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# Conscience, Incorporated

James D. Nelson

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*Abstract*

*Do business corporations have free exercise rights? This question has become critically important in recent challenges to the Affordable Care Act's so-called "contraception mandate." A host of businesses selling ordinary goods and services claim that they cannot be compelled to provide employees with insurance that covers contraception. Courts have divided over whether corporations can assert rights of conscience, and existing theoretical accounts fail to provide guidance on this question.*

*This Article offers a new normative framework for evaluating corporate claims of conscience. Drawing on theories of conscience and collective rights, it develops a "social theory" of conscience that explains how individual moral identity is formed within associations and, consequently, how the social structure of those associations can support institutional claims for legal exemptions.*

*The social theory of conscience has direct implications for free exercise doctrine. For an institution to assert a valid claim, it must be a constitutive community, such that individual members regard the collective as intimately tied to their sense of self. Some institutions, like churches and other religious organizations, fit comfortably in this category. But the legal, social, and economic norms that govern modern business practice pervasively undermine the formation of tight personal connections to for-profit corporations and thereby erode the normative basis for institutional legal exemptions. Free exercise doctrine should therefore resist corporate claims to exemptions from the law.*

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## INTRODUCTION

Do business corporations have free exercise rights? Until recently, that question may have seemed an academic flight of fancy. But in a series of high-profile lawsuits, for-profit businesses have claimed that the so-called "contraception mandate"—which requires employers to offer health plans that cover contraceptives—violates their deeply held beliefs.[1] These claims raise novel and difficult questions, both about the foundations of institutional conscience and about the role of business organizations in society.

1. *See, e.g.*, Complaint at 2, 7, O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-cv-00476-CEJ) (involving an industrial goods holding company); Complaint at 2, Newland v. Sebelius, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-01123-JLK) (involving an HVAC manufacturer); Complaint at 2, 8, Legatus v. Sebelius, 901 F. Supp. 2d 980 (E.D. Mich. 2012) (No. 2:12-cv-12061-RHC-MJH) (involving a power tool supply company); Complaint at 8, 23, Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-cv-01000-HE) (involving a retail chain of arts and crafts stores); Complaint at 2, 5, Autocam Corp. v. Sebelius, No. 1:12-cv-01096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012) (involving an automotive and medical manufacturer); Complaint at 2, 4, Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735 (S.D. Ill. 2012) (No. 3:12-cv-01072-MJR-PMF) (involving a construction company); Complaint at 2, 4, Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs., No. 6:12-cv-03459-JCE, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012) (involving a wholesale scrap metal recycling manufacturer); Complaint at 2, Grote Indus., L.L.C. v. Sebelius, 914 F. Supp. 2d 943 (S.D. Ind. 2012) (No. 4:12-cv-00134-SEB-DML) (involving a vehicle safety system manufacturer); Complaint at 1-2, Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (No. 5:12-cv-06744-MSG) (involving a wood cabinet manufacturer); Complaint at 2, 6, Monaghan v. Sebelius, 931 F. Supp. 2d 794 (E.D. Mich. 2013) (No. 2:12-cv-15488-LPZ-MJH) (involving a property management company).

In one of the most widely publicized cases, *Hobby Lobby Stores, Inc. v. Sebelius*, a for-profit retail chain of arts and crafts stores challenged the mandate on the grounds that it conflicts with Christian principles.[2] Hobby Lobby currently operates in over 500 locations across the country and has more than 13,000 employees.[3] The Tenth Circuit, sitting en banc, held that Hobby Lobby's claim is likely to succeed on the merits.[4] But other courts have reached precisely the opposite conclusion in analogous circumstances,[5] and the Supreme Court is now poised to weigh in on the issue.[6]

Perhaps the most difficult question in these cases arises as a threshold matter: can businesses raise conscience-based objections to the law? Federal courts are deeply divided on this initial inquiry.[7] Some courts have viewed conscience as an inherently personal phenomenon.[8] Others have seen essentially no difference between corporate claims and individual claims.[9] Still other courts have found the issue so puzzling that they have skipped over it entirely.[10] The root of the problem is not conflicting doctrine. Instead, the problem is that courts do not have a workable theory to guide their analysis.

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2. Complaint, *Hobby Lobby Stores, Inc.*, *supra* note 1, at 2, 8.

3. *Id.* at 1.

4. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc).

5. *See, e.g.*, Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Servs., 724 F.3d 377, 389 (3d Cir. 2013); Autocam Corp. v. Sebelius, 730 F.3d 618, 628 (6th Cir. 2013).

6. *See* Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013) (granting certiorari); Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013) (granting certiorari).

7. *Compare Hobby Lobby Stores, Inc.*, 723 F.3d at 1121 (holding that a for-profit retail chain of arts and crafts stores is likely to succeed on the merits of its claim), *and* Korte v. Sebelius, 735 F.3d 654, 659, 687 (7th Cir. 2013) (granting motions for preliminary injunctions filed by a for-profit construction company and a for-profit manufacturing firm), *with Conestoga Wood Specialties Corp.*, 724 F.3d at 381, 389 (denying a for-profit cabinet manufacturer's motion for preliminary injunction), *and Autocam Corp.*, 730 F.3d at 620, 628 (denying a for-profit automotive product manufacturer's motion for a preliminary injunction).

8. *See, e.g.*, Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743 (S.D. Ill. 2012) (finding that free exercise rights are "'purely personal'"); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013) (same).

9. *See, e.g.*, Legatus v. Sebelius, 901 F. Supp. 2d 980, 988 (E.D. Mich. 2012) (holding that a closely held corporation may assert the free exercise rights of its owner); Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 114, 117 (D.D.C. 2012) (same).

10. *See, e.g.*, Newland v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012) (noting that the question of corporate free exercise rights "pose[s] difficult questions of first impression" that merit further investigation); O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (agreeing with the *Newland* court that the threshold question is difficult and assuming corporate standing for the sake of argument).

In this Article, I present a theory of corporate conscience to fill the void. Drawing from philosophical literature on conscience and on collective rights, I develop a "social theory" of conscience. This theory focuses on how individuals are related to each other within groups, associations, and organizations. It describes how the freedom of conscience can be implicated through various collective entities and how individual autonomy interests can translate into collective claims for legal exemptions. The theory also provides a conceptual scheme to classify various types of groups and lays the groundwork for evaluating corporate claims of conscience.

My argument for the social theory begins by explaining how existing accounts of corporate personhood do not provide adequate resources to resolve claims of corporate conscience. In Part I, I argue that none of these theories are capable of generating normative arguments for or against the recognition of particular corporate rights. This indeterminacy claim builds on a critique of corporate theory offered by the legal realists during the early decades of the twentieth century. As the realists showed, although personhood theories are often invoked to support or defeat various rights claims, they do so only by smuggling in unstated moral and legal premises.

In addition to their indeterminacy, theories of corporate personhood are subject to a deeper criticism, namely, that they fail to capture the ways in which individual attitudes and behavior are deeply intertwined with organizational structure. This conceptual oversimplification, in turn, renders those theories blind to a critical source of normative evaluation for corporate rights claims—the nature of the relationships between individuals and the corporations with which they are associated. This argument against corporate personhood theories offers at least a partial explanation for the indeterminacy of existing accounts and points toward a richer and more complete normative conception of corporate conscience.

Building on these criticisms, Part II constructs a social theory of conscience, which seeks to connect individual interests to organizational structure. First, the theory identifies conscience as the normative core of religious free exercise. It then links the freedom of conscience to the concept of personal identity. Drawing on various strands of the collective rights literature, and in particular the work of Meir Dan-Cohen, I explain how personal identity is in significant ways constructed though the internalization of various collective roles. At the core of the social theory of conscience is a distinction between *identification* with a collective, where one's membership in a group is intimately tied to personal identity, and *detachment*, where one's role in a group is external to the self. These individual modes of affiliation provide the building blocks for a conceptual scheme to classify what kinds of collectives can make intelligible claims of institutional conscience.

The social theory of conscience offers a coherent means by which to evaluate for-profit corporations' claims to legal exemptions. Part III undertakes this analysis and concludes that due to the legal, structural, and eco-

nomic features of modern corporations, nearly all corporate conscience claims are untenable. To explain how the social theory reaches this conclusion, I first identify a set of major corporate constituents—shareholders, corporate managers, employees, and customers—and describe the social and economic norms that shape the relationships between these individuals and the corporate entity. I then argue that the expectations accompanying each of these corporate roles give individual participants powerful reasons to adopt a detached mode of affiliation. This pattern of detached affiliation, in turn, undermines the formation of shared interests in conscience that would support institutional exemptions. Although it is possible to imagine exceptions, I argue that we should generally view for-profit claims to exemptions with a significant amount of skepticism.

Part IV responds to two types of objections to the social theory of conscience. The first is that the theory is too strong, i.e., that it excludes too many claims of corporate conscience. The argument here is that instead of merely reflecting existing patterns of affiliation in business corporations, the law might encourage ethical behavior in the marketplace by making room for conscience-based activity. The second objection is that the theory is too weak, i.e., that it does not exclude enough claims for corporate exemptions. On this view, which has gained adherents in some federal courts, conscience is an inherently individual phenomenon that has no corporate analogue. Against these objections, I argue not only that exemptions are ill-suited to the task of curbing corporate abuse and that we should be concerned about the effects of moralizing the marketplace, but also that at least some nonmarket organizations warrant protection.

Finally, Part V explores wider implications of the social theory of conscience. In addition to offering a meaningful guide to corporate claims, the theory provides a powerful new lens through which to view the broader phenomenon of institutional exemption. A wide array of religious organizations—including churches, schools, hospitals, and social service agencies—routinely bring conscience-based objections to the law. Applying the social theory framework more broadly has the potential to solve a variety of puzzles regarding the kinds of associations that should qualify for free exercise protection.

## I. THE INADEQUACY OF CORPORATE PERSONHOOD

Before constructing a new theory of corporate conscience, it is important to understand what is wrong with existing approaches. A common assumption among both courts and scholars is that theories of corporate

personhood are capable of resolving many disputes over corporate rights.[11] These theories purport to offer descriptions of the essence or nature of the corporation, which then carry normative implications for particular corporate rights claims. Although these theories are remarkably persistent, they fail to illuminate our inquiry into corporate rights of conscience.

### A. Theories of Corporate Personhood

One way to describe the corporation is as an artificial entity. At its core, the artificial entity theory posits that the corporation is a creature of positive law that owes its existence to an act of the sovereign.[12] The canonical statement of this conception comes from Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*.[13] In the course of holding that the Contracts Clause protects corporations, Marshall wrote that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[14] On this view, state action precedes collective organization and determines the rights, duties, and powers of the corporation.[15]

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11. *See, e.g.*, Beth Stephens, *Are Corporations People? Corporate Personhood Under the Constitution and International Law*, 44 RUTGERS L.J. 1 (2013) (discussing theories of corporate personhood in domestic and international law); Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011) (discussing theories of corporate personhood as applied to the Second Amendment); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89, 94 (1987) (relying on the artificial entity theory of corporate personhood to uphold a state statute that regulated shareholders' rights).

12. *See* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1447-55 (1987); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205-11; Miller, *supra* note 11, at 916-17; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580 (1990).

13. 17 U.S. (4 Wheat.) 518 (1819).

14. *Id.* at 636.

15. The artificial entity theory was especially prevalent in the first half of the nineteenth century. *See* Mark, *supra* note 12, at 1441. At that time, corporate charters were special privileges granted by the state in each instance of incorporation to pursue some public good or benefit. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985). Corporations were viewed, therefore, as "quasi-public" entities that existed for specific purposes. *See* Mark, *supra* note 12, at 1453-54. In the latter half of the nineteenth century, the artificial entity theory began to fade. Horwitz, *supra*, at 181. In the spirit of Jacksonian egalitarianism and distaste for monopolistic privilege, states replaced special chartering laws with "general incorporation" statutes. *Id.* at 189-90. These statutes, anticipating modern-day corporate law, made incorporation largely a function of compliance with general filing requirements. *See* Millon, *supra* note 12, at 206. General incorporation served to undermine the artificial entity premise that corporations are a product of particularized sovereign grace rather than the initiative of the individuals conduct-

A second view is that the corporation is just an aggregate of individuals. The aggregate theory denies that the corporation is a concession from the state, insisting instead that it is merely a collection of natural persons who join together in a business enterprise.[16] One of the earliest statements of the aggregate theory was offered by Justice Field riding circuit in *The Railroad Tax Cases*: "[T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name."[17] The Supreme Court struck similar notes in *County of Santa Clara v. Southern Pacific Railway*, where it held that the Equal Protection Clause of the Fourteenth Amendment prohibits states from taxing corporate property differently than the property of individuals.[18] The corporate entity, on the aggregate view, is a misleading reification that distracts focus from the individual members of the corporation.[19]

A third view is that the corporation is a real entity in and of itself. On this conception, the corporation is neither an aggregated mass of shareholders nor an invention of the state. Instead, the corporation is a naturally occurring phenomenon that has an independent life and personality of its own.[20] The corporation is as real as any other social group, and its functional existence is neither dependent upon nor reducible to the individual acts of its members. On the real-entity view, the corporation is a product of organi-

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ing its operations. *See* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1485-86 (1989). But the artificial entity theory continues to crop up, both in scholarly literature, see, e.g., David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 155 (2013) (defending a version of the artificial entity theory), and in Supreme Court doctrine, see, e.g., *CTS Corp.*, 481 U.S. at 89 (quoting Justice Marshall's artificial entity language in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), and stating that a corporation's very existence is the product of state law); and *California Bankers Association v. Shultz*, 416 U.S. 21, 65-66 (1974) (stating that corporations are artificial entities that are privileged by the government and therefore subject to enhanced regulation).

16. *See* Mark, *supra* note 12, at 1459; *see also* VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE § 29, at 24 (1882); HENRY O. TAYLOR, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK, at iv (1884).

17. 13 F. 722, 748 (C.C.D. Cal. 1882).

18. 118 U.S. 394, 409, 417 (1886).

19. The rise of the modern managerial corporation posed significant problems for the aggregate theory. In place of individual shareholders running their businesses, hierarchies of professional managers began to administer increasingly complex business operations. *See* Bratton, *supra* note 15, at 1487. This separation of ownership and control put stress on the idea that corporations are simply a group of shareholders united in a business enterprise. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 121 (reprt. ed. 1933).

20. *See* Mark, *supra* note 12, at 1465; Bratton, *supra* note 15, at 1490; *see also* OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (Frederic William Maitland trans., Cambridge University Press 1951) (1900).

zational structures and purposes and is therefore an autonomous being in its own right.[21]

B. Indeterminacy

Although some commentators argue that the real-entity view is the reigning theory of corporate personhood,[22] traces of each conception continually reemerge in legal doctrine.[23] But do any of these theories help us make sense of corporate rights of conscience? That is, can any of the existing theories of corporate personhood generate arguments for or against recognizing business claims for exemption?

One problem with theories of corporate personhood is that they are indeterminate. That is, abstract theories that seek to capture the essence of the corporation are not capable of producing the normative premises necessary to evaluate particular rights claims. The broad form of this criticism follows John Dewey's observation that conceptions of personhood distract attention from the underlying facts and interests that ought to guide the law's treatment of corporations.[24] Rather than providing useful theoretical guidance, in other words, different conceptions of corporate personhood offer only rhetorical tools to advance preferred policy positions.[25] Dewey's perceptive critique highlighted the fact that these conceptions do not engage the interests that ground particular rights claims, nor do they provide any sense of how those interests are implicated within corporations.[26]

In response to this skeptical assessment, defenders of corporate personhood theory have argued that, although various conceptions of the corporation do not mechanically produce particular normative results, they nonetheless have normative implications or "tilt."[27] For example, Morton

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21. *See* ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS (1897).

22. *See, e.g.*, Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1045.

23. *See* Miller, *supra* note 11, at 916-31 (detailing modern courts' usage of each theory).

24. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 670-73 (1926).

25. *Id.*; *see also* Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 298 (1928) ("It is not the part of legal personality to dictate conclusions. To insist that because it has been decided that a corporation is a legal person for some purposes it must therefore be a legal person for all purposes, or to insist that because it has been decided that a partnership is not a legal person for some purposes it cannot therefore be so for any purposes, is to make of both corporate personality and partnership impersonality a master rather than a servant, and to decide legal questions on irrelevant considerations without inquiry into their merits."); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (arguing that courts should adopt a functional approach to answering questions about corporate rights).

26. *See* Dewey, *supra* note 24.

27. *See, e.g.*, Horwitz, *supra* note 15, at 176.

Horwitz has argued that theories of the corporation exist in particular historical contexts, and those contexts provide interpretive assumptions that endow the theories with determinate normative meaning.[28] Although it is true that theories of corporate personhood create a wide range of interpretive possibility, Horwitz claims that the range is significantly narrowed by the actual conventions of particular interpretive communities.[29]

This response seems capable of explaining why corporate personhood theories have been used *in service of* particular doctrinal outcomes, but it does not show that the theories have any freestanding normative purchase. The fact that a theory has been invoked in an effort to legitimize big business in one context or to support extensive regulation in another does not demonstrate the theory's independent persuasive force. Instead, the normative content in each instance comes from unstated elements of the interpretive context, and the theory of corporate personhood is simply the conceptual vehicle in which to smuggle that content.

In the context of conscience-based claims to exemption by business corporations, the indeterminacy problem seems particularly acute. Without any generally accepted conventions on the role of businesses in conscience-based association, we do not have a preexisting normative consensus on which to rely. Instead, the issue of corporate rights of conscience raises difficult questions about the function of and justification for collective religious practice and the degree to which business firms fit within that picture. On such terrain, it is hard to see how the current interpretive context could imbue any conception of corporate personhood with determinate content.

Take, for example, the artificial entity theory. This theory is usually invoked in an effort to narrow the range of corporate rights.[30] But even if we accept that corporations are created by the state, that does not settle the matter of whether the artificially created group should have rights of conscience. Similarly, the aggregate theory would seem to suggest robust protection for individual rights, but it provides no indication of whether those rights are exercised within the business itself. Finally, the real-entity theory tells us that the corporation has a real personality, but not whether that real personality justifies exemptions from legal requirements.

Descriptions of the essence or nature of the corporation do not compel any particular results. They do not identify the individual interests at stake, nor do they tell us anything about how those interests play out in particular social contexts. They merely distract us from the task of stating the "con-

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28. *Id.* at 175-76.

29. *Id.* at 176; *see also* Millon, *supra* note 12, at 244-46 (explaining Horwitz's account of historical context and offering a limited defense).

30. *See, e.g.*, Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 65-66 (1974) (relying on the artificial entity theory in holding that financial reporting requirements do not violate any Fourth Amendment rights held by banks).

crete facts and relations" at issue in corporate claims for legal exemptions and generating normative arguments to assess those claims.[31]

C. Distortion

Theories of corporate personhood also tend to distort proper analysis of normatively relevant relationships within corporations. More specifically, each of the dominant conceptions focuses narrowly on individual participants or on the entity itself without attending to how organizations structure and influence individual attitudes and interactions. By failing to take full account of the connections between individuals and entities, each theory becomes conceptually incomplete and normatively impoverished. Identifying this distortion both helps to explain the indeterminacy of corporate personhood theory and points toward a richer approach to analyzing corporate conscience.

To begin with the entity views, both the artificial entity and the real-entity conceptions marginalize individual corporate participants. The artificial entity view focuses almost exclusively on the relationship between the state and the corporation. Artificial entity theorists claim that the state is conceptually prior to the corporation and that corporations owe their entire existence to sovereign grace.[32] But that view does not contend with the status of individuals in the corporation or with how their rights might transfer to the corporate entity.

In the course of advancing a competing account of the relationship between the state and corporations, the real-entity view encourages the same distortion. This theory focuses on the behavior of the corporation as a whole and not the individuals that occupy its offices. In fact, because the corporation would remain the same entity even if all of the individual members were to change, individuals fall out of focus.[33] The real-entity conception, then, tends to obscure individual behavior and interests, and prioritizes the personality of the organization.

Finally, instead of sidelining individuals, the aggregate theory assumes away the corporate entity itself. The aggregate view recognizes that individuals are fundamentally important to the corporation and cannot be subsumed into the collective. But the aggregate view goes even further, claiming that the corporation is merely a conglomeration of individuals, and any talk of an entity is either misleading fiction or confusing reification. On this view, individuals are the whole story, and speaking of the corporation as an

31. *See* Dewey, *supra* note 24, at 673.

32. *See* sources cited *supra* note 15.

33. *See* PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 13-18 (1984) (advancing a modern philosophical version of the real-entity theory).

entity in and of itself is a conceptual mistake.[34] The theory, therefore, cannot account for the various arrangements and norms that influence individual behavior within organizations and structure their relations.

This conceptual distortion is problematic when it comes to analyzing claims of corporate conscience. By neglecting individuals, the artificial and natural entity views cannot explain how an organization comes to hold rights that protect individual liberty. That is, without looking at individual interests, we cannot begin to generate arguments for the freedom of conscience. But by casting aside the various structures that accompany corporate organization, the aggregate theory has no account of how these individual interests come to be associated with particular collective projects.

Although the realist charge of indeterminacy is powerful and enduring,[35] it is more destructive than constructive. As with many legal realist insights, it demolishes traditional conceptions, leaving no positive theory in their place. But understanding how corporate personhood theories distort our view of organizational relationships can open a more fruitful theoretical path. Not only does it help to explain the problem of indeterminacy, it also suggests where we ought to look for the missing normative content. The only way to capture how individual interests in the freedom of conscience might generate collective claims is to focus on the way that individuals associate with corporate entities. None of the existing theories make room for this kind of inquiry.

The next Part attempts to take seriously the methodological insights generated by the distortion critique. It aims to describe the ways in which individuals affiliate with collectives and to conceptualize how those relationships might affect the translation of individual conscience into institutional claims. It is from these relationships that we can build a theory that is both connected to individual liberty of conscience and attentive to the actual structures that organize corporate life.

## II. THE SOCIAL THEORY OF CONSCIENCE

Recognizing the shortcomings of existing theories of corporate personhood, we can see the need to develop a theory of corporate conscience that takes account of the nature of the relationships between individuals and organizations. The theory must avoid the reification of corporate entities such that individual participation in a business enterprise becomes epiphenomenal. But it must also resist the temptation to ignore organizational

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34. As other commentators have noted, the modern "nexus of contracts" theory of the corporation is a reformulation of the aggregate theory. *See, e.g.*, Millon, *supra* note 12, at 229.

35. *See* Mark, *supra* note 12, at 1481 (crediting the realist critique for displacing corporate theory from legal thought).

structures and norms that shape individual behavior. Instead, the theory needs to chart a middle course between aggregates and entities.[36] I call that middle course the social theory of conscience.

Before I sketch the elements of the social theory of conscience, a few preliminaries are in order. First, my account proceeds on the assumptions of normative individualism.[37] The idea of normative individualism is that individual human interests are the ultimate source and measure of value. Organizations and other social entities are not entitled to moral consideration in their own right, separate and apart from the good of individuals. Although this Article is not the place to develop an argument for that baseline assumption, the idea that organizations have morally compelling interests, independent of the interests of individuals, is philosophically dubious.[38]

But although the social theory of conscience is committed to normative individualism, it does not deny that organizations exist. That denial would render the theory blind to the ways in which institutional structures and norms influence human behavior and interaction.[39] Collective entities may not have interests of their own, but that does not mean that patterns of organization have no effect on the world. To develop a theory on the assumption that those patterns are not real would be to commit the same mistake for which I criticized the aggregate theory of corporate personhood.[40]

Next, I focus on the freedom of conscience over other possible justifications for protecting religious liberty. The idea that respect for conscience provides the normative foundation for free exercise law has been developed extensively in both the legal and philosophical literature.[41] Although some scholars have resisted this move and attempted to defend the idea that reli-

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36. *See* LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 24-25 (1987).

37. For more extensive statements of normative individualism, see CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 180-82 (2011); and Christopher McMahon, *The Ontological and Moral Status of Organizations*, 5 BUS. ETHICS Q. 541, 547 (1995).

38. *See* McMahon, *supra* note 37, at 547-50 (arguing that it is implausible to make statements about the good of organizations without ultimate reference to the good of individuals). For a recent example of a value-collectivist approach, see MIODRAG A. JOVANOVIĆ, COLLECTIVE RIGHTS: A LEGAL THEORY (2012). For insightful criticism of that approach, see Dwight G. Newman, *Value Collectivism, Collective Rights, and Self-Threatening Theory*, 33 OXFORD J. LEGAL STUD. 197 (2013).

39. *See* MAY, *supra* note 36, at 20-21.

40. *See supra* Section I.C.

41. *See, e.g.*, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008); KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 98 (2005); AMY GUTMANN, IDENTITY IN DEMOCRACY 151-91 (2003); Michael J. Sandel, *Religious Liberty—Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597.

gion should be singled out for special treatment,[42] those accounts fail to specify the particular feature or features of religious practice that justify its privileged status.[43]

Finally, we need at least a bit more detail about the idea of conscience itself. To be sure, no one conception commands universal acceptance.[44] Conscience has been variably described as an act of judgment relying on knowledge of natural law,[45] an emotional internalization of prevailing cultural norms,[46] an "inner judge" that admonishes us toward right conduct,[47] and the subjective desire or will to act morally.[48]

Each of these conceptions, however, misses the degree to which conscience is intimately connected to personal identity. Several distinguished scholars have explored the deep, constitutive relationship between conscience and individual personhood.[49] Most persuasively, Timothy Macklem has argued that the notion of *commitment* distinguishes conscience from other related concepts and justifies its protection.[50] According to Macklem, when we commit to certain beliefs and projects, we make them part of our

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42. *See, e.g.*, Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 593 (arguing that religion is entitled to special protection because it is an object of what Charles Taylor calls "strong evaluation"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497 (1990) (arguing that religion deserves special treatment because its obligations "transcend the individual and are outside the individual's control").

43. *See* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1377-403 (2012) (arguing that there is no moral basis on which to distinguish religion from secular comprehensive conceptions of the good).

44. *See, e.g.*, Thomas E. Hill, Jr., *Four Conceptions of Conscience*, *in* INTEGRITY AND CONSCIENCE 13 (Ian Shapiro & Robert Adams eds., 1998) (detailing and evaluating four historical conceptions of conscience); Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 225-33 (2009) (describing conscience as a "protean notion" and identifying several different strands of the concept); ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 15-121 (2010) (reviewing the history of varying conceptions of conscience and highlighting the concept's relational dimension).

45. *See* 1 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 407-08 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947) (c. 1265-1274).

46. *See, e.g.*, Gilbert Ryle, *Conscience and Moral Convictions*, 7 ANALYSIS 31, 31-39 (1940).

47. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), *reprinted in* PRACTICAL PHILOSOPHY 353, 553 (Mary J. Gregor ed. & trans., Cambridge University Press 1996).

48. *See, e.g.*, GUTMANN, *supra* note 41, at 168-78.

49. *See, e.g.*, APPIAH, *supra* note 41; WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM 66-69 (2005); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65-71 (1996).

50. *See* TIMOTHY MACKLEM, INDEPENDENCE OF MIND 68-118 (2006). Although I build on Macklem's account of the freedom of conscience, I reject his attempt to show that the special value of *faith* distinguishes religion from conscience and justifies religion's special protection. *See id.* at 119-54.

identity and therefore shape the way we picture ourselves.[51] These commitments, in turn, form the basis for evaluating future action and judging it against our own self-image.[52] For Macklem, the process of selecting our commitments, integrating them with other aspects of our identities, and then applying those commitments to future projects is the autonomous process of self-authorship that justifies respect for the freedom of conscience.[53]

In the remainder of this Part, I take Macklem's account of conscience as a starting point and attempt to explore the social dimension of commitment. If, as Maklem argues, conscience is about the construction of our identity and personhood, we must be attentive to the ways in which our various social associations contribute to that process.[54] Once that social aspect of commitment is in hand, we can begin to evaluate the kinds of collectives that embody a shared interest in such self-definition.

### A. The Social Construction of Identity

On the view of conscience as commitment, it might be tempting initially to think of constructing one's identity as a solitary endeavor. Commitment is a process of personalizing various aspects of the world—of making them part of our own life story. As a core aspect of our autonomy, the ultimate responsibility for crafting a coherent and desirable narrative lies with each individual person.

But commitment does not occur in a vacuum. Instead, significant parts of our identities are constructed out of the various roles that we play in associations. Admittedly, some people have richer associational lives than others, but all of our identities are at least partially constituted by membership in social groups.[55] How, then, do these collectives become part of our identities?

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51. *Id.* at 101-03.

52. *Id.* at 110-13.

53. *Id.* at 113-16.

54. On the idea that identity is, at least in part, socially constructed, see Sheldon Stryker & Anne Statham, *Symbolic Interaction and Role Theory*, *in* 1 HANDBOOK OF SOCIAL PSYCHOLOGY 311 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985); Richard T. Serpe, *Stability and Change in Self: A Structural Symbolic Interactionist Explanation*, 50 SOC. PSYCHOL. Q. 44 (1987); Ralph H. Turner, *The Role and the Person*, 84 AM. J. SOC. 1 (1978); GEORGE H. MEAD, MIND, SELF, AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (Charles W. Morris ed., 1967 ed. 1934). For a different view, see DEREK PARFIT, REASONS AND PERSONS (1984) (advancing an approach to personal identity that depends on conditions of psychological continuity and connectedness).

55. *See* Sheldon Stryker, *Identity Salience and Role Performance: The Relevance of Symbolic Interaction Theory for Family Research*, 30 J. MARRIAGE & FAM. 558 (1968) (exploring the social construction of identity within the context of family life); *see also* MAY, *supra* note 36, at 181 ("[N]o person fails to be a member of at least one social group.").

I begin with a distinction between two different ways in which individuals relate to collectives. The first kind of relationship is one of *identification*. Individuals can be said to identify with a collective if they regard their membership in that group as a significant aspect of their personhood.[56] When individuals identify with a collective entity, their participation in forming and enacting that group's agenda becomes intertwined with their other core commitments and projects. That intimate connection prompts those individuals to integrate their particular affiliation with other roles to which they are attached and attempt to order those roles in a way that achieves a coherent picture of the self. It also involves a process of reflective endorsement of their affiliation, such that that particular affiliation becomes part of their self-description. On this model, an identification relationship tends to break down distinctions between self-interest and group goals.[57] Participation in the life of the group takes on intrinsic meaning or value—it becomes a good in itself.[58]

A few examples help to elucidate the idea of identification with a collective. Perhaps the clearest case of identification can be seen in the way that a parent regards his or her role within a family. That role typically involves a close connection between the parent's duties and that parent's identity as a person. If asked to describe themselves, few, if any, parents would neglect to mention their intimate association with family members. Their family becomes part of who they are, and other aspects of their identity must be arranged or rearranged to be consistent with that association.

Membership in a cult provides an even more extreme illustration of the concept of identification. Cult members identify with their organizations so strongly that other parts of their personhood come to be defined exclusively by that membership. Cult mentality pushes people to have strong emotional connections to group life and to see all aspects of their existence through the prism of that single attachment. In fact, many cults aim to destroy any noncollective aspects of identity and to replace them with a sort of group consciousness. Although cult membership is hardly the norm, think-

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56. For an extended treatment of the role of identity in associations, see GUTMANN, *supra* note 41, at 86-116.

57. *See, e.g.*, Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CANADIAN J.L. & JURISPRUDENCE 217, 218-19 (1991) (describing the social allegiances that lead community members to see group goals as their own goals).

58. The concept of identification has deep roots in the philosophical literature on collective rights. *See, e.g.*, MARLIES GALENKAMP, INDIVIDUALISM VERSUS COLLECTIVISM: THE CONCEPT OF COLLECTIVE RIGHTS 81-100 (1993); McDonald, *supra* note 57; Victor Segesvary, *Group Rights: The Definition of Group Rights in the Contemporary Legal Debate Based on Socio-Cultural Analysis*, 3 INT'L J. ON GROUP RTS. 89 (1995). It also shares elements of Harry Frankfurt's conception of wholeheartedness. *See* HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 159-76 (1988).

ing about it in terms of an excessive form of identification helps to illustrate the basic concept.

The relationship of identification can be contrasted with one of *detachment*.[59] In a detached mode of affiliation, individuals regard the collective's goals and values as distant from their own personal identities. A detached affiliation sprouts few, if any, connections with core aspects of the self and is experienced without any significant emotional involvement or investment. Detached affiliation calls for impersonal modes of interaction and is characterized by interlocking instrumental motivations and goals.

Meir Dan-Cohen offers the example of a telephone operator at AT&T as someone who is enacting a detached role.[60] The operator does not regard his membership in the company as a significant part of his personhood and expends little or no effort to integrate his duties in that role with his life's narrative. Instead, his actions on behalf of the company are tightly controlled by his role description, and those actions are secured through a mixture of financial incentives and implicit threats of negative treatment if his performance does not meet externally imposed standards.

The difference between identification and detachment lies entirely in the subjective attitudes of individuals who enact collective roles. The distinction highlights how individuals regard the collective enterprise within the larger schema of their personhood and how they locate their membership in relation to core aspects of their own identities.

But although the distinction is based on subjective attitudes, those attitudes are not entirely idiosyncratic.[61] Different roles within collective entities come with more or less defined patterns of expectations for behavior. The roles of father or cult member or telephone operator are saddled with social expectations of the appropriate behavior that those roles entail. Those expectations, in turn, push individuals toward one mode of affiliation or the other—i.e., toward identification or detachment. In other words, the norms that accompany collective roles, in significant respects, write the "script" for social behavior and heavily influence the way that individuals relate to collectives.[62]

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59. *See* Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1223-25 (1994) (distinguishing between detached and non-detached roles); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 872 (2005) (utilizing Meir Dan-Cohen's concept of detached roles).

60. Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1238-39 (1991).

61. *See* Dan-Cohen, *supra* note 59, at 1223. *Contra* Koppelman, *supra* note 44, at 236-37 (arguing that individual identification "is a poor basis for legal exemption because it is potentially so idiosyncratic").

62. Dan-Cohen, *supra* note 59, at 1224, 1228-33.

This focus on subjective motivation also helps to highlight another crucial aspect of the distinction—individual motivation to perform collective tasks. When individuals identify with a collective role, they internalize the pattern of expectations such that it becomes intrinsically valuable. In other words, the expectations associated with internalized roles become the expectations people have of themselves.

But to secure compliance with the expectations that accompany a role distant from the self, that role must be accompanied by some sort of external coercion or inducement. Intrinsic motivation is not a sufficient reason to perform a detached role. Some extra element of coercion or reward must be added to the mix to close the incentive gap.[63]

It is important to note that pure affiliations of identification and detachment are ideal types. To be sure, sometimes people who have an identity relationship with a collective nevertheless act in instrumental ways, and the reverse is true for detached roles as well. Still, the ideal-typical distinction helps to explain how the formation of individual identity is crucially dependent on membership in various social groups.

### B. Of Organizations and Constitutive Communities

Building on the distinction between identification and detachment, we can begin to construct a basic conceptual scheme to classify collectives. The strategy here is to move beyond individual-level affiliations and to look at the dominant modes of affiliation at the level of the collective. In other words, now that we have in hand a distinction between individual modes of affiliation, what kinds of collectives emerge from patterns of identification and detachment?

Here I want to leverage another distinction, again building on the work of Meir Dan-Cohen, this time between *organizations* and *constitutive communities*.[64] Organizations are constructed out of a dominant pattern of de-

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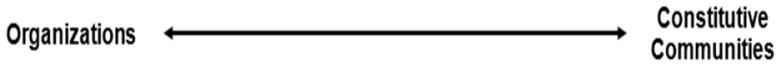
63. *See* LIST & PETTIT, *supra* note 37, at 124-28 (describing methods for achieving incentive compatibility within a group).

64. Dan-Cohen offers the distinction between organizations and communities in several places. He develops the idea most comprehensively in *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*. Dan-Cohen, *supra* note 60. The distinction is central to Dan-Cohen's work on collective rights more generally. *See, e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986). I use the term "constitutive community" to refer to those associations in which we form *parts* of our identities. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (2d ed. 1998). Contrary to the arguments of some communitarians, however, I see no inconsistency between recognizing constitutive communities and liberal political theory more generally. *See* C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895, 897-905 (1985) (arguing that John Rawls' theory of justice is not subject to the critique that it assumes an atomistic conception of the person).

tached relationships with a collective. When the characteristic attitude or mode of affiliation within a collective is distant, impersonal, or alienated, that collective can be classified as an organization. Within an organization, people do not integrate collective goals and values with the core aspects of their identities, and they perform their tasks largely motivated by explicit or implicit threats of coercion or offers of inducement. Those motives are external to the will and therefore stand apart from the reflective endorsement that makes up the self. Organizations ensure that their members' actions are compatible with organizational goals largely through manipulation of instrumental incentives.[65] Organizations, therefore, are constructed out of a series of interlocking impersonal relationships in which people use their collective affiliation as a tool to achieve instrumental ends.

Constitutive communities, on the other hand, are constructed out of a cluster of identification relationships. In a constitutive community, individual members view their affiliation with the collective as a central aspect of their own identities. Those members integrate their roles in the community with other core commitments and projects, and regard the collective good as intertwined with their own good. These individual members are intrinsically motivated, because, in a significant sense, the group's goals are their own goals, and they therefore enact those roles transparently and authentically.[66] Constitutive communities, then, are constructed out of normatively thick collective affiliations in which individual members regard their own good as intimately connected to the good of the group.

Once again, the distinction between organizations and constitutive communities picks out ideal types. These ideal types can be best thought of as two poles on a continuum of collectives:




We can then place various collectives along this continuum according to the pattern of identification with or detachment from the collective entity. The family, for example, would fall on the constitutive community side of the spectrum. Family members tend to identify with the collective unit and to consider their roles to be intertwined with personal identity. Similarly, a cult would be a constitutive community because both the leaders and the ordinary members regard the group as an important aspect of their personhood. Multinational firms like AT&T and IBM, by contrast, would fall on the organization side of the spectrum. These corporations stitch together roles activated by external goals and motivated by instrumental incentives.

65. *See* LIST & PETTIT, *supra* note 37, at 124-28.
66. *See* Dan-Cohen, *supra* note 60, at 1238, 1249.

The idea of a constitutive community, I suggest, is the most plausible way to make sense of collective claims of conscience. On the conception of conscience as commitment, individuals have an interest in selecting among available beliefs and projects, and making those beliefs and projects part of and coherent with their personal identities. To make a strong claim of collective conscience, though, that interest must be in some significant respect *shared* among the members of a group or institution. That is, for the individual interest in commitment to become a group claim, that interest must be held in common by the group's members. My claim, then, is that the pattern of shared interests in self-definition through an association should be the normative touchstone for evaluating collective claims of conscience.

### C. A Preliminary Objection

At the outset, one might reasonably object that the idea of constitutive community is overly complicated and that there might be proxies for institutional conscience that do the same normative work without the need for any conceptual apparatus. Three potential candidates seem to be most promising: size, organizational bureaucracy, and public statements of purpose.[67]

It might seem intuitive that the size of an organization will have a lot to do with whether it can make plausible claims of institutional conscience. A proponent of this position might even say that my continuum from organizations to constitutive communities is really just a continuum from large associations to small associations. Small groups, on this view, can support commitments to associational life in a way that eludes larger groups. Pulling from my examples above, families are small and so collective claims are credible, but AT&T and IBM are enormous and so collective claims are precluded.

Ultimately, however, size falters in the face of recalcitrant counterexamples. To take just one, Second Baptist Church in Houston, Texas, has over 60,000 members.[68] Congregational life is filled with worship, Bible study, community outreach, and evangelism. It seems hard to imagine that plausible claims of institutional conscience would disappear at some point

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67. In the context of conscience-based claims made by hospitals, Elizabeth Sepper has suggested that size, internal cohesion, and consistency of organizational message should play a large part in judging institutional claims of conscience. *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1563-71 (2012). Although I reject the idea that size or consistency of message are good proxies for institutional conscience, Sepper's notion of cohesion is consistent with my account of constitutive communities. *See supra* Section II.B. Meir Dan-Cohen, in his early work, also seems to suggest that size and bureaucracy are important considerations in the analysis of collective rights. *See* DAN-COHEN, *supra* note 64, at 34-36.

68. *See The Winning Walk with Dr. Ed Young*, WINNING WALK, www.winningwalk.org/about (last visited Feb. 18, 2014).

just because the Church was successful in recruiting new members. In fact, size may actually be an advantage in fostering identification. It allows individuals to feel like they are connected to an entity that is doing truly significant work, both locally and internationally, and gives them the sense that they are part of a much larger social project. Size alone, then, seems an insufficient proxy for individual commitment to group life.

Bureaucracy might appear to be a more promising option because, unlike size, it focuses on the internal structure of the organization. The intuition here would go something like this: The more levels of administration between individuals and the collective entity, the more relational distance between individual identity and collective life. But at least in some circumstances, it seems just as likely that bureaucracy will work in the opposite direction. That is, the more highly organized the collective, the more it can target individual members for appeals to collective identification. Take the military for example. There are few, if any, organizations that are more hierarchical and bureaucratized than the armed forces. But the authority structure within the military is set up that way in significant part to achieve the kind of collective buy-in that is indispensable in combat. So, just as size proved to be a poor proxy for commitment, so too is bureaucracy.

Finally, a critic might argue that the best test of collective commitment is the formulation of a consistent public message on issues important to the group. In discussing exemptions for hospitals, for example, Elizabeth Sepper has argued that institutional claims of conscience should depend at least in part on the formulation of a clear public position on moral issues.[69] But the emphasis on clear message seems to be misplaced. Conscience is a dynamic process of assessing our various commitments to beliefs and projects, and is subject to constant revision and reevaluation in light of related aspects of moral and intellectual personhood. Sometimes legitimate institutional claims of conscience can be based on evolving or vacillating positions, and sometimes they may be based on not taking any firm position at all.

Consider, for example, the Episcopal Church's 2000 decision not to take any particular stand on the issue of same-sex marriage.[70] In its general statement of policy, the Church basically punted on the divisive question, leaving it to each diocese to establish whatever practices suited local needs.[71] But even that institutional punt was the product of sincere, consci-

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69. Sepper, *supra* note 67, at 1564-65.

70. *See* EPISCOPAL CHURCH, RESOLUTION NO. 2000-D039, ACKNOWLEDGE RELATIONSHIPS OTHER THAN MARRIAGE AND EXISTENCE OF DISAGREEMENT ON THE CHURCH'S TEACHING 1 (2001), *available at* http://www.episcopalarchives.org/SCLM/churchwide/045_D039_2000.pdf.

71. *Id.*; *see also* STANDING COMM. ON LITURGY & MUSIC, EPISCOPAL CHURCH, THEOLOGICAL ASPECTS OF COMMITTED RELATIONSHIPS OF SAME-SEX COUPLES, *in* REPORT TO

entious deliberation by the leaders and members of the Church. The lack of a clear moral message on a particular issue, therefore, should not preclude the possibility of a collective claim of conscience in the event of a conflict with the law.

My argument against using public message as a proxy for institutional conscience parallels Seana Shiffrin's criticism of the Court's message-based approach to the freedom of association.[72] Shiffrin notes that the Court has taken a narrow view of the interests at stake in resisting compelled association.[73] In *Roberts v. United States Jaycees*[74] and in *Boy Scouts of America v. Dale*,[75] the key question for the Court was whether forcing the organization to admit unwanted members—in *Jaycees*, women; in *Dale*, gay men—would undermine its expressive message. But, as Shiffrin persuasively argues, that is the wrong question. The real problem with compelled association is not the threat of diluting an organization's message, but of intruding on the epistemic process of idea formation that occurs in social associations.[76] And that danger is present regardless of whether the organization has formulated a consistent public message.[77]

So, too, with institutional conscience. Genuine claims for exemption can arise even if an organization has previously taken a different position. They can also arise in new and unforeseen circumstances that prompt a group to consider an issue it had previously ignored. An inquiry into consistency of message, therefore, is not a suitable substitute for analysis of the social structure of organizational life.

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THE 73D GENERAL CONVENTION 205, 231 (2000), *available at* http://www.episcopalarchives.org/SCLM/church-wide/040_BlueBook_SCLM_2000.pdf (recommending that issues related to same-sex relationships be resolved by local bishops and dioceses).

72. *See* Shiffrin, *supra* note 59, at 840.

73. *Id.* at 845.

74. 468 U.S. 609, 612 (1984).

75. 530 U.S. 640, 644 (2000).

76. Shiffrin, *supra* note 59, at 869, 875-76. Shiffrin uses the term "social associations" to identify the groups that have a formative effect on their members' beliefs. *Id.* at 866, 868. Although she includes a variety of groups under this label, including bowling leagues, drinking clubs, and knitting circles, she seems to want to exclude associations that I have categorized as "organizations." *Id.* at 877.

77. In *Dale*, the dissenting Justices argued that the Boy Scouts should not enjoy rights against compelled association with gay men because the organization had not consistently stated an unequivocal message opposing homosexuality. *See* 530 U.S. at 675-78 (Stevens, J., dissenting); 530 U.S. at 700-02 (Souter, J., dissenting). But as Seana Shiffrin argues, focusing on the consistency of an organization's message would discourage reconsideration of old views in light of new circumstances. Shiffrin, *supra* note 59, at 845-51. That result would both undermine the freedom of thought that is a central justification for free speech and provide an incentive for organizations to be stubborn and intransigent in their public views. *Id.*

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The social theory of conscience, with its focus on the pattern of relations within collective entities, puts us in a better position to evaluate institutional claims of conscience. It both connects the idea of individual conscience to associational life and describes the kinds of social arrangements within those associations that can support its translation into organizational claims. Where do business corporations fit in this picture? Are they the sorts of collectives that can make plausible claims of institutional conscience? The next Part turns to these questions.

## III. BUSINESS CORPORATIONS

To shed light on the nature of individual affiliation with corporations, this Part focuses on the structural, social, and legal features of corporate life that script various corporate roles. Drawing on literature in corporate law, as well as organizational behavior and theory, I argue that environmental conditions in modern corporate life encourage shareholders, officers and directors, employees, and customers to detach from their organizational roles.[78] That general pattern of detachment, according to the social theory of conscience, pervasively undermines the formation of constitutive community and erodes the normative basis for institutional exemption.

It is important to note at the outset that this discussion is not intended to prove that all for-profit claims of conscience are implausible. Indeed, it is conceivable that the emergence of new values-based corporate forms may, in time, produce a different script for at least some corporate behavior.[79] Instead, the objective here is to show that basic elements of the ordinary corporate landscape produce identifiable patterns of detachment among

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78. Although there is considerable debate about which "stakeholders" should count, particularly in the field of business ethics, this choice of constituents reflects sensitivity to the arguments advanced by proponents of normative stakeholder theory without expanding the boundaries of the organization so far as to make the term meaningless. *See* Samantha Miles, *Stakeholder: Essentially Contested or Just Confused?*, 108 J. BUS. ETHICS 285 (2012) (detailing different conceptions of the term "stakeholder"); R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART 206-08 (2010) (recognizing that a broad definition of "stakeholder" undermines the utility of the concept).

79. For purposes of discussing the legal, structural, and economic features of the modern corporate environment, I put to the side businesses that are organized under new hybrid corporate statutes that require the pursuit of public benefit alongside shareholder wealth. *See, e.g.*, CAL. CORP. CODE §§ 14600-31 (West 2014) (benefit corporation statute); ME. REV. STAT. tit. 31, § 1611 (2014) (low-profit limited liability company statute). At this point, it is too early to tell whether these new corporate forms will allow various constituents to transcend the commercial norms of ordinary business practice. If the statutes do manage to carve out a niche for non-maximizing businesses, however, the structural differences in those businesses may justify a different result under the social theory analysis.

corporate constituents. Those patterns, in turn, can provide the foundation for designing coherent and desirable legal doctrine.

## A. Corporate Constituents

### 1. *Shareholders*

Given the conventional emphasis on their primacy within corporations,[80] it is reasonable to begin an account of corporate affiliation by examining shareholders. How do these constituents, as a class, relate to the corporate entity? That is, what kind of affiliation do they tend to have with the businesses in which they invest?

#### a. Public Corporations

##### i. *Individual Investors*

In their landmark study, Adolf Berle and Gardiner Means demonstrated that modern public corporations are characterized by the separation of ownership and control.[81] Shareholders, who were traditionally thought to "own" the firm, now exercise little or no authority over its operation. Instead, hierarchies of professional managers, who typically have only small shares in their firms, make all of the day-to-day decisions.[82]

Although there are competing historical accounts of when and why ownership separated from control,[83] the modern implications are relatively clear. Today, both corporate structure and corporate law regard individual shareholders as mere passive investors.[84] Most individual shareholders have very little incentive to become involved in corporate governance.[85] Share ownership is often widely dispersed, and very few investors own enough

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80. *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (arguing that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value").

81. *See* BERLE & MEANS, *supra* note 19.

82. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 5.3, at 195 (2002).

83. *Compare, e.g.*, BERLE & MEANS, *supra* note 19, at 10-17 (arguing that the rise in capital-intensive industrial corporations required massive investments that could only be secured by offering ownership shares to the public), *with* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937, at 357-60 (1991) (arguing that the increasing complexity of modern firms required the expertise of a class of professional managers).

84. *See* BAINBRIDGE, *supra* note 82, § 10.7, at 512-14.

85. *See* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751 (2006).

stock to be interested in or able to exercise significant voting power.[86] In addition, the cost of such active involvement in corporate affairs is likely to be prohibitive, given the investment in time and other resources that would be required to become a knowledgeable participant in corporate governance. Finally, in accordance with modern portfolio theory, shareholders' investments are typically diversified across many different businesses, which tends to undercut their incentive to focus on the administration of any one firm.[87] Accordingly, corporate law scholars routinely characterize retail investors as "rationally apathetic."[88]

Several features of corporate and securities law reinforce shareholder passivity and rational apathy. For example, investors are discouraged from acquiring large blocks of shares by onerous disclosure requirements. Under current securities law, investors who wish to increase their ownership beyond five percent must file a report with the SEC providing extensive personal and financial information.[89] Shareholders are also discouraged from taking an active governance role by restrictive rules regarding communication with other shareholders and by fears of obtaining information that could put them at odds with insider trading rules.[90] In short, various features of corporate law and culture serve to reinforce the dominant norm of shareholder passivity.

Given the reality of shareholder passivity, and the modern regulatory landscape that supports this state of affairs, recent corporate law scholarship has decidedly rejected the idea that shareholders really "own" the corporation.[91] Instead, many scholars have characterized shareholders as residual claimants on corporate assets. That is, rather than thinking that shareholders purchase a piece of the corporation, this view contends that shareholders

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86. This is not to mention that a large amount of publicly traded stock is held indirectly through institutional investors. *See infra* Subsection III.A.1.a.ii; *see also* Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 55-56 (2009), *available at* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/citizens-not-united:-the-lack-of-stockholder-voluntariness-in-corporate-political-speech/ (discussing the pattern of institutional stock ownership in the United States).

87. *See generally* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 153-94 (6th ed. 2000) (explaining modern portfolio theory).

88. *See, e.g.*, Bainbridge, *supra* note 85, at 1745; *see also* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 6 (1994); BERLE & MEANS, *supra* note 19, at 75-76.

89. *See* 15 U.S.C. § 78m(d) (2012).

90. *See* BAINBRIDGE, *supra* note 82, § 10.7, at 513-14.

91. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 37 (2012); Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 800 n.52 (2002).

implicitly contract to purchase a residual claim upon earnings and asset liquidation.[92]

That status as residual claimant, rather than corporate owner, has significant implications for how individual investors relate to the corporation. If economic circumstances lead shareholders to be rationally apathetic, there is little reason to believe that they will invest any significant time monitoring corporate activities, much less be so involved with the corporation that it becomes part of their personal identity. Instead, the model of shareholder as residual claimant will lead rational investors to prioritize maximization of the market value of their residual claim.[93] It will, in other words, lead shareholders to value the corporations in which they invest solely for their potential to produce financial returns. The relationship between individual shareholders and modern public corporations, then, appears to be the epitome of detached affiliation.

ii. *Institutional Investors*

Although there is a virtual consensus that individual investors are passive and apathetic, some corporate law scholars argue that modern institutional investors, like pension or mutual funds, might take a more active role in corporate governance.[94] The idea here is that institutional investors own relatively large blocks of stock and, therefore, have the incentive to monitor investments more closely and take a more active role in corporate governance. Although the empirical evidence is mixed on whether these institutions have actually taken an active role in corporate affairs,[95] that kind of participation bears little resemblance to individual identification.

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92. *See, e.g.*, OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 184 (1996); *see also* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395-403 (1983) (arguing that as residual claimants, shareholders are the only group within the corporation that has the proper incentives to make discretionary decisions).

93. *See* Eugene F. Fama & Michael C. Jensen, *Organizational Forms and Investment Decisions*, 14 J. FIN. ECON. 101, 102-03 (1985).

94. *See, e.g.*, Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990); JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC (2000).

95. *See, e.g.*, Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459, 459-62 (Peter Newman ed., 1998) (arguing that most institutional investors devote very little attention to corporate governance issues). Traditional institutional investors also seek to maintain a diversified portfolio, which undercuts their incentive to become active players in corporate governance. *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1049, 1070 (2007) (discussing the norm of diversification in mutual and pension funds). Hedge funds tend to take a far more active role in corporate governance than traditional institutional investors. *See* April

What really matters for the social theory of conscience is how the individual members of pension and mutual funds regard the corporations in which their funds are invested. On that score, the presence of significant institutional investors only serves to put greater distance between individuals and corporate entities. If the relationship of individual shareholders was one of detached investment, the existence of institutional intermediaries seems only to magnify that detachment. Indeed, individual fund members are often unaware of which particular companies compose their portfolios.[96] Under this arrangement, those individuals will expect fund managers simply to maximize the overall value of their investment, an expectation that is backed by the legal force of fund managers' fiduciary duties.[97]

The detachment brought on by the phenomenon of institutional investment is perhaps most pronounced when it comes to investment by hedge funds. Again, there is good reason to believe that hedge funds are not merely "passive investors," but are instead quite active in the process of corporate governance.[98] Indeed, hedge fund activism is likely to outpace considerably that of traditional institutional investors because hedge funds tend to focus on larger investments in fewer companies, rather than pursuing a strategy of diversification.[99] But the resulting relationship between individual investors and corporate entities is likely to be as far away from identification as possible. Hedge funds focus almost exclusively on financial return and tend aggressively to turn over their portfolios, sometimes even dumping companies within seconds of purchase.[100] The picture here is one of instrumental motivation, where individual investors have little or no connection to any particular company.

The emergence of socially responsible investment would seem to counter the conventional view of financially motivated fund management. As a historical matter, ethical investments began as a way for religious individuals to avoid funding activities that conflicted with the tenets of their faith.[101] As ethical investment grew in popularity, it took on a broader focus, including non-sectarian efforts such as divestment in South Africa to protest

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Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187, 226 (2009).

96. *See* STOUT, *supra* note 91, at 91.

97. *See id.*

98. *See* Klein & Zur, *supra* note 95.

99. *See* Kahan & Rock, *supra* note 95, at 1047-70.

100. *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 579-80 (2006) (discussing the high turnover rate among hedge funds); *see also* STOUT, *supra* note 91, at 66 (discussing the modern practice of "flash trading"). *But see* Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1731-32 (2008) (arguing that hedge fund activists are not as focused on short-term returns as some critics contend).

101. *See* Benjamin J. Richardson & Wes Cragg, *Being Virtuous and Prosperous: SRI's Conflicting Goals*, 92 J. BUS. ETHICS 21, 21 (2010).

apartheid.[102] But more recently, socially responsible investment has come to look a lot more like ordinary institutional investment. Contemporary emphasis on the so-called "business case" for ethical investment has marginalized moral considerations in favor of the same wealth-maximization imperatives that guide managers of ordinary investment funds.[103] Indeed, because of the light-touch screens used by most ethical investment funds, the average socially responsible portfolio is now nearly identical to traditional institutional portfolios.[104] It is unclear, therefore, how much ethical investment alters the relationship between individuals and the companies that they fund.

Although this account of shareholding in the modern public corporation is preliminary, it supports the idea that shareholders have detached roles in business corporations. They are either rationally apathetic passive investors, or they are institutions designed and monitored by individuals for the pecuniary rewards they promise. This pattern of detached affiliation marks a significant step toward recognizing that public corporations, on our continuum of collectives, are paradigm *organizations*.

b. Close Corporations

My description of shareholders in public firms as passive and rationally apathetic investors, however, does not comfortably apply to shareholders in close corporations.[105] In these firms, ownership is not typically separated from control.[106] Instead, a small group of equity holders has significant authority over both the long-term policy of the corporation and its day-to-day operations.[107] Shareholders in close corporations, then, cannot be so easily characterized as aloof or detached from the corporate entity. In fact, the unity of ownership and control lends itself much more naturally to a tight connection between individual shareholders and the corporation.

But even in close corporations, controlling shareholders are under significant pressure to act in the interest of overall profitability. In close corpo-

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102. *Id.*

103. *Id.* at 28.

104. *See* PAUL HAWKEN, NATURAL CAPITAL INST., SOCIALLY RESPONSIBLE INVESTING: HOW THE SRI INDUSTRY HAS FAILED TO RESPOND TO PEOPLE WHO WANT TO INVEST WITH CONSCIENCE AND WHAT CAN BE DONE TO CHANGE IT 16 (2004), *available at* http://www.naturalcapital.org/docs/SRI%20Report%2010-04_word.pdf.

105. Although there is some dispute over the precise definition of a close corporation, it is typically understood to involve a small number of shareholders who substantially participate in the corporation's management and whose shares are not readily transferable on the market. *See, e.g.*, MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 338 (8th ed. 2000); 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE § 1.2 (rev. 3d ed. 2013).

106. EISENBERG, *supra* note 105.

107. *Id.*

rations, controlling shareholders owe fiduciary duties to minority shareholders,[108] which require them to protect the value of the minority shares. Controlling shareholders, therefore, are legally constrained in the degree to which they can deviate from wealth-maximization norms. They must pursue legitimate business objectives that accrue to the financial benefit of all shareholders.[109]

Indeed, as D. Gordon Smith has argued, the shareholder wealth-maximization norm originated in the context of close corporations.[110] Concerned with the prospect that majority shareholders would take advantage of minority shareholders, courts repeatedly held that the majority must act to maximize the value of *all* shares.[111] Today, these kinds of cases are sometimes treated as a matter of fiduciary duty and sometimes handled under the doctrine of minority oppression.[112] But whatever the doctrinal mechanism, the law requires controlling shareholders in close corporations to act in the interest of overall share value.[113]

In some close corporations, however, there are no real minority interests to speak of. That is, in some businesses, a small number of owners are effectively united in common interest.[114] Often these are businesses in which all of the shares are held by members of a family.[115] But even in these corporations, there remain powerful incentives for shareholders not to ignore that there is an essential separation between business and personal identity. In other words, even where controlling shareholders are neither passive investors nor fiduciaries, there are significant structural reasons why those shareholders must maintain at least some relational distance from their businesses.

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108. *See* JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW § 14.15, at 437-38 (3d ed. 2011).

109. The high-water mark of fiduciary duties among shareholders in close corporations was *Donahue v. Rodd Electrotype Co. of New England*, which held that the strict partnership standard of "'utmost good faith and loyalty'" applies to majority shareholders. 328 N.E.2d 505, 515 (Mass. 1975) (quoting Cardullo v. Landau, 105 N.E.2d 843, 845 (Mass. 1952)).

110. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 305-20 (1998).

111. *Id.* at 310; *see also* Jones v. Missouri-Edison Elec. Co., 144 F. 765, 771 (8th Cir. 1906) (holding that majority shareholders have a duty to assure that the corporation "produce[s] the largest possible amount to protect the interests of the holders of the minority of the stock").

112. *See* Smith, *supra* note 110, at 320-22.

113. *Id.* at 310.

114. 1 O'NEAL & THOMPSON, *supra* note 105, § 1:2.

115. For an interesting discussion of tensions that arise in applying corporate law to family businesses, see Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185 (2013).

To explain the incentives for shareholders to maintain that distance, we should begin by recognizing the critical importance of limited liability in forming corporate entities. The principle that shareholders enjoy limited liability is an essential and ingrained feature of corporate law.[116] Indeed, two prominent commentators have called it the "cornerstone of capitalism."[117] Limited liability ensures that investors, be they passive or active, will only stand to lose the amount of capital that they put into a corporation and that if a corporation's debts exceed its assets, corporate creditors will not be permitted to levy on the personal assets of shareholders.[118] This protection is enormously valuable to corporate shareholders, including controlling shareholders in close corporations, and they will go to great lengths to assure that it is not removed.[119]

But how might shareholders lose the protection of limited liability? The answer comes from the concept of veil piercing. Veil piercing describes a family of related legal doctrines, but the most common form involves a situation in which courts hold individual stockholders liable for corporate debts that cannot be satisfied by the corporation itself.[120] In other words, in some circumstances, courts will disregard the "fiction" of the corporate legal entity and hold liable the individuals who run its operations.

Because the prospect of veil piercing is such a substantial threat,[121] particularly to those who control close corporations,[122] shareholders will rationally want to know the conditions under which the doctrine will be applied so that they can adjust their behavior accordingly. But what kind of advice would a competent lawyer give to controlling shareholders in close corporations? Stated more generally, and connecting this question to the

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116. *See* COX & HAZEN, *supra* note 108, § 7.2, at 123; Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000).

117. COX & HAZEN, *supra* note 108, § 7.2, at 123.

118. *Id.*

119. In a 1911 speech, Nicholas Murray Butler, President of Columbia University, said that "the limited liability corporation is the greatest single discovery of modern times . . . [e]ven steam and electricity are far less important . . . and they would be reduced to comparative impotence without it." NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT? 82 (1912).

120. COX & HAZEN, *supra* note 108, § 7.3, at 126. Related doctrines include holding parent companies liable for the debts of a subsidiary and so-called "reverse" veil piercing, which involves allowing shareholders' personal creditors to access corporate assets to satisfy personal debts. *Id.* § 7.4, at 128-29.

121. Veil piercing is the single most litigated issue in all of corporate law. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW § 1.5, at 69 (2d ed. 2010); *see also* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991). Moreover, a recent empirical study demonstrated that although rates of veil piercing vary across jurisdictions, the overall rate of successful claims is just under 50%. Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 115 (2010).

122. No court in the United States has ever pierced the corporate veil of a public corporation. *See* GEVURTZ, *supra* note 121, § 1.5.4, at 78; Oh, *supra* note 121, at 110.

issue of shareholder identification with the corporate entity, what kind of relationship does the law of veil piercing encourage between controlling shareholders and their businesses?

According to the "alter ego" theory of veil piercing, courts inquire into whether the corporation is truly a separate entity from the individuals who control it.[123] That is, one major factor that will lead courts to pierce the corporate veil is if the controlling shareholders disregard the separateness of the legal entity and relegate the corporation to the status of a façade for conducting their own affairs.[124] If controlling shareholders do not behave in a way that respects the separation between their own concerns and those of the corporation itself, the court may not respect that separation either.[125] Under the alter ego doctrine, then, the message to controlling shareholders seems relatively clear: If they want to make sure to keep the benefits of limited liability, they better maintain some distance between their personal lives and their businesses.[126]

Many commentators have noted that the alter ego theory, and indeed the whole subject of veil piercing, is doctrinally and conceptually confused.[127] In fact, as early as 1926, Judge Cardozo remarked that the doctrine is not a coherent guide for behavior, but is instead "enveloped in the mists of metaphor."[128] Modern commentators tend to highlight the indeterminacy of the metaphors or the lack of sound economic justification for the focus on legal separation.[129]

But even if the long line of legal pronouncements about veil piercing lacks a coherent theoretical basis, the metaphors and rhetoric have been used to justify real legal outcomes. Those outcomes, in turn, predictably create certain behavioral incentives for rational shareholders who desperately wish to avoid falling on the wrong side of the line. The doctrine of veil piercing, therefore, encourages shareholders to behave as if there is a sharp distinction between personal identity and corporate affairs. It tells share-

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123. COX & HAZEN, *supra* note 108, § 7.3, at 127-28.

124. *Id.*

125. *Id.*; GEVURTZ, *supra* note 121, § 1.5, at 80; *see also* Zimmerman v. Puccio, 613 F.3d 60, 74-75 (1st Cir. 2010) (piercing the corporate veil where owners failed to observe the corporate form and ignored corporate formalities); United States v. WRW Corp., 986 F.2d 138, 143-44 (6th Cir. 1993) (piercing the corporate veil because the individual owners and the corporation did not have separate personalities); Victoria Elevator Co. of Minneapolis v. Meriden Grain Co., 283 N.W.2d 509, 513 (Minn. 1979) (piercing the corporate veil because the owner failed adequately to treat the corporation as a separate entity).

126. BAINBRIDGE, *supra* note 82, § 4.3, at 159.

127. *See, e.g.*, Stephen Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001) (arguing that veil piercing is doctrinally and theoretically unsound and should be abolished); GEVURTZ, *supra* note 121, § 1.5, at 69-72 (arguing that veil-piercing doctrine is indeterminate and undertheorized).

128. Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926).

129. *See, e.g.*, BAINBRIDGE, *supra* note 82, § 4.4, at 171-90.

holders that their businesses are not to be regarded in the same way as their personal property. It even insists that they go through the motions of observing various corporate formalities, such as holding stockholders' or directors' meetings,[130] just so they do not forget that essential separation.

Legal doctrine regarding limited liability and veil piercing, then, cautions controlling shareholders against complete identification with their businesses, lest they pay dearly in the event of insolvency. So, although it is plain that shareholders in close corporations have a much tighter connection to their businesses than do shareholders in public corporations, the law continues to script even that role as one that requires some measure of detachment.

### 2. *Directors and Officers*

Corporate directors and officers have distinct relationships with their firms. Directors tend to be remote managers of corporate affairs, while officers are responsible for the day-to-day operation of the business.[131] As this Subsection illustrates, however, legal, social, and economic forces write the script for individuals in each role to form instrumental and detached affiliations with the corporation.

#### a. Directors

The board of directors is not traditionally considered a corporate constituent, but the role of director is of paramount significance in the business corporation.[132] Members of the board of directors have ultimate legal authority over all ordinary matters of corporate administration.[133] Corporate directors have the power to choose the firm's Chief Executive Officer, to determine the use or sale of corporate property, to declare and pay dividends, and to pay corporate debts or declare bankruptcy.[134]

But how are board members supposed to exercise those powers? In other words, what expectations do we have for the behavior of directors,

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130. *See, e.g.*, Fiumetto v. Garrett Enters., Inc., 749 N.E.2d 992, 1006 (Ill. App. Ct. 2001) (stating that the failure to hold directors' meetings contributes to a finding of individual liability); Saxton v. Luke, 296 S.E.2d 751, 752 (Ga. Ct. App. 1982) (holding that the absence of corporate meetings supports imposition of individual liability).

131. *See* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005).

132. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) (advancing a director-centered view of corporate governance); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (describing an alternate director-centered theory of corporate governance).

133. COX & HAZEN, *supra* note 108, § 9.4, at 166-68.

134. *Id.* § 9.4, at 167.

and how might those expectations bear on the relationship that directors have with the corporation?

Corporate law provides at least part of the answer. Directors owe fiduciary duties to the corporation. They are expected to exercise reasonable diligence in conducting corporate affairs and are required to put the financial well-being of the corporation before their own.[135] But this initial description leaves considerable ambiguity as to the ends of corporate governance—that is, in whose interests should the corporation be managed?

The classic answer to this question was given by the Michigan Supreme Court in *Dodge v. Ford Motor Co*.[136] In rejecting Henry Ford's decision not to issue special dividends to shareholders so that the company could reduce the price of cars and increase wages, the court wrote:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[137]

According to the *Dodge* court, directors are required to run the corporation for the financial benefit of shareholders, regardless of their own moral commitments.[138] *Dodge*, in other words, says that the corporation is a tool to produce financial gain for investors, not a vehicle for realizing moral goals.

Recently, several influential corporate law scholars have challenged the idea that directors are legally required to maximize shareholder value.[139] These scholars make a series of related points: (1) *Dodge* was really about the duties that controlling shareholders owe to minority shareholders;[140] (2) very few courts have relied on *Dodge* for the wealth-maximization proposition;[141] (3) over thirty states have passed so-called "other constituency" statutes that expressly permit directors to consider the interests of corporate stakeholders other than shareholders;[142] and (4) the business judgment rule precludes courts from enforcing any wealth-maximization mandate.[143] The

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135. These are the duties of care and loyalty, respectively.

136. 170 N.W. 668 (Mich. 1919).

137. *Id.* at 684.

138. *Id.*

139. *See, e.g.*, STOUT, *supra* note 91, at 26-27; M. Todd Henderson, *The Story of* Dodge v. Ford Motor Company*: Everything Old Is New Again*, *in* CORPORATE LAW STORIES 37, 66, 75 (J. Mark Ramseyer ed., 2009); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 772-75 (2005); Smith, *supra* note 110, at 320.

140. *See, e.g.*, Smith, *supra* note 110, at 320; STOUT, *supra* note 91, at 26.

141. *See, e.g.*, STOUT, *supra* note 91, at 27.

142. *See, e.g.*, Elhauge, *supra* note 139, at 763.

143. *See, e.g.*, Henderson, *supra* note 139, at 37-39.

conclusion these scholars draw is that the legal requirement to maximize shareholder wealth is a "myth"[144] or a "canard."[145]

But there are several reasons to be wary of this revisionist account. First, the *Dodge* case was both argued and decided in terms of the duties of *directors*, rather than controlling shareholders.[146] For example, the language quoted above, for which the case has become famous, specifically discusses the duties of directors to increase shareholder value.[147] Subsequent courts that have cited *Dodge*, moreover, have treated it as establishing the director's duty to maximize shareholder wealth.[148]

Second, the fact that only a few courts have explicitly relied on *Dodge* does not indicate that it is no longer good law. The dearth of citations to *Dodge* stems instead from the fact that wealth maximization is nearly impossible to enforce. As long as corporate directors are willing to offer even the most tenuous connection between their actions and shareholder value to satisfy their duties of care and loyalty, courts will take them at their word.[149] But that deferential posture is a matter of institutional competence, not legal duty, and we should resist the temptation to infer the absence of the latter from the absence of the former.

As for other constituency statutes, there is reason to believe that they are less revolutionary than meets the eye. As Jonathan Macey argues, the statutes cannot be read to allow directors to benefit other corporate stakeholders at the expense of shareholders.[150] Instead, they are stated in permissive language and are best seen as a sort of "tie-breaker[]," which allows managers to consider the interests of other constituencies only if shareholders would not be prejudiced.[151] It is less than clear, in other words, whether these statutes actually undermine the conventional view of shareholder primacy in corporate law.

Finally, the revisionist account makes much of the business judgment rule and the extent to which it precludes courts from enforcing any legal requirement to maximize shareholder value. The revisionists are certainly correct that the business judgment rule practically insulates corporate directors from the threat of legal liability for failure to adequately pursue share-

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144. STOUT, *supra* note 91, at 11.

145. *See* Larry Ribstein, *The Shareholder Maximization Canard*, TRUTH ON THE MARKET (July 28, 2010), http://truthonthemarket.com/2010/07/28/the-shareholder-maximization-canard/.

146. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684-85 (Mich. 1919).

147. *Id.* at 684.

148. *See, e.g.*, Long v. Norwood Hills Corp., 380 S.W.2d 451, 476 (Mo. Ct. App. 1964); E.I. Du Pont de Nemours & Co. v. Clark, 88 A.2d 436, 444 (Del. 1952).

149. *See* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 190 (2008).

150. *Id.* at 179.

151. *Id.*

holder wealth. But once again, we should be careful to distinguish the issue of enforceability from the issue of legal duty. The business judgment rule is a very deferential *standard of review*, but it does not alter or eliminate the underlying wealth-maximization *standard of conduct*.[152]

Nor is *Dodge* the only source of legal authority for the shareholder primacy view. For starters, the American Law Institute's (ALI) *Principles of Corporate Governance* declares that "a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[153] Although that statement is later qualified by provisions that permit exceptions for compliance with the law and charitable contributions,[154] the primary focus remains on shareholder wealth.[155]

Moreover, the leading corporate law jurisdiction endorses this principle. For example, in *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Court of Chancery held that, by acting on a community-based vision of their business, the directors of craigslist breached their fiduciary duty to the company's shareholders.[156] In a passage more than a little reminiscent of *Dodge*, the court stated:

> Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[157]

The court went on to chastise the craigslist directors for "openly eschew[ing] stockholder wealth maximization."[158] With regard to the question of how directors are supposed to run business corporations, the *eBay* court gave essentially the same answer as the *Dodge* court nearly a hundred years earlier—directors must act to maximize shareholder value.

But even if the strong shareholder wealth-maximization language from *Dodge*, the ALI *Principles*, and *eBay* do not state enforceable legal requirements, the principle appears to be a widely shared norm among corpo-

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152. *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM. L. REV. 437, 444-45 (1993) (distinguishing between standards of review and standards of conduct in corporate law); *see also* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) (arguing that the business judgment rule is better understood as a doctrine of abstention than as a standard of director liability).

153. 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(a) (1994).

154. *Id.* § 2.01(b).

155. *See* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 826 (2012).

156. 16 A.3d 1, 46 (Del. Ch. 2010).

157. *Id.* at 34.

158. *Id.* at 35.

rate directors.[159] That is, even if the revisionists were correct on the law, it would still be the case that corporate directors are overwhelmingly primed to pursue shareholder wealth. That norm is prevalent in business schools, law schools, corporate social circles, and corporate boardrooms.[160] Even the most ardent critics of the norm, moreover, acknowledge its prevalence in U.S. businesses.[161] Corporate directors, in other words, are taught to believe in both the legal requirement and the normative desirability of shareholder wealth-maximization.[162] These social norms can be at least as powerful an influence on director behavior as legal doctrine, and they have had an enormous impact on the way that directors view their role within corporations.[163]

Finally, in addition to legal doctrine and social norms, stock-based director compensation adds economic motivation to maximize share price. To an increasing degree, corporations are using stock to compensate directors, with the idea that financial motivation will help discipline board members who might otherwise act to benefit other constituencies.[164] This approach to compensation, in turn, provides economic reinforcement of shareholder primacy and assures that director behavior will be even more carefully attuned to the financial returns of the firm.

In short, corporate directors are expected to manage firms in a way that maximizes the financial benefit to shareholders. These attitudes regard-

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159. *See* Lyman Johnson, *Corporate Law Professors as Gatekeepers*, 6 U. ST. THOMAS. L.J. 447, 450 (2008) (describing the "rampant [shareholder] wealth-primacy norm in the cultures of business and business-advising"). Indeed, among the criteria for self-assessment listed on the National Association of Corporate Directors (NACD) Report on Director Professionalism is that the board "focuses on activities that will help the company maximize shareholder value." NAT'L ASS'N OF CORPORATE DIRS. & CTR. FOR BD. LEADERSHIP, REPORT OF THE NACD BLUE RIBBON COMMISSION ON DIRECTOR PROFESSIONALISM 70 (2005).

160. *See* DARRELL WEST, THE PURPOSE OF THE CORPORATION IN BUSINESS AND LAW SCHOOL CURRICULA 1-2 (Governance Studies at Brookings 2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/7/19%20corporation%20west/0719_corporation_west.pdf; *see also* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) (stating that "[n]orms in American business circles, starting with business school education, emphasize the value, appropriateness, and, indeed, the justice of maximizing shareholder wealth").

161. *See* STOUT, *supra* note 91, at 101-02.

162. *See* Roe, *supra* note 160, at 2073; *see also* Bainbridge, *supra* note 132, at 576 (stating that shareholder wealth maximization is a basic feature of corporate ideology).

163. *See* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1264-78 (1999) (discussing the social norms that heavily influence the behavior of corporate directors); *see also* Daniel J.H. Greenwood, *Discussing Corporate Misbehavior: The Conflicting Norms of Market, Agency, Profit and Loyalty*, 70 BROOK. L. REV. 1213, 1226-30 (2005) (discussing the web of conflicting social norms that affect behavior within corporations).

164. *See* BAINBRIDGE, *supra* note 82, § 9.2, at 418; *see also* Eliezer M. Fich & Anil Shivdasani, *The Impact of Stock-Option Compensation for Outside Directors on Firm Value*, 78 J. BUS. 2229 (2005).

ing the role of directors are pervasive and widely accepted in American business culture, and they push directors toward instrumental financial objectives and an external locus of control over their organizational behavior. This pattern of expectations for directors, therefore, scripts that role away from deep individual identification with the corporate entity and toward a detached affiliation with the firm.

b. Officers

In discussing the relationship between shareholders and management, corporate law and scholarship have often conflated the role of director with that of corporate officer.[165] Prominent casebooks and treatises note that fiduciary duties apply to both directors and officers, but nearly all of the relevant case law involves only the responsibilities of directors.[166] As a historical matter, this inattention to officers' duties makes some sense, considering that many of the corporation's top officers were also directors.[167] But since the late 1980s, corporate boards have been populated more often by so-called "outside" directors—i.e., directors who do not hold any other corporate office.[168] The result is that there is a significant disconnect between discourse about the duties of corporate executives and the real world operation of commercial businesses.

Corporate officers are far more involved in the on-the-ground administration of their firms than are outside directors. For these officers, their corporate roles are full-time jobs, which require their constant attention. Not surprisingly, in light of the day-to-day dominance of senior officers, boards of directors have often become mere passive monitors that rubber-stamp the decisions of corporate executives.[169]

But although typical officers are highly engaged in the administration of the corporation, their role is channeled and confined in much the same way as that of directors. Corporate officers are subject to the same legal pronouncements regarding their duty to maximize shareholder wealth.[170] Corporate officers may be entrusted with vast authority over the administra-

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165. *See* Johnson & Millon, *supra* note 131, at 1604-06.

166. *Id.* at 1610.

167. *See* ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 688-89 (9th ed. 2005); Johnson & Millon, *supra* note 131, at 1612.

168. *See generally* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).

169. *See* Megan Wischmeier Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 BUS. LAW. 27, 50-51 (2010).

170. *See* Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009) (holding that the fiduciary duties of corporate officers are the same as those that apply to directors).

tion of the corporation, but they must exercise that authority in the financial interests of the shareholders.

Moreover, the same social norms that dominate American boardrooms also influence the behavior of corporate officers. These officers went to the same business schools (or law schools) as the directors, travel in the same social circles, and generally endorse the same view of their function within the corporation.[171] In other words, officers think that they are required to maximize shareholder wealth, and they think that is exactly how it should be.

Finally, tying officer compensation to stock price provides powerful incentives to focus on maximizing shareholder returns.[172] In the 1990s, stock options became a significant component of executive pay, mainly to align managerial incentives with shareholder value.[173] Although recent reforms under the Dodd-Frank Wall Street Reform and Consumer Protection Act address various issues related to executive compensation in public firms,[174] the continued connection between share price and executive pay reinforces the shareholder primacy norm.

Once again, the modern corporation's focus on shareholder wealth-maximization, backed by legal, economic, and social norms, constrains the relationship that individual managers can have with their corporations. Officers may be more in touch than directors with the functioning of the corporations they manage, but their guiding compass is the same. Those who run the corporation are not in a dialogue with all of their constituents over the proper conduct of the business. Instead, they are structurally channeled to the task of protecting shareholder wealth, regardless of other goals and values.

### 3. *Employees*

Employees provide the labor necessary to carry out corporate business. Although they were largely ignored in traditional concepts of the corporation,[175] the emergence of stakeholder theory has emphasized that em-

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171. *See* WEST, *supra* note 160.

172. *See* Richard A. Posner, *Are American CEOs Overpaid, and, If So, What If Anything Should Be Done About It?*, 58 DUKE L.J. 1013, 1026-27 (2009) (arguing that the common practice of compensating CEOs with stock options causes executives to have an excessive focus on short-term profit).

173. *See* Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 104 (2005).

174. *See* 15 U.S.C. § 78n–1 (2012).

175. *See supra* Part I; *see also* Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 283-85 (1998) (pointing out that employees have virtually no role in modern theories of corporate law).

ployees are critical to the overall operation of a business enterprise.[176] Accordingly, any account of individual affiliation with corporations must describe the relationship between employees and the corporate entity.

Empirical evidence suggests that modern employees overwhelmingly form detached relationships with their companies. Studies of employee motivation have consistently shown that corporate employees are heavily motivated by the financial rewards that their positions promise.[177] In response to surveys, employees in for-profit businesses routinely list wages or other forms of compensation as the primary motivator of their work-related conduct, and there is evidence that the power of extrinsic motivation has only increased over time.[178]

Moreover, there is additional evidence to suggest that these consistent survey results actually *underreport* the degree to which corporate employees are motivated by financial incentives.[179] That is, even if employees already self-report a relatively high level of extrinsic motivation, their actual behavior within organizations shows that financial rewards play an even larger role in their motivation than they are willing to admit. And although many early studies of employee motivation did not distinguish between the for-profit and nonprofit sectors, recent research has shown that monetary rewards act as a significantly more powerful motivator of employees in for-profit businesses than in nonprofits.[180] This evidence from the organizational behavior literature strongly suggests that, as a class, employees in business corporations are largely motivated by instrumental incentives.

A critic of this account might object that although financial rewards often drive the initial decision to affiliate with a particular company, over time that instrumental affiliation will likely have attitudinal effects. In other words, even if pay is a large determinant of why people join a company, the longer an employee stays with an organization, the more that employee will come to identify with the organization and its goals. In this way, what might

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176. *See, e.g.*, THOMAS DONALDSON & THOMAS W. DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999); PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS (1985); R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984); Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53 (1991).

177. *See, e.g.*, Carolyn Wiley, *What Motivates Employees According to over 40 Years of Motivation Surveys*, 18 INT'L J. MANPOWER 263, 276-77 (1997).

178. *Id.*

179. Sara L. Rynes, Barry Gerhart & Kathleen A. Minette, *The Importance of Pay in Employee Motivation: Discrepancies Between What People Say and What They Do*, 43 HUM. RESOURCE MGMT. 381, 382-85 (2004).

180. *See* Rein De Cooman et al., *A Cross-Sector Comparison of Motivation-Related Concepts in For-Profit and Not-For-Profit Service Organizations*, 40 NONPROFIT & VOLUNTARY SECTOR Q. 296 (2011); Sung Min Park & Jessica Word, *Driven to Service: Intrinsic and Extrinsic Motivation for Public and Nonprofit Managers*, 41 PUB. PERSONNEL MGMT. 705, 726 (2012).

start out as an instrumental attachment to a company will eventually transform into an emotional connection to the firm and an integration of the employee's role with her sense of self.[181]

Although this hypothesis has considerable intuitive appeal, it seems that two related developments in contemporary business practice have largely served to undermine its empirical premise. First, in an increasingly competitive environment, modern businesses have come to view employees less as team members and more as labor costs.[182] For instance, over the past three decades, there has been a steep rise in firms' use of proactive downsizing.[183] Of course, corporate layoffs are nothing new, as businesses have historically resorted to reductions in force in the face of changing conditions.[184] More recently, however, firms have used a variety of downsizing strategies not as a last resort, but rather to achieve cost-cutting and efficiency goals regardless of whether business is declining or expanding.[185]

This changing view of employees is perhaps most evident in the widespread application of several modern management concepts. For example, the "core competencies" model directs firms to focus resources on essential processes and outsource peripheral tasks to third-party providers, with the goal of reducing labor costs.[186] Many firms have also employed business "reengineering" or organizational "delayering" to achieve efficiency goals.[187] Reengineering strategies involve taking a brand new look at a firm to see how it might be completely realigned to maximize value for the bot-

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181. *See* John E. Mathieu & Dennis M. Zajac, *A Review and Meta-Analysis of the Antecedents, Correlates, and Consequences of Organizational Commitment*, 108 PSYCHOL. BULL. 171, 172 (1990) (hypothesizing that employees may be drawn initially to organizations for calculative reasons, but later on develop affective ties).

182. *See* WAYNE F. CASCIO, RESPONSIBLE RESTRUCTURING: CREATIVE AND PROFITABLE ALTERNATIVES TO LAYOFFS 6-7 (2002); Rosemary Cravotta & Brian H. Kleiner, *New Developments Concerning Reductions in Force*, 24 MGMT. RES. NEWS, nos. 3-4, 2001, at 90, 90-92.

183. *See* Franco Gandolfi & Magnus Hansson, *Reduction-in-Force (RIF)—New Developments and a Brief Historical Analysis of a Business Strategy*, 16 J. MGMT. & ORG. 727, 733 (2010).

184. Norman E. Amundson et al., *Survivors of Downsizing: Helpful and Hindering Experiences*, 52 CAREER DEV. Q. 256, 256 (2004).

185. *See* Mark Farrell & Felix T. Mavondo, *The Effect of Downsizing Strategy and Reorientation Strategy on a Learning Orientation*, 33 PERSONNEL REV. 383, 383, 385-86 (2004); PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE 17, 22 (1999); Amundson et al., *supra* note 184, at 256; Wayne F. Cascio, *Strategies for Responsible Restructuring*, ACAD. MGMT. EXECUTIVE, August 2002, at 80, 80-88; Clint Chadwick, Larry W. Hunter & Stephen L. Walston, *Effects of Downsizing Practices on the Performance of Hospitals*, 25 STRATEGIC MGMT. J. 405, 405 (2004).

186. Cravotta & Kleiner, *supra* note 182, at 91.

187. Gandolfi & Hansson, *supra* note 183, at 731-32.

tom line.[188] Corporate "delayering," on the other hand, involves removing entire layers of the organizational chart to reduce labor costs and increase efficiency.[189] The emergence of these new business strategies, with their focus on reducing the cost of labor input, signal a pronounced shift in company perspective on the role of employees within business firms.

Although there are complex economic forces behind the emergence of these strategies, including globalization, technological advancement, and hypercompetitive markets,[190] the effects on employee morale and commitment are relatively clear. To begin with, these downsizing techniques have led to a significant decrease in employees' perceived job security.[191] Employees at all levels of the firm are increasingly aware that their jobs might be eliminated in an effort to reorganize or reengineer their firm's business model.

This job insecurity, in turn, has led to an overall decrease in employees' identification with their companies and personal adoption of corporate goals.[192] As employees increasingly see their companies committed to cost-reduction and efficiency strategies, employees have perceived a sharp decline in organizational support for individual workers.[193] This decline in organizational support has been accompanied by increased employee detachment from organizational goals and a greater emphasis on individual skill development and financial rewards.

Social psychologists regard this trend as a fundamental reorientation of the employment relationship—whereas the traditional "psychological contract" between an organization and its employees was relational in na-

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188. MICHAEL HAMMER & JAMES CHAMPY, REENGINEERING THE CORPORATION: A MANIFESTO FOR BUSINESS REVOLUTION 1-7 (2001); Gandolfi & Hansson, *supra* note 183, at 731.

189. Julie Wulf, *The Flattened Firm: Not as Advertised*, CAL. MGMT. REV., Fall 2012, at 5, 8-11.

190. *See* Marc Beylerian & Brian H. Kleiner, *The Downsized Workplace*, 26 MGMT. RES. NEWS, nos. 2-4, 2003, at 97, 97-98; Nell Mirabal & Robert DeYoung, *Downsizing as a Strategic Intervention*, J. AM. ACAD. BUS., March 2005, at 39, 39; Vaughan S. Radcliffe, David R. Campbell & Timothy J. Fogarty, *Exploring Downsizing: A Case Study on the Use of Accounting Information*, 13 J. MGMT. ACCT. RES. 131, 137-39 (2001).

191. *See* Hannah K. Knudsen et al., *Downsizing Survival: The Experience of Work and Organizational Commitment*, 73 SOC. INQUIRY 265, 268-69 (2003).

192. *See id.* at 270, 277; S.K. Aityan & T.K.P. Gupta, *Challenges of Employee Loyalty in Corporate America*, 2012 BUS. & ECON. J. 1, 1, *available at* http://astonjournals.com/manuscripts/Vol2012/BEJ-55_Vol2012.pdf; Yehuda Baruch, *The Rise and Fall of Organizational Commitment*, 17 HUM. SYS. MGMT. 135 (1998).

193. Knudsen et al., *supra* note 191, at 277; *see also* Baruch, *supra* note 192 (arguing that downsizing leads to lower levels of perceived organizational support); Roderick D. Iverson & Christopher D. Zatzick, *The Effects of Downsizing on Labor Productivity: The Value of Showing Consideration for Employees' Morale and Welfare in High-Performance Work Systems*, 50 HUM. RESOURCE MGMT. 29, 39-40 (2011) (exploring ways to limit the decline in perceived organizational support that comes with downsizing).

ture, it has become increasingly transactional.[194] In other words, given the reality of modern business practice, employees can no longer rationally afford to make a deep psychological investment in their companies. Instead, they must cognitively separate the organization's goals from their own. They must detach.

And that is exactly what today's employees have done. In light of the rapid pace of change in modern corporations, the norm among employees has shifted from the idea of lifetime employment to the notion of lifetime employability.[195] The shift here is from the traditional assumption among workers that they would stay with one company for their entire careers, to the new responsibility of each employee constantly to remain attractive to potential future employers. This new brand of corporate employee, whatever their position on the organizational chart,[196] invests in developing new skills and knowledge that they can transfer outside of the organization. In other words, new corporate employees invest in themselves rather than in their organizations.

The evidence for this paradigm shift in corporate employment is overwhelming. Employee mobility has skyrocketed, particularly among the younger generation of workers. The average employee now stays in one job for 4.6 years, but that number is considerably lower for workers under thirty-five years of age.[197] The result is that soon the average worker will hold between fifteen and twenty jobs over the course of her working life.[198] Management scholars now talk about companies as "boundaryless" and describe employees as pursuing "protean" careers, focused on individual self-development rather than company commitment.[199] Predictably, this increased employee mobility, and the resulting short tenure of most employ-

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194. *See, e.g.*, Anjali Chaudhry, Jacqueline A.M. Coyle-Shapiro & Sandy J. Wayne, *A Longitudinal Study of the Impact of Organizational Change on Transactional, Relational, and Balanced Psychological Contracts*, 18 J. LEADERSHIP & ORGANIZATIONAL STUD. 247, 248-50 (2011).

195. *See* Gandolfi & Hansson, *supra* note 183, at 738; *see also* Peter Cappelli, *Career Jobs Are Dead*, CAL. MGMT. REV., Fall 1999, at 146, 146.

196. *See* Franco Gandolfi, *Unravelling Downsizing—What Do We Know About the Phenomenon?*, 10 REV. INT'L COMP. MGMT. 414, 419-20 (2009).

197. *Employee Tenure in 2012*, BUREAU LAB. STAT. (Sept. 20, 2012), http://www.bls.gov/opub/ted/2012/ted_20120920.htm.

198. *See id.*

199. *See, e.g.*, Jon P. Briscoe, Douglas T. Hall & Rachel L. Frautschy DeMuth, *Protean and Boundaryless Careers: An Empirical Exploration*, 69 J. VOCATIONAL BEHAV. 30 (2006); Sherry E. Sullivan & Michael B. Arthur, *The Evolution of the Boundaryless Career Concept: Examining Physical and Psychological Mobility*, 69 J. VOCATIONAL BEHAV. 19 (2006); MICHAEL B. ARTHUR & DENISE M. ROUSSEAU, THE BOUNDARYLESS CAREER: A NEW EMPLOYMENT PRINCIPLE FOR A NEW ORGANIZATIONAL ERA (1996); *see also* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 553-56 (2001) (discussing the concept of boundaryless careers in the context of labor and employment law).

ees, has led to instrumental and detached attitudes toward businesses and low levels of identification with collective enterprise.[200]

Of course, not all employers are subject to the same cost-cutting demands, and not all businesses ruthlessly pursue efficiency strategies at the expense of employee loyalty. But even in businesses that genuinely seek employee commitment and attachment, the radical changes in employee mobility and the accompanying mentality of self-development remain. There will almost certainly continue to be exceptional companies that credibly commit to their employees and receive identification and investment in return. But the dominant view of corporate employment has changed, and the resulting conditions push both companies and employees toward transactional and instrumental terms of affiliation.

4. *Customers*

In analyzing the typical relationships between various individual constituents and the business firm, it would be an oversight to ignore the role of customers. The behavior of customers is perhaps the most important determinant of business size, shape, and strategy in any competitive market. If, as the saying goes, "the customer is king," we must take a closer look at the manner in which customers interact with business corporations.

It is perhaps best to start with Albert Hirschman's famous observations of consumer behavior in competitive markets.[201] In his classic analysis of organizational behavior, Hirschman distinguishes between two modes of participation in the governance of collective bodies, including business firms: exit and voice.[202] Under the exit option, participants in an enterprise signal their dissatisfaction with organizational policies or performance by ending their affiliation.[203] In the case of customers of profit-making firms, exit involves customers buying goods or services from another vendor or not buying those goods or services at all. Voice, on the other hand, involves expressing one's opinion about the organization directly to management and urging the organization to alter its practices in a preferred direction.[204]

As Hirschman first observed, the dominant mode of customer involvement in the affairs of a business firm comes through the use of exit.[205] It is only rational for consumers in competitive markets to rely on exit rather

200. Tammy B. Kondratuk et al., *Linking Career Mobility with Corporate Loyalty: How Does Job Change Relate to Organizational Commitment?*, 65 J. VOCATIONAL BEHAV. 332, 345-47 (2004).

201. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

202. *Id.* at 3-5.

203. *Id.* at 4.

204. *Id.*

205. *Id.* at 33.

than voice. Consumers do not interact with only a few business firms, but instead spread their purchases over a wide range of products. As that number increases, the cost of voice begins to dwarf its expected benefits, leading rational consumers to indicate dissatisfaction by finding a substitute from another firm. In a competitive market, these substitutes will be readily available, and the more competitive the market, the more that exit will dominate consumer behavior.[206]

No doubt the world has changed since Hirschman wrote his seminal work. Most obviously, the rise of the Internet has dramatically lowered the cost of voice. Whereas dissatisfied customers previously were unable effectively to communicate their complaints, they can now simply post a negative online review or submit a complaint via a company's online system. But just as the Internet has reduced the cost of voice, it has also further reduced the cost of exit.[207] The geographical switching costs that used to attend a change in supplier have now been largely eliminated through online purchasing and home delivery of most goods.[208] As a result, although voice has certainly increased since Hirschman's time, exit continues to dominate in competitive markets.[209]

What does the characteristic use of the exit strategy mean for the relationships that tend to develop between customers and business firms? The first implication, as noted by Elizabeth Anderson, is that the market develops norms that are impersonal and instrumental.[210] Markets tend to produce modes of interaction that are suitable for regulating transactions among strangers.[211] Parties with no precontractual obligations to each other typically enter into agreements that explicitly define the terms of exchange and view those agreements as a means to satisfy their own particular instrumental ends.[212]

Customers' use of exit rather than voice also means that the communicative content of their decisions in the market will be thin and one-dimensional. A customer's choice to buy or not to buy a product does not typically come with an articulation of the reasons for that choice. The decision to exit by purchasing a substitute product from a competitor could be driven by price, or service, or quality, or moral values, but the only content of that decision that is normally transmitted to the company is the sheer

206. *Id.* at 40.

207. *See* Behrang Rezabakhsh et al., *Consumer Power: A Comparison of the Old Economy and the Internet Economy*, 29 J. CONSUMER POL'Y 3, 15 (2006).

208. *Id.*

209. *See* T. Randolph Beard et al., Market Structure, Quality and Consumer Behavior: Exit, Voice and Loyalty Under Increasing Competition (Feb. 2012) (unpublished manuscript) (on file with author).

210. ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 145, 151 (1993).

211. *Id.* at 145.

212. *Id.*

statistical and aggregate fact of exit. In this information-starved situation, companies tend to assume that the reasons for exit are economic—either price or quality—and attempt to adjust their behavior accordingly.

The cramped communicative resources of the exit strategy push consumers toward even more detached relations with for-profit firms. To begin, companies can only respond to the information that they are given, and exit does not allow customers to explain their grievances or to convey to the firm what needs or expectations are not being satisfied. Moreover, even if exit were to be effective in communicating some messages from customers to business firms, that strategy severs the ongoing affiliation with the organization. In other words, in situations where exit dominates, the main way for a customer to communicate with a firm is to disengage completely.[213] But without the content-rich use of voice, and without the expectation of an extended and ongoing relationship, it is hard to see how customers can meaningfully participate in the development and enactment of shared values.[214]

The emergence of the Corporate Social Responsibility (CSR) movement, however, threatens to upset this picture of the impersonal market. By buying a product from a firm that adopts a particular set of values, it seems that customers may be able to send a more communicatively rich message to firms. But at least for now, much of CSR's emphasis on value-based customer relations appears to be wishful thinking. Consumers are still overwhelmingly motivated by price and product quality when they make their purchasing decisions, and most people do not even consider factors other than their own use of consumer goods.[215] Although customers have expressed a positive attitude toward socially responsible businesses, the majority of them do not regularly rely on CSR as a factor in their market decisions when they have such a choice.[216]

One possible reason for this apparent inconsistency between expressed preferences and actual practice is that the commercial environment primes

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213. This orientation towards exit is perhaps strongest in the context of retail businesses. For example, if a customer is unhappy with Walmart's decision to sell contraceptives, the dominant mode of expressing that displeasure would be to stop shopping at Walmart. The use of exit might be somewhat less prevalent where customers have fewer options, either due to monopolization or due to specialized benefits of loyalty. For example, a patron of a certain hotel chain or airline company might have more reason to complain about unsatisfactory service—i.e., to use voice—if that patron has accumulated status or redeemable loyalty points that would not transfer to a different company.

214. *See* ANDERSON, *supra* note 210, at 167.

215. *See* Lois A. Mohr, Deborah J. Webb & Katherine E. Harris, *Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONSUMER AFF. 45, 67 (2001); Dale O. Cloninger with Raj Aggarwal et al., *Doing Well by Doing Good: Do Financial Markets 'Price' Ethical Behavior?*, FIN. PRAC. & EDUC., Fall-Winter 2000, at 24, 25-26.

216. *See* Mohr, Webb & Harris, *supra* note 215, at 67.

consumers for instrumental behavior.[217] That is, even though real human beings (as opposed to the mythical *homo economicus*[218]) care about more than material well-being, the norms and expectations that surround market transactions activate material cues and push their other values "off-line."[219] It seems, then, that at least to a significant degree, the traditional picture of market relations as instrumental and impersonal continues to hold true. Customers, in the face of relatively low costs of exit, maintain highly mobile and detached relationships with the various business firms from which they purchase goods and services.

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Having developed an account of the typical modes of affiliation among the major corporate constituencies, one can make broader observations about the patterns that have emerged. To begin, the norms that accompany various corporate roles either encourage or demand a detached form of affiliation. Shareholders, managers, employees, and customers, for a variety of legal, social, and economic reasons, are not expected to form tight moral connections with their corporations. Of course these individuals continue to have personal identities, but those identities are largely walled off from their enactment of various corporate roles.

Looking at this pattern of detached affiliation at the collective level, most business corporations seem to fit comfortably in the category of organizations rather than constitutive communities. The social roles that shape individual affiliation with these corporations are dominated by the pursuit of instrumental objectives, and those roles do not lend themselves to deep individual identification. The thick affiliation that characterizes a constitutive community, where individual identity is intimately tied to group goals, is noticeably absent.

There are some businesses, however, that seem to fall closer to the constitutive community end of the spectrum. In these businesses, the equity shares are not held by hundreds of diversified and rationally apathetic investors, but instead by one person or perhaps a small number of close relatives. Collective conscience claims in these businesses are not as easy to dismiss.

Still, there remain powerful legal, structural, and economic forces that constantly threaten to undermine the aspiration to collective identification. The presence of any minority shareholders outside of a control group introduces the duty of controlling shareholders to maximize share value. Perhaps

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217. *See* Stephen Ellis, *Market Hegemony and Economic Theory*, 38 PHIL. SOC. SCI. 513, 524 (2008).

218. *See* Ronald J. Colombo, *Exposing the Myth of Homo Economicus*, 32 HARV. J.L. & PUB. POL'Y 737, 739 (2009) (book review).

219. Ellis, *supra* note 217, at 528.

more importantly, if these intimate businesses are to grow, they must hire employees, who, as we have seen, typically will not share in the personal investment and moral commitments of the company's shareholders. Finally, although customers might respect or even applaud the moral orientation of these businesses, their economic purchasing decisions with regard to ordinary goods and services are unlikely to make them significant participants in the shared development of personal identity.[220] The detached relationships of other corporate constituents, therefore, will seriously undermine the shared interests at the heart of organizational claims for exemptions.

As I have argued, the most plausible account of collective conscience is premised on the idea of deep personal identification with the group. It is only when group membership is bound up with personal identity, and conceptions of the good are developed in association with others, that the idea of collective conscience becomes intelligible. The environment in most business corporations, however, is not conducive to this pattern of individual identification and, therefore, those businesses cannot support institutional claims of conscience.

### B. Doctrinal Implementation

How, then, should courts proceed? In other words, what doctrinal rule or approach should courts adopt to implement these theoretical insights?

Courts have at least two options: a strong presumption against for-profit conscience claims or a categorical rule precluding them altogether. Under the first option, courts could adopt a presumption that would reflect a healthy skepticism of claims by business organizations. That presumption would be in accord with the general features of corporate enterprise, in which individual members are typically channeled toward detached and instrumental modes of affiliation, while also allowing for the possibility that some businesses might break the mold.[221]

Such a presumption would also serve a useful information-forcing function. Courts have limited investigative resources and few formal chan-

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220. I use the phrase "ordinary goods and services" largely in the same manner that for-profit litigants in the contraception mandate cases have used the term "secular" for their businesses. That is, the goods or services that are for sale, such as crafts or HVAC systems or mining equipment, do not have any explicitly religious or moral content. *See, e.g.*, O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149, 1158 (E.D. Mo. 2012) (referring to an industrial goods holding company as "secular"). A potentially more difficult assessment of customer affiliation might come in the context of for-profit sale of religious materials, such as Bibles. *See, e.g.*, Tyndale House Publishers, Inc. v. Sebelius, 904 F. Supp. 2d 106, 111 (D.D.C. 2012) (challenge by for-profit Bible publisher).

221. *See supra* Section III.A.

nels for independent discovery of facts.[222] They are dependent on the parties to produce enough information, through pleadings, discovery, and trial, so that they can resolve disputed legal issues. If courts adopt a strong presumption against exemptions, businesses would have an incentive to provide robust and specific evidence demonstrating a pattern of individual identification.[223]

Under the presumption strategy, it would be possible for an exceptional business organization to demonstrate that, despite the norms and pressures of the competitive environment, the company has formed a genuine constitutive community. To do so, a business would need to go beyond stating the conscientious beliefs of the controlling shareholders or pointing to corporate practices and documents that implement those beliefs. Instead, to state an exemption claim in its own right, the company would be required to provide evidence of close identification with the organization and its goals among shareholders, managers, employees, and customers. This presumption, in other words, would be demanding, but it would not disqualify businesses as such.

A second option would be for courts to adopt a categorical rule against business exemptions. The move to a categorical rule is bolstered by considering the modest benefits of case-by-case adjudication as compared to its significant drawbacks. To begin with the modest benefits, Section III.A showed that legitimate claims of conscience by business corporations will be quite rare. As a general matter, the various roles in business corporations are scripted by law and social practice to be enacted in a detached and instrumental manner. That pattern of detachment undermines the formation of constitutive community and, therefore, the normative basis for institutional exemption. Accordingly, a categorical rule carries a relatively low risk of substantial over-inclusiveness.

On the other hand, the difficulty of determining, in each instance of an exemption claim, whether a business organization is a constitutive community is likely to be considerable. Even if courts were to adopt a presumption, which would force business claimants to bear the expense of producing factual support for their claims, courts would still be required to evaluate that evidence carefully and weigh it against competing evidence produced by the government. In addition to consuming limited resources, this kind of inquiry would require courts to answer some rather challenging and delicate questions about identification among corporate constituents.

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222. *See* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 379 (1984).

223. Most of the existing complaints in the contraception mandate cases do not state any facts about particular individuals within the corporation other than the controlling shareholders. *See, e.g.*, Complaint, O'Brien v. U.S. Dep't of Health & Human Servs., 894 F. Supp. 2d 1149 (E.D. Mo. 2012) (No. 4:12-cv-00476-CEJ).

Considering the difficulties involved in assessing evidence of constituent commitment, and the relatively modest expected benefits of such a particularized approach, courts might reasonably opt for a bright-line rule that precludes for-profit exemption claims. Such a categorical rule would be over-inclusive with respect to the exceptional business organization that, despite powerful legal and social norms, achieves a pattern of individual identification with the company. But all legal rules are over-inclusive to some degree,[224] and given the general patterns described in Section III.A, it seems that the burdens associated with a thorough, case-by-case evaluation might support a different approach.

One might counter at this point in the analysis that bright-line rules are appropriate in some circumstances, but not when it comes to cases that implicate an interest as important as the freedom of conscience. In other words, in the context of ordinary legal decision making, it is appropriate to consider the decision costs of particularized and careful review, but in the context of fundamental liberties, courts should try to protect the interests at stake to the maximum extent possible.

When it comes to business claims for conscience-based exemption, however, there is reason to think that a categorical approach would not have such dire consequences. Here, it is important to recognize the availability of alternate forms of legal organization that might lend credibility to the claim of institutional conscience. Most obviously, the legal and social norms in the nonprofit sector would be much friendlier to the formation of constitutive communities than those in the for-profit setting. The nondistribution constraint that characterizes nonprofits, for example, would remove the pressure to maximize the financial value of the organization and provide an environment more conducive to deep personal identification.[225] With this alternate avenue available for forming constitutive communities, the over-inclusiveness of a categorical rule against conscience-based claims by for-profit companies becomes even less worrisome.

Ultimately, the choice between a strong presumption and a categorical rule is a matter of implementation rather than normative principle.[226] The presumption strategy is a more direct method of operationalizing the social theory of conscience, and by manipulating the proof structure, courts could begin to address some serious concerns about institutional capacity. The

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224. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31-34 (1991).

225. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (identifying the nondistribution constraint, i.e., the prohibition on distributing profits to those in control, as the unifying feature of nonprofit organizations).

226. *See* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 37-44 (2001) (distinguishing between interpretation of a constitutional principle and implementation of that principle).

categorical rule strategy, however, has considerable advantages of its own, particularly in light of the epistemic hurdles that courts would face in assessing each business claim on a case-by-case basis. In the end, either strategy is a reasonable method of implementing the normative values at stake, and the social theory of conscience is not determinative between the two.

## IV. OBJECTIONS

### A. The Moral Marketplace

One possible objection to my account is that it is too hostile to business exemption claims. A critic raising this objection might ask the following question: Even if the norms of the modern market economy tend to squeeze out conscience, does that mean that the law has to reflect those norms? In other words, why should the law merely recognize a regrettable situation rather than attempt to encourage more conscience in the boardroom and in the workplace? Corporations have been the object of withering criticism for being essentially amoral or even immoral institutions.[227] Why not make conscience-based exemptions more widely available to businesses to encourage a moral marketplace?[228]

It is certainly true that the law is capable of changing behavior in corporations. But the real question is not whether the law might encourage morality in the market, but rather what part of the law would best accomplish that goal. The moral marketplace objection suggests that market participants could be channeled toward more socially desirable behavior by expanding application of the Free Exercise Clause or other legal protections of conscience. But merely opening the door to the possibility of conscience-based exemptions would do very little to alter the underlying norms of business practice. If we want to rewrite the social script for participation in business, we would need to target the legal and social expectations that accompany corporate activity. In other words, we should look to corporate law, or more generally the law of business,[229] rather than the First Amendment.

In fact, this is exactly what the CSR movement is trying to accomplish. The emergence of an emphasis on the socially responsible business

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227. *See, e.g.*, JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004) (describing the structural incentives that lead modern public corporations to act in morally unacceptable ways).

228. *See* VISCHER, *supra* note 44, at 179-205 (arguing that creating more space for conscience within for-profit corporations might help to avoid corporate abuse).

229. *See* Adam Winkler, *Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History*, 67 L. & CONTEMP. PROBS. 109 (2004) (discussing how various business organizations are regulated by legal regimes outside of corporate law).

was in part a reaction to excesses in the marketplace and corporate abuse.[230] CSR advocates have tried to rewrite both the legal and social scripts for management behavior to make room for moral action in business. Although it seems that these efforts may have had their most significant impact on corporate marketing rather than corporate practice,[231] the movement's focus on corporate law and norms is a rational starting point to achieve its goals. Redesigning the expectations of corporate practice might not be easy, but, to be effective, it must focus on the actual legal and social norms that govern its various actors.

Moreover, the moral marketplace objection seems to depend at least in part on an equation between the practice of conscience in business and socially desirable behavior. Corporate exemption claims only arise, however, when the political community has decided it would be best to regulate a particular practice. In other words, when a business claims a right to an exemption from a commercial regulation, it stands in opposition to the democratic determination of public interest.[232] That is certainly not to say that the democratic process functioned properly or that it was sufficiently sensitive to potential conscientious objections. My point is simply that more conscience-based action in the market will not necessarily lead to desirable results for the public as a whole.

Finally, even if conscience-based decision making might have some salutary effects on curbing corporate abuse,[233] we might wonder whether those benefits are worth the costs. Traditional market relations bring with them a valuable kind of egalitarianism: People do not need to possess certain characteristics or attitudes or identities to gain access to goods and services. Similarly, market participation does not depend on any sort of special preexisting relationships. The market is open to those who have the means and willingness to pay, regardless of who they are or whom they know.[234] But if we encourage people to bring a thick sense of personal identity with them into business transactions and arrangements, we may lose at least some of the liberating aspects of an impersonal marketplace.

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230. *See generally* WILLIAM C. FREDERICK, CORPORATION, BE GOOD!: THE STORY OF CORPORATE SOCIAL RESPONSIBILITY (2006).

231. *See, e.g.*, Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1009-24 (2011) (arguing that pressure to maximize shareholder wealth leads companies to market themselves as socially responsible while acting to maximize share value).

232. *See* VISCHER, *supra* note 44, at 118-21 (distinguishing between the collective good as determined by the state and the common good that acknowledges other legitimate sources of authority).

233. *Id.* at 195-96, 205 (suggesting that greater integration of conscience and corporate practice may have curbed the well-known abuses at Enron).

234. ANDERSON, *supra* note 210, at 145.

This concern about the costs of encouraging conscience in the market extends beyond the issue of consumer access. Although somewhat paternalistic, we might also have reason to worry about the effects on those individuals who come to identify with their companies. As I have discussed above, various competitive pressures mandate that firms adapt swiftly to rapidly fluctuating economic conditions. Companies need to pay close attention to their operational efficiency, and those businesses that fail to keep their costs under control will fall by the wayside. Under these unsettled conditions, thick identification with for-profit firms is a dangerous proposition. It puts individual members of the business at greater risk of deep, personal harm from losing a connection to an aspect of their identities.[235] In situations that lack long-term stability, like the modern corporate marketplace, concern for the psychological welfare of individual members might provide an additional reason not to encourage identification with business firms.

The idea of a moral marketplace is certainly enticing. The hope of such a project is that, in the absence of specific requirements of public purpose in modern corporate law, businesses themselves will provide the antidote to corporate abuse. But an expansive notion of institutional conscience is not capable of remedying an excessive focus on the bottom line, and making room for conscience in the marketplace is far from an unalloyed good.

### B. "Purely Personal" Rights

A second objection might be that I have been too charitable to the idea of business exemptions. A critic advancing this objection would claim that conscience is inherently an individual phenomenon and has no corporate analogue. Indeed, this is the approach that some courts have taken in denying for-profit companies' claims to exemption from the contraception mandate.[236] Following a skeptical intuition about the idea of business conscience, these courts have found that free exercise rights are "purely personal" and therefore not available to corporate plaintiffs.

This objection has seemingly strong support in the doctrine. In *United States v. White*, for example, the Supreme Court held that the right against self-incrimination is a purely personal one and, therefore, cannot be invoked by a corporation.[237] The Court found that the historic function of the right was to ensure that criminal trials were conducted in a way that treated individuals with "dignity, humanity and impartiality" and that corporations are

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235. *See* Dan-Cohen, *supra* note 59, at 1234-35.

236. *See, e.g.*, Korte v. U.S. Dep't of Health & Human Servs., 912 F. Supp. 2d 735, 743-44 (S.D. Ill. 2012); Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1288 (W.D. Okla. 2012); Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013).

237. 322 U.S. 694, 698-99 (1944).

not entitled to the same treatment.[238] The Court affirmed this reasoning in *First National Bank of Boston v. Bellotti*, stating that "[c]ertain 'purely personal' guarantees" are not available to corporations because "the 'historic function' of the particular guarantee has been limited to the protection of individuals."[239]

Although this skeptical intuition about corporate conscience rights is understandable, courts' reliance on the "purely personal" line of cases is unsound. If, in fact, free exercise rights are limited to individual claimants, then courts would be forced to abandon the historical assumption that those guarantees also protect churches and other religious organizations.[240] The idea that these religious groups are entitled to free exercise rights can fairly be characterized as a constitutional fixed point, and recognition of that considered judgment should cast considerable doubt on any normative theory that cannot accommodate those results.[241]

The social theory of conscience, however, provides the resources both to justify the skeptical intuition about for-profit institutions and to explain why they should be treated differently than churches and other religious

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238. *Id.* at 698. The Court's opinion in *White*, however, seems to depend more on a concern for the effectiveness of governmental investigation of corporations than on the individual nature of the right against self-incrimination. *See id.* at 700 ("The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective."). This focus on the government's investigative interests, rather than on whether a corporation might have a *prima facie* claim to protection, is consistent with the Court's interest-balancing approach to corporate criminal procedure rights more generally. *See* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 826-41 (1996).

239. 435 U.S. 765, 778 n.14 (1978) (quoting *White*, 322 U.S. at 699, 701). Although the *Bellotti* Court recognized the category of "purely personal" rights, it found that free speech is not one of those rights. *Id.*

240. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (holding that the Religion Clauses of the First Amendment prohibit an employment discrimination suit by a ministerial employee against a church-owned school); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that a local ordinance prohibiting the ritual slaughter of animals violated a Santeria church's rights under the Free Exercise Clause); Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (holding that a religious sect is entitled to an exemption from federal drug laws for its ritual use of a hallucinogenic tea under the Religious Freedom Restoration Act); *see also* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2012)) (specifically protecting free exercise rights of religious institutions).

241. *See* JOHN RAWLS, A THEORY OF JUSTICE 42-46 (rev. ed. 1999) (describing the notion of reflective equilibrium, whereby we revise our moral theory in light of considered judgments, and vice versa).

organizations. Business corporations should not generally be entitled to free exercise exemptions because they are constructed out of a pattern of detached individual relationships that do not lead to shared interests in collective development of conscience. But traditional religious organizations, including churches and other places of worship, are assembled out of a very different pattern of collective commitment. The dominant mode of affiliation within these institutions is one of identification, where individual believers develop and enact their beliefs in a normatively thick association. These associations, in other words, are constitutive communities and are therefore capable of supporting robust claims of collective conscience.

There may indeed be some rights that ought to be regarded as "purely personal."[242] When adjudicating corporate claims to these rights, it is appropriate and defensible to rely on cases like *White* and *Bellotti* to dispose of cases at the outset. That move, however, is not available in the free exercise context, given our constitutional (and subconstitutional) tradition of respecting conscience claims of churches and other religious organizations.[243]

## V. BEYOND CORPORATE CONSCIENCE

Although this Article has focused on business organizations, the social theory of conscience provides a conceptual tool with the potential to reveal new ways of thinking about the exemption claims of more traditional religious organizations. This is not the place to undertake a comprehensive analysis of institutional accommodation, but perhaps some brief observations will indicate future avenues for the theory.

Returning to the conceptual scheme I sketched in Part II, we can at least begin to think about how we might place various institutions on the continuum between *organizations* and *constitutive communities*. As we saw in Part III, the pattern of individual detachment from for-profit corporations led us to categorize them in general as organizations that cannot make plausible claims for exemption. I have also suggested that the pattern of individual identification within churches would lead us to categorize them as exemplars of constitutive communities, which is consistent with our considered judgment that they can make such claims. So, with some confidence, we can start to fill in our scheme at the poles:

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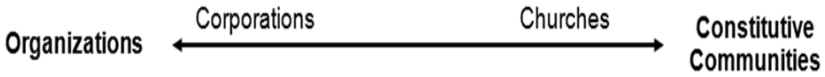
242. It seems likely that the Eighth Amendment right against cruel and unusual punishments would fit comfortably in this category. *See* Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1315 n.13 (1996) (arguing that although corporations should enjoy Eighth Amendment rights against excessive fines, it would make little sense to apply the Cruel and Unusual Punishments Clause to corporations). Perhaps a more obvious example is the fundamental right to marry. *See* Loving v. Virginia, 388 U.S. 1 (1967).

243. *See supra* note 240.




There are obviously a host of institutions that would likely fall somewhere between for-profit corporations and churches on the continuum. Religiously oriented schools, charities, social service agencies, soup kitchens, adoption centers, and hospitals are just some of the groups that might make institutional claims for exemption from governmental regulation. The social theory of conscience provides an analytic tool to evaluate whether these groups should be treated more like churches or business corporations.

These other institutions, however, might not be subject to the same sort of generalized inquiry I have applied to business corporations. The legal, social, and economic norms that govern behavior in these nonprofit organizations are not nearly as monolithic as those I have described in contemporary business practice. Instead, we would need to take a more focused approach to decide whether particular institutions are the kinds of associations that can support genuinely collective claims of conscience. How do the administrators, donors, teachers, parents, and students affiliate with a religious school? How do the benefactors, doctors, nurses, and patients affiliate with a hospital? The social theory of conscience does not answer these questions *a priori*, but it does tell us why we should ask them.

The social theory of conscience might also help us to see from a different angle the regulations that sparked the contraception mandate controversy in the first place. As originally promulgated, the regulations only exempted a relatively narrow set of religious institutions. To qualify for an exemption as a religious employer, an institution had to meet four criteria:

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization [as defined in the Internal Revenue Code].[244]

At least part of the government's justification for these stringent criteria was that they would minimize the impact on employees, because those who work for exempted institutions presumably share the conscientious objections of their employer.[245]

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244. 45 C.F.R. § 147.130(a)(iv)(B) (2011).

245. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

Although this explanation has some merit, perhaps these narrow restrictions can be better justified as ingredients for creating constitutive communities. For example, the requirement that employees generally share the religious beliefs of the organization can be seen as a recognition that most employees do not associate with their employer out of identification with its moral positions. Likewise, the requirement that the organization primarily serves persons of the same religious faith ensures that exemptions will only be extended to tight-knit groups that do not have significant diversity in their pattern of individual affiliations. Finally, the requirement that the institution be not-for-profit might be best justified as a recognition that commercial objectives threaten to undermine the conditions for collective claims of conscience.

I do not mean to claim that these considerations played any part in the actual promulgation of the regulations. Nor am I suggesting that the specific provisions were crafted in a way that adequately captures the kinds of institutions that should be entitled to conscience-based exemptions. Indeed, in the wake of massive outrage in religious communities over the exclusion of various church-affiliated entities from the exemption, the Obama administration crafted a "compromise" that shifts the requirement to cover contraceptives from these religiously affiliated employers to their health insurance issuers or third-party plan administrators.[246] My point is simply that the social theory of conscience might offer a more complete explanation for the inclusion of these particular provisions in the first place.

When all is said and done, the legacy of the contraception mandate may be that it exposed the need to think more seriously about the broader phenomenon of institutional exemption. The most urgent doctrinal question has arisen in the context of for-profit corporations, and the social theory of conscience offers a coherent answer to that question. But the logic of the theory extends beyond the corporate context and provides a new way to think about the kinds of institutions that should be entitled to make conscience-based claims in their own right. The current controversy over insurance coverage for employees will eventually pass, but the larger institutional question is here to stay.

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246. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,875 (July 2, 2013) (to be codified at 45 C.F.R. pts. 147 & 156). According to this compromise, religiously affiliated organizations can continue to offer health plans that do not cover contraceptive services, but the insurance companies that provide those plans would be required to pay for those services at no cost to employees. *Id.* In the case of self-insured group health plans offered by these organizations, third-party administrators of those plans would be responsible for arranging coverage with a health insurance issuer. *Id.* This compromise, however, does not apply to for-profit corporations. *Id.*

## CONCLUSION

Principled adjudication of corporate exemption claims requires a theory of institutional conscience. Existing conceptual resources are inadequate and courts around the country have struggled to find a coherent explanation for their decisions. Some courts have tried to ignore the question, but that is not an appealing long-term strategy. Others have largely relied on skepticism of the corporate form, but skepticism alone is not sufficient, either legally or morally, to deny corporate exemption claims.

The social theory of conscience provides a conceptual tool to unpack institutional claims for legal exemptions. It connects the freedom of conscience to collective life and describes what sorts of associations are structurally suited to make plausible claims of conscience. It also shows why for-profit businesses are not generally the kinds of institutions that can make those claims.

Designations like "Inc." and "Corp." are not talismanic, but neither are they irrelevant. They carry heavy legal, social, and economic baggage that undermines the formation of collective conscience. Organization for profit does matter when it comes to asserting institutional claims for legal exemptions. The social theory of conscience tells us why.