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DePaul Law Review

Volume 65
Issue 2 *Winter 2016 Twenty-First Annual Clifford Symposium on Tort Law and Social Policy*

Article 2

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CORPORATIONS AND EXPRESSIVE RIGHTS: HOW THE LINES SHOULD BE DRAWN

Margaret M. Blair[1]

INTRODUCTION

In the last seven years, the U.S. Supreme Court has significantly expanded the range of constitutional and statutory expressive rights that it has granted to corporations. It did so broadly in one case, signaling that freedom of speech is apparently available to all corporations, regardless of what they are speaking on,[2] and, additionally, it did so in another case (a freedom of religion case) without carefully distinguishing which types of corporations would be granted the rights and which types would not.[3] In an article I previously published with Elizabeth Pollman, we argued that a broad-brush grant of expressive rights across the board to all corporations cannot be justified even though it may be appropriate to recognize certain constitutional rights for specific corporations.[4] To grant rights in a sensible way, the U.S. Supreme Court must more carefully articulate its rationale for granting some rights to certain corporations. In particular, the Court needs to develop a framework for thinking about why particular types of corporations should have certain rights in certain circumstances, while other corporations should not automatically be granted those same

1. Milton R. Underwood Chair in Free Enterprise, Professor of Law, Vanderbilt Law School. Special thanks to Elizabeth Pollman who shared her wisdom with me and to the participants in the 21st Annual Clifford Symposium on Tort Law and Social Policy: *The Supreme Court, Business and Civil Justice* at DePaul University College of Law.

2. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."). "[T]he Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.*

3. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759, 2785 (2014) (specifying that the case at issue involved a "closely held" corporation and that the Court's holding applies to "closely held corporations"). For a discussion of how the law should delineate which corporations are closely held when applying the Patient Protection and Affordable Care Act's contraception mandate (the issue at stake in *Hobby Lobby*), see Robert P. Bartlett III et al., Hobby Lobby *and Closely Held Corporations*, CLS BLUE SKY BLOG (Oct. 13, 2014), http://clsbluesky.law.columbia.edu/2014/10/13/hobby-lobby-and-closely-held-corporations/.

4. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV., 1673, 1742–43 (2015) (discussing the need for the U.S. Supreme Court to draw lines between corporations in determining their rights).

rights just because they are corporations.[5] In other words, not all corporations are alike when it comes to the allocation of corporate constitutional rights. The U.S. Supreme Court must "draw lines" to map out the contours of corporate constitutional rights. Professor Pollman and I proposed a framework for understanding the U.S. Supreme Court's corporate rights decisions based on the idea that when rights are granted to corporations, this granting of rights must be based either on a "derivative" rationale (the rights are derived from some group of natural persons) or on an "instrumental" rationale (granting the right to the corporation protects the rights of some parties outside the corporation).[6] Neither of these rationales justifies an across-the-board grant of expressive rights to all corporations. I explore the implications of this framework for corporate constitutional rights in this Article.

The problem arises because many types of corporations exist. The National Association for the Advancement of Colored People (NAACP), ExxonMobil Corp. (ExxonMobil), Hobby Lobby Stores (Hobby Lobby), Inc., Alibaba Group Holding Ltd. (Alibaba), the Mayo Clinic, and Grandma's Bakery, which sells homemade bread and muffins at the local farmers market, have very little in common with each other except that they are all organized as corporations or similar entities.[7] Each of these six organizations uses the corporate

5. As I will discuss in more detail *infra*, the U.S. Supreme Court has, at times, distinguished newspaper and media companies from other companies with respect to granting speech rights. *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1036–37 (2011) (discussing the Court's press jurisprudence and treatment of the press); *infra* Part III.A.1. The Court indicated that religious liberty rights under the Religious Freedom Restoration Act, as recognized in *Hobby Lobby*, were limited to religious nonprofits and closely held, for-profit corporations. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2785 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA."). Congress and the Court have also historically recognized a distinction between for-profit and nonprofit corporations for some purposes. *See* James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461, 504–11 (2015) (discussing the for-profit versus nonprofit dichotomy in the freedom of association doctrine). And, since the 1930s, federal securities laws have distinguished between corporations with publicly traded securities and those whose securities are not publicly traded. *See, e.g.*, Securities Exchange Act of 1934, Pub. L. No. 73-291, § 12, 48 Stat. 881, 892–94 (codified as amended at 15 U.S.C. § 786 (2012)); *see also* Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. (forthcoming 2016) (manuscript at 12) (discussing the various ways that the law distinguishes different types of corporations).

6. Blair & Pollman, *supra* note 4, at 1742–43. R

7. The author expresses her apologies to the multiple actual organizations with the name "Grandma's Bakery" that can be found by conducting a Google search. As used in this Article, "Grandma's Bakery" is a hypothetical corporation that represents a particular type of corporation designated by the Internal Revenue Service (IRS) as an "S Corporation." The IRS stated that for 2003, S Corporations, which can have no more than seventy-five shareholders, "accounted for 61.9 percent of the 5.4 million corporate returns filed." Kelly Luttrell, *S Corporation Returns, 2003*, SOI BULL., Spring 2006, at 91, 93, https://www.irs.gov/pub/irs-soi/spring06bul.pdf.

form for somewhat different reasons and uses somewhat different aspects of corporate law. The NAACP is a nonprofit membership corporation that has no shareholders but over 500,000 members and supporters.[8] ExxonMobil is a for-profit business corporation that operates globally with hundreds of subsidiaries and tens of thousands of employees and shareholders.[9] Additionally, a large proportion of ExxonMobil's stock is held by institutional investors.[10] Hobby Lobby is, famously, a family-owned business corporation with only five shareholders[11] but over 600 stores[12] and more than 20,000 employees.[13] Alibaba is a holding company chartered in the Cayman Islands. It has a complex contractual relationship with several operating corporations in China that actually carry out the business activities of Alibaba. The shares of Alibaba that trade on the New York Stock Exchange are not equity shares in the operating companies—they are "American Depository Shares" (ADSs), which are interests in the Cayman Islands' entity.[14] The Mayo Clinic is a complex network of related nonprofit corporations. It has no shareholders[15] but has thousands of employees, customers, and donors.[16] Grandma's Bakery is organized as a corporation but only has one shareholder and two employees.[17]

One important reason why all of these organizations use a corporate form is that when a corporation is formed, the law creates a separate legal entity that then holds the property and enters into contracts

8. *See NAACP: 100 Years of History*, NAACP, http://www.naacp.org/pages/naacp-history (last visited Aug. 20, 2015).

9. *See Exxon Mobil*, FORTUNE 500, http://fortune.com/fortune500/exxon-mobil-2/ (last visited June 13, 2016) (reporting the number of employees); *Exxon Mobil Corporation (XOM)*, YAHOO! FIN., https://finance.yahoo.com/q/mh?s=XOM+Major+Holders (last visited July 30, 2015) (reporting the number of shareholders).

10. *Exxon Mobil Corporation (XOM)*, *supra* note 9. R

11. Technically, the five members of the Green family operate the company through a trust. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014) ("The Greens operate Hobby Lobby . . . through a management trust, of which each member of the family serves as trustee.").

12. *Our Story*, HOBBY LOBBY, http://www.hobbylobby.com/about-us/our-story (last visited Aug. 21, 2015).

13. *#118 Hobby Lobby Stores*, FORBES, http://www.forbes.com/companies/hobby-lobby-stores/ (last visited Dec. 31, 2015).

14. Alibaba Group Holding Ltd., Registration Statement (Form F-1) (May 6, 2014), http://www.sec.gov/Archives/edgar/data/1577552/000119312514184994/d709111df1.htm.

15. *See Frequently Asked Questions*, MAYO CLINIC, http://www.mayoclinic.org/giving-to-mayo-clinic/contact-us/frequently-asked-questions (last visited Aug. 21, 2015).

16. *See About Mayo Clinic*, MAYO CLINIC, http://www.mayoclinic.org/giving-to-mayo-clinic/contact-us/frequently-asked-questions (last visited Aug. 21, 2015).

17. *See supra* note 7. R

with other parties to carry out its activities.[18] In the nineteenth century, when the U.S. Supreme Court began recognizing corporations as entities with constitutional rights, none of the corporations in existence at that time looked like any of the six modern corporations mentioned *supra*. They had likely come into existence by means of special charters issued by a state to local merchants or business people, specifically to carry out some enterprise or infrastructure project, such as building a bridge or operating a bank, that would provide services to the community.[19] Their charters imposed fairly strict limits on what the corporations could do.[20] But, like the people who form corporations today, the organizers of the early corporations found the corporate form useful because the form made it possible to commit resources to an enterprise that could not be withdrawn if one of the participants or investors needed to get out of the investment.[21]

The corporate constitutional rights cases decided by the U.S. Supreme Court in the nineteenth century reinforced this function of the corporate form by determining that with respect to property and contract, the corporation at issue generally had the same rights as a natural person would have in an otherwise similar situation.[22] In deciding these early cases, the rationale that the Court most frequently gave was that granting a right to a corporation protected the rights of natural persons behind the corporation, people who, it was probably fair to assume at the time, had come together to form the corporation or

18. *See* LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 73 (2010) ("The corporation has been regarded from its inception as a legal entity distinct from its owners."); *see also* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 390 (2003) ("[I]ncorporation gave the enterprise 'entity' status under the law . . . ."); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History* 17 n.74 (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 812, 2015), http://dx.doi.org/10.2139/ssrn.2564708 ("To contend that a corporation is the owners of its equity is to reject corporation law itself.").

19. *See* Blair, *supra* note 18, at 423 (identifying the types of corporations that existed in the U.S. during the early nineteenth century); Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 959–67 (2014) (finding that early corporations were chartered by local merchants and wealthy landowners to build bridges, canals, other infrastructure projects and, additionally, to provide insurance and banking services to their communities). **R**

20. Corporate charters were highly specific and narrowly construed in the first half of the nineteenth century. *See, e.g.*, EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 189 (1954) (discussing cases in which courts found contracts void because "all those [contracts] which were not expressly or impliedly authorized, were contracts which were necessarily void").

21. Blair, *supra* note 18, at 390 ("[T]he critical advantage of the corporate form [was] . . . the ability to *commit* capital, once amassed, for extended periods of time—for decades and even centuries."). **R**

22. *See* Blair & Pollman, *supra* note 4, at 1743. **R**

participate in it because of its special ability to structure property and contractual relationships.[23] In each case, the corporation at issue was seen by the Court as standing in the place of natural persons with respect to the property and contract rights.

In the twentieth century, however, the Court began expanding the rights available to corporations to include certain protections for defending against criminal charges[24] plus a variety of "expressive" rights, such as freedom of association, freedom of press, freedom of speech, and, most recently, freedom to exercise religion.[25] The Court, when recognizing that corporations have expressive rights, has continued to use the rationale that it is protecting the rights of the people behind the corporations.[26]

Exercising expressive rights is a quintessential human activity.[27] Individuals may join certain corporations, such as membership corporations or political action organizations, as a way to express certain rights.[28] For example, the NAACP was specifically formed to allow its members to associate together, express their political views, and lobby

23. *Id.* at 1694–95.

24. This was necessary because the Court, in *New York Central & Hudson River Railroad Co. v. United States*, found, for the first time, that a corporation could be held criminally liable for the actions of its agents. 212 U.S. 481, 494–95 (1909); *see also* Blair & Pollman, *supra* note 4, at 1715–16 (discussing the Court's corporate criminal law jurisprudence). R

25. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770, 773 (1976); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958); Hale v. Henkel, 201 U.S. 43, 76–77 (1906), *overruled in part by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964). The recognition that a business corporation can "exercise religion" came in a case involving statutory interpretation, rather than a constitutional right. *See Hobby Lobby*, 134 S. Ct. at 2785. Although the phrase "expressive rights" usually encompasses freedom of speech, press, and association, for purposes of this Article, I am including freedom to practice religion as an expressive right.

26. *See* discussion *infra* Part II.

27. As part of her "capabilities approach" to understanding human rights, Martha Nussbaum, Professor of Law and Ethics at the University of Chicago, wrote of the "legal guarantees of freedom of expression" as "aspects of the general capability to use one's mind and one's senses in a way directed by one's own practical reason[,]" and "guarantees of non-interference with certain choices that are especially personal and definitive of selfhood." *See* Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 277 (1997) (quoting Martha C. Nussbaum, *Human Capabilities, Female Human Beings*, *in* WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 61, 84–85 (M. Nusssbaum & J. Glover eds., 1995)).

28. Nelson, *supra* note 5, at 464–68 (discussing the history of disparate treatment by the U.S. Supreme Court of nonprofit corporations, which have greater institutional autonomy than for-profit corporations to exclude groups as members, on the grounds that nonprofit organizations are "expressive associations," while for-profit corporations are "commercial associations"). R

for their civil rights.[29] Thus, in 1958, the Court found that the NAACP had a constitutional right to withhold its membership lists from Alabama authorities to protect its members' freedom of association.[30]

However, the argument that granting a right to a corporation protects the people behind the corporation is undermined if it is used to recognize a corporate right when the people behind the corporation did not organize through the corporate form to exercise that particular right. Line drawing is essential in the context of expressive rights. Of the people who interact with a corporation, it matters which ones are assumed to be represented by the corporation, what role they play in the corporation, and why they associated together in the corporate form.

In reviewing the Court's reasoning in cases involving expressive rights for corporations, it becomes clear that at least two dimensions have, at times, been important, and should be important, to the Court in every case in which it is deciding whether a particular corporation has a particular right. The first dimension is a "people" dimension—who, exactly, are the people behind a given corporation who are believed to be acting together through the corporation rather than acting alone? What role is each person playing in the corporation? And, who among those people deserves to have her interests taken into account in granting a particular right to the corporation? The question of whose interests should be considered in assigning rights to the corporation is important because, depending on the right at issue, granting a right to a corporation may be a benefit to some of the people involved in the corporation—corporate managers for example—but a detriment to other people, such as customers or employees, who the corporation might be thought to represent for some purposes.

The second dimension is the "purpose" of the corporation at issue. Why did these people come together to act through this corporation? For what purpose was the corporation formed, and is that purpose closely related to the expressive right at issue? The purpose dimension matters because the reason that various people who might be represented by the corporation came together may have nothing at all to do with the right in question. Over one-half of the common shares of

29. *NAACP: 100 Years of History*, *supra* note 8 (discussing the NAACP's history and "principal objective . . . to ensure the political, educational, social and economic equality of minority group citizens of United States and eliminate race prejudice"). R

30. *Patterson*, 357 U.S. at 466. The nonprofit corporate sector became a widely used organizational form in the post-World War II period in the United States when open access to the use of the form came to be regarded as necessary for freedom of association. *See* Jonathan Levy, From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation (unpublished manuscript) (manuscript at 3–4) (on file with author).

ExxonMobil, for example, are owned by big mutual funds and other institutional investors.[31] It is not plausible to imagine that these institutional investors, plus a large number of individual investors, came together for the purpose of advocating or expressing support for certain political candidates. Thus, it would defy reason to say ExxonMobil represents its shareholders for the purpose of expressing political preferences in election campaigns.

In *Citizens United v. Federal Election Commission*,[32] the Court could have decided the case on narrow grounds and reached the same result by observing that Citizens United (the organization) represented a specific group of like-minded people who came together to pool their resources for the purpose of political expression, and, therefore, it was necessary to grant free speech rights to the corporation to protect the freedom of speech rights of the people behind it. But, that is not what the Court did. Instead, the Court decided the case broadly and did not distinguish Citizens United, a nonprofit corporation whose business is political advocacy, from other types of corporations.[33] Although the Court said that its decision was based on the idea that the First Amendment protects speech and does not look to the corporate identity of the speaker,[34] it is very hard to believe that the Court would have reached the same conclusion if the plaintiff in the case had been, say, Alibaba.[35]

In the dimension of corporate purpose, the Court has generally discussed (on a case-by-case basis), or at least made reference to, the purpose of the specific corporations at issue in its rulings on corporate rights.[36] But, it has not always been clear in its decisions how purpose entered into its reasoning.

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31. *See Exxon Mobil Corporation (XOM)*, *supra* note 9. **R**

32. 558 U.S. 310 (2010).

33. *Id.* at 365 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

34. *Id.* at 341 ("The First Amendment protects speech and speaker, and the ideas that flow from each."); *id.* at 347 ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity."); *see* Blair & Pollman, *supra* note 4, at 1725 (discussing **R** the Court's use of an instrumental rationale for its corporate rights rulings with respect to freedom of speech). See *infra* Part III.A.3, for a further discussion of instrumental rationales.

35. *See* Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663, 703 (2011) ("The Court nevertheless is likely to uphold the restrictions to prevent undue foreign influence over elections. To do so, however, will require the Court to blink its own First Amendment theory and its professed constitutional faith.").

36. *See, e.g.*, *Citizens United*, 558 U.S. at 319, 365 (noting that "Citizens United is a nonprofit corporation" but then applying its decision broadly to all corporations); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767–68, 776 (1978) (noting that the appellants were "two national banking associations and three business corporations" but then deciding that the purpose and business of the corporations are irrelevant to its finding that the Massachusetts law at issue inhibited

The Court's failure to satisfactorily address this issue in its recent decision in *Burwell v. Hobby Lobby Stores, Inc.*[37] is a significant source of the controversy surrounding that decision.[38] By contrast, relatively little controversy surrounded the U.S. Department of Health and Human Services's (HHS) earlier decision to grant employee health care plan exemptions regarding birth control methods to a subset of nonprofit, religious-based organizations on the ground that those requirements were inconsistent with the organizations' deeply held religious beliefs that they were dedicated to advancing.[39] Counsel for the government in *Hobby Lobby* argued that this exemption should not apply to the plaintiff corporations because they were for-profit corporations and, thus, could not be in the business of advancing religious beliefs.[40] The Court rejected that argument, stating that nothing in state-level corporate law precludes a corporation, even a for-profit business corporation, from exercising religion.[41] In language that will likely be repeated in corporate law cases in the coming

free speech); N.Y. Cent. & Hudson River R.R. Co., 212 U.S. 481, 494–95 (1909) (discussing facts of the case that were specific to the corporation's business but deciding the case broadly). "[T]here is a large class of offenses . . . wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with [a crime]." *Id.* However, in cases involving the freedom of speech of media corporations, the fact that the corporation involved was a media corporation played a significant role in the Court's decision prior to *Bellotti*.

37. 134 S. Ct. 2751 (2014).

38. *E.g.*, David T. Ball, *The* Hobby Lobby *Surprise: Making Money Can Be a Religious Experience*, BUS. L. TODAY, Dec. 2014, at 1, 3 ("As for the Court's decision on the threshold issue, it definitely surprised many, and angered some."). See James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1565, for an argument that the "[f]ree exercise doctrine should . . . resist corporate claims to exemptions from the law."

39. *See generally Administration Issues Final Rules on Contraceptive Coverage and Religious Organizations*, HHS.GOV (July 28, 2013), http://www.hhs.gov/news/press/2013pres/06/20130628a.html (discussing how the final rule worked to respect houses of worship and other nonprofit religious organizations by creating an exemption for contraceptive coverage in their health plans). There was some controversy surrounding the contraceptive coverage mandate when its outlines were first announced. *See, e.g.*, Erik Eckholm, *Both Sides Eager To Take Birth Control Coverage Issue to Voters*, N.Y. TIMES, Feb. 15, 2012, http://www.nytimes.com/2012/02/16/us/politics/both-sides-eager-to-take-contraception-mandate-debate-to-voters.html; Laurie Goodstein, *Bishops Reject White House's New Plan on Contraception*, N.Y. TIMES, Feb. 11, 2012, http://www.nytimes.com/2012/02/12/us/catholic-bishops-criticize-new-contraception-proposal.html. This is why the government provided the exemption for nonprofit religious organizations. HHS's decision to exempt the religious organizations did not spark further controversy. Christi Parsons et al., *Obama's Birth-Control Compromise Wins Some Support*, BALT. SUN, Feb. 10, 2012, http://articles.baltimoresun.com/2012-02-10/health/sc-dc-0211-contraceptives-fight-20120210_1_president-obama-coverage-valerie-jarrett.

40. Hobby Lobby Stores, Inc., 134 S. Ct. at 2767.

41. *Id.* at 2770 (concluding that the government's argument "flies in the face of modern corporate law"); *see, e.g.*, Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 6–7 (2014) (asserting that corporate law permits corporations to pursue goals other than shareholder wealth maximization); Brett McDonnell, *The Liberal Case for* Hobby Lobby

years, the Court observed that corporate law "does not require corporations to pursue profit at the expense of everything else, and many do not do so."[42] The Court seemed to acknowledge that its holding should not be applied to all corporations by frequently referring to the plaintiff corporations as "closely-held."[43] But, it neither defined "closely held" nor explained why its reasoning should only apply to closely held corporations.[44] Thus, we do not have a clear road map based on that case to tell us which corporations should have protected rights to practice religion and which should not. In sorting that issue out in future cases, the question of corporate purpose will likely play a large role. Indeed, the question in *Hobby Lobby* should not have been whether corporate law in general prohibits for-profit corporations from practicing religion, but whether the plaintiff corporations in the case were, in fact, formed for that purpose.

This Article proceeds as follows. In Part II, I review the people dimension of how the Court should draw lines among the many varieties of corporations in existence. Part III reviews the purpose dimension. Part IV offers some concluding thoughts about how analysis in these two dimensions should guide a court considering expressive rights for corporations.

II. WHO ARE THE PEOPLE INVOLVED IN A CORPORATION?

The question of who the people are behind a corporation is important because the U.S. Supreme Court has clearly said that it recognizes corporations as having rights not because a corporation is a legal "person" but because there are natural persons represented by the corporation whose rights will be best protected by according the right or protection in question to the corporation.[45] The Court adopted this

(Minn. Legal Studies Research Paper Series, Research Paper No. 14-39, 2014), http://dx.doi.org/10.2139/ssrn.2513380.

42. *Hobby Lobby*, 134 S. Ct. at 2771 ("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."). Leo E. Strine, Jr., Chief Justice, of the Delaware Supreme Court has scathingly written of the Court's reasoning and understanding of corporate law in *Hobby Lobby*. *See* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications* (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 804, 2015), http://?dx.doi.org/?10.2139/?ssrn.2555816.

43. Hobby Lobby, 134 S. Ct. *passim*.

44. Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY ch. 8 (Zoë Robinson et al. eds., 2016); Pollman, *supra* note 5 (manuscript at 28). R

45. Blair & Pollman, *supra* note 4, at 1678 ("[T]he Court's reasoning in these [nineteenth century cases] was based on an understanding of corporations as associations of individuals . . . . This tracing of early case law shows that despite public perceptions, the Court has never based its R

rationale early in the nineteenth century and repeated it as recently as in *Hobby Lobby*, asserting that "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of . . . people."[46] "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 the corporation in one way or another."[47] That made sense in the nineteenth century when corporations were relatively simple organizations with stable, identifiable investors and senior executives and the rights at issue were property and contract rights.[48] Shareholders in the earliest business corporations, such as those chartered in the early nineteenth century to build bridges or open banks, were likely to be local merchants and prosperous landowners who wanted the services that the corporation would provide.[49]

A key advantage of early corporations was that they enabled a group of people to act as one "body"[50] for purposes of owning property and entering into contracts. Until the 1950s, the corporate form was not generally available for use by single individuals or by other corporations; in fact, state-level corporate law in the United States typically required that at least three or more natural persons act together to form a corporation.[51] Since the middle of the twentieth cen-

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corporate rights jurisprudence on the idea that a corporation is a constitutionally protected 'person' in its own right.").

46. *Hobby Lobby*, 134 S. Ct. at 2768.

47. *Id.*

48. Blair & Pollman, *supra* note 4, at 1673–74, 1697–1700. **R**

49. *Id.* at 1699–1700; *see* Hansmann & Pargendler, *supra* note 19*;* Joseph H. Sommer, *The* **R**
Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility, 49 BUFF. L. REV., 1011, 1021, 1034–35 (2001) (showing that early banks were chartered by local merchants who wanted to ensure that banking services would be available in their community).

50. *E.g.*, 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (1793) (defining a corporation as "a collection of many individuals, united into one body" that has "perpetual [succession] under an *artificial form*" and is "vested, by the policy of the law, with the capacity of acting, in several respects, as an *individual*").

51. *See* MODEL BUS. CORP. ACT § 47 (AM. BAR ASS'N 1950) ("Three or more natural persons . . . may act as incorporators of a corporation"). As of 1960, according to the notation to Model Business Corporation Act [MCBA], §2.01, "all but nine states specified that the incorporators must be three or more natural persons," and the comment to the 1960 MBCA stated that the Act "follow[ed] the traditional concept of several individuals combining to form a corporation." The MBCA was changed in 1962 to permit incorporation by a single person, or by another corporation.

Case law going back at least to 1871 suggests that when, on occasion, a single individual came to hold all of the shares of a corporation, courts would still recognize that the corporation was a separate entity from the owner of its shares. Margaret M. Blair, *The Four Functions of Corporate Personhood*, *in* HANDBOOK OF ECONOMIC ORGANIZATION: INTEGRATING ECONOMIC THE-

tury, however, most states have permitted corporations to be formed by a single individual or even by other corporations. The result has been a huge proliferation of corporations created for a very wide range of activities and utilizing variations of the corporate form.

Many contemporary corporations cannot plausibly be regarded as representing an identifiable group of natural persons. For example, ExxonMobil operates in over 200 countries through a complex web of more than 150 operating subsidiaries and holding companies.[52] Consider Exxon Neftegas Ltd. (Neftegas), a wholly-owned Russian-based subsidiary of ExxonMobil. Who are the natural persons behind this corporation? Are they the sole shareholder of Neftegas, which is itself a corporation? Are they the shareholders of ExxonMobil, the parent corporation, more than one-half of whom are financial institutions, such as mutual funds and pension plans[53] and many of the rest trade in and out of the stock, sometimes at high speed? Are they the managers of the subsidiary, many of whom may be Russian? And, if we can identify some natural persons whom Neftegas can be understood to represent for some purposes, would they have protected status under the U.S. Constitution? Do we have reason to believe Neftegas represents them for expressive purposes and that recognizing the corporation as having expressive rights would serve to protect those natural persons' expressive rights? For a corporation with these characteristics, it would be extremely troubling if the U.S. Supreme Court decided that the company has the right to participate in the political process in the United States by having an unlimited right to make expenditures supporting a candidate for office.

If the Court is going to follow a decision-rule that grants expressive rights to corporations derivatively—rights that are derived from the natural persons believed to be behind the corporations—then the Court must be able to look behind the corporation to identify who the natural persons are and in what capacity they are involved in the cor-

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ORY AND ORGANIZATION THEORY 440, 458 nn. 35 & 36 (Anna Grandori ed., 2013) (footnote omitted) (citation omitted) (quoting MODEL BUS. CORP. ACT § 2.01 hist. n.2 (AM. BAR ASS'N 2008)). As early as 1888, New Jersey liberalized its corporation laws to permit corporations to merge and hold stock in other corporations. Christopher Grandy, *New Jersey Corporate Chartermonging, 1875–1929*, 49 J. ECON. HIST. 677, 681 (1989). But, corporations could not be formed by another corporation or by a single individual prior to the changes that took place in state law in the 1950s and 1960s. Blair, *supra* note 51, at 452, 458 nn. 35 & 36. **R**

52. ExxonMobil's 2010 annual filing with the Securities and Exchange Commission listed 170 different affiliated companies, most of which were wholly owned by the parent company. *See* Exxon Mobil Corp., Annual Report (Form10-K/A) (Dec. 31, 2010), http://www.sec.gov/Archives/edgar/data/34088/000119312511050134/dex21.htm.

53. *See supra* notes 9–10, 31, and accompanying text (discussing ExxonMobil's shareholders).

poration.[54] Thus, before awarding constitutionally protected expressive rights to a particular corporation, the Court must ask at least four questions about the people behind the corporation from whom these rights could be derived.

A. Are the Relevant Persons Natural Persons or Institutional Persons?

Institutional persons do not inherently have constitutionally protected expressive rights.[55] So, if a corporation is a wholly owned subsidiary of another corporation, then the presumption should be that no constitutionally protected expressive rights for the subsidiary corporation can be derived from natural persons unless a case can be made that the relevant natural persons whose rights are being protected are not the corporation's shareholders (the parent corporation in the case of Neftegas) but, rather, the managers, employees, customers, or some other group of natural persons.[56] A similar result should apply if a majority of the corporation's shares are held by institutional investors, such as pension funds or mutual funds. For these corporations, even if some of the stockholders are natural persons, those natural persons cannot control the corporation,[57] so the corporation cannot be said to represent them for expressive purposes. Again, an exception might apply if a case can be made that the relevant natural persons whom the corporation represents are some other actors, such as managers, employees, or customers.

B. Are the Relevant Natural Persons U.S. Citizens or Residents, or are They Foreign Citizens?

If the relevant group of natural persons whom the corporation is believed to represent are not citizens or residents of the United States, then they may not be entitled to constitutional protections and a cor-

54. The Chief Justice of the Delaware Supreme Court questioned the appropriateness of regarding modern business corporations as "associations of individuals." *See* Strine & Walter, *supra* note 18 (manuscript at 17 n.74) ("It is a stretch to say the modern corporation is an association of individuals, given that most corporate stock is held by institutional investors."). R

55. *See, e.g.*, Blair & Pollman, *supra* note 4, at 1680–96 (citing cases showing that the U.S. Supreme Court grounded its grants of constitutionally protected rights to corporations on the idea that corporations are "associations of persons"). R

56. *See infra* Part II.C. (discussing the various roles that natural persons can play in a corporation).

57. *See, e.g.*, Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 207 (1892) ("It is . . . fundamental in the law of corporations, that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business.").

poration representing their interests has no derivative basis for a claim of constitutional protection for expressive rights.[58]

C. What Role Do People Who Are Associated with the Corporation and Have Expressive Rights Play?

I consider four of the primary roles natural persons can play in corporations; each have different implications for expressive rights questions.

1. Does the Corporation Have "Members"?

If the people behind the corporation are members, as we would find in a nonprofit membership corporation such as the American Civil Liberties Union, Inc.[59] or the National Rifle Association,[60] and if there is reason to believe the members joined together in the organization for expressive purposes, then this provides a clear basis for the idea that granting expressive rights to the organization may be necessary to protect the expressive rights of the members.[61]

The history of nonprofit membership corporations in the United States supports this approach to corporate rights. Like other corporations, the earliest nonprofit-type corporations were chartered by special acts of the states to carry out certain educational, religious, or charitable purposes.[62] Over the last few decades of the nineteenth century, states passed general incorporation acts for nonprofits but still imposed some restrictions on who could form these organizations and for what purposes.[63] By the middle of the twentieth century, political pressures grew to make the nonprofit corporate form more ac-

58. In theory, a corporation such as Neftegas could have an instrumental basis for constitutionally protected rights under the purpose part of the analysis proposed *infra*, even if there is no derivative basis for granting these rights. See *infra* Part III.A.3, for a discussion of the instrumental rationale for granting rights to corporations.

59. *See* Am. Civil Liberties Union, Inc. Return of Organization Exempt from Income Tax (Form 990) (2013), https://www.aclu.org/files/pdfs/about/ACLU%20Form%20990%20Public%20Disclosure%20Copy.pdf (stating the number of voting members). Nonprofit corporations will be discussed more generally *infra* under the topic of the purpose of the corporation. *See infra* Part III.

60. *See* Nat'l Rifle Ass'n of Am., Return of Organization Exempt from Income Tax (Form 990) (2013), http://990s.foundationcenter.org/990_pdf_archive/530/530116130/530116130_201312_990O.pdf_ga=1.194253869.1017092510.1407783357 (stating the number of voting members).

61. The purpose for which the members joined together is still relevant. The members of Sam's Club or American Airlines AAdvantage frequent flier program probably did not join together for the purpose of exercising expressive rights. *See infra* Part II.

62. *See* Levy, *supra* note 30 (manuscript at 7–12). R

63. *Id.* (manuscript at 4) ("While states passed general incorporation laws for nonprofit corporations in the late nineteenth century, in many states judges retained discretion in granting nonprofit corporate charters.").

cessible to more people for a greater variety of purposes. Driving this change was a spreading belief that the right to form and join organizations with like-minded people was a right of association guaranteed by the First Amendment.[64] In the 1950s, this point was brought home in the NAACP cases. In *NAACP v. Alabama ex rel. Patterson*,[65] the U.S. Supreme Court held that Alabama could not compel the NAACP to disclose the group's membership because this would violate the members' freedom of association.[66] In 1961, a New York court of appeals explicitly found that individuals had the right to join similar organizations on the ground that "if 'expression' was 'lawful,' then 'those engaging in it were entitled to a vehicle for such expression.'"[67]

If members of a corporation are other corporations, as is the case with the U.S. Chamber of Commerce[68] and the National Collegiate Athletic Association,[69] the link to natural persons from whom an expressive right could be derived is less direct, and the presumption should be against granting such a right on a derivative basis.[70] Nonetheless, there might still be a compelling argument for granting a right to this type of corporation, but such a right would more sensibly be granted based on an instrumental rationale tied to the purpose of the

64. *Id.* ("With civil rights advocates equating access to nonprofit incorporation with 'freedom of association,' by the 1970s open access was achieved."); *see also id.* (manuscript at 43–45) ("[O]nce civic-minded nonprofits, focused on membership, transformed into professionally managed commercial entities.").

65. 357 U.S. 449 (1958).

66. *Id.* at 466; *see also* NAACP v. Button, 371 U.S. 415, 444 (1963) ("We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010) (discussing the significance of NAACP cases for freedom of association). *See generally* Nelson, *supra* note 5, at 506 (discussing the importance of freedom of association in the legal evolution of nonprofit corporate law). R

67. Levy, *supra* note 30 (manuscript at 30) (citing Ass'n for the Pres. of Freedom of Choice, Inc. v. Shapiro, 174 N.E.2d 487, 490 (N.Y. 1961)). R

68. *See Join the Chamber*, U.S. CHAMBER COMM., https://www.uschamber.com/members/join-chamber (last visited Aug. 18, 2015) ("Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations.").

69. *See About the NCAA*, NCAA, http://www.ncaa.org/about (last visited Aug. 18, 2015).

70. The rationale for granting an expressive right such as freedom of speech to the Chamber of Commerce might be much stronger in the purpose dimension than in the people dimension because one of its most important purposes is expressive. *See* U.S. CHAMBER COMMERCE, https://www.uschamber.com (last visited Aug. 18, 2015) ("Since 1912, we've been fighting for your business and looking out for your bottom line. We are your eyes and ears here in Washington. We listen to your needs and convey your message in the political arena, taking action on legislative issues that impact your business."); *infra* Part III (discussing the purpose dimension).

specific corporation rather than the identity of the people behind the corporation.[71]

If we can identify the members of a corporation as the natural persons from whom an expressive right might be derived, then we can proceed to the next level of analysis and ask whether, given that the members' individual rights should be protected, granting the right to the corporation is necessary to facilitate that purpose.[72]

2. Does the Corporation Represent Its Investors?

In a for-profit business corporation, one group of natural persons that a corporation might plausibly be said to represent is the shareholders.[73] If the number of natural persons who are shareholders in a given corporation is small, stable, and cohesive, it is conceivable that being investors in the business of the corporation is an expressive activity for those people. Book stores, cafes and restaurants, newspapers and magazines, art galleries, farmers markets, theaters, radio and television stations, websites, and film production companies are examples of businesses that people sometimes engage in for the satisfaction they provide and opportunity for community engagement or personal expression, rather than merely for the income these businesses might generate. In arguing their case and challenging the requirement under the rules promulgated to enact the Patient Protection and Affordable Care Act (ACA),[74] which states that employers with fifty or more full-time employees must provide access to a specified range of contraceptive benefits in its employee health care plan,[75] the Green family,

71. Although the purpose of the Chamber of Commerce is expressive, this does not, by itself, imply that the Court should recognize a full range of expressive rights for it. In *Roberts v. U.S. Jaycees*, Justice O'Connor argued in her concurring opinion that the Jaycees was a predominantly commercial organization and, therefore, only entitled to "minimal constitutional protection" of its associational activities. 468 U.S. 609, 635 (1984) (O'Connor, J., concurring).

72. *See infra* Part III (explaining the purpose behind corporation formation).

73. Legal scholars have long debated whether the law requires officers and directors to run corporations solely for the benefit of shareholders. That question is beyond the scope of this Article. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 773 (2005) and Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2007), for well-articulated views on both sides of this debate. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999), for an alternative way to frame the question of what the goals of corporate governance should be.

74. Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

75. HHS promulgated regulations pursuant to the ACA requiring employers' group health plans to provide "preventive care and screenings" for women without any cost sharing requirements. 42 U.S.C. § 300gg-13(a)(4) (2012). This was further interpreted by HHS to require coverage for twenty contraceptive methods that were approved by the Food and Drug Administration, four of which have been challenged by certain religious groups on the grounds

whose members own all shares of Hobby Lobby, claimed to operate their business on Christian principles.[76] In *Hobby Lobby*, the Court noted that the Green family's opponents presented no reasons why the Court should reject or question that claim.[77] In finding that Hobby Lobby should be exempt from the contraceptive requirement on the grounds that the requirement burdened the corporation's right to practice religion under the Religious Freedom Restoration Act of 1993,[78] the Court attempted to limit the application of its finding to closely held corporations,[79] implicitly recognizing that this sort of claim would be much more difficult to sustain in the case of a business corporation with hundreds, or even a few dozen, shareholders and not a credible claim at all for a publicly traded corporation. In other words, the argument that granting expressive rights to corporations might be necessary to protect the expressive rights of its shareholders is plausible if the shares are entirely owned by a small, cohesive group, such as family members. But, as the number of shareholders increases and as other factors that might link those shareholders together for expressive purposes are weakened, it becomes much less persuasive that a corporation is a vehicle for shareholders to exercise expressive rights and that granting expressive rights to a corporation is necessary to protect the expressive rights of its shareholders.

This analysis would also be different for nonprofit corporations.[80] Under the people analysis, I simply note that nonprofit corporations also have investors who are more likely to be called donors. Nonprofit corporations are distinguished from for-profit corporations by the fact that they operate under what Henry Hansmann has called a "nondistribution constraint," meaning that nonprofit corporations

that the methods may prevent fertilized eggs from attaching to the uterus. Burwell v. Hobby Lobby Stores, Inc., S. Ct. 2751, 2762–63 (2014).

76. *Id.* at 2765–66.

77. *Id.* at 2774 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.").

78. *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-1 to -4)

79. *See Hobby Lobby*, 134 S. Ct. *passim*; *id.* at 2774. ("[W]e have no occasion to consider RFRA's applicability to such [large publicly traded corporations] companies."); *see also* Stephen Bainbridge, *What Is a "Close Corporation" for Purposes of the New* Hobby Lobby *Rule*, PROFESSORBAINBRIGE.COM (July 1, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/07/what-is-a-close-corporation-for-purposes-of-the-new-hobby-lobby-rule.html; Steven Davidoff Solomon, *In* Hobby Lobby *Ruling, a Missing Definition Stirs Debate*, N.Y. TIMES, Sept. 2, 2014, http://dealbook.nytimes.com/2014/09/02/in-hobby-lobby-ruling-a-missing-definition-stirs-debate/?_r=0.

80. *See infra* Part III.B.1 (discussing the way to categorize nonprofit organizations to determine if they have expressive rights).

may not distribute assets or net income to any of the parties who control or contribute to the nonprofit but must reinvest any surplus funds in the mission of the nonprofit.[81] Thus, donors may not earn any return on their investment in a nonprofit, and it therefore seems unlikely that individuals would donate time, money, or other things of value to a nonprofit corporation for any reason other than to support the mission of the nonprofit. For this reason, being a donor to a nonprofit is generally understood as an inherently expressive act—an act of support for the nonprofit's mission.[82] For this type of corporation, it is easy to imagine scenarios in which it would be necessary to recognize and protect expressive rights of the organization in order to protect the expressive rights of its donors. This is exactly what the Court did in the NAACP cases.[83]

3. Can a Corporation Represent Its Directors and Managers?

At first, one might think that a corporation could be said to represent its directors and managers because those are natural persons who are actually involved in and cause the corporation to act on a day-to-day basis. The question of whether a corporation should be seen as representing the interests of its directors and managers, however, again depends on whether the directors and managers are a small, cohesive group closely tied to the investors. In start-up and venture capital companies, as well as in family businesses, the business activities that a corporation carries out may well be an expression of the individuals who exercise leadership in the firm, just as the Green family claims with regard to its business, Hobby Lobby.[84]

81. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) ("A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees . . . . Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide."). There is a sizeable literature on the tax rules defining and influencing nonprofit organizations. *See, e.g.*, Evelyn Brody & Joseph J. Cordes, *Tax Treatment of Nonprofit Organizations: A Two-Edged Sword?*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 141 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2006).

82. One of the earliest U.S. Supreme Court decisions to deal with corporate rights involved what we would today identify as a nonprofit corporation—Dartmouth College. In this case, the Court observed that the original charter of Dartmouth College, granted in 1769, should be understood as a contract between the crown and the donors and trustees, in which the donors contributed land and money to create the school, and the Court found that the nonprofit corporation represented the donors. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 642 (1819) ("The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal.").

83. *See* Levy, *supra* note 30 (manuscript at 33). **R**

84. *See supra* notes 76–79 and accompanying text.

But, when the officers and directors of a corporation are different individuals from the investors and donors, the officers and directors have fiduciary duties to put the best interests of the corporation ahead of their own interests.[85] In other words, directors and hired managers are supposed to act on behalf of, and represent, the corporation. So, it is circular logic, and contradicts corporate law, to argue that the corporation represents the officers and directors for purposes of expressive rights.

4. Can a Corporation Represent Its Employees or Other Stakeholders?

Can a corporation be said to represent the interests of its employees for purposes of expressive rights?[86] Could it represent its customers or other stakeholders? Here, again, there is not a simple answer that applies to all issues and corporations. If the corporation in question is an employee-cooperative or a consumer-cooperative (either would probably be organized as a noncapital stock corporation or some similar form), then it is possible that granting the corporation the right to practice religion or speak out on political matters could facilitate political expression by the employees or consumers who are members of the cooperative. The analysis that would be required is similar to the analysis of nonprofit membership corporations discussed *supra*. If the corporation in question is some type of nonprofit educational or health care organization, such as a university or a hospital, the corporation is expected, as part of its mission, to act on behalf of its customers—the students in the case of a university or patients in the case of a hospital. Recognizing that these corporations have expressive rights could facilitate and protect the expressive rights of their various stakeholders.

However, a problem is introduced if we look to other stakeholders in a for-profit corporation to see who the people are from whom an expressive right for a corporation could be derived. The problem is

85. MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 1998) ("A director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation."); *Id.* § 8.42(a) ("An officer with discretionary authority shall discharge his duties under that authority: (1) in good faith; (2) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation.").

86. The Court in *Hobby Lobby* stated: "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people," specifically including "shareholders, officers, and employees." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

that most business corporations of any significant size have many stakeholders, and those stakeholders are likely to have competing interests, at least with respect to some issues.[87] A university might represent its students for some matters, its faculty for other matters, and, still with respect to other matters, may represent the research or artistic community.

When the interests of various stakeholders conflict, is it the Court's place to decide whose interests take precedence for purposes of an expressive rights claim by the corporation? To date, the Court has skirted this issue in its jurisprudence on corporations' expressive rights. In *First National Bank of Boston v. Bellotti*,[88] the Court decided that a Massachusetts law, which imposed restrictions on the ability of for-profit corporations to make expenditures to support their views on referendum proposals submitted to the voters unless the issue at stake "materially affect[ed] . . . the property, business or assets of the corporation," was unconstitutional.[89] The Court acknowledged, however, that there could be a difference of opinion between the managers of a corporation and its shareholders (and, presumably, among other stakeholders of the corporation as well) about political matters. But, the Court dismissed this concern, noting that "[u]ltimately, shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[90] In *Citizens United*, the Court similarly dismissed the problem that shareholders might disagree with management's decisions about engaging in political speech. Citing *Bellotti*, the Court stated: "There is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[91] And, in *Hobby Lobby*, the Court stressed that protecting the expressive right of the corporation protects "the rights of people associated with the corporation, including shareholders, officers, and employees."[92] Then, without explanation or discussion, the Court seems to say, in effect, that only the shareholders count: "Pro-

87. The literature on stakeholders in corporations is voluminous, and I make no attempt to reference all of it in this Article. See Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65 (1995), for an introduction to the literature.

88. 435 U.S. 765 (1978).

89. *Id.* at 768.

90. *Id.* at 794.

91. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010) (quoting *Bellotti*, 435 U.S. at 794).

92. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).

tecting the free-exercise rights of closely held corporations . . . protects the religious liberty of the humans who own and control them."[93]

If the Court is going to rely on a derivative rationale for granting expressive rights to corporations, it is important that it either explain whose voice counts in deciding whether the corporation speaks for those people (and why) or limit the types of corporations that are granted expressive rights on a derivative basis to those corporations in which it is clear who the corporation represents.

D. How Stable Is the Group of Natural Persons Assumed To Be Represented by the Corporation and How Homogeneous are the Interests of These Persons?

The fourth question that the Court should ask before deciding to accord an expressive right to a corporation on a derivative rationale is whether the group of people the Court believes the corporation represents is a stable group with shared interests that can plausibly be aggregated and represented. This analysis may be fairly straightforward for a membership corporation in which we can assume that the members: (1) joined of their own will; (2) wanted to associate with other members for some common purpose; (3) continue to be members as long as they continue their desire to pursue that purpose; and (4) if they decide they no longer want to pursue that purpose, they are free to exit. If a membership corporation is exercising expressive rights to advance the purpose for which the members joined, then those expressive rights should be protected to the same extent that the rights of individual members deserve protection. This was the analysis the Court used in two NAACP cases involving freedom of association.[94]

However, many other types of corporations, both for-profit and nonprofit, may have multiple constituencies. Even if all of those constituencies are natural persons with legitimate claims to constitutional protections, it is not appropriate to treat a corporation as representing all of these constituencies for the purpose of expressive rights when their interests in the corporation conflict. It should be incumbent on the corporation claiming protection of an expressive right to explain who it purports to represent, how it is possible to aggregate the inter-

93. *Id.*

94. *See* NAACP v. Button, 371 U.S. 415, 444 (1963) (finding that a corporation may assert free speech and free assembly rights on behalf of its members); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958) ("[I]mmunity from state scrutiny of [petitioner's] membership lists . . . is here so related to the right of [petitioner's] members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment.").

ests or preferences of that group of stakeholders, and why the interests of that group should take precedence over conflicting interests of other stakeholders. The Court should also consider whether the members of that group are stable in that neither the specific people involved nor their interests are subject to rapid change. A publicly traded corporation, for example, should not be allowed to claim expressive rights on behalf of day traders, high-frequency traders, and short sellers even though all of those actors might hold a sizeable number of the corporation's securities for at least a brief period of time.

III. WHAT IS THE PURPOSE FOR WHICH THE CORPORATION WAS FORMED?

The second dimension that the Court should consider in assessing whether a particular corporation should be recognized as having a constitutionally protected right of expression is the purpose for which a corporation is formed. Corporate purpose is important for two reasons. First, it goes to the issue of whether the corporation can serve, and is serving, as a vehicle for the natural persons behind the corporation to exercise their expressive rights. And, second, in some cases, the Court has recognized corporations as having constitutionally protected rights for instrumental reasons—arguing that granting the right to the corporation is a way to achieve some socially beneficial and constitutionally significant purpose.[95] Any such benefit depends on what the purpose of the corporation is.

Categorizing corporations by purpose to determine whether the corporation should have constitutional protection for expressive activities may, at first, seem like a dangerous exercise in regulating the content of corporate expression. But, some of the distinctions I discuss *infra* have already been made in the law and will seem familiar, and some others could easily be made without regulating the content of corporate speech.

A. Does Granting an Expressive Right to a Corporation Serve some Important Social Function?

To answer the question posed in this Section, we must consider the corporate purposes for which courts have recognized an instrumental rationale for granting expressive rights to corporations.

95. Blair & Pollman, *supra* note 4, at 1726 (arguing that the Court has generally granted rights to corporations either derivatively or for instrumental reasons). R

1. Media Corporations

The Court has used an instrumental rationale for recognizing claims of freedom of press or freedom of speech for media companies and for other corporations that have an explicitly expressive purpose.[96] The Court has repeatedly recognized, for example, that newspaper publishers, book publishers, film production companies, theaters, and other similar organizations must have protected constitutional rights to produce and publish the journalistic or artistic products of their employees and others to protect the First Amendment rights of individual writers, editors, scholars, commentators, and artists. Universities, colleges, or organizations formed for the advancement of science, the arts, or sports are also in the business of disseminating expression as well as fostering debate and discussion. These organizations are primary mechanisms through which natural persons exercise their rights to speak, write, publish, and disseminate their views, whether those views are scientific, religious, artistic, athletic, or political. It clearly furthers the purpose of the First Amendment for these kinds of organizations to be granted freedom of speech and freedom of press.

There is a rich history of case law affirming that media corporations have constitutional protection for freedom of speech and freedom of press.[97] As suggested by the examples mentioned *supra*, media corporations can be both nonprofit and for-profit, but the distinction does not matter for determining the appropriateness of granting expressive

96. In many cases the Court has recognized that the First Amendment must protect media corporations so that they can carry out their function. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 218 (1997) (establishing that cable television companies were protected speakers under the First Amendment); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (finding that a Georgia statute prohibiting the release of a rape victim's name and its common-law privacy action counterpart were unconstitutional limits on freedom of press); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (finding that the City of Chattanooga's denial of the request by Southeastern Promotions to stage the musical "Hair" in the Tivoli theater amounted to "prior restraint" and impeded freedom of speech of Southeastern Promotions, a corporation); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (finding that a Florida state law requiring newspapers to allow equal space in their newspapers to political candidates if they endorse a particular candidate violates the constitutional principle of freedom of press); N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (finding that the freedom of press rights of the New York Times Co. superseded § 793 of the Espionage Act, making it criminal to publish information the possessor had reason to believe could be used to the injury of the United States—in this case, the Pentagon Papers); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (establishing that freedom of press rights protected the newspaper against defamation and libel claims when reporting on the actions of public officials if there was no actual malice); Grosjean v. Am. Press Co., 297 U.S. 233, 251 (1936) (holding unconstitutional a state license tax imposed on newspaper corporations selling advertising as an impermissible abridgment of speech or of the press.). *Citizens United* cited these and a number of other cases as support for the proposition that "First Amendment protection extends to corporations." 558 U.S. at 342.

97. *See supra* note 96 (discussing these cases). **R**

rights to these corporations. Importantly, the Court has not had a difficult time identifying the corporations that need protection on these grounds, and scholars and commentators have not expressed concerns that granting First Amendment rights to media companies will corrupt the political process or lead to other social harms. However, an important problem in granting expressive rights to media corporations is the difficulty of distinguishing media corporations from other corporations. In fact, the Court in *Citizens United* denied that this distinction should matter.[98]

2. Commercial Speech

The other context in which the Court has granted freedom of speech and press rights to corporations for instrumental reasons are the cases involving commercial speech. In those cases, the Court has found that regulations limiting the information that corporations can publish about the characteristics and prices of the products and services they sell deprives consumers of access to information they need to make decisions in the marketplace. Thus, these regulations have been struck down. In these cases, the Court has recognized that the selling corporation has the right to publish information for the instrumental purpose of enriching the information that is available in the market and because potential customers have the right to hear and learn about that information.[99]

3. Is There an Instrumental Rationale for Corporate Political Speech?

The Court used an instrumental argument in *Bellotti* and *Citizens United*, arguing that the First Amendment protects speech without regard to who the speaker is.[100] In the commercial speech cases in

98. *Citizens United*, 558 U.S. at 352. ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."). This could become more of a problem in the future. In the age of the Internet, as more corporations interact with suppliers, customers, and even their own employees over the Internet, and as more of the products that these companies sell are intangible products (e.g., brand, image, information, analysis, interactive games, and presentation packages), commercial speech is almost completely unregulated. A great deal of commercial speech, commentary, and visual material goes out anonymously, and corporations spend a substantial amount of time and resources trying to keep confidential information from going out and limiting the damage from negative information that does go out. "With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred." *Id.*

99. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 US. 748, 772–73 (1976).

100. *See Citizens United*, 558 U.S. at 341 ("The First Amendment protects speech and speaker, and the ideas that flow from each."). "Political speech does not lose First Amendment protec-

which this argument first appeared, there was no question about whether potential customers would know the source of the information that the corporations wanted to publish. This was also true for the instrumental rationale regarding freedom of speech and press for media companies. The Court did not have to consider the impact of commercial information going into the marketplace of ideas without attribution or other information for readers and listeners about the source of the information and commentary. In the realm of political discussion and debate, however, this is not necessarily the case. In 2011, Walmart funded a misleadingly named organization, "Littleton Neighbors Voting No," to fight a ballot measure in Colorado that would have kept it from opening a new store.[101] This confused voters rather than adding to the mix of information they could use to make a fair and intelligent decision. This is a significant problem for the instrumental rationale supporting political speech because the ability of corporate speech to enrich the insights and perspectives available to potential voters, and not deceive readers and listeners, corrupt the democratic process, or obfuscate the issues, critically depends on readers' and listeners' ability to determine the sources of the political information or commentary.

This example points to one of the most troubling concerns about the Court's decision in *Citizens United*: it undermines campaign finance regulations designed to ensure that readers and listeners of political speech know, or can easily find out, who or which people, corporations, or special interests are responsible for publishing the speech. Corporations, labor organizations, federal government contractors, and foreign nationals are all prohibited from making direct contributions to candidates for federal office or to national, state, or local party committees.[102] These organizations are allowed to form

tion 'simply because its source is a corporation.'" *Id.* at 342 (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

101. Ciara Torres-Spelliscy recounted the story of this happening in comments she provided to the Securities and Exch. Comm'n when it was considering the rules that would require publicly traded corporations to report their political spending. *See Comments of Ciara Torres-Spilliscy Assistant Professor of Law at Stetson University College of Law Before the Sec. and Exchange Commission Regarding Petition File No. 4-637*, at 10 (2011), http://www.sec.gov/comments/4-637/4637-13.pdf; Angela Migally, *Coloradans' Right To Know*, DENV. POST, http://www.denverpost.com/headlines/ci_13827296 (last updated Nov. 20, 2009, 12:01 PM).

102. *See* 52 U.S.C. § 30118(a) (2012) ("It is unlawful for any national bank, or . . . . any corporation whatsoever, or any labor organization, to make a contribution or expenditure in connection with any election [of the presidential and vice presidential electors or a Senator or a Congressperson]."); *Id.* § 30119 ("It shall be unlawful for any person—(1) who enters into any contract with the United States . . . to make any contribution of money or other things of value, or to promise expressly or impliedly to make such contribution to any political party, committee, or candidate for public office . . . ."); *id.* § 30121(a) ("It shall be unlawful for—(1) a foreign

"political action committees" (PACs), which can raise voluntary contributions from specified classes of individuals (generally shareholders and managers of the corporation sponsoring the PAC in the case of a corporation or members in the case of a union or other interest group) and use the funds to directly support candidates and party committees.[103] PACs that are independent from corporations or other organizations can also contribute to candidate campaigns.[104] But PACs, just like other political committees, are subject to limits on how much money any organization or individual can contribute to them as well as how much they can contribute to any individual candidate's campaign.[105] They are also required to periodically file reports with the Federal Election Commission, reporting the names of every individual (or other political committee) who contributed more than $200 in an election cycle.[106] Thus, campaign finance laws try to regulate direct contributions to parties' and candidates' campaigns.

One of the effects of *Citizens United*, however, was the elimination of restrictions on corporations' and unions' abilities to make what are called "independent expenditures" to support a candidate for election as long as their expenditures are not coordinated with the campaign or the party.[107] Organizations quickly emerged to undertake this kind of activity. These organizations are officially called "independent-expenditure only committees" or, unofficially, "Super PACs." Super PACs are required to report the sources of the funds they spend on election

national, directly or indirectly, to make—(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication . . . .").

103. *Id.* § 30118(b)(2)(C) ("[Restrictions on contributions by corporations, labor organizations and other specified organizations] shall not include . . . (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."). "Political action committees" (PACs) are the popular name for these separately segregated funds.

104. PACs are regulated in the same way that other political committees are regulated. *See, e.g.*, *id.* § 30102 (organization); *id.* § 30103 (registration requirements); *id.* § 30104 (reporting requirements).

105. *Id.* § 30116 (limiting contributions and expenditures). These are summarized as applied to the 2015–2016 federal elections in *The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMM'N, http://www.fec.gov/pages/brochures/fecfeca.shtml#Contribution_Limits (last updated Jan. 2015).

106. 52 U.S.C. § 30104(b)(3).

107. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 312 (2010) ("*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. . . . [Hence,] Section 441b's restrictions on [these] expenditures are . . . invalid . . . .").

campaigns.[108] But, in addition to Super PAC spending, existing and new § 501(c) organizations, as well as for-profit corporations, also began spending substantial amounts of money on "independent expenditures." These organizations are not required to reveal their membership or sources of funding to the public, and there is no legal limit as to how much they can raise or spend under campaign finance laws.[109] The effect has been to flood the "marketplace of ideas" with political speech while simultaneously demolishing the rules that were intended to provide voters with key information they need to fully understand and evaluate that political speech. For example, according to Public Citizen, a nonprofit public interest advocacy group, the U.S. Chamber of Commerce (a § 501(c)(6) organization) was the largest overall spender in the 2014 congressional races.[110] The Chamber does not reveal which of its members provide the funds for the organization to support its independent expenditures. And, a growing list of organizations with completely uninformative names that are also not required to reveal their sources of funds, like Crossroads GPS, Patriot Majority USA, American Action Network, and Americans for Prosperity, also made the list of top ten "nondisclosing" organizations in terms of spending on congressional elections in 2014.[111]

Although the Court in *Citizens United* recognized the importance of providing voters with information about the source of political speech,[112] there is currently no mechanism that can ensure adequate

108. 52 U.S.C. § 30104(a)(4) ("All political committees other than authorized committees of a candidate shall [file reports] . . . ."); *id.* § 30104(b) ("Each report under this section shall disclose—. . . (3) the identification of each—(A) person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 . . . .").

109. Section 501(c)(3) organizations may not engage in political speech, but § 501(c)(4) organizations and other § 501(c) tax-exempt organizations may make unlimited independent expenditures under *Citizens United*. These organizations (if they have annual receipts greater than $50,000) are required to report their sources of funds to the IRS in their Form 990 filings, but they are not required to share this information with the public; in fact, they can redact the names of donors when they make their Form 990 public. All organizations that are tax exempt must file Form 990 annually, or they may lose their tax-exempt status. *See generally* Return of Organization Exempt from Income Tax (Form 990) (2014), http://www.irs.gov/pub/irs-pdf/f990.pdf. Although § 501(c)(4) organizations are not subject to absolute limits on how much they can spend on independent expenditures, if they spend enough money they will no longer meet the requirement that the organization's "primary activities" are "social welfare," and, thus, they can lose their tax-exempt status. *See* JOHN FRANCIS REILLY ET AL., IRC 501(c)(4) ORGANIZATIONS I-25 (2003), http://www.irs.gov/pub/irs-tege/eotopici03.pdf (last visited Aug. 4. 2015).

110. *See* SAM JEWLER, PUB. CITIZEN, THE DARK SIDE OF *CITIZENS UNITED* 5 (Oct. 29, 2014), http://www.citizen.org/documents/us-chamber-of-commerce-dark-money-spending-report.pdf.

111. *Id.*

112. *Citizens United*, 558 U.S. at 319 ("The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.").

disclosure of the true source of expenditures in support of (or attacking) political candidates. Additionally, because of the opaqueness of so much political spending, it may be difficult to ensure that foreign organizations and citizens are not pouring money into political activities.[113] But, some of the language in its decision appears to close off obvious ways of preventing that from happening. It is up to Congress to find a way to write the rules to limit these abuses without simply criminalizing corporate independent expenditures.

4. An Instrumental Rationale for Other Kinds of Expressive Rights?

Because we have been considering expressive rights broadly, it is worth pointing out that the instrumental rationale cannot be used to explain or justify grants of freedom of assembly or free exercise of religion to corporations. The instrumental rationale can only be used to justify rights whose benefits extend to parties other than the parties who are exercising the rights, such as the citizens and voters who have access to a wider range of viewpoints. The benefits of freedom of assembly and freedom to exercise religion inure primarily, if not completely, to the parties who exercise those rights. So, in considering whether a corporation should have either of these rights, we must look at who the corporation is thought to represent.

B. Does the Corporation Itself Have an Explicitly Expressive Purpose?

An alternative instrumental rationale for granting expressive rights to corporations would be that the basic purpose of the corporation is expressive. This rationale provides an alternative basis for recognizing media corporations as having expressive rights, but this Section addresses a different way to categorize corporations when considering whether they should have expressive rights: (1) Nonprofit corporations; (2) for-profit corporations and other entities that have few or no employees and that exist solely to hold or invest in certain assets; and (3) for-profit, nonmedia corporations that are actively operating a business.

1. Nonprofit Corporations

It should not be difficult for courts to distinguish between nonprofit and for-profit corporations. The distinction is well established in the

113. In *Citizens United*, the Court declined to address this problem. *Id.* at 362 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

law, and much finer distinctions have been drawn within the category of nonprofits regarding the kinds of political activities these corporations can carry out.[114]

Congress and state legislatures have recognized a distinction between for-profit and not-for-profit corporations since the late nineteenth century.[115] An 1874 Pennsylvania statute divided all corporations into three categories according to their tax status: (1) religious corporations, which were exempt from property taxes; (2) for-profit business corporations, which were taxable; and (3) "not-for-profit" corporations, which were exempt from taxes.[116]

Today, the tax rules governing categories of tax-exempt corporations are quite complex, but for purposes of this Article, it is sufficient to note the basic rule: a corporation does not have to pay federal taxes on net income if it is organized for certain purposes or carries out certain types of activities and if it maintains the necessary records and files the necessary forms with the IRS.[117] The tax code provides for several categories of corporations that are tax exempt. Corporations organized under § 501(c)(3) do not have to pay federal taxes on net income, and, under § 509(a) and § 170(b), donors who contribute resources to these corporations may be able to take a deduction for their contributions from their income for purposes of computing federal income taxes. Contributors to corporations organized under § 501(c)(4)–(c)(28) may not take a tax deduction for their contributions, dues, or membership fees, but the corporation itself is exempt from paying taxes on its net income.

The designated purposes under § 501(c)(3) include: "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports

114. For a discussion regarding categories of nonprofit corporations in the tax code, under I.R.C. § 501(c) (2012), see *infra* notes 124–28 and accompanying text.

115. This distinction was briefly touched on in Part II *supra*. *See supra* notes 45–54 and accompanying text; *see also* Nelson, *supra* note 38, at 1575–86 (articulating a "'social theory' of conscience" and applying that theory to the distinction between religious organizations and for-profit business corporations); Nelson, *supra* note 5, at 512–13 (discussing the policy issues at stake in the law's distinction between nonprofit and for profit corporations); Levy, *supra* note 30 (manuscript at 4) (describing the development of laws at both the state and federal level that distinguished nonprofit corporations from ordinary business corporations); Pollman, *supra* note 5 (manuscript at 39) (discussing the legal distinction between for-profit business corporations and nonprofit corporations). R R R R R

116. *See* Levy, *supra* note 30 (manuscript at 9) (citing Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Association, and Nonprofit Orgs. in the United States, 1600–2000*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 32, 37 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006)). R

117. Nonprofit organizations must file Form 990 annually with the IRS as part of their tax returns. *See* I.R.C. §501(c); Nelson, *supra* note 38. R

competition . . . or for the prevention of cruelty to children or animals."[118] For corporations carrying out these activities, this Section further requires that no private shareholder or other individual exercising control over the corporation may receive a personal benefit from the corporation.[119] This rule has been called the "nondistribution constraint."[120] Although many corporations can be said to facilitate human expression by their employees, members, donors, or other constituents, Congress has imposed limits on the kinds of expression these corporations may engage in if they are to retain their full tax advantages. In particular,

> no substantial part of the activities of [§ 501(c)(3) corporations may involve] carrying on propaganda, or otherwise attempting, to influence legislation . . . [and the corporation must] not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[121]

Thus, Congress has recognized that many nonprofit corporations act as vehicles for human expression, but it has also decided that they should not benefit from a tax subsidy if they are used for lobbying or to advance political or partisan agendas. In *Regan v. Taxation with Representation of Washington*[122] (TRW), the U.S. Supreme Court affirmed that denying tax-exempt status to a corporation does not amount to suppressing that corporation's free speech. "The Code does not deny TRW the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TRW any independent benefit on account of its intention to lobby," the Court said. "Congress has merely refused to pay for the lobbying out of public moneys."[123]

Corporations organized under § 501(c)(4) include civic leagues "not organized for profit," social welfare organizations, and "local associations of employees."[124] Section 501(c)(5) covers "labor, agricultural,

118. I.R.C. § 501(c)(3).

119. *Id.* ("[N]o part of [their] net earnings . . . inures to the benefit of any private shareholder or individual . . . .").

120. It has generally been interpreted to mean that the corporation may not pay dividends or distribute its net income or assets to its donors or employees. *See, e.g.*, Hansmann, *supra* note 81, at 838. R

121. I.R.C. § 501(c)(3).

122. 461 U.S. 540 (1983).

123. *Id.* at 545. Some scholars and commentators have argued that *Citizens United* now supersedes *Regan* so that even § 501(c)(3) corporations should be free to speak out on political questions and endorse candidates for public office. *See, e.g.*, Paul Weitzel, *Protecting Speech from the Heart: How* Citizens United *Strikes Down Political Speech Restrictions on Churches and Charities*, 16 TEX. REV. L. & POL. 155, 174 (2011). But, the Court has not yet addressed this question.

124. I.R.C. § 501(c)(4).

or horticultural organizations";[125] Section 501(c)(6) covers "business leagues, chambers of commerce, real-estate boards, boards of trade, or professional football leagues . . . not organized for profit. . . .;[126] Section 501(c)(7) covers "clubs organized for pleasure, recreation, and other nonprofitable purposes";[127] and Section 501(c)(8) covers "fraternal beneficiary societies, orders, or associations."[128] And, a long list of other voluntary associations and mutual insurance companies are covered in the higher numbered subsections of § 501(c). These other categories of nonprofit organizations do not have to pay taxes on net income, but donors do not receive a tax deduction for their donation. Since *Citizens United*, these firms are not subject to restrictions on their ability to engage in political activity by making independent expenditures.

The line drawing that has been done in the tax code does not directly address the issue of purpose that should be addressed in U.S. Supreme Court jurisprudence on corporate constitutional rights, which is whether the corporation facilitates expression by the natural persons behind the corporation. But, it is already a well-established distinction in the law that does reasonably well in this regard.[129] The activities of § 501(c)(3) nonprofit corporations organized to serve religious, educational, literary, or scientific purposes are clearly about facilitating various forms of human expression. Sections 501(c)(4), (c)(5), and (c)(6) corporations generally have purposes related to freedom of association and advocate for the interests of their members, so these categories of corporations can also be understood as facilitating expression by their members. Moreover, the nonprofit status of these corporations means that their expressive goals can credibly take precedence over financial or economic goals because their special tax status means that they may not pay out their net income to donors or employees.[130] This reduces the possibility that any of the participants might have an incentive to allow financial or economic goals to trump the expressive goals of the organizations.[131]

125. *Id.*§ 501(c)(5).

126. *Id.* § 501(c)(6).

127. *Id.* § 501(c)(7).

128. *Id.* § 501(c)(8).

129. *See* Nelson, *supra* note 5, at 464 (concluding that the factors that distinguish nonprofits from for-profit corporations do a reasonable job of distinguishing corporations for whom membership, or participation in is "closely connected with their members' personal identities"). R

130. *See* I.R.C. § 501(c)(3) (stating a firm's net earnings in this category may not "benefit . . . any private shareholder or individual").

131. Hansmann, *supra* note 81, at 838; Nelson, *supra* note 5, at 506 (noting that the nondistribution constraint "instantiates a widely accepted norm of behavior in the nonprofit sector. R

It should be recognized that there are some nonprofit corporations that are not organized for expressive purposes. A credit union or insurance company organized (under I.R.C. § 501(c)(14) or § 501(c)(15)) for teachers and employees of a school system is an example. A mutual insurance company or credit union can reasonably be understood to represent its members for certain financial purposes but not for political expression.

Aside from these special cases, it has long been recognized that nonprofit corporations are organized for the purpose of facilitating various kinds of expression by their members, donors, employees, and customers. The presumption should be that these corporations should receive constitutional protections for their expressive activities unless there is a public purpose reason to deny this protection.[132]

2. Corporations and Other Types of Business Entities That Are Passive Investment Vehicles Controlled Entirely by Another Corporation

This Section discusses another category that includes holding companies, special purpose vehicles, and other corporations and LLCs organized to be passive holders of assets with no operations and few or no employees. Examples of corporations organized as passive investment vehicles include: (1) special purpose entities used by financial firms in the securitization of financial assets[133] and (2) subsidiaries of operating corporations that are chartered in low-tax states by the operating firm to be the owner of its intellectual property.[134] These corporations typically have no employees except, perhaps, a single agent who is primarily an employee of the control company. They may have creditors and shareholders, but it is highly unlikely that these will be

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That norm . . . is one of shared commitment to the *mission* of the organization rather than the production of private financial benefit").

132. For example, it might be possibile that granting freedom of speech to an organization that can accept unlimited tax-subsidized dollars is likely to corrupt the political process. This is similar, however, to the antidistortion rationale for limits on corporate independent expenditures rejected by *Citizens United*. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 313 (2010) ("Neither *Austin*'s antidistortion rationale, nor the Government's other justifications support § 441b's restrictions.").

133. *See* Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1663 (2004); Steven L. Schwarcz, *Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures*, 70 U. CIN. L. REV. 1309, 1314 (2002); Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 135 (1994).

134. *See* MICHAEL MAZEROV, CTR. ON BUDGET & POLICY PRIORITIES, STATE CORPORATE TAX SHELTERS AND THE NEED FOR "COMBINED REPORTING" 1 (Oct. 26, 2007), http://www.cbpp.org//archiveSite/10-26-07sfp.pdf; Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes,* N.Y. TIMES, Apr. 28, 2012, http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html?_r=1.

natural persons. These corporations have, as their primary business purpose, the partitioning of assets for tax or liability purposes, and they cannot credibly be said to facilitate expression by any natural persons.[135]

3. *Nonmedia, For-Profit Business Corporations That Are Actual Operating Companies*[136]

In the wake of the *Citizens United* and *Hobby Lobby* decisions, some commentators have argued that we should rule out the possibility that any for-profit corporations could have expressive rights guaranteed under the Constitution.[137] But, like nonprofit corporations, for-profit corporations exist for a variety of different purposes. The question of whether they should be granted First Amendment rights should depend on whether their purpose is to facilitate expression by an identifiable group of people behind the corporation. The following is an attempt to identify how these lines might be drawn.[138]

a. Dual-Purpose Corporations

The argument that the purpose of a for-profit corporation (other than a media company) might be to facilitate expression by natural persons associated with the corporation is probably strongest for dual-purpose corporations, such as "social enterprise" firms, which use commercial strategies to carry out business activities for the benefit of the public,[139] or "benefit corporations," which are corporations that state in their charters that their purpose is to have some positive impact on society or the environment in addition to making profits.[140]

135. If the question ever came up, I can see no rationale whatsoever for granting expressive rights to these corporations.

136. *See supra* Part III.A.1 (discussing media corporations).

137. *See, e.g.*, Stephen A. Justino, *Yes on Amendment 65, but . . .*, DENVER POST: IDEA LOG FOR OPINION (Sept. 28, 2012, 4:39 PM), http://blogs.denverpost.com/opinion/2012/09/28/amendment-65/26184/.

138. The categories of corporations that I delineate in this Section are not necessarily well defined in the law or mutually exclusive. For example, Hobby Lobby is a for-profit, operating company but has some characteristics that make it similar to what I call a "dual-purpose" corporation. *See infra* notes 139–44 and accompanying text. R

139. "Social enterprise" is a broad term that includes some nonprofit organizations as well as some corporations that are legally for-profit firms.

140. Delaware General Corporate Law Section 362 defines a "public benefit corporation" as

> a for-profit corporation . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. . . . [It] shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.

DEL. CODE ANN. tit 8, § 362 (2014).

Benefit corporations may be organized under special sections of corporate statutes in thirty-one different states that have these statutes.[141] Officers and directors of these corporations have duties to pursue these special purposes in addition to earning profits for shareholders, and the shareholders and other investors are assumed to know that the corporation has made these commitments at the time that they chose to invest in the corporation.

Other types of business corporations that fit into this category are corporations whose shares are entirely owned by charitable foundations, such as Newman's Own, Inc., which contributes all of its annual profits to the Newman's Own Foundation.[142] Additionally, Hobby Lobby arguably fits into this category, although its shares are held not by a family-run charitable foundation but by a trust for members of the Green family[143] who have made a commitment to donate a certain percentage of profits to charity.[144] These corporations were established to operate for-profit businesses and to utilize the profits from the businesses to support some public or charitable cause. Investors, employees, and customers of these corporations can be assumed to be aware of this special purpose. Thus, it is reasonable to believe that dual-purpose corporations may facilitate expression by people behind the corporation, many or all of whom participate, at least partly, because they want to show support for that purpose.

Although their avowed dual missions suggest that these corporations might reasonably claim to represent a number of different natural persons for some expressive purposes (other than just to earn a profit), given the difficulties of aggregating diverse interests the presumption should be against granting rights to these corporations derivatively. However, there may be instrumental reasons for granting expressive rights to this type of corporation.

b. Nonmedia, For-profit Operating Corporations with Many Investors and Employees

This final category is the one most people probably think about when they have reflexively criticized the *Citizens United* and *Hobby*

141. *See State by State Status of Legislation,* BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status (last visited Aug. 17, 2015).

142. *See* NEWMAN'S OWN, http://www.newmansown.com/charity/ (last visited Aug. 17, 2015).

143. The supporting documents in *Hobby Lobby* do not explain the purpose of the family trust, but this is probably a tax shelter device. *See, e.g.*, Brief for Respondents at 2 n.3, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), 2014 WL 546899.

144. However, that commitment may not be legally binding, so this is not a clear case.

Lobby decisions.[145] Examples of nonmedia, for-profit corporations range from giant publicly traded corporations, such as ExxonMobil, Walmart, Nike, Pfizer, and Intel, to lesser-known publicly traded corporations, such as United Natural Foods, Inc.,[146] and, lastly, to privately held companies, such as FastMed Urgent Care.[147] These corporations may have lofty mission statements[148] and may, in fact, claim to serve many stakeholders,[149] however, widely traded corporations notoriously face pressures to focus on short-term profits even at the expense of other goals.[150] And, even if the company's shares trade privately (as did FastMed's shares until very recently), an outside in-

145. See Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 622–23 (2011); John Wellington Ennis, *Outrage over* Citizens United *Has Jump-Started a Revolution*, TAKEPART (Jan. 21 2015), http://www.takepart.com/article/2015/01/21/unexpected-upside-citizens-united; Liz Kennedy, *Top 5 Ways* Citizens United *Harms Democracy & Top 5 Ways We're Fighting To Take Democracy Back*, DÇMOS (Jan. 15, 2015), http://www.demos.org/publication/top-5-ways-citizens-united-harms-democracy-top-5-ways-we%E2%80%99re-fighting-take-democracy-back; Lawrence Lessig, *An Open Letter to the Citizens Against* Citizens United, ATLANTIC (Mar. 21, 2012), http://www.theatlantic.com/politics/archive/2012/03/an-open-letter-to-the-citizens-against-citizens-united/254902/; and Michael Peppard, Citizens United*: Time for Outrage*, COMMONWEAL MAG., July 16, 2012, https://www.commonwealmagazine.org/blog/citizens-united-time-outrage, for popular criticisms of the *Citizens United* decision. John C. Coates IV examined the impact of the *Citizens United* decision on publicly traded corporations and found that after the decision, "corporate lobbying and PAC activity jumped, in both frequency and amount." John C. Coates IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMP. LEGAL STUD. 657 (2012).

146. United Natural Foods is a publicly traded company with shares trading on the NASDAQ. *Investor Overview*, UNFI, http://phx.corporate-ir.net/phoenix.zhtml?c=93228&p=irol-irhome (last updated Aug. 15, 2015).

147. *See* Reuel Heyden, *FastMed Urgent Care and Family Practice Holds Grand Opening, Welcomes Sidney Wolinksy PA*, FASTMED.COM (Aug. 5, 2014), http://www.fastmed.com/about-fastmed/fastmed-news/fastmed-urgent-care-and-family-practice-holds-grand-opening-welcomes-sidney-wolinsky-pa ("FastMed Urgent Care and Family Clinic is one of the only privately held Joint Commission Accredited Urgent Care Companies in North Carolina.").

148. United Natural Foods, Inc., for example, says its mission is "to exceed the needs and expectations of all our stakeholders: our customers, associates, natural and specialty product consumers, suppliers, shareholders, communities, the environment and the planet." *Vision and Mission*, UNFI, https://www.unfi.com/Company/Pages/VisionAndMission.aspx (last visited Aug. 17, 2015).

149. FastMed Urgent Care claims that its mission is "to serve [its] communities and patients with a high level of quality, personal care, affordable and convenient urgent care, family practice and other specialty medicine services." *Mission Statement*, FASTMED, http://www.fastmed.com/about-fastmed/mission-statement (last visited Aug. 17, 2015).

150. *See* WILLIAM A. GALSTON & ELAINE C. KARMARCK, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, MORE BUILDERS AND FEWER TRADERS: A GROWTH STRATEGY FOR THE AMERICAN ECONOMY 8 (June 2015), http://www.brookings.edu/~/media/research/files/papers/2015/06/30-american-economy-growth-strategy-galston-kamarck/cepmglastonkarmarck4.pdf (discussing a variety of evidence from corporations focusing excessively on quarterly profits and failing to adequately invest for long-term growth).

vestor could acquire enough shares to control these corporations[151] and compel the corporation to focus on maximizing profits and share value even at the expense of other goals the prior management might have been pursuing.

With these corporations, it is hard to make a convincing argument that they can represent any particular group of natural persons for expressive purposes unless one regards profit maximization as an expressive activity. It is not credible that this type of corporation serves to facilitate the speech of its human participants if its agents, in causing the corporation to act, speak out on political issues unrelated to the business of the corporation, or attempt to use the corporation to promote political views or to exercise religion. The presumption for nonmedia, for-profit corporations, especially for corporations whose shares trade widely should, therefore, be that they do not represent any particular group of natural persons for expressive purposes not directly related to the business interests of the corporation.

Nonetheless, corporations that pursue for-profit businesses are likely to gain special knowledge about a variety of issues. That knowledge is appropriately regarded as the knowledge of the corporation itself, especially if it has been codified, recorded, and disseminated within the corporation, or embedded in the routines and procedures of the corporation.[152] When such a corporation speaks through its agents, or engages in other expressive acts (publishing, promoting, advertising, testifying), it may be appropriate to assume that it represents the interests of its participants as long as it is speaking on matters relating to its business for which it actually has special expertise. Moreover, when the corporation has knowledge from its research or experience, the public discourse is, or can be, enhanced when that corporation speaks out about that knowledge. These corporations should have constitutionally protected rights to speak about or publish matters in which they have expertise directly obtained from, or related to, their technology and business experience. The rationale for this has nothing to do with the rights of natural persons

151. In June 2015, FastMed announced that the private equity firm, ABRY Partners, acquired control of the corporation. Angela Gonzales, *Equity Firm Closes FastMed Urgent Care Acquisition*, PHX. BUS. J., http://www.bizjournals.com/phoenix/blog/health-care-daily/2015/06/equity-firm-closes-fastmed-urgent-care-acquisition.html (last updated June 17, 2015, 4:04 PM).

152. RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 14 (1982) (arguing that corporations embed specialized knowledge into the routines that their employees carry out); *see also* Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1359–60 (1979) (analyzing the cases involving corporations wishing to assert First Amendment rights to protect expression, which is part of their business).

represented by the corporation, all of whom have individual rights protected by the Constitution to speak out, to tell their individual stories, and express their opinions.

IV. WHERE CORPORATE RIGHTS JURISPRUDENCE SHOULD GO NOW

Citizens United and *Hobby Lobby* will not be the last words on corporate constitutional rights, if only because it is highly unlikely that the Court will follow the implications of some of the more extreme statements in *Citizens United*. For example, Richard Hasen argues that the Court will probably not strike down "reasonable limits on campaign contributions made directly to candidates, allow spending by foreign nationals to influence candidate elections [or] to treat spending in judicial elections the same way as spending for other races."[153] Subsequent cases will also likely test the boundaries of the *Hobby Lobby* decision.

The analysis in this Article addresses the line drawing that must be done when the Court considers future questions about expressive rights in the name of a corporation. When a corporation can credibly be understood as representing the interests of natural persons who, individually, have valid claims to First Amendment protections and who associated with the corporation for some expressive purpose, the right of the corporation to carry out that expressive activity should be protected by the First Amendment. Americans for Tax Reform[154] and Citizens United for Tax Justice[155] should have fully protected rights to freedom of speech, freedom of press, and freedom of association[156] for activities pursuant to their missions[157] because these organizations

153. *See* Hasen, *supra* note 145, at 585. *But see* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014) (striking down aggregate limits on how much money an individual donor may contribute to candidates or committees); Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2492 (2012) (per curiam) (expanding the *Citizens United* ruling regarding independent expenditures by striking down state-level limits on corporate spending on elections). R

154. *See generally About*, AMS. FOR TAX REFORM, http://www.atr.org/about (last visited Aug. 17, 2015) (describing the Americans for Tax Reform organization, which "opposes all tax increases as a matter of principle").

155. *See generally Background and History*, CITIZENS FOR TAX JUST., http://ctj.org/about/background.php (last visited Aug. 17, 2015) (describing the Citizens for Tax Justice's mission to "give ordinary people a greater voice in the development of tax laws" and fight against "armies of special interest lobbyists for corporations and the wealthy").

156. And, if some hypothetical organization were created to advocate for the idea that conscientious believers of some religion should resist paying taxes because paying taxes is a form of idolatry, that organization should be free to "practice" religion by advocating against paying taxes.

157. See *supra* notes 154–55, for the websites that provide the mission of each organization. R

plausibly represent their donors and other supporters by speaking out on tax issues.

This basis for granting constitutional rights to corporations is a derivative rationale. Corporations' rights are derived from the rights of some group of natural persons whom the corporation is believed to represent. An alternative justification that the U.S. Supreme Court has sometimes relied on for granting expressive rights to corporations is an instrumental rationale: protecting the rights of a corporation serves some larger social purpose. This rationale only works for freedom of speech and freedom of press by which it can be argued that the speech or writings of a corporation enrich the pool of information and perspectives available to citizens or other natural persons. As the Court has said, it is the speech that is protected not just the person making the speech.[158] The instrumental rationale does not work for freedom of assembly or freedom to practice religion because those rights only have value to the practitioners not to observers or listeners. This analysis suggests several lessons:

First, it would be a mistake for the Court to broadly regard all corporations as having the full complement of First Amendment rights regardless of their purposes and circumstances. Recognizing this, the Court attempted to narrow the implications of its decision in *Hobby Lobby* by saying that the result only applies to "closely held corporations." The Court could have also limited its decision in *Citizens United* to apply specifically to corporations that were formed and financed by natural persons for the purpose of political advocacy, as was the nonprofit corporation at issue. Instead, it wrote the decision broadly, seemingly applying the findings to all corporations all the time. The dissent in *Citizens United* expressed concern that the decision could have the effect of opening the door to the efforts of foreign persons or organizations to influence election outcomes.[159] Since *Citizens United*, the Court has upheld prohibitions on campaign spending by foreigners.[160] But, because private for-profit corporations are not required to reveal the sources of funds that they spend on independent expenditures, it is not clear how this spending can be policed without restricting which corporations can spend and what they can

158. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010).

159. Justice Stevens, in *Citizens United*, called attention to this problem. 558 U.S. at 424 (Stevens, J., concurring in part and dissenting in part) ("If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would . . . appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans . . . .").

160. *See, e.g.*, Bluman v. Fed. Election Comm'n, 132 S. Ct. 1087 (2012) (mem.).

spend it on.[161] To clarify this point, the Court should consider adopting a more nuanced test in which it acknowledges that, at least with respect to political speech, this expression only deserves to be protected if it comes, directly or indirectly (through a corporation that truly represents them), from natural persons who are entitled to participate in the democratic process in the United States.

Second, to restore some restraints, limit the potential for corrupting influences in political campaigns in the United States, and protect against other harms, the Court should carry out a three-part test in future decisions regarding corporate constitutional rights:

1. The Court must determine if there is an identifiable and relatively stable group of actual natural persons who are citizens or residents of the United States and who can credibly be said to be represented by the corporation in question.

2. If the answer to the first question is yes, the Court should determine whether those natural persons intended to be acting together through the corporation in question for the purpose of exercising the expressive right in question. If the answer is yes, the right should be granted; however, if such an organization speaks out on political questions, the sources of the funding for the political speech must be made public.

3. If the answer to either or both of the aforementioned questions is no, then some rights—primarily freedom of speech or freedom of press—might still be granted to the corporation on the basis of an instrumental rationale if doing so serves to enrich the information and points of view available to citizens or other natural persons who have the right to have access to the information.[162] If the instrumental rationale is the only basis for granting a challenged right, however, at least two constraints on a corporation's right to speak or publish should be permitted: (1) the right of the corporation to speak or publish only applies to information and perspectives that come out of the technology, special knowledge, or business experience of the corpora-

161. In *Bluman*, the Court did not explain why speech was not protected when it came from a foreigner. The entire decision was as follows: "Appeal from the United States District Court for the District of Columbia. Judgment affirmed." *Id.* This decision suggests that, despite its disclaimers, the Court does, in fact, consider from whom the speech comes. In theory, one channel of enforcement would be that the IRS could learn of foreign money flowing from a corporation into political campaigns through information in tax filings of the corporation. The IRS could then report this activity to law enforcement authorities, which could pursue the offending corporation. But, unless the IRS is given resources to support active screening of tax filings for improper political spending by corporations, this is an extremely weak enforcement mechanism.

162. Insisting that the recipients of the information must have a right to receive the information is necessary to ensure that corporations do not have the right to publish confidential information (e.g., medical records or government classified information).

tion;[163] and (2) sources of the information being disseminated by the corporation must be fully identified. It would not contribute to full discussion and debate of a policy question among the electorate for voters to be barraged with anonymous claims and assertions. The public must be able to determine the source of information or perspectives on political matters for the information to be correctly understood, interpreted, and valued.

In *Citizens United*, the U.S. Supreme Court said that it did not want to do "case-by-case determinations to verify whether political speech is banned."[164] But, it also declined to draw a hard line that would be easy to police by simply recognizing that corporate persons are not the same as natural persons and allowing the government to restrain the speech of corporate "persons." Going forward, the Court must undertake a more difficult and nuanced analysis.

163. To continue to beat the ExxonMobil hypothetical, Barnett Gathering LLC, a wholly owned pipeline subsidiary of ExxonMobil, likely has no special claim to expertise on vaccination requirements for school children in the state of New Hampshire, so it should not have a constitutional right to speak out on these issues.

164. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010).