, *supra* note 16, at 40–51 (describing the construction of legal persons in terms drawn in part on Pettit and Hobbes).

62. Dewey, *supra* note 1, at 673. Again, some scholars have misinterpreted Dewey to suggest that he counseled legal scholars to abjure inquiries about legal personality. *See supra* note 2 and accompanying text. In my view, Dewey’s argument should be taken instead to empower the law as against the competing conceptions of corporations or other organizational forms drawn from various philosophical or theological movements. In other words, legal ontology derives from underlying political, economic, religious, and sociological theories that are instantiated in legal practice in historical context.

tices conclude that a corporation is entitled to object to government action, they typically employ the logic of the “aggregate” theory of the corporation. The State’s authority is limited because firms are composed of individuals who themselves have interests the State is bound not to trample.⁶³

Another scholar who has done a survey of the literature finds a “deeply disturbing” consensus that the Supreme Court lacks “a coherent approach or engagement with theoretical questions concerning the nature of the firm.”⁶⁴ Others deride the Court’s opinions on this score as “‘ad hoc,’ ‘right-by-right,’ ‘arbitrary,’ [and] ‘sporadic.’”⁶⁵ Going forward, it would be beneficial to avoid this kind of inconsistent, incoherent style of theory selection.

An institutional legal theory of the firm proves helpful in this respect for a couple of reasons. First, such a theory allows for an understanding of the socially constructed nature of business enterprises (and other organizations) and their “social reality.” It therefore provides an intellectual justification for the flexibility of different results under different circumstances. Second, an institutional theory can embrace the question of how business firms and other organizations relate to other important institutions in society, including, especially in the context of this Article, the institutions of political government and religion. There remains plenty of room for competing normative views and disagreements once the distractions of old theories are swept away and the concrete facts and relations of modern firms are made plain.

A. *Citizens United: The Place of Business in Politics*

Citizens United is a titanic case because it steps into the long-standing and important question of the role that large and powerful business firms should play in democratic political government, particularly in the election of government officials. It is not at all clear that the Supreme Court needed to take this step. The facts of the case, which involve a nonprofit corporation organized specifically for political purposes, did not initially raise the larger issue of whether a for-profit corporation had a political right to speak and make financial expenditures to support political candidates.⁶⁶ Once again, however, Toc-

63. Buccola, *supra* note 15, at 501–02.

64. Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 99 (2014).

65. *Id.* (quoting several legal scholars).

66. A number of narrower grounds were available to the Court, which would have avoided the larger constitutional question. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 405 (2010) (Stevens, J., concurring in part and dissenting in part) (“[T]he parties have advanced

queville has been proven right, and the important question of the place of business firms in politics gravitated toward a judicial resolution.⁶⁷ Interestingly, Tocqueville also worried about the influence of business in politics in the United States, foreseeing the possibility that a new “aristocracy” could arise from among wealthy industrialists.⁶⁸

Citizens United illustrates the tendency of judges to pick theories of the firm to support their preferred results.⁶⁹ Before examining the different theories adopted by competing opinions in *Citizens United*, however, it is useful to recall that this judicial ambivalence has deep roots. Sometimes different theories of the firm have even been invoked by the same Justice in different circumstances. For example, in two seminal historical cases regarding the constitutional rights of business corporations, Justice Field adopted starkly different theories of the corporation.⁷⁰ *Paul v. Virginia*⁷¹ refused to recognize corporations as citizens for purposes of constitutional protection under the Privileges and Immunities Clause of the Fourteenth Amendment.⁷² “The

numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy organizations such as *Citizens United*, without toppling statutes and precedents.”). Justices in the eventual majority, however, felt that the law had reached a state of impasse requiring them to hear arguments at their own insistence on the constitutional political rights of corporations to free speech. *Id.* at 329 (“[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.”); *id.* at 375 (Roberts, C.J., concurring) (“It should go without saying . . . that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.”).

67. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. and trans., 2000) (“There is almost no political question in the United States that is not resolved sooner or later into a judicial question.”). As discussed in the sundry opinions in *Citizens United*, the central question of the role of business firms in politics had a long history of both precedents and statutes. *See Citizens United*, 558 U.S. at 320–21; *id.* at 379–80 (Roberts, J., concurring); *id.* at 387, 389 (Scalia, J., concurring); *id.* at 394–95 (Stevens, J., concurring in part and dissenting in part); *id.* at 481 (Thomas, J., concurring in part and dissenting in part).

68. 2 TOCQUEVILLE, *supra* note 67, at 530–32.

69. *See, e.g.*, Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement To End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 246–47 (2011) (“The Supreme Court has never developed a unified theoretical justification for its conclusion that corporations are persons under the Constitution. Thus, there is no coherent, consistent way of defining corporate constitutional rights. The effect is a corporate personhood jurisprudence that often seems purely result-oriented. The Court has utilized conflicting theories of corporate personhood to support particular results, rather than as guiding principles to help reach them.” (footnotes omitted)). *See also supra* notes 63–65 and accompanying text.

70. *See* Buccola, *supra* note 15, at 508 & n.39. .

71. 75 U.S. 168 (1868), *overruled in part by* U.S. v. S.E. Underwriters Ass’n, 322 U.S. 533 (1944).

72. *Id.* at 178. *See generally* U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)).

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term citizens,” Justice Field held for a unanimous Court, “applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.”⁷³ This is a version of a top-down or concession theory of the firm. But then, in *Santa Clara County v. Southern Pacific Railroad*,⁷⁴ the Court affirmed Justice Field’s appellate opinion (written when he was “riding circuit”), which recognized that a corporation had a constitutional right as a “person” under the Equal Protection Clause of the Fourteenth Amendment.⁷⁵ In his appellate court opinion, Justice Field noted that the term citizen had been “dropped” in the Equal Protection Clause as compared with the Privileges and Immunities Clause.⁷⁶ He concluded by endorsing, at least implicitly, a bottom-up or participant view of the firm:

[N]o state shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the laws.⁷⁷

This ambivalence between top-down and bottom-up perspectives of the firm continues in the judicial opinions in *Citizens United* and *Hobby Lobby*.

In *Citizens United*, Justice Kennedy’s majority opinion adopts a bottom-up participant view of the corporation similar to the one in *Santa Clara*.⁷⁸ On this view, firms are comprised of people, and they represent the real interests of people acting in the world through the vehicle of organizations. Therefore, constitutional protection should extend to these institutions with respect to political speech. To do otherwise would trample on the legitimate constitutional rights of business participants and accord too much power to the government.⁷⁹

73. *Paul*, 75 U.S. at 177.

74. 118 U.S. 394 (1886).

75. *Id.* at 409–10. See generally U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)).

76. *Cty. of Santa Clara v. S. Pac. R.R.*, 18 F. 385 (Cir. Ct., D. Cal. 1883), *aff’d*, 118 U.S. 394 (1886); see also *supra* notes 72, 75 (quoting the two amendments).

77. *Santa Clara*, 18 F. at 398–99; see also ORTS, *supra* note 16, at 11–12 (discussing *Santa Clara*’s “bottom-up” view of the firm). More recently, the scope of equal protection rights for business firms has been reduced. See, e.g., *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 674 (1981).

78. See ORTS, *supra* note 16, at 10–11 (discussing Justice Kennedy’s opinion).

79. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339–40, 370–72 (2010).

In his dissenting opinion, Justice Stevens adopts a version of the top-down concession theory.⁸⁰ He quotes Justice Marshall's well-known proposition in *Dartmouth College v. Woodward*,⁸¹ which strongly supports the ability of the government to regulate corporations: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"⁸² Justice Stevens echoes a strongly government-centered view of the powers, rights, and duties of business corporations and other firms.

He goes on to argue, in a phrase later quoted by Justice Ginsburg in her dissenting opinion in *Hobby Lobby*:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.⁸³

Here, one hears the strains of Justice Field in *Paul* rather than the Justice Field of *Santa Clara*. For Justice Stevens, corporations cannot be "citizens."⁸⁴ They cannot vote, and they should not complain if their political speech is regulated or even entirely forbidden.⁸⁵ Justice Stevens's references the Tillman Act, which banned all corporate con-

80. ORTS, *supra* note 16, at 243–44 (discussing Justice Stevens' opinion in *Citizens United*).

81. 17 U.S. 518 (1819).

82. *Citizens United*, 558 U.S. at 428–29 (Stevens, J., concurring in part and dissenting in part) (quoting *Dartmouth Coll.*, 17 U.S. at 636). For another landmark Supreme Court case favorably citing this language from *Dartmouth College*, see *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987). Justice Ginsburg's dissenting opinion in *Hobby Lobby* cites *Dartmouth College* as well. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting).

83. *Citizens United*, 558 U.S. at 466 (Stevens, J., concurring in part and dissenting in part); see also *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting).

84. *Citizens United*, 558 U.S. at 470–75 (Stevens, J., concurring in part and dissenting in part) (emphasizing the role of "ordinary citizens" versus corporations).

85. As Justice Stevens ironically notes: "Under 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." *Id.* at 424–25 (Stevens, J., concurring in part and dissenting in part). One scholar follows this line of thinking and argues that if corporations are deemed to have moral capacity, they should, indeed, have a right to vote. John Hasnas, *Should Corporations Have the Right To Vote?: A Paradox in the Theory of Corporate Moral Agency* (Normative Bus. Ethics Workshop Series, Zicklin Ctr. for Bus. Ethics Research, Wharton School, Univ. of Pa., 2014), <http://faculty.msb.edu/hasnasj/GTWebSite/Vote%20Revised.pdf>. This is a rhetorical argument, however, and nobody seems to take the idea seriously that artificial entities should have political voting rights. Under free incorporation laws, millions of new entities would be created in a regime allowing corporations to vote, which would make a mockery of the electorate in a political democracy—which is precisely Justice Stevens' point.

tributions to political candidates.⁸⁶ And he quotes Theodore Roosevelt who proclaimed: “All contributions by corporations to any political committee or for any political purpose should be forbidden by law. . . .”⁸⁷

Because Justice Kennedy and Justice Stevens adopt extreme opposing views of the firm—a bottom-up participant theory versus a top-down concession theory—they talk past each other. Additionally, they each make mistakes that a more moderate institutional theory of the firm can reveal and ameliorate.

Justice Kennedy overstates his argument when he repeatedly asserts that there should be no constitutional difference based on the “identity” of a person—natural or organizational—for purposes of extending First Amendment protections for political speech.⁸⁸ He uses only a string citation (without parenthetical descriptions) to support the broad assertion that “First Amendment protection extends to corporations.”⁸⁹ It is true that a number of precedents recognize some degree of constitutional protection for corporate persons in the area of political speech.⁹⁰ Justice Kennedy goes too far, though, in claiming that 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.’”⁹¹ Sometimes the Court has indeed treated corporations differently.⁹²

Justice Stevens rightly castigates the majority opinion for repeatedly and uncritically invoking its “identity” rationale.⁹³ His own counter-

86. *Citizens United*, 558 U.S. at 433 (Stevens, J., concurring in part and dissenting in part) (citing Tillman Act, ch. 420, 34 Stat. 864–85 (1907) (codified as amended at 2 U.S.C. § 441(b) (1994) (transferred to 52 U.S.C. § 30118 (2012))).

87. *Id.* (quoting President Theodore Roosevelt, Fifth Annual Message to the Senate and House of Representatives (Dec. 5, 1905)).

88. *See, e.g., Citizens United*, 558 U.S. at 347 (“[T]he First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.”).

89. *Id.* at 342 (listing cases).

90. *See, e.g., First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that a for-profit corporation had a constitutional right of free speech to oppose a state referendum on a tax issue).

91. *Citizens United*, 558 U.S. at 343.

92. In his dissenting opinion, Justice Stevens recounts the history of congressional regulation of corporate activities in campaign finance beginning with the Tillman Act of 1907 as well as the Court’s precedents that interpret and generally defer to this legislation. *Id.* at 432–41 (Stevens, J., concurring in part and dissenting in part). He correctly points out that this line of cases draws a “corporate/individual distinction” in the First Amendment context. *Id.* at 437 (Stevens, J., concurring in part and dissenting in part). These precedents support Justice Stevens’ claim that the majority decision in *Citizens United* also violated foundational principles of stare decisis. *See id.* at 408–14 (Stevens, J., concurring in part and dissenting in part).

93. *See id.* at 419 (Stevens, J., concurring in part and dissenting in part).

examples, however, are inapt because they refer only to categories of natural persons who are restricted in their exercise of political rights of free speech, such as “students, prisoners, members of the Armed Forces, foreigners, and [government] employees.”⁹⁴ Better examples would draw on the institutional persons that Justice Kennedy has in mind.

Consider, for example, municipal corporations. Imagine that the Mayor of the City of Chicago decides to contribute city treasury funds toward advocacy of an election campaign for President. I do not think that Justice Kennedy, or any of his brethren in the majority, would agree that the simple fact that a city is incorporated should be interpreted to mean that it is a “person” sufficient to be accorded the status of First Amendment protection in this context. The reason is obvious. The City of Chicago’s taxpayers are likely to be divided on the question of who the next President should be, and their funds paid in taxes to the City are not intended for use toward a political purpose outside of the City. This is not to say that the Mayor cannot express an opinion or endorse a candidate for President.⁹⁵ But taxpayer funds should not be allocated to campaigns elsewhere simply because a municipality is a “corporation.”

Similarly, consider a subgroup of the federal government, such as the United States Marine Corps. For certain purposes, the Marines are recognized as a separate institutional person.⁹⁶ It would violate basic principles of democratic government as currently structured, however, to say that the Marines are an organizational person having the authority to devote funds to political campaigns. On the contrary, the Armed Forces of the United States are careful to observe a principle of civilian control with respect to the elected office of the President and constraints enacted by Congress. Just as individual members of the Armed Forces are not permitted full rights of freedom of political speech when serving, the organizational persons of the military

94. *Id.* at 420 (Stevens, J., concurring in part and dissenting in part) (footnotes omitted).

95. And vice versa: presidents may endorse mayoral or other candidates for office. I do not deny that politicians will often find ways to help each other in elections. The example in the text, of course, riffs off President Obama’s actions in Chicago that appeared to support his friend Rahm Emmanuel’s mayoral reelection bid. See Michael D. Shear, *Obama Honors Workers and Endorses a Mayor*, N.Y. TIMES, Feb. 20, 2015, at A16. The point is that transfers of funds from one government body to another for the purpose of electioneering should be frowned upon. And legal limits should recognize what Stevens calls “a corporate/individual distinction.” See *supra* note 92.

96. See, e.g., *Smith v. Commanding Officer, 1st Battalion, 23d Marines, 4th Marine Div., U.S. Marine Corps Reserve*, 380 F. Supp. 588, 589–90 (S.D. Tex. 1974) (rejecting, on constitutional grounds, a request for an injunction to allow wearing short-hair wigs during annual training deployments).

(i.e., Army, Navy, Air Force, and Marines) are similarly restricted.⁹⁷ Again the rationale is obvious: the military may favor or disfavor engagement in war or other uses of force, and it would violate principles of democratic government to allow the military to influence these decisions on the basis of economic or professional self-interest.

Now shift the organizational focus slightly to consider business corporations primarily involved in supplying the military with weapons. The same rationale should apply to private defense contractors as to the U.S. Department of Defense. Under a strict reading of *Citizens United*, Lockheed Martin and other companies might be seen to have a right to participate directly in political elections. In fact, most of these companies impose ethical restrictions on themselves, but it nevertheless makes sense that a government may, and probably should, choose to restrict the political influence of the defense industry.⁹⁸ At least in some cases, then, strong public policy considerations support an argument to examine the identity and purpose of a corporation or other organization when deciding whether and how to allocate political rights of free speech.

Another example concerns business firms that are either government-owned, such as Amtrak or the U.S. Postal Service, or public-private hybrids, such as Fannie Mae and Freddie Mac.⁹⁹ These kinds of firms reveal fine lines between public and private in a manner that may cause difficulty if one simply extends First Amendment corporate rights to these organizations without considering identity and context.¹⁰⁰ An inconsistent result would obtain if courts read *Citizens United* to give these corporate entities general rights of political

97. See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976) (rejecting a constitutional challenge to political electioneering on military bases as “wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control” because “[i]t is a policy that has been reflected in numerous laws and military regulations throughout our history”); see also Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 799–801 (2012) (reexamining the role of the military within the contemporary constitutional structure); Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 99–104 (2013) (describing the traditional policy of “civilian control of the military” and the corresponding “need for an apolitical military”).

98. See Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT'L L. 549 (2002), for an elaboration of this concern as it pertains to various dimensions of business and government interactions, including campaign finance law. See also LOCKHEED MARTIN, SETTING THE STANDARD: CODE OF ETHICS AND BUSINESS CONDUCT, <http://www.lockheedmartin.com/content/dam/lockheed/data/corporate/documents/ethics/code-of-conduct.pdf> (last updated June 2014) (describing Lockheed Martin’s internal governance policies).

99. See ORTS, *supra* note 16, at 110–11, 198–200 (discussing examples of government-owned and public-private hybrid firms).

100. See *id.* at 109–31 (discussing the “public/private distinction” as “two faces of the business enterprise”).

speech, yet continued to restrict individual government employees from participating in various political activities.¹⁰¹

Recently, the Supreme Court demonstrated its facility for delving into organizational details when dealing with a case that turned, in part, on whether Amtrak was “a government entity” or “a private entity.”¹⁰² A statute creating Amtrak and establishing its governance structure plainly stated that Amtrak “is not a department, agency, or instrumentality of the United States Government.”¹⁰³ It stated further that Amtrak “shall be operated and managed as a for-profit corporation.”¹⁰⁴ These provisions convinced the D.C. Court of Appeals to find Amtrak to be a private corporation, which was then found to have unconstitutionally delegated powers to regulate “metrics and standards” for passenger rail service that adversely affected the operations of the private freight railroad plaintiffs.¹⁰⁵

However, the U.S. Supreme Court, in a unanimous opinion by Justice Kennedy, reversed. Justice Kennedy’s opinion began with an analysis of “Amtrak’s ownership and corporate structure,” observing that the government owns all of the preferred stock and most of the common stock (under the authority of the Secretary of Transportation) and that Amtrak’s board is also largely selected by the government (i.e., the President appoints seven board members, with Senate confirmation, and Amtrak’s president selects eight other members).¹⁰⁶ Amtrak is also subject to pervasive governmental oversight and is required to follow other public interest objectives in addition to profit-making (e.g., providing “efficient and effective intercity passenger rail mobility” and ensuring “mobility in times of natural disaster”).¹⁰⁷ Last but not least, Amtrak receives large subsidies from the government, amounting to more than \$1 billion annually.¹⁰⁸

In the Amtrak case, Justice Kennedy demonstrates that the Court can inquire into the legal details of “ownership and corporate structure” when it wants to do so. His majority opinion in *Citizens United*, however, falls short in this respect. Imagine that Amtrak’s manage-

101. For a recent case upholding the ability of governments to restrict the political speech of their employees when acting within their scope of official duties against a First Amendment challenge, see *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

102. U.S. Dep’t of Transp. v. Ass’n of Am. R. RS., 135 S. Ct. 1225, 1228, 1231 (2015).

103. *Id.* at 1231 (quoting 49 U.S.C. § 24301(a)(3) (2012)).

104. *Id.* (quoting 49 U.S.C. § 24301(a)(2)).

105. *Id.* at 1231 (citing *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 677 (D.C. Cir. 2013), *vacated*, 135 S. Ct. 1225 (2015)).

106. *Id.* at 1231.

107. *Id.* at 1232 (citing 49 U.S.C. §§ 24101(b), (c)(9)).

108. *U.S. Dept. of Transp.*, 135 S. Ct. at 1232.

ment decided in the future to allocate some of its funds to political campaigns. No current member of the Court would fail to see the conflict of interest: a government-owned and government-subsidized corporation attempting to influence the selection of its own public monitors (the President and members of Congress). Notice, however, that a close look at private business corporations reveals conflicts of interest among the participants in firms analogous to the conflicts of interest in this Amtrak-based hypothetical. This conceptual connection can be illuminated by reconsidering the limitations of the “shareholder-protection” rationale advocated in *Citizens United*.

In *Citizens United*, the majority opinion rejects the “shareholder-protection” argument advanced in Justice Stevens’ opinion (which cites the precedent of *Austin v. Michigan Chamber of Commerce*¹⁰⁹ for the proposition).¹¹⁰ The shareholder-protection argument suggests that many shareholders may object (perhaps even a controlling majority of them) to particular political positions taken by their firms in political campaigns. On the narrow facts of *Citizens United* itself, the Court’s rejection of this argument may have been correct. Because *Citizens United* was organized as a nonprofit political advocacy group, even the for-profit corporations providing funds to it would arguably have agreed with the political purpose of *Citizens United*, though one might then wonder about the shareholders of the private corporate donors.¹¹¹ In any event, the Court’s holding is very broad and seems to indicate that dissenting shareholders do not have a right to object to political speech made by leaders and managers of the companies in which they invest. Justice Kennedy gestures toward the mechanisms of “corporate democracy” as a potential check on managerial power, but he greatly overestimates the effectiveness of corporate governance in this domain.¹¹² Corporate legal scholars know, as Justice Stevens also notes in his opinion, that the instruments of corporate governance used for political expression by shareholders are

109. 494 U.S. 652 (1990), *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

110. *Citizens United*, 558 U.S. at 348–49, 361–62; *see id.* at 475–78 (Stevens, J., concurring in part and dissenting in part) (citing *Austin*, 494 U.S. at 660–61).

111. One option for a narrower holding in *Citizens United* would have been for the Court to allow for a *de minimis* amount of for-profit corporate contributions to a political nonprofit organization. *Id.* at 328–29; *id.* at 406–07 (Stevens, J., concurring in part and dissenting in part). The legally recognized ability of firms to donate “reasonable” amounts to charitable and philanthropic causes might have been read to support this exception. *See* 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b) (AM. LAW INST. 1994).

112. *See Citizens United*, 558 U.S. at 361–62, 370 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794, 794 n.34) (1978)).

unlikely to prove satisfactory or effective.¹¹³ By empowering corporate management (and majority shareholders to some degree) to make decisions about corporate political speech to influence elections, the Court diminishes the interests (if not violates the rights) of dissenting shareholders.

However, shareholders should not be the only ones who matter. Corporate firms are composed not only of equity-owning shareholders but also other participants, including creditors and employees. From an institutional perspective, one sees that creditors and employees also count as meaningful participants in firms for various purposes. Creditors provide debt financing, which can often be as important to a business firm as equity ownership.¹¹⁴ Employees act as agents of the firm in many circumstances, and they also share in revenues through labor contract arrangements.¹¹⁵ When a firm succeeds financially, creditors and employees benefit as well as managers and shareholders. An institutional understanding of the legal as well as the economic structure of the firm, however, suggests that Justice Kennedy gets his theory of the firm wrong when he implicitly considers only majority shareholders and managers. Justice Kennedy's formalistic invocation of "the corporation" as the rights holder conveniently obscures the fact of these other participants' interests and rights. Particularly with respect to political purposes, it is difficult to deny that *Citizens United* inequitably grants greater rights and powers of political speech to top managers and controlling shareholders who appoint these managers at the expense of creditors, employees, and lower-level managers.¹¹⁶

Political Action Committees (PACs) were designed to address exactly this problem, as Justice Kennedy himself recognizes.¹¹⁷ Although campaign finance statutes barred corporations and unions from "using their general treasury funds for express advocacy or electioneering communications," PACs were authorized as "separate segregated funds" that were "limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union."¹¹⁸ Although some observers still criticized PACs as also

113. See *id.* at 476–77 (Stevens, J., concurring in part and dissenting in part).

114. See ORTS, *supra* note 16, at 84–90 (examining the role of creditors in the legal structure of business firms).

115. See *id.* at 57–62, 72, 137 (examining the role of employees in firms).

116. On this view, the idea of "reverse piercing" a corporate entity in favor of respecting the political or religious views of majority or sole shareholders should be limited by consideration of other people who are participating directly in the business. See Stephen M. Bainbridge, *Using Reverse Veil Piercing To Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235, 236 (2013).

117. *Citizens United*, 558 U.S. at 321.

118. *Id.* (quoting 2 U.S.C. § 441b(b)(2) (1994) (transferred to 52 U.S.C. § 30118 (2012))).

having undue influence on elections, PACs at least solved the problem of using “other people’s money” for political purposes.¹¹⁹

Although Justice Stevens also makes this general argument in his dissent, his theory of the firm is too narrow along another dimension. Arguably, the question of relevant interests affected by corporate political speech include all of those who participate in the firm and add to its overall wealth and power. These interests include creditors and employees as well as managers and shareholders. As an institutional legal theory of the firm shows—again to follow Dewey’s legal realism—the boundaries of firms vary according to the question that is asked.¹²⁰ In the context of the political speech of citizens, it seems relatively obvious that the interests of employees, creditors, and shareholders should matter. They are citizens as well as business participants. It is also not clear whether the authorization by a majority of a firm’s shareholders approving a particular instance of corporate political speech should be considered sufficient to justify or legitimate the action. Because the primary purpose of for-profit firms is economic self-interest, then even controlling shareholders may hold different political views (and corresponding preferences about political candidates) than corporate leaders who will presumably seek to advance the economic interests of their firms rather than their individual political agendas.

Justice Kennedy’s strongest argument is that the interest of individual citizens who “listen” to corporate political speech is best respected by recognizing a corporate right of free speech.¹²¹ However, even from this perspective, an argument based on an institutional theory of the firm might press the point regarding the scope of the distortion. The point here is distinct from the “antidistortion rationale” promoted by Justice Stevens in his dissent, which focuses on general inequalities of wealth enabled by corporate structures of property and power that may skew democratic government.¹²² The Court is correct

119. See Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871, 873 (2004) (citing LOUIS BRANDEIS, OTHER PEOPLE’S MONEY—AND HOW THE BANKERS USE IT (1914)).

120. ORTS, *supra* note 16, at 6, 108 (citing Hart, *supra* note 24, at 19–23, 31–33, 40–45).

121. See *Citizens United*, 558 U.S. at 341 (“The First Amendment protects speech and speaker, and the ideas that flow from each.”); see also Orts & Sepinwall, *supra* note 10, at 2290–91 (discussing listener’s rights and providing further citations). As I argue elsewhere in a co-authored article, the corporate right involved in *Citizens United* is best conceived as a “primary organizational right” that resides in the organization itself (and subject to the organization’s control) rather than a “secondary organizational right” that tracks the individual rights of organizational participants. Orts & Sepinwall, *supra* note 10, at 2295.

122. *Citizens United*, 558 U.S. at 464–75 (Stevens, J., concurring in part and dissenting in part). The “antidistortion rationale” was adopted in the *Austin* case, which interpreted the “share-

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to respond that the First Amendment should not be interpreted to handicap rich individuals in expressing their opinions.¹²³ The relevant “distortion” derives instead from the internal structure of authority in for-profit firms. Again, the organization of *Citizens United* is, perhaps, unproblematic because it is a nonprofit corporation with a specifically political purpose.¹²⁴ For-profit corporations and other business firms, however, are organized with an aim to pursue profit and economic gain.¹²⁵ To assume that corporate political speech will not be severely distorted by the economic structure of authority in for-profit firms does not respect the organizational complexity of modern society. The political preferences and views of individual citizens do not necessarily correspond to the economic interests that these same people may follow in their roles as managers, employees, and investors in business firms.¹²⁶

It is also true that the global structure of large corporate firms poses a concern about the influence of foreign individuals and even nation-states on the internal political processes of the United States. This charge leveled against the majority by Justice Stevens—and famously repeated by President Obama in his State of the Union Address immediately following the issuance of *Citizens United*—is overbroad. Justice Stevens correctly points out in his dissenting opinion that campaign finance restrictions are placed on foreign nationals, including foreign-based corporations, though he goes overboard with his analogy, suggesting that the majority’s approach would have protected a free speech right for Tokyo Rose during World War II.¹²⁷ Justice Kennedy correctly responds that *Citizens United* does not reach the question of whether the government may have “a compelling interest in preventing foreign individuals or associations from influencing our

holder protection rationale” as part of the same fabric. *Id.* at 464–65, 478 (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310 (2010)).

123. See *Citizens United*, 558 U.S. at 350 (“The rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.”).

124. A future case might distinguish and limit *Citizens United* on this ground.

125. In this connection, Justice Stevens properly cites the American Law Institute’s well-known principle of corporate governance. *Citizens United*, 558 U.S. at 470 (Stevens, J., concurring in part and dissenting in part) (quoting 1 PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 111, § 2.01(a)) (“[A] corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”). However, Justice Stevens omits the three exceptions given to profit seeking—namely following the law, ethical considerations, and philanthropic contributions—which expand the permissible scope of a firm’s objective. 1 PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 111, § 2.01(b).

126. See ORTS, *supra* note 16, *passim*, for an elaboration of the different roles that individuals play in society regarding their relationships to firms.

127. *Citizens United*, 558 U.S. at 423–24 (Stevens, J., concurring in part and dissenting in part).

Nation's political process."¹²⁸ He also observes that the relevant statute preventing political contributions and expenditures from foreign nationals is not limited to "corporations or associations that were created in foreign countries or funded predominantly by foreign shareholders."¹²⁹ At least in this respect, the Court leaves open the possibility that for-profit corporations, which are open to investments from foreign sources (and often also staffed by foreign managers), would be refused First Amendment protection under *Citizens United*. In this respect also, Justice Kennedy seems willing to recognize at least some degree of discriminatory treatment of corporations based on their "identity."

Note that President Obama may therefore have been wrong on the merits to accuse the Court in *Citizens United* of "open[ing] the floodgates to special interests—including foreign corporations—to spend without limit in our elections,"¹³⁰ and Justice Alito may have been correct in mouthing "not true" in response during Obama's State of the Union speech.¹³¹ Whether President Obama or Justice Alito or both were impolite, I leave to others better versed in political etiquette to decide.¹³²

Notwithstanding any faux pas in expression, the fact that many different investors and employees from different countries are involved in business enterprises in a global economy suggests that the "foreign national" restriction may in fact cut back quite substantially on the long-term scope of *Citizens United*.¹³³ An institutional theory of the firm suggests that revisiting the compromise of PACs may provide a viable solution to channel political interests within firms (and unions and perhaps other organizations as well) appropriately and in keeping with the revealed preferences and views of U.S. citizens.

128. *Id.* at 362.

129. *Id.*

130. Address Before the Joint Session of the Congress the State of the Union, 1 PUB. PAPERS 75, 81 (Jan. 27, 2010).

131. See TIMOTHY K. KUHNER, CAPITALISM v. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION 90 (2014), for one version of the interaction.

132. Compare Glenn Greenwald, *Justice Alito's Conduct and the Court's Credibility*, SALON (Jan. 28, 2010), http://www.salon.com/2010/01/28/alito_2/with_Ashby_Jones_On_Obama_v_Alito_Who's_Right_Here's_Your_Answer, WALL ST. J. L. BLOG (Jan. 29, 2010), <http://blogs.wsj.com/law/2010/01/29/on-obama-v-alito-whos-right-heres-your-answer/>.

133. See Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 605–10 (2011) (arguing that future cases will adjust the holding of *Citizens United* to control foreign influence on elections); Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 703 (2011) ("The Court . . . is likely to uphold the restrictions to prevent undue foreign influence over elections.").

Just as the majority opinion in *Citizens United* suffers from theoretical weaknesses, Justice Stevens' lengthy dissenting opinion is also vulnerable to critique from an institutional perspective on the firm. He privileges shareholders over other business participants with his emphasis of a "shareholder protection rationale."¹³⁴ As previously discussed, there is also good reason to expand this argument to include what might be called an employee protection rationale and a creditor protection rationale.¹³⁵ In his dissent, Justice Stevens does not entertain these possibilities because he implicitly adopts a shareholder-centered view of the corporation. In a footnote, he explicitly declines to consider that different theories of the firm may matter.

Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model. . . . It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern.¹³⁶

Although this view may seem consistent with Dewey's argument that corporations are whatever the law says they are, an appeal simply to the standards of "human welfare" suggests no constitutional limitations to the government's power to regulate firms at all. Constitutional protections, however, should be based on sturdier foundations than general calculations of "human welfare." Justice Stevens misses an opportunity here to engage with deeper questions about the nature of corporate enterprises and grasps hold of a false dichotomy for support: arguing that the Court's decision favoring corporate rights of political speech will "'enhance the relative voice' of some (i.e., humans) over others (i.e., nonhumans)."¹³⁷

Justice Stevens' failure to recognize *any* constitutional limitations protecting corporate rights may have been one reason that Justice Scalia was provoked (although he was often easily provoked) to retort that the dissenters had dredged up "corporation-hating quotations" to support their cause for regulation.¹³⁸ I do not dispute that the larger issue here in the background is the problem of corruption emanating

134. See *Citizens United*, 558 U.S. at 447, 475–79 (Stevens, J., concurring in part and dissenting in part).

135. See also *supra* notes 110–20 and accompanying text.

136. *Citizens United*, 558 U.S. at 465 n.72 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

137. *Id.* at 424 (Stevens, J., concurring in part and dissenting in part) (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

138. *Id.* at 386 (Scalia, J., concurring).

from large business enterprises, which history and much contemporary academic analysis support (Justice Scalia to the contrary notwithstanding).¹³⁹ *Citizens United* has been decried as the end of campaign finance law.¹⁴⁰ And surely—combined with more recent cases, such as *McCutcheon v. Federal Election Commission*¹⁴¹—the “anticorruption rationale” appears to have been set aside by the current Court, at least in general terms.¹⁴² But I leave for others to discuss these larger institutional problems of corruption and campaign finance law.

My contribution here is to remark that an institutional theory of the firm helps provide some concrete details about how business firms work, who they involve, and how they set their priorities for internal governance—including political priorities.¹⁴³ A focus on the concrete facts and relations of business firms reveals a continuing need to focus on methods to preserve a democratic political process from undue influence and corruption by large economic interests.¹⁴⁴ Political corruption is a long-standing social problem that has not only been associated with the advent of large business firms but also with the great inequalities of wealth that divide individuals.¹⁴⁵ As Justice Breyer writes in his *McCutcheon* dissent: “Where enough money calls

139. For a several sources on the large issue of corruption in politics, see ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY* (reissue ed. 2000); BROOKS JACKSON, *HONEST GRAFT: BIG MONEY AND THE AMERICAN POLITICAL PROCESS* (2d ed. 1990); ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* (2009); ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1988); and SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999).

140. See Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 2 (2012).

141. 134 S. Ct. 1434 (2014) (striking down statutory limitations on the total amount of money that individuals may contribute to many different political candidates).

142. The *McCutcheon* Court reads *Citizens United* as requiring evidence of quid pro quo corruption or “its appearance” for a constitutionally valid regulation. *Id.* at 1441. At the same time, *McCutcheon* accepts restrictions on contributions by individuals to particular candidates, even though it struck down restrictions on aggregate contributions by individuals made to many different candidates. *Id.* at 1442–43, 1451 (citing *Buckley*, 424 U.S. at 27).

143. As a practical matter, one reason to think that *Citizens United* may not prove as revolutionary as some fear is that many large corporations may take a neutral political stance, not wishing to displease customers, suppliers, or others, who may have different political loyalties. See Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J. L. & PUB. POL’Y 639, 653 (2011) (arguing that firms are likely to adopt “prudentially pusillanimous policies” when it comes to political involvement, even after being granted greater freedom of maneuver under *Citizens United*).

144. Dewey, *supra* note 1. See Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1399–1401 (2013), for an argument against adopting a judicial definition of corruption, including the narrow quid pro quo assumptions in *Citizens United* and, subsequently to her article, *McCutcheon*.

145. See ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* (2014), for a historical overview in the U.S. context. See ROBERT E. MUTCH, *BUYING THE VOTE: A HISTORY OF CAMPAIGN FINANCE REFORM* (2014), for an

the tune, the general public will not be heard. Insofar as corruption cuts the link between political thought and political action, a free marketplace of political ideas loses its point.”¹⁴⁶ Close attention to the legal structure of firms and the complexity of the relationships among business participants exposes major fault lines that legal reforms may then help to secure and manage with improved effectiveness and fairness.

B. Hobby Lobby: *Business and Freedom of Religion*

Like *Citizens United*, *Hobby Lobby* illustrates that competing theories of the firm can interact in a subterranean and perhaps not always conscious manner among the Justices of the Supreme Court. Again here, the majority opinion, this time written by Justice Alito (with the same colleagues joining as in *Citizens United*), adopts a bottom-up participant theory of the firm.¹⁴⁷ And the main dissenting opinion by Justice Ginsburg invokes a top-down concession theory. In support of her view, she cites both *Dartmouth College*, which she acknowledges was decided “nearly two centuries ago,” as well as Justice Stevens’ claim in *Citizens United* that corporations “have no consciences, no beliefs, no feelings, no thoughts, no desires.”¹⁴⁸

Justice Alito eloquently counters this last sentiment in his opinion. *Hobby Lobby* involved three religiously oriented for-profit corporations (Hobby Lobby, Mardel, and Conestoga), who claimed that requirements under the Patient Protection and Affordable Care Act (ACA)¹⁴⁹ violated their rights under the Religious Freedom Restoration Act of 1993 (RFRA).¹⁵⁰ More specifically, the owners claimed

analysis focusing on the underlying economic inequality as the fundamental problem causing political corruption; *see also supra* note 139.

146. *McCutcheon*, 134 S. Ct. at 1467 (Breyer, J., dissenting). The relatively recent report of a hedge fund entrepreneur’s large political contributions supports this concern. The generous backer organized contributions of \$31 million for a new network of “superPACs” enabled by *Citizens United* and its progeny, including *McCutcheon*, to launch the presidential bid of Ted Cruz. *See* Eric Lichtblau & Alexandra Stevenson, *Behind Cruz Campaign’s Striking Start, a Donor of Few Words*, N.Y. TIMES, Apr. 11, 2015, at A1.

147. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60, 2767–68 (2014).

148. *Id.* at 2794 (Ginsburg, J., dissenting) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissent in part)); *see also supra* note 83 and accompanying text.

149. Pub. L. No. 111-148, 124 Stat. 110 (1993) (codified as amended in scattered sections of 42 U.S.C.).

150. *Hobby Lobby*, 134 S. Ct. at 2759, 2764–66. As one pundit noted, the RFRA acronym as a spoken word has “the unfortunate resemblance to the sound of a hoarse Labrador retriever.” Gail Collins, *Indiana Loses Its Game*, N.Y. TIMES, Apr. 2, 2015, at A27. *See generally* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to bb-4) (2012)).

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that the ACA required them to provide funding for an insurance scheme for their employees to cover four methods of contraception, which they deemed “abortifacients” and, therefore, against their religious principles to support.¹⁵¹ In his majority opinion, Justice Alito explains that the family-connected founders and owners of these corporations employed “a familiar legal fiction” to establish their for-profit corporate businesses. He writes:

[I]t is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations’ financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.¹⁵²

Justice Alito concludes: “Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”¹⁵³ This is an excellent statement of the bottom-up participant view of the firm.

But notice a subtle shift in this description. Justice Alito’s conception of the firm changes from a “body of law” that “specifies the rights and obligation of the people (including *shareholders, officers, and employees*)” to one that defines a claim for the protection of “the religious liberty of the humans who *own and control* those companies.”¹⁵⁴ An important key question here is: What happened to the rights of employees when the topic of religion within the firm arose? They simply appear to have been ignored.

An institutional theory of the firm focuses attention on the changing boundary lines of the firm drawn by the law in different circum-

151. *Hobby Lobby*, 134 S. Ct. at 2759, 2764–65. The methods of contraception at issue were two types of “morning after” pills and two kinds of intrauterine devices. *Id.* at 2765. These preventative health care measures had been required for women in health insurance policies under the ACA and through regulations adopted following recommendations from the Institute of Medicine. *Id.* at 2762.

152. *Id.* at 2768.

153. *Id.*

154. *Id.* (emphasis added).

stances. Again, the legal boundaries of firms change according to the question asked.¹⁵⁵ Consider employees: if the question involves the authority of people acting as representatives of the firm and in the firm's name, then the law of agency and organizational structure will determine the answer. For example, an employee acts as the legal "agent" of the firm in situations "within the scope of employment."¹⁵⁶ Contracts entered into by employees bind the firm and are considered authoritative actions by the firm.¹⁵⁷ Similarly, negligence by employees when acting on the job that physically harms other people is attributed by operation of "vicarious liability" to the firm.¹⁵⁸

It is also true, as Justice Alito assumes, that owners and managers have principal roles in the organization of firms, including business corporations. And they have the authority to set the objectives and strategies for the activities of the firm. This role of governance includes organizational values, as Justice Alito nicely describes:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.¹⁵⁹

Justice Alito is correct. Owners and managers usually have the authority to make decisions about a firm's objective, including the values it will follow in terms of its governance, operations, and general activities.¹⁶⁰

155. See *supra* note 120 and accompanying text.

156. ORTS, *supra* note 16, at 56–61, 139–40; see also Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997) (discussing modern vicarious liability).

157. ORTS, *supra* note 16, at 57 (citing 2 RESTATEMENT (THIRD) OF AGENCY §§ 6.01, 6.02, 6.03 (AM. LAW INST. 2006)).

158. *Id.* (citing 2 RESTATEMENT (THIRD) OF AGENCY §§ 7.03(2)(b), 7.07, 7.08)).

159. *Hobby Lobby*, 134 S. Ct. at 2771.

160. Exceptions come to mind in situations in which employees have a role in the governance of firms, such as through representation of rank-and-file employees on the board of directors, European-style works councils, or collective bargaining over nondistributional issues. For a general overview of these situations, see Margaret M. Blair & Mark T. Roe, *Introduction*, in *EMPLOYEES AND CORPORATE GOVERNANCE* 1, 1–2 (Margaret M. Blair & Mark J. Roe eds., 1999);

However, the governance of firms also occurs within a background of statutory and constitutional limitations that protect the rights as well as the interests of employees and other business participants. Justice Alito's opinion recognizes that important laws regarding employment discrimination will trump religious values asserted by owners, at least with respect to racial discrimination in employment defended by an appeal to religious authority.¹⁶¹ It is unfortunate that his opinion does not also expressly refer to other forms of employment discrimination, though one can infer that he, and most of his brethren, would uphold other legal limitations of discrimination against employees on the basis of sex, gender, ethnicity, national origin, and, yes, even religion!¹⁶²

The real question in *Hobby Lobby*, then, is: Who counts as a relevant member of a firm for purposes of deciding questions of the "free exercise" of religion?¹⁶³ As with many questions when business meets religion (or, as in *Citizens United*, when business meets politics), the

Brett H. McDonnell, *The Curious Incident of the Workers in the Boardroom*, 29 HOFSTRA L. REV. 503, 504–05 (2000) (book review); Joel Rogers & Wolfgang Streeck, *The Study of Works Councils: Concepts and Problems*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 3, 4 (Joel Rogers & Wolfgang Streeck eds., 1995). These exceptions prove the general rule, however, of managerial and capital ownership control of most firms.

161. *Hobby Lobby*, 134 S. Ct. at 2783 ("The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." (citation omitted)).

162. One of the big questions following *Hobby Lobby* is whether the case will sanction religiously motivated discrimination based on sexual orientation. See Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 94 (2015) ("What about discrimination based on sexual orientation? This context is highly likely to present the next cutting edge of RFRA claims by both religious nonprofits and for-profit companies."). Most recently, state legislation has mimicked *Hobby Lobby* to provide a possible legal basis for discrimination against business customers based on religious objections to sexual orientation. See Collins, *supra* note 150 (discussing Indiana's statute and the response to it); Monica Davey et al., *After Rights Clash, Two States Revise Legislation*, N.Y. TIMES, Apr. 3, 2015, at A12 (describing controversy over statutes in Indiana and Arkansas). The U.S. Supreme Court's landmark decision recognizing a constitutional right of same-sex marriage, following a line of precedents expressing disapproval of discrimination based on sexual orientation, suggests that the judicial winds are blowing strongly against such religious rights claims. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593, 2608 (2015); see also *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2006) (striking down a criminal statute forbidding homosexual acts); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (invalidating a state constitutional provision aimed at disallowing nondiscrimination state statutes or municipal ordinances).

163. *Hobby Lobby* is a "free exercise" case, though as translated through a statutory riff following previous Supreme Court decisions. For an authoritative account of the two pillars of freedom of religion under the Free Exercise Clause and the Establishment Clause of the First Amendment, see 1–2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION (2009).

answers are not easy. For example, laws against employment discrimination have often been drafted to exclude very small business firms, as measured by the number of employees. The ACA, which was at issue in *Hobby Lobby*, exempts firms with less than fifty employees.¹⁶⁴ The scope of other statutes, such as the principal federal statutes prohibiting discrimination in employment based on characteristics of race, color, religion, sex (including pregnancy), national origin, age, disability, or genetic information, are also limited by business size.¹⁶⁵ As Justice Ginsberg observes in her dissent, these statutes set varying limits for exemptions, ranging from less than fifteen employees (for race, color, religion, national origin, or sex) to less than fifty employees (for age).¹⁶⁶ One way to explain these limitations is that they accord some degree of deference and legal immunity to small family businesses, as well as other closely knit firms holding religious values. As firms grow larger, however, they then should arguably participate with a more “public” face that accommodates general views of permissible practices in areas such as employment.¹⁶⁷

With respect to religion and business firms, the Court in *Hobby Lobby* gets the answer wrong because it sees owners and top managers as having a greater claim to assert religious values than the employees who work for them. There is no dispute that the plaintiff firms in *Hobby Lobby* must comply with employment discrimination laws, which virtually assure that the firms are comprised of employees with a diversity of religious (and nonreligious) values. At the time of litigation, Hobby Lobby had 13,000 employees, Conestoga had 950, and Mardel had 400.¹⁶⁸ Given that the firms must not discriminate based on religion in their hiring practices, it is safe to assume that at least some women employees in these firms disagree with the religious principles of their employers. Moreover, the employees’ rights to contraception are not minimal. As Justice Alito recognizes, the Constitu-

164. *Hobby Lobby*, 134 S. Ct. at 2762 (citing 26 U.S.C. §§ 4980H(a), 4980H (c)(2), 5000A(f)(2) (2012)).

165. For this list of current prohibited categories of employment discrimination, see *Prohibited Employment Practices/Policies*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/practices/index.cfm> (last visited Jan. 27, 2016).

166. *Hobby Lobby*, 134 S. Ct. at 2800–01 (Ginsburg, J., dissenting). Notably, Title VII “expressly exempt[s] churches and other nonprofit religious institutions but not for-profit corporations.” *Id.* at 2773 (citing the statute and the government’s brief). However, Justice Alito does not find this argument persuasive with respect to drawing an analogous line with respect to the ACA because the statute is not explicit in the same way. *Id.*

167. See generally ORTS, *supra* note 16, at 109–31 (describing the “public” face of “private” business firms). Another argument favoring small businesses in this context involves the greater transaction costs of compliance for them as compared with larger businesses.

168. *Hobby Lobby*, 134 S. Ct. at 2764–65.

tion has been interpreted to include a right of privacy to use contraception.¹⁶⁹

A good argument can therefore be made that religious rights should be recognized in situations in which the members of the firm—including employees—are likely to share the same religious affiliation. Carving out small firms of less than fifteen employees seems to be about right as an approximation, recognizing that a somewhat arbitrary line must be drawn somewhere. However, the scope granted in *Hobby Lobby* with respect to thousands of employees appears much too wide if employees' religious and other constitutional rights are taken seriously and respected. The Court's focus, by the way, on "close corporations" is a red herring. As Justice Ginsburg observes in her dissenting opinion, closely held corporations can become quite large in terms of both capitalization and numbers of employees.¹⁷⁰ For instance, the family-owned Mars candy company accounts for about \$33 billion in annual revenues and around 72,000 employees. Cargill is a closely held corporation with more than \$136 billion in revenues and approximately 140,000 employees.¹⁷¹ At least, however, Justice Alito's opinion counts out large publicly traded corporations.¹⁷² The logic of his analysis regarding family-owned firms with strong and consistent advocacy of religious principles as founding principles should also limit the potential expansion of *Hobby Lobby* to firms with diversity among employees as well as diversity among owners.

The saving grace (so to speak) appears in the least restrictive means that the Court maintains is available to secure the important rights and interests of women employees affected by the Court's decision. Justice Alito points out that the Obama Administration may use an alternative method of insurance provisioning that has been created to

169. In Justice Alito's words: "Under our cases, women (and men) have a constitutional right to obtain contraceptives . . ." *Id.* at 2779–80 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

170. *Hobby Lobby*, 134 S. Ct. at 2797 n.19 (Ginsburg, J., dissenting) ("'Closely held' is not synonymous with 'small.'").

171. *Id.* (citing *America's Largest Private Companies 2013*, FORBES, (Dec. 18, 2013), <http://www.forbes.com/sites/andreamurphy/2013/12/18/americas-largest-private-companies-2013/>).

172. *Id.* at 2774. Still, Justice Alito's reasoning in this context is troubling. He argues that "it seems unlikely" that "corporate giants," including publicly traded firms, "will often assert RFRA claims" because of "numerous practical restraints." *Id.* "For example," he continues, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable." *Id.* This answer does not alleviate concerns that many large privately held enterprises could "agree to run a corporation under the same religious beliefs" and ignore the religious diversity of their employees.

serve the employees of religious organizations and religious nonprofits.¹⁷³ Under this accommodation, argues Alito, the effect “on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.”¹⁷⁴

This consideration suggests the potential for a narrow reading of the *Hobby Lobby* holding, and the deciding vote cast by Justice Kennedy reinforces this interpretation. In his concurring opinion, Kennedy recognizes the tensions involved between the religious beliefs of employers and those of employees. Leaning heavily on the availability to the government of a least restrictive alternative, he argues more generally that these questions are not easy ones. In his words:

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult.¹⁷⁵

In *Hobby Lobby*, the important rights of employees—which include religious rights as well as constitutional rights of privacy—are masked by an implicit theory of the firm that hides employees from proper recognition and possible coverage.¹⁷⁶ Employees should have the right to express their beliefs and establish their own “religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.”¹⁷⁷ It is true, as the Court holds, that the term “person” as defined in RFRA—as well as the Constitution—refers to business firms as well as individual people.¹⁷⁸ What remains to be done, however, is to argue in legal terms about who counts as a member of a firm for the purposes of respecting fundamental religious (and

173. *Id.* at 2780–83.

174. *Id.* at 2760.

175. *Id.* at 2785 (Kennedy, J., concurring) (citations omitted).

176. The argument favoring the recognition of employees’ religious rights was urged on the Court in an amicus brief of religious and nonprofit organizations, including representatives of Christian, Hindu, Jewish, Unitarian Universalist, and other faiths. Brief for Religious Orgs. as Amici Curiae Supporting the Government, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354/13-356), 2014 WL 333898.

177. *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

178. *Id.* at 2768 (citing RFRA’s reference to “a person exercising religion” and the Dictionary Act, 1 U.S.C. § 1 (2012), defining “person” to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”).

nonreligious) rights and values. The answer is neither given in the dictionary (or the Dictionary Act) nor provided by old theories of the firm. Once again, as Dewey observes, larger questions are implicated in this legal definition involving historical “struggles and movements,” including those regarding the relationships of business and religion in society.¹⁷⁹

Perhaps surprisingly, Justice Ginsburg’s vigorous dissent does not grasp the nettle of the problem in *Hobby Lobby* in terms of a legal theory of the firm either. Instead, her opinion implicitly concedes the importance of the women’s rights involved by inexplicably agreeing to characterize female employees as “third parties who do not share the owner’s religious faith.”¹⁸⁰ Why, though, should one characterize employees as third parties in their own firms with respect to questions of freedom of religion and choice about a constitutionally protected area of privacy (i.e., contraception)?¹⁸¹ The failure to include a theory of the firm that can encompass employees as well as owners leads to an inadvertent devaluation of employees’ religious and other fundamental rights.

As previously noted, Justice Ginsburg follows an abstracted top-down theory of the firm.¹⁸² This posture puts her at a conceptual dis-

179. See *supra* notes 31–32 and accompanying text. As some scholars and commentators warn, organized religions pose a significant danger to individual rights when they impose or attempt to impose their religious values on others. See e.g., MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008); MARTHA C. NUSSBAUM, *THE NEW RELIGIOUS INTOLERANCE: OVERCOMING THE POLITICS OF FEAR IN AN ANXIOUS AGE* (2012); KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* (2006); WHOSE GOD RULES? IS THE UNITED STATES A SECULAR NATION OR A THEOLEGAL DEMOCRACY? (Nathan C. Walker & Edwin J. Greenlee eds., 2011) (collecting essays). For broader social theoretical analysis, see also JURGEN HABERMAS, *BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS* (2008).

180. *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

181. As Justice Ginsburg notes, the interests of the employees’ dependents are also implicated. *Id.* I would argue that these dependents are the true “third parties” involved, and they also deserve protection. See Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 *DRAKE L. REV.* 433, 437–38 (2014), and Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions After Hobby Lobby*, 82 *U. CHI. L. REV.* 1897, 1905–07 (2015), for strong arguments that future cases should take the effects on third parties much more seriously in religious accommodation situations than does *Hobby Lobby*. Loewentheil makes the point also that characterizing women in these cases as “third parties” is a misnomer. She prefers the term “rights-holders,” though for her the relevant relationship is between women and rights of statutory coverage provided by the government. Loewentheil, *supra* note 181, at 467–68. I am arguing here for employees to be recognized as having an ontological status as members of their firms for purposes of analysis concerning religious and constitutional rights regarding their own health care, which may include access to contraception.

182. See *supra* note 148 and accompanying text.

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advantage to Justice Alito. At the same time that the Court emphasizes the “rights” of the owners and managers of Hobby Lobby, Conestoga, and Mardel, Justice Ginsberg is reduced to appealing to the “significant interests” of women employees.¹⁸³ A failure to step into an analysis of the real workings of firms—which reveals employees as a vital component of them—allows the majority to claim, at least rhetorically, the high ground of “religious rights” as opposed to mere health “interests.” Employees are seen as external to the firm rather than internal—which concedes the authority to the firm’s owners to make decisions about religious values even when these decisions primarily affect the rights of the employees.

Considering this last point may help to navigate the boundaries of religion and business in future cases after *Hobby Lobby*, especially those that have no easy accommodation available as a least restrictive alternative that may please everybody (with the exception of the government bureaucrats forced to create the new program or make adjustments to an existing one).¹⁸⁴ Justice Alito is correct that business governance involves the selection and choice among values, and many management decisions may permissibly make reference to these values.¹⁸⁵ For example, it is difficult to imagine that religious principles should somehow be segregated from everyday business ethics.¹⁸⁶ At the same time, Justice Ginsburg is also correct to remind us of the general principle that “[y]our right to swing your arm ends just where the other man’s nose begins.”¹⁸⁷ In cases to be decided after *Hobby Lobby*, the right of private business owners to exercise their freedom

183. See *Hobby Lobby*, 134 S. Ct. at 2790 (Ginsburg, J., dissenting); see also *id.* 2799 (Ginsburg, J., dissenting) (referring to employees’ “interests” rather than rights).

184. Justice Alito recognized this burden on the government but argued that the need to respect religious views of business owners was sufficient to justify the additional expense. *Id.* at 2781. In future cases, the Court recognized that “cost may be an important factor in the least-restrictive-means analysis” weighing religious rights against government efficiency. *Id.*

185. On this score, Justice Alito mentions the persuasive example of new “hybrid corporate forms,” including the “benefit corporation,” which has been recognized by statutes passed in over one-half of the states and allows for the creation of “a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.” *Id.* at 2771. See generally ORTS, *supra* note 16, at 206–15 (providing an overview of “hybrid social enterprises,” including benefit corporations).

186. Cf. Martin S.J. Calkins, *Recovering Religion’s Prophetic Voice for Business Ethics*, 23 J. BUS. ETHICS 339, 347 (2000) (arguing in favor of including religious values in business ethics); Timothy L. Fort, *Religion and Business Ethics: The Lessons from Political Morality*, 16 J. BUS. ETHICS 263 (1997) (surveying various political theories arguing for different views of treating religion with respect to business ethics).

187. *Hobby Lobby*, 134 S. Ct. at 2791 (Ginsburg, J., dissenting) (alteration in original) (quoting Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

of religion should end at the bodies of women employees who may disagree and hold different fundamental religious and moral values.¹⁸⁸

III. CONCLUSION

Developing a theory of the firm by examining the concrete facts and relations of the role of law in their construction can provide greater analytical clarity to address controversies that will no doubt continue with respect to the institutional lines separating business firms from the processes of democratic government, on one hand (with a gesture to *Citizens United*), and the commitments of diverse religions, on the other (with a wave to *Hobby Lobby*). In this Article, I hope to have made the case that the legacy of John Dewey, as supported by contemporary philosophers of organizational ontology, such as John Searle and Philip Pettit, urges scholars, judges, and policy makers to pay close attention to the legal foundations of business firms rather than continue to rely implicitly on nonlegal theories of corporations and firms that have plagued the law for generations. Doing so may help clear the undergrowth of unhelpful arguments positing that firms are either composed only of their participants (and sometimes only a select class of participants) or are merely governmental creations that can therefore be manipulated by the government at will. A broader institutional theory of the firm reveals a diversity of real individual interests and complex constellations of rights involved in firms. Taking greater care to understand the legal relationships and social ontology of business firms may pave a road toward regulatory and judicial decisions that can best address continuing large-scale social issues, including combating corruption, respecting diverse faiths, and finding an appropriate balance among the institutions of business, government, and religion in our complex modern society.¹⁸⁹

188. See Amy J. Sepinwall, *Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015), for an argument that it makes sense, in some circumstances, to recognize the ability of corporate managers and owners to exercise religious rights through their corporations (in the absence, I would add, of circumstances that would violate similar fundamental rights of their employees or other managers and owners).

189. Another direction forward suggested by Amy Sepinwall, which I have not emphasized here, would focus on a "teleological" analysis concerning the purpose of an organization rather than the "ontological" analysis about the nature of an organization, which I have focused on in this Article. See *id.* at 179. A teleological approach is probably useful at least in drawing some bright lines separating nonprofit and for-profit organizations, but this topic lies beyond the scope of this Article. I believe that following a teleological approach to organizational analysis can be consistent with an ontological approach.