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# Can a Tailor Mend the Analytical Hole? A Framework for Understanding Corporate Constitutional Rights

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## ABSTRACT

The Supreme Court's decisions relating to corporate constitutional rights are a conceptual quagmire. While the Court has grappled with the proper scope of corporate rights for more than two centuries, it has failed to articulate a consistent approach to determine which rights corporations should receive and how those rights should be delineated. As a result, the Court has issued a long line of decisions with conflicting and internally inconsistent reasoning—sometimes extending the existence and scope of certain constitutional rights to corporations, while at other times limiting entire categories of rights to natural persons. The Court's recent decisions in *Citizens United v. Federal Election Commission* and *Burwell v. Hobby Lobby Stores*, both of which expanded the scope of corporate constitutional rights, have resulted in increased scrutiny of the Court's seemingly ad hoc process of adjudicating corporate rights.

This Comment proposes an analytical and normative framework drawn from the Supreme Court's jurisprudence on institutional tailoring to fill this void. In several other settings, including government workplaces, prisons, and K–12 public schools, the Court has limited people's constitutional rights to bring about greater institutional effectiveness and efficiency. Although institutional tailoring has historically been limited to these institutions, its underlying rationales apply with equal or greater force to corporations. Institutional tailoring can therefore serve as an analytical framework for the Court to decide the precise scope of corporate constitutional rights.



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## INTRODUCTION

Following the U.S. Supreme Court's recent decisions in *Citizens United v. Federal Election Commission*[1] and *Burwell v. Hobby Lobby Stores, Inc.*,[2] business corporations enjoy expanded rights in the realm of speech and religious liberty. The decisions, however, failed to articulate a generally applicable framework for deciding how questions of corporate constitutional rights should be resolved. On the one hand, *Citizens United* granted all corporations a broad right to spend unlimited amounts of money on independent political broadcasts in candidate elections.[3] On the other hand, *Hobby Lobby* dealt "solely with the contraceptive mandate"[4] of the Affordable Care Act and granted exemptions from the legislation only to "closely held corporations."[5]

In the wake of these decisions, it is unclear where the Supreme Court draws the line on corporate constitutional rights. Indeed, the question of which rights corporations are entitled to "has bedeviled the Court and commentators for two centuries."[6] The absence of a principled explanation has led to "a web of conflicting and confusing precedent in a plethora of constitutional and statutory contexts," and caused Supreme Court decisions relating to corporate rights to appear "irrational, inconsistent, result-oriented and, to say the least, unpredictable."[7]

1. 558 U.S. 310, 372 (2010) (holding that corporations have a First Amendment right to make unlimited independent political expenditures).
2. 134 S. Ct. 2751 (2014) (extending statutory free exercise rights under the Religious Freedom Restoration Act (RFRA) to closely held corporations owned and controlled by shareholders with sincerely held religious beliefs).
3. *See Citizens United*, 558 U.S. at 372. The decision did place two limits on corporate spending. First, it did not allow corporations to distribute electoral propaganda if the speech was coordinated with a campaign organization. *Id.* at 360. Second, the corporate speakers were required to sign off on advertisements. *Id.* at 366. Both of these limits, however, apply to non-corporate expenditures in support of candidates, too.
4. *Hobby Lobby*, 134 S. Ct. at 2783 ("Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs.").
5. *Id.* at 2775. While the Court's holding is limited to closely held corporations, the Court did not foreclose the possibility that all for-profit corporations could claim religious rights. *See id.* at 2774 ("[W]e have no occasion in these cases to consider RFRA's applicability to such companies."). The Court simply said that it was "unlikely" that larger corporations would assert religious exercise claims due to "numerous practical restraints." *Id.*
6. Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 321 (2015).
7. Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby, Conestoga Wood, *the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201, 206 (2014).

This Comment presents an analytical and normative framework to fill this void. Although *Citizens United* and *Hobby Lobby* were controversial,[8] the decisions are now binding precedent. Indeed, more than a century of precedent exists to support the claim that corporations are entitled to certain constitutional rights.[9] The immediate and pragmatic question for the Court and scholars alike is not whether corporations are entitled to constitutional rights but rather *which* constitutional rights they should receive, and what the scope of those rights should be.

The Supreme Court's existing jurisprudence may provide an answer. In several other settings, including government workplaces, prisons, and K–12 public schools, the Supreme Court has allowed restrictions on individuals' constitutional rights. Public employees, prisoners, and public school students do not lose all their rights in those settings. But the Court more readily defers to the judgment of administrators within these institutions and permits restrictions on constitutional rights for the sake of institutional effectiveness and efficiency. Some scholars refer to this doctrine as "institutional tailoring."[10]

8. For example, one movement has developed to overturn the decisions through a constitutional amendment attacking the concept of corporate personhood. More than one hundred senators and representatives have introduced a proposed Twenty-eighth Amendment in the 114th Congress. This amendment, called the "Democracy for All Amendment," gives Congress and the States power to enact limits on the "raising and spending of money . . . to influence elections," and gives them power to "distinguish between natural persons and corporations." *See* Jeff Clements, *28th Amendment Introduced in Congress With More Than 100 Sponsors*, CORPS. ARE NOT PEOPLE (Jan. 21, 2015), https://corporationsarenotpeople.com/2015/01/22/28th-amendment-introduced-in-congress-with-more-than-100-sponsors [https://perma.cc/LS8F-5CMP]. Voters in California recently passed Proposition 59, which also asks the state's elected officials to propose and ratify an amendment to the federal Constitution overturning *Citizens United*. *California Proposition 59—Overturn* Citizens United—*Results: Approved*, N.Y. TIMES (Nov 13, 2016), http://www.nytimes.com/elections/results/california-ballot-measure-59-overturn-citizens-united [https://perma.cc/8W8X-5UGR]. For debate about *Citizens United* among scholars, see Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221 (2011) (arguing that viewing corporations as real constitutional entities is inconsistent with the manner in which the drafters and ratifiers defined "people" during the debates); Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701, 702 (2011) (arguing that the fact that corporations are not people and thus should not be afforded constitutional rights is legally baseless and logically irrelevant); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497, 518–48 (2011) (arguing that *Citizens United* reflected five false assumptions about corporate law principles).

9. *See infra* notes 51–58 and accompanying text.

10. One of the first scholars to coin the term was Scott Moss. *See generally* Scott A. Moss, *Students and Workers and Prisoners—Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007). For a more thorough explanation of institutional tailoring doctrine (by a different name), see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 258–61 (1995); *infra* Part II.

The Court has justified its institutional tailoring doctrine with three rationales. The first is waiver: By making a voluntary, ex ante choice to enter into an institution with restrictive rules, people agree to give up some constitutional rights.[11] The second is the high cost of judicial error: Granting people in these institutions too many constitutional rights can have especially bad consequences such as the inefficient performance of public services or a threat of violence to others.[12] The third is lesser value rights: Individual rights within these institutions are thought to have less value or significance because of the nature of each institution and because the exercise of constitutional rights within these settings does not promote the values underlying those rights.[13]

These justifications have historically been used only to limit the constitutional rights of people in government institutions such as government workplaces, prisons, and public schools. All three of these justifications, however, also apply with equal, if not more, force to corporations. As a result, the Court's institutional tailoring doctrine can serve as a framework for courts to decide the constitutional rights that corporations should be entitled to and the scope of those rights.

The argument proceeds as follows. Part I sets the stage by discussing the history of corporate constitutional rights jurisprudence. As is clear from the over century-long history of cases, corporations were granted certain constitutional rights long before *Citizens United* and *Hobby Lobby* were decided. As this history also makes clear, however, the Court has failed to develop a cohesive doctrine to guide its decision making about when corporations should and should not be entitled to constitutional rights.

Part II presents a brief overview of how the Supreme Court has used institutional tailoring to limit the rights of people in government workplaces, prisons, and public schools. The Court routinely defers to administrators in each of these institutions when deciding the extent to which people's constitutional rights can be limited. At the same time, the Court has developed various legal rules—each adapted to the unique characteristics of the institutions—that restrict the extent to which these administrators may limit people's constitutional rights.

11. This argument varies in persuasive power in each institution. It is less effective to explain the waiver rationale as applied to prisoners and public school children, both of whom typically do not make a voluntary decision to enter their respective institutions. Yet the U.S. Supreme Court and scholars have suggested that waiver supports a restriction on the constitutional rights of people in prisons and public schools due to the element of choice in both contexts—the choice to attend public rather than private school and the choice to commit a crime. *See infra* Part III.A.

12. *See infra* Part III.B.

13. *See infra* Part III.C.

Part III argues that the three rationales that the Court and scholars have used to justify institutional tailoring also support applying the analytical framework to corporations. First, just as government employees, prisoners, and public school students voluntarily enter into their respective institutions, so do the founders of corporations voluntarily incorporate in order to receive government benefits.[14] Second, the especially bad consequences that can occur were courts to mistakenly recognize too many constitutional rights in government workplaces, prisons, and public schools can also occur if courts do not limit the constitutional rights of corporations. Third, just as the interest in protecting the full range of public employees', prisoners', and public school children's constitutional rights is less significant because of the operational imperatives of government institutions and the lack of values served by the exercise of constitutional rights within such institutions, so too is the interest in granting corporations full constitutional rights less significant in light of their primary purpose as profit-producing entities.

Part IV applies the institutional tailoring doctrine to corporate free speech and religious liberty rights to illustrate how these rights might be limited under such a framework. As the analysis makes clear, institutional tailoring would encourage the Court to reduce the constitutional rights it granted to corporations in *Citizens United* and *Hobby Lobby*. At the same time, there are a number of free speech and religious liberty rights that corporations could continue to exercise under an institutional tailoring framework.

Finally, the Conclusion reflects on the benefits of applying institutional tailoring to corporations. A series of examples suggests why this area of the law is so divisive and why it defies a bright-line rule. Institutional tailoring can provide a much-needed framework for courts to decide when corporations should receive constitutional rights.

## I. THE HISTORY OF CORPORATE CONSTITUTIONAL RIGHTS

Few recent Supreme Court decisions have provoked such lasting controversy as *Citizens United v. Federal Election Commission*.[15] The Court found in favor of a corporation that wished to air a movie critical of presidential candidate Hillary Clinton while she was competing in primary elections, but had been banned from doing so under Section 203 of the Bipartisan Campaign Reform Act (BCRA), which criminalized certain political advocacy based on

14. *See supra* note 11.
15. 558 U.S. 310 (2010).

an anticorruption rationale.[16] In striking down this section of the BCRA, the Court held that the First Amendment prohibited limiting corporate and union funding of independent political speech.[17]

The controversial decision sparked much dialogue regarding its legitimacy and its implications.[18] In a blistering dissenting opinion, Justice Stevens wrote that corporations should not receive the same First Amendment rights as citizens because "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of 'We the People' by whom and for whom our Constitution was established."[19] Commentators have reflected on the ruling as "dramatically reshap[ing] the business of politics" in the nation.[20] Lawrence Lessig, a candidate in the 2016 presidential election, focused his entire campaign on The Citizen Equality Act, a piece of legislation designed in large part to overturn *Citizens United* and institute comprehensive campaign finance reform.[21]

And yet, the history of corporate rights jurisprudence reveals that the Court viewed the corporation as a person entitled to certain constitutional rights long

16. *See id.* at 370–71.

17. *Id.* at 349 ("If the First Amendment has any force, it prohibits Congress from fining or jailing . . . associations of citizens, for simply engaging in political speech.").

18. *See generally* Barack Obama, Remarks by the President in State of the Union Address (Jan. 27, 2010) ("With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections."); Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953 (2011) (arguing that the right to give and spend money in connection with elections need not be protected as speech under the First Amendment); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) (arguing that, in contrast to Justice Scalia's interpretation of the Free Press Clause of the First Amendment in *Citizens United*, a narrow definition of the press should be adopted); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 CARDOZO L. REV. 2365 (2010) (challenging the *Citizens United* majority's claim that corporate spending does not result in corruption).

19. *Citizens United*, 558 U.S. at 466 (Stevens, J., dissenting).

20. Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015, 12:26 PM), http://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics [https://perma.cc/CSJ7-EPDA].

21. *See The Plan*, LARRY LESSIG FOR PRESIDENT, https://lessig2016.us/the-plan [https://perma.cc/7VZA-KW55] (outlining presidential candidate Lawrence Lessig's platform); *see also* Lawrence Lessig, *The Only Realistic Way to Fix Campaign Finance*, N.Y. TIMES: OPINION PAGES (July 21, 2015), http://www.nytimes.com/2015/07/21/opinion/the-only-realistic-way-to-fix-campaign-finance.html?_r=0 [http://perma.cc/N8ZM-HEV8]. Lessig was not the only person in the 2016 election to devote substantial resources to overturning *Citizens United*. The Democratic Party committed to both enacting "a constitutional amendment to overturn . . . *Citizens United*" and "appoint[ing] judges who . . . curb billionaires' influence over elections because they understand that *Citizens United* has fundamentally damaged our democracy." DEMOCRATIC PLATFORM COMMITTEE, 2016 DEMOCRATIC PARTY PLATFORM 25 (July 21, 2016), https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf [https://perma.cc/DHP8-5E7S].

before the controversy surrounding *Citizens United* erupted. Though *Citizens United* and the *Hobby Lobby* decision four years later expanded the scope of corporate First Amendment rights, corporations have long held other constitutional rights. This Part examines the development and history of corporate personhood[22] and argues that the claim that corporations should be stripped of all constitutional rights is futile and contrary to precedent.

### A. Did a Secret Conspiracy Start It All?

Corporations have existed since the colonial era, but it is unclear what rights and privileges the founders intended to grant to them. The Constitution itself, to be sure, includes no specific references to corporations.[23] Perhaps this omission, together with the context surrounding the enactment of the Bill of Rights, reveals that the founders did not intend for the Constitution to protect corporate rights.[24] On the other hand, some Supreme Court justices have argued that

22. Corporate personhood is the idea that corporations should be treated as people under the law and therefore entitled to many or even all of the same rights as natural persons. *Compare* Susanna Kim Ripken, *Corporate First Amendment Rights After* Citizens United: *An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 215 (2011) ("Once the law recognizes the corporation as a person, it does not take much to decide corporations then have legal standing as persons to claim all manner of basic rights, including constitutional rights originally intended for individuals."), *with* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 867 (2007) ("[C]orporate personhood has played a smaller role in crafting corporate constitutional rights than many believe. . . . [C]orporate constitutional rights, including the freedom of speech, are not equivalent to the rights enjoyed by natural persons.").

23. U.S. CONST. (making no reference to corporations); *see* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 113–15 (1970); Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. & POL'Y 197, 201 (2007) ("[T]he term 'corporation' does not appear in either the U.S. Constitution or the Bill of Rights.").

24. *See, e.g.*, Marcantel, *supra* note 8, at 249–54 (arguing that statements made by the drafters and ratifiers of the Bill of Rights indicate that it was designed to protect rights of "humanity" and "birthright," which are inconsistent with its application to corporations); *see also* NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 100 (1997) (wherein Patrick Henry refers to the rights as "the rights of human nature"); *id.* at 432 (wherein Patrick Henry refers to the rights as "human rights and privileges"); Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 823 (2004) ("Thomas Jefferson and James Madison cautioned against the dangers of corporations, in part because the American colonies were operated as corrupt English corporations."). *But see* United States v. Amedy, 24 U.S. (11 Wheat.) 392, 412 (1826) (interpreting "person" in a criminal statute to include corporations); Soc'y for the Propagation of the Gospel in Foreign Parts v. New-Haven, 21 U.S. (8 Wheat.) 464, 481–82 (1823) (interpreting "person" in the treaty ending the Revolutionary War as including corporations).

corporations have existed throughout American history and have always been thought to receive constitutional protections.[25]

Though the number of corporations gradually increased since the nation's founding, with an estimated three hundred in existence by 1800, their rights were limited.[26] State legislatures granted charters only by special order on an individual basis, thereby subjecting corporations to strict government limitations.[27] And though some saw the adoption of the Fourteenth Amendment as supporting the claim for expansive corporate rights,[28] the Supreme Court initially disagreed. In the 1873 *Slaughter-House Cases*[29]—in which several butchers' associations argued that a statute regulating slaughterhouses in New Orleans violated their Fourteenth Amendment rights—the Court wrote that it "doubt[s] very much whether any action of a state not directed by way of discrimination against negroes as a class, or on account of their race, will ever be held to come within the purview of [the Fourteenth Amendment]."[30]

25. *See Citizens United*, 558 U.S. at 392–93 (2010) (Scalia, J., concurring) (arguing that the "text offers no foothold for excluding any category of speaker" and that "the dissent offers no evidence about the original meaning of the text to support any such exclusion"). Justice Scalia, joined by Justices Alito and Thomas, also wrote that corporations were "a familiar figure in American economic life" by the end of the eighteenth century, and that there was no evidence that the founders would have excluded them from First Amendment rights. *Id.* at 387 (quoting McConnell v. Federal Election Comm'n, 540 U.S. 93, 256 (2003)).

26. *See* CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 2 (Warren J. Samuels & Arthur S. Miller eds., 1987).

27. *See* David F. Linowes, *The Corporation as Citizen*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 346 (A.E. Dick Howard ed., 1992). In order to receive a charter, corporations had to be "designed to serve a social function of the state." Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945).

28. *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (forthcoming Jan. 2018) (describing the story of railroad corporations litigating a series of "test cases" on the constitutional rights of corporations following the adoption of the Fourteenth Amendment). The railroads were supported by Stephen Field, a pro-business justice who sat on the Supreme Court when the Fourteenth Amendment was ratified. In several cases decided after the adoption of the Fourteenth Amendment, "Field had made clear . . . that he read the Fourteenth Amendment far more expansively than most of his Supreme Court brethren both with respect to the scope of coverage and with respect to the substance of the protections afforded." Harkins, *supra* note 7, at 216.

29. 83 U.S. (16 Wall.) 36, 76 (1873).

30. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). Describing the purpose of the Fourteenth Amendment, the Court wrote: "The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by [the Fourteenth Amendment] . . . ." *Id.*

There was, however, a turning point for corporate rights in 1886. After what some now view as a secret conspiracy,[31] corporate claims to constitutional rights would never be the same.

The case of *Santa Clara County v. Southern Pacific Railroad*[32] was a far cry from the modern-day, attention-grabbing Supreme Court cases on issues such as same-sex marriage, affirmative action, and the right to bear arms. The case presented the narrow question of whether a tax assessment on railroad property was void because the state improperly taxed railroad fences that instead should have been assessed by local authorities.[33] It also raised the broader question of whether denying railroad corporations the right to deduct the amount of their debts from the taxable value of their property—a benefit that was given to natural persons—violated the Constitution.[34] At the time, few would have expected that *Santa Clara* would lay the foundation for vastly expanded corporate constitutional rights.

The railroad's lawyer, Roscoe Conkling, focused his case on the Fourteenth Amendment and attempted to persuade the justices to read it broadly. His claims were based on the actions of the Joint Committee on Reconstruction, which drafted the Fourteenth Amendment. Conkling argued that because the Committee changed the phrasing of the Fourteenth Amendment from the words "citizens of the United States" to "persons in each State," they intended to include business corporations within the ambit of the Amendment.[35]

Conkling faced skepticism from the Court, however. Over a decade before *Santa Clara*, the Court had observed that "person" appears in multiple provisions of the Constitution clearly in reference to human beings.[36] It concluded, therefore, that "[t]he plain and evident meaning of the [term] is . . . persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons."[37] Conkling, on the other hand, insisted that the various provisions of the Amendment did not have "a single inspiration or design," but rather were "separately and independently conceived."[38] The Court also noted that the *Slaughter-House Cases* had suggested that the Fourteenth

31. The term "secret conspiracy" has been used by several scholars, most recently Adam Winkler. *See generally* WINKLER, *supra* note 28.
32. 118 U.S. 394 (1886).
33. *Id.* at 396–97, 412–14.
34. *Id.* at 411.
35. *See* HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 599 (1968).
36. Ins. Co. v. City of New Orleans, 13 F. Cas. 67, 68 (C.C.D. La. 1870).
37. *Id.*
38. GRAHAM, *supra* note 35 at 596.

Amendment was solely concerned with ensuring the freedom of former slaves.[39] In response, Conkling claimed that while the "rights and wrongs of the freedmen were the chief spur and incentive" of the Amendment, the committee had intended to do far more.[40]

But there was an even more fundamental problem: Conkling's arguments were supported only by his own words. No one involved in the public debate over the ratification of the Fourteenth Amendment had ever mentioned extending its protections to business corporations. Conkling's saving grace was allegedly a journal, which he claimed was "compiled contemporaneously, 'by an experienced recorder,' to capture the Joint Committee's deliberations over the Fourteenth Amendment."[41] Yet historians who have studied the journal have found no support for Conkling's claims. Howard Jay Graham, a librarian who became one of the nation's leading experts on the Fourteenth Amendment, found that "neither the sub-committee, nor anyone, at any time or under any circumstances, so far as the historical record indicates, ever used the word 'citizen' in any draft of the equal protection or due process clauses."[42] Worse yet, Graham concluded that Conkling "suppressed pertinent facts and misrepresented others . . . resorted to misquotation and unfair arrangement of the facts,"[43] and presented an argument that was little more than "a deliberate, brazen forgery."[44]

The Court did not take Conkling at his word. Instead, its decision answered only the narrower question in the case, finding that the state board lacked jurisdiction to assess the value of the fences and thus that the tax assessment at issue was void.[45]

39. *See id.* at 595; *Ins. Co.*, 13 F. Cas. at 68 ("This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal.").

40. GRAHAM, *supra* note 35 at 604 ("A particular grievance, some startling illusion of a grievance, is commonly the spur of agitation, and of popular or legislative action—sometimes of revolution. . . . But what then? Did the logic of the events, did the changes in jurisprudence . . . confine themselves to the little cause, the particular instance, incident, provocation, or failure of justice, from which the agitation, the movement, the amendment, or the reformation came?").

41. WINKLER, *supra* note 28.

42. GRAHAM, *supra* note 35, at 42.

43. *Id.* at 38, 44. *See generally* Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment: 2*, 48 YALE L.J. 171 (1938) (analyzing the historical record surrounding the manuscript journal of the Committee and concluding that Roscoe Conkling misled the Supreme Court by claiming that the Fourteenth Amendment was intended to secure the rights of corporations).

44. GRAHAM, *supra* note 35, at 417.

45. Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 411, 416 (1886).

The court reporter, however, seemed to have had another agenda in mind. A former president of a railroad company,[46] J.C. Bancroft Davis prefaced the Court's decision with a misleading headnote stating that the Court had found that corporations are persons within the meaning of the Fourteenth Amendment.[47] Yet the opinion provides no discussion, reasoning, or authority related to corporate personhood.[48] Indeed, Davis had received clear direction from the Chief Justice that the Court had "avoided [addressing] the constitutional question in the decision."[49] And so the conspiracy, "one of the most bizarre in constitutional history," had begun.[50]

### B. The Expansion of Corporate Rights

The Court soon made clear that it would rely on the *Santa Clara* headnote as binding precedent for the proposition that corporations were protected by the Fourteenth Amendment, despite the fact that the opinion itself endorsed no such principle. In *Minneapolis & St. Louis Railroad v. Beckwith*,[51] the Court cited *Santa Clara* in its holding that corporations could invoke Fourteenth Amendment due process protections, and wrote:

> [C]orporations are persons within the meaning of [the Fourteenth Amendment]. It was so held in *Santa Clara County v. Southern Pacific Railroad* . . . . [C]orporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment

46. *See* THOM HARTMANN, UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE"—AND HOW YOU CAN FIGHT BACK 47 (2010). Davis was a former president of the Newburgh and New York Railway Company, and thus likely was sympathetic to the position of the railroads. Others, however, have suggested that perhaps Justice Field—a pro-business justice with ties to several railroads—may have encouraged him to include the remarks. *See, e.g.*, Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 78 (2005).

47. *Santa Clara County*, 118 U.S. at 396. The headnote read: "One of the points made and discussed at length in the brief of counsel for defendants in error was that 'Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.' Before argument Mr. CHIEF JUSTICE WAITE said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." *Id.*

48. Frank D. Wagner, *How Not to Write a Syllabus*, 15 SCRIBES J. LEGAL WRITING 153, 158 (2013) ("If nothing else, Davis's colorful headnoting has proved instructive to later Reporters determined to learn how *not* to write a syllabus.").

49. C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 224 (1963) (quoting Waite to Davis, May 31, 1886, Bancroft Davis Papers).

50. WINKLER, *supra* note 28.

51. 129 U.S. 26 (1889).

> of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.[52]

With this foundation established, "corporate personhood was no longer just a headnote."[53] Indeed, a series of decisions following *Santa Clara* removed any doubt that corporations were entitled to constitutional rights.[54]

In the twentieth century, the Court granted corporations a number of rights beyond the context of property and contract interests. Corporations received certain free speech rights and the right to expressive association,[55] Fourth Amendment rights against unreasonable searches,[56] Fifth Amendment rights against

52. *Id.* at 28.

53. WINKLER, *supra* note 28.

54. *See* Blake v. McClung, 172 U.S. 239, 259 (1898) ("[A] corporation is a 'person' within the meaning of the Fourteenth Amendment."); Smyth v. Ames, 169 U.S. 466, 522 (1898) ("That corporations are persons within the meaning of this [Fourteenth] Amendment is now settled."); Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution."); Covington & Lexington Turnpike Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."); Charlotte, Columbia & Augusta R.R. Co. v. Gibbes, 142 U.S. 386, 391 (1892) ("Private corporations are persons within the meaning of the amendment."); Home Ins. Co. v. New York, 134 U.S. 594, 606 (1890) ("It is conceded that corporations are persons within the meaning of this Amendment. It has been so decided by this court.").

Skeptics of the corporate rights line of cases may argue that corporations should be stripped of their constitutional rights due to the groundless legal reasoning in *Santa Clara*. This argument, however, is not practically sound. "[C]ourts have only limited authority to act based on their own views of correctness. Trial courts and even three-judge appellate panels, for instance, cannot normally overrule prior appellate precedents, even when the trial court or panel is absolutely sure that the precedent was wrongly decided." Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1875–76 (2014). Even the Supreme Court is often hesitant to overrule its precedent to ensure "reliance and judicial manageability" and "avoid deleterious effects." *Id.* at 1877. These limitations, together with the fact that corporations have held certain rights since the nation's founding, make it doubtful that the Court will strip corporations of all constitutional rights.

55. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8–9, 17 n.14 (1986) (holding that California cannot compel a private, but heavily regulated, utility company to grant access to its property to associate itself with another party's message); First Nat'l Bank of Bos. v. Belotti, 435 U.S. 765, 795 (1978) (holding that corporations should not be prevented or barred from participating in public debates and the public discourse with respect to governmental affairs); Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 773 (1976) (invalidating a ban on truthful advertising of prescription drugs).

56. Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978) (finding a corporate constitutional right against warrantless inspections by workplace safety regulators); Hale v. Henkel, 201 U.S. 43, 76 (1906) ("[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures.").

double jeopardy and takings,[57] and arguably even Sixth and Seventh Amendment rights as persons entitled to trial by jury.[58]

The Court's 2010 decision in *Citizens United*[59] was another leap forward for corporate rights. While commercial and political speech protections for corporations date back a number of years,[60] the Court's conceptualization of corporations and the theory of a corporate political voice broke new ground in *Citizens United*. The Court concluded that the speech of corporations is no less valuable to voters than the speech of individuals and therefore could not be subject to restrictions by the legislature.[61] Justice Scalia's concurrence reasoned that the restriction on corporate spending was unconstitutional because "[t]he [First] Amendment is written in terms of 'speech,' not speakers. . . . [It] offers no foothold for excluding any category of speaker . . . ."[62] As a result, he reasoned, Congress could not limit corporations' free speech rights simply because of their corporate form.

Four years later, the Court heard arguments in *Burwell v. Hobby Lobby*,[63] a case in which a corporation contested the so-called "contraceptive mandate"[64] in the Affordable Care Act (the ACA).[65] The provision required corporations over a certain size to provide employees with health insurance, including medically approved forms of preventive care.[66] The owners of Hobby Lobby, a national arts and crafts chain that was subject to the ACA's contraceptive mandate, brought the lawsuit, claiming the provision violated the Religious Freedom Restoration

57. United States v. Martin Linen Supply Co., 430 U.S. 564, 576 (1977) (finding that corporations have rights against double jeopardy); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (upholding the corporate right against double jeopardy); Russn. Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (holding that a corporation has the right to a takings claim under the Fifth Amendment).

58. Ross v. Bernhard, 396 U.S. 531, 532–34 (1970) (extending the corporate right to trial by jury to "those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury"). I say arguably because in a more recent case, the Court denied a corporation's right to a jury trial on the basis that it was charged with a petty offense. *See* Muniz v. Hoffman, 422 U.S. 454, 476 (1975).

59. 558 U.S. 310 (2010).

60. *See, e.g.*, *First Nat'l Bank of Bos.*, 435 U.S. at 776 (holding that a state statute that prevented corporations from making political contributions was a violation of their political speech rights); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761–70 (1976) (holding that a ban on advertising prescription drug prices by pharmacists constituted a violation of corporate commercial speech rights).

61. *See Citizens United*, 558 U.S. at 363–64.

62. *Id.* at 392–93 (Scalia, J., concurring). Justice Scalia's concurrence was joined by Justice Alito in whole and by Justice Thomas in part. *Id.* at 385.

63. 134 S. Ct. 2751 (2014).

64. *Id.* at 2763.

65. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

66. *Id.* § 2713, 124 Stat. at 131.

Act (RFRA),[67] which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling government purpose.[68] The Supreme Court decided in their favor, and found that Hobby Lobby—indeed, all closely held corporations—should be considered a person under RFRA.[69]

The argument that corporations have no constitutional rights, therefore, is simply untenable today given the Court's expansive line of precedent to the contrary. No matter where one stands on the controversial issue as a legal or policy matter, the Supreme Court has made clear that corporations are entitled to certain constitutional rights. And yet, the Court has failed to ground its rulings in a coherent concept of corporate personhood.[70] A footnote in Justice Powell's decision in *First National Bank of Boston v. Bellotti*[71] is the closest the Court has come to creating a uniform test. According to that footnote, the Constitution protects corporations' constitutional rights except for "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, [that] are unavailable to corporations . . . ."[72] This framework, however, was used in neither *Citizens United* nor *Hobby Lobby* and is not adhered to by the Court today.

The absence of a settled, principled understanding of corporate constitutional rights has resulted in confusion and inconsistent results.[73] Until the Court provides a framework for explaining why and when corporations are to receive

67. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb–2000bb-4. (2012).
68. 42 U.S.C. § 2000bb-1(a)–(b) (2012).
69. *Hobby Lobby*, 134 S. Ct. at 2768–70.
70. *See* Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 909 (2011) ("No unified theory governs when or to what extent the Constitution protects a corporation."); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 50 (2014) ("[T]he Court has confronted issues concerning the applicability and scope of constitutional protections for corporations for over two hundred years. In all of this time, it has failed to articulate a test or standard approach for its rulings.").
71. 435 U.S. 765, 778 n.14 (1978).
72. *Id.*
73. *Compare* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87–90 (1809) (Marshall, C.J.) (holding that when determining right to sue, courts may look through corporate form because the corporate name represents persons who are members of the corporation), *with* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (holding that a corporation "possesses only those properties which the charter of its creation confers upon it"); *compare* Hale v. Henkel, 201 U.S. 43, 70, 76 (1906) (holding that corporations are not protected by the Self-Incrimination Clause of the Fifth Amendment, but are protected by the Fourth Amendment's prohibition against unreasonable searches), *with* United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977) (holding that the Fifth Amendment's double jeopardy clause protects corporations); *compare* Hope Ins. Co. v. Boardman, 9 U.S. 57, 61 (1809) (holding that diversity jurisdiction depends on the citizenship of members of the corporation), *with* Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (holding that jurisdiction depends on the imputed citizenship of the corporation without regard to the actual citizenship of corporate members).

certain constitutional rights, the confusion and inconsistencies characterizing *Hobby Lobby* and *Citizens United* will continue.[74]

## II. THE THEORY OF TAILORED RIGHTS

The corporate rights setting is not the first time the Supreme Court has granted some, but not all, constitutional rights to a person or entity. The Court has also granted limited rights to government employees, prisoners, and public school students under the doctrine of institutional tailoring.[75] In most cases, courts independently scrutinize whether restrictions upon constitutional rights are necessary to serve important government interests.[76] Under an institutional tailoring framework, however, courts decline to apply such independent review. Instead, courts defer heavily to the judgment of administrators within the institutions. Implicit in courts' deference is the notion that people in these institutions possess limited constitutional rights as compared to people outside such institutions.

This Part presents an overview of the Supreme Court's decisions in institutional tailoring cases relating to government workplaces, prisons, and K–12 public schools.[77] Though the Court has made clear that government employees, prisoners, and public school students are not without constitutional rights, it has stipulated that their rights are subject to limitation. Using several different standards—each adapted to deal with the unique characteristics of each respective institution—the Court has elaborated upon the extent to which constitutional rights may be limited.

74. Indeed, counsel for Hobby Lobby made this exact point in their response to the government's petition for writ of certiorari: "The existing conflict [between courts] is likely to deepen rapidly, with the same issues pending in some thirty-five other cases around the country." Brief for Respondents at 17–18, Sebelius v. Hobby Lobby Stores, Inc., 723 F.3d 1114 (10th Cir. 2013) (No. 13-354).

75. *See generally* Moss, *supra* note 10, at 1635.

76. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 264 (1985) ("[A]ppellate courts often exercise independent judgment with respect to constitutional law application.").

77. Although the cases mentioned in this Part chiefly deal with free speech claims, the Supreme Court has also applied institutional tailoring to limit other constitutional rights. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995) (holding that a school requirement that students submit to random urinalysis testing to be eligible for participation in interscholastic athletics did not violate the Fourth and Fourteenth Amendments in the context of schools); Goss v. Lopez, 419 U.S. 565, 581–82, (1975) (holding that due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred").

### A. Government Workplaces

In *Pickering v. Board of Education*,[78] the Court recognized that the rights of government employees must be balanced against the state's interests in promoting the efficient performance of public services.[79] The case involved a teacher who was fired for sending a letter to a newspaper in which he criticized the way the local school board allocated funds between academics and athletics.[80] Finding that the teacher's firing violated the First Amendment, the Court wrote that there must be "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[81]

Though the Court declined to establish a bright-line rule for how courts should weigh these competing interests, it did "indicate some of the general lines along which an analysis of the controlling interests should run."[82] The Court listed several factors to consider when analyzing whether speech by government employees was protected, such as: (1) whether maintaining "discipline by immediate superiors or harmony among coworkers" would be threatened by the speech;[83] (2) whether the employee's action "impeded the . . . proper performance of his daily duties . . . or . . . interfered with the regular operation of the [facility] generally";[84] and (3) the nature of the issue and whether the speaker was "likely to have informed and definite opinions" on the matter.[85]

The Court added to its institutional tailoring framework for government workplaces in *Connick v. Myers*.[86] In that case, the Court affirmed *Pickering* but found that speech by government employees that did not comment on matters of public concern was unprotected.[87] Thus, the Court upheld the government's termination of an assistant district attorney for speaking out against her transfer to a different section of the court.[88]

78. 391 U.S. 563 (1968).
79. *See id.* at 568.
80. *Id.* at 564.
81. *Id.* at 568.
82. *Id.* at 569.
83. *Id.* at 570.
84. *Id.* at 572–73.
85. *Id.* at 572.
86. 461 U.S. 138 (1983).
87. *Id.* at 146. ("[I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.").
88. *Id.* at 154.

The Court reasoned that because the speech took place in a government institution, there was reasonable concern about the functionality of the workplace.[89] By speaking out against her transfer and asking her colleagues to express their views on the condition of their jobs, the aggrieved employee in *Connick* distracted others in the office from their routine duties.[90] The Court saw no need to require the employer to wait for an actual disruption to occur at the office and cause "destruction of working relationships."[91] *Connick* thus narrowed the circumstances in which the *Pickering* balancing test applied by limiting its applicability to cases involving speech on matters of public concern.[92]

While the Court has continued to elaborate upon this framework,[93] the principle remains the same: The constitutional rights of public employees may be restricted to a greater extent than the rights of ordinary citizens.

### B. Prisons

Although the Supreme Court has held that the barriers of prison walls do not strip inmates of all constitutional rights, prisoners do lose certain constitutional rights as a result of their confinement. In *Turner v. Safley*,[94] the landmark case on prisoners' rights, the Court upheld a regulation that allowed prison officials to prohibit inmates from corresponding with those at another prison, but struck down a regulation that prohibited inmates from marrying without the warden's permission.[95] In so doing, the Court stated that regulations that infringe on inmates' constitutional rights are valid if they are "'reasonably related' to legitimate penological interests."[96] The Court reasoned that such a deferential standard of review was necessary due to the unique characteristics of the prison environment.[97]

89. *Id.* at 153.
90. *Id.*
91. *Id.* at 151–52.
92. *Id.* at 147.
93. *See, e.g.*, San Diego v. Roe, 543 U.S. 77, 84 (2004) (holding that pornographic videos sold online by a police officer were not a matter of public concern, at least when the videos were "linked to [the employee's] official status as a police officer, and [were] designed to exploit his employer's image"); Rankin v. McPherson, 483 U.S. 378, 378 (1987) (holding that saying to a coworker friend that one wishes the President had been assassinated constituted speech on a matter of public concern); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284 (1977) (holding that publicizing a principal's memorandum about teacher dress and appearance was a matter of public concern).
94. 482 U.S. 78 (1987).
95. *Id.* at 100.
96. *Id.* at 78.
97. *Id.* at 89 ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative

The *Turner* Court found that the correspondence regulation was logically connected to the government's interest in preserving prison security.[98] Because mail sent between prisons "can be used to communicate escape plans and to arrange assaults and other violent acts," and because it would be "impossible [for prison officials] to read every piece of inmate-to-inmate correspondence," the Court upheld the regulation prohibiting correspondence between inmates.[99] The marriage prohibition, however, was "not reasonably related to these penological interests," but rather was an "exaggerated response" to the prison's goal of preventing violent confrontations between inmates.[100] Because it did not satisfy the reasonable relationship standard, the Court struck down the marriage regulation as unconstitutional.[101]

The reasonable relationship test established in *Turner* continues to serve as the Court's framework for determining the constitutional rights of prisoners. Most recently, in 2006, the Court used the *Turner* test to uphold a Pennsylvania prison regulation that prevented some inmates from having access to newspapers, magazines, or photographs.[102] Finding that the regulation was designed to "motivate better behavior on the part of particularly difficult prisoners . . . to minimize the amount of property they control in their cells, and . . . to ensure prison safety," the Court concluded that it withstood the lenient *Turner* standard.[103] The Court has also used the same test to uphold prison regulations that prevented certain prisoners from being interviewed by the media[104] and limited the publications that prisoners could receive,[105] while invalidating a practice in which prison officials read and censored incoming and outgoing correspondence by prisoners.[106]

solutions to the intractable problems of prison administration."). In another case, *Procunier v. Martinez*, the Court discussed these challenges in more detail: "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating . . . the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable . . . ." 416 U.S. 396, 404–05 (1974).

98. *Turner*, 482 U.S. at 91.
99. *Id.* at 91, 93.
100. *Id.* at 97–98.
101. *Id.* at 91.
102. Beard v. Banks, 548 U.S. 521, 521 (2006).
103. *Id.* at 530.
104. Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).
105. Thornburgh v. Abbott, 490 U.S. 401 (1989).
106. Procunier v. Martinez, 416 U.S. 396 (1974).

### C. Public Schools

The Supreme Court has stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" simply because they attend public schools.[107] Students must retain some of their rights because "[t]he classroom is peculiarly the 'marketplace of ideas,'"[108] and the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[109] At the same time, however, the Court has shown great deference to school administrators in restricting certain student rights, and made clear that the constitutional rights of students are not "coextensive with the rights of adults in other settings."[110]

The landmark case that established these limits was *Tinker v. Des Moines Independent Community School District*.[111] The case concerned the children of an Iowa family who strongly opposed American participation in the Vietnam War. When the school learned that some students intended to wear black armbands to school to protest the war, it adopted a policy prohibiting the wearing of any armbands.[112] The Tinker children refused to obey the prohibition and, as a result, were suspended.[113]

The Court held that the wearing of armbands as a sign of political protest was protected by the First Amendment.[114] It then went on to apply its institutional tailoring doctrine to determine whether the students' suspension violated their First Amendment rights. Acknowledging the "special characteristics of the school environment," the Court found that school administrators had greater authority to restrict student speech.[115] This discretion, however, was limited. Public schools could only restrict students' speech when they could show that it would substantially interfere with the work of the school or collided "with the rights of other students to be secure and to be let alone."[116]

Applying its test to the Tinker children, the Court found that because the armbands had not caused any disruption or infringed upon any other students'

107. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
108. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
109. Shelton v. Tucker, 364 U.S. 479, 487 (1960).
110. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); *see* Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 825–26, 828 (2009).
111. 393 U.S. 503 (1969).
112. *Id.* at 504.
113. *Id.*
114. *Id.* at 505–06.
115. *Id.* at 506–07.
116. *Id.* at 508.

rights, the students' suspension was an unconstitutional restriction of their First Amendment rights.[117] Mere fear of possible disruption, the Court concluded, did not warrant stripping students of their First Amendment rights.[118]

In a trilogy of cases following *Tinker*, the Court further curtailed students' speech rights. First, in *Bethel School District v. Fraser*,[119] the Court ruled that school officials could punish a high school student for giving a speech containing "an elaborate, graphic, and explicit sexual metaphor" during a school assembly.[120] The Court found that the student's speech was inherently disruptive and interfered with the school's educational mission.[121] Adding to its institutional tailoring doctrine, the Court held that public schools may prohibit student speech when it is wholly inconsistent with their goals of maintaining order, discipline, and control in the school environment, and of teaching the boundaries of civility and appropriate conduct.[122]

Two years later, in *Hazelwood School District v. Kuhlmeier*,[123] the Court ruled in favor of a school when it upheld the suppression of certain articles from a student-written school newspaper.[124] The case involved two stories that described divorce in students' families and students' experiences with teen pregnancies.[125] Concerned that the articles were inappropriate, the principal deleted them from the issue.[126] The Court upheld the constitutionality of the principal's actions, and held that school officials have greater authority to limit student speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[127] When student speech is "supervised by faculty members and designed to impart particular

117. *Id.* at 508, 514.
118. *Id.* at 508 ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."); *id.* at 514 ("[T]he record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.").
119. 478 U.S. 675 (1986).
120. *Id.* at 678, 685–86. The full text of student Matthew Fraser's speech is reprinted in Justice Brennan's concurring opinion. *Id.* at 687 (Brennan, J., concurring).
121. *Id.* at 685–86.
122. *Id.* at 683 ("The inculcation of these values is truly the 'work of the schools.'" (quoting *Tinker*, 393 U.S. at 508)).
123. 484 U.S. 260 (1988).
124. *Id.*
125. *Id.* at 263.
126. *Id.* at 263–64. The school principal censored the newspaper because he felt that the parents whose divorce was described in one of the articles should have been given an opportunity to respond to the student's remarks or to consent to publication, and that the identity of pregnant students quoted in the pregnancy story might still be apparent, despite the use of pseudonyms. *Id.*
127. *Id.* at 271.

knowledge or skills to student participants and audiences," schools may restrict the speech as long as the restriction reasonably relates to legitimate pedagogical concerns.[128] Because the articles at issue were to appear in a newspaper published by the school, the Court found that the principal had the authority to withhold them from publication.[129]

The Court again expanded the authority of school officials in its most recent school speech decision. In *Morse v. Frederick*,[130] the Court held that school officials may restrict student speech that is reasonably regarded as promoting illegal drug use.[131] The case involved a high school student who stood across the street from his school holding up a fourteen-foot, homemade banner proclaiming, "BONG HiTS 4 JESUS," as the Olympic Torch Relay passed.[132] The Court reasoned that because the advocacy of illegal drug use threatens student safety, the student's speech could be punished.[133]

## III. THE CASE FOR APPLYING INSTITUTIONAL TAILORING TO CORPORATIONS

Part II described the Court's practice of limiting the constitutional rights of government employees, prisoners, and K–12 public school students under its institutional tailoring doctrine. This Part serves two purposes. I first discuss three rationales underlying institutional tailoring. The first, which I call waiver, posits that people's constitutional rights can be limited when they make a voluntary, ex ante choice to enter a setting with restrictive rules. The second, which I call the high cost of judicial error, stresses that erroneously granting unregulated constitutional rights to people in government workplaces, prisons, or public schools can have especially bad consequences. The third, which I term lesser value rights, suggests that the exercise of individual rights within these institutions has less value or significance because of the nature of each institution, and because the exercise of constitutional rights within the institutions does not promote the values underlying those rights.

Second, I argue that the Court should apply its institutional tailoring framework to corporations. Though institutional tailoring has historically been limited to government institutions, I argue that these three rationales used to

128. *Id.*
129. *Id.*
130. 551 U.S. 393 (2007).
131. *See id.* at 396–97.
132. *Id.* at 397.
133. *See id.* at 409–10.

justify tailored rights for public employees, prisoners, and public school children apply with equal or greater force to corporations. As a result, institutional tailoring can serve as an analytical framework for the Court to decide which constitutional rights corporations should receive.

### A. Waiver of Constitutional Rights

The Supreme Court has said that when people voluntarily choose to enter government institutions with restrictive rules, they in effect agree to relinquish their full set of constitutional rights. In one of the earliest cases in which the Court relied on the waiver rationale, it found that public employees had no First Amendment speech rights against their government employers:

> [T]he unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted . . . constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[134]

Though the Court has tempered the restrictions on the rights of public employees since then,[135] the waiver argument has been repeatedly cited as justification for limiting people's constitutional rights under institutional tailoring. In a recent case narrowing the free speech rights of government employees, the Court reaffirmed this principle, writing that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."[136]

The waiver rationale has also been used to limit the rights of prisoners and public school students. Fundamentally, choosing to commit a crime brings with it incarceration and a limited set of constitutional rights. The Supreme Court of Virginia, for example, has written that "during his term of service in the penitentiary, [a convicted felon] is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights

134. Connick v. Myers, 461 U.S. 138, 143–44 (1983) (alteration in original) (quoting McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892)).

135. For a discussion of the Supreme Court's current doctrine regarding the constitutional rights of government employees, see *supra* Part II.A.

136. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); *see also* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952) ("[People] may work for the school system upon the reasonable terms laid down by the proper authorities . . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.").

except those which the law in its humanity accords to him."[137] And in the context of public schools, parents make a choice to send their children to public schools rather than enrolling them in private schools or home schools.[138] Even parents who enroll their children in public schools voluntarily choose between school districts, each of which has different rules that govern students.[139]

The waiver argument, however, is not without its critics. Scholars have noted that in the context of government workplaces, not all employees can be said to have voluntarily waived their rights. Given the high unemployment rates in certain major municipalities that employ large numbers of people, for instance, a person seeking work may not have completely free choice in deciding whether to accept a government job.[140] Furthermore, once an employee has been on the job for some time, the costs of leaving increase.[141] The employee's emotional attachment to the job—what scholars have termed the endowment effect—also weighs against starting their career afresh in a new job.[142]

137. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

138. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.").

139. *See* Moss, *supra* note 10, at 1646. Dress codes, for instance, vary widely between school districts, ranging from no regulations at all to mandatory uniform policies. *See* Greg Toppo, *What to Wear? Schools Increasingly Making That Decision*, USA TODAY (Aug. 18, 2014, 6:04 AM), http://www.usatoday.com/story/news/nation/2013/08/18/more-school-uniforms/2662387/ [https://perma.cc/3JMA-2PT2]. Some have questioned whether such dress codes infringe on the First Amendment rights of students. *See, e.g.*, Nancy Murray, *Striking a Balance: Students, Educators, and the Courts: School Safety: Are We on the Right Track?*, 34 NEW ENG. L. REV. 635, 640–43 (2000).

140. As of May 2016, several cities and states had unemployment rates significantly higher than the federal rate of five percent: El Centro, California (23.5 percent); Yuma, Arizona (18.8 percent); Merced, California (11.1 percent); Ocean City, New Jersey (10.9 percent). U.S. DEP'T OF LABOR: BUREAU OF LABOR STATISTICS, USDL-16-1291, METROPOLITAN AREA EMPLOYMENT AND UNEMPLOYMENT—MAY 2016 (2016), http://www.bls.gov/news.release/pdf/metro.pdf [https://perma.cc/VXE4-65MY].

141. It is common for employers to provide new employees health insurance only after three months of employment—a norm sufficiently widespread to have become part of even broad legislative proposals to mandate employer-provided health care. *See, e.g.*, Jennifer Bender, Note, *The Impact of* ERISA *on California Health Care Law Following the United States Supreme Court's Pro-Preemption Interpretation*, 26 WHITTIER L. REV. 1169, 1184 (2005) (recounting how even under a broad California bill to mandate employer-provided health insurance, "[t]o qualify for health coverage, an employee was required to work as [sic] least 100 hours per month for the same employer for at least three months").

142. *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1235–36 (2003) (referencing a study in which "[t]he majority of subjects said they would stay at the current position" despite the opportunity to transfer to a position with a higher salary or better working conditions).

Similar problems plague the waiver rationale as applied to prisoners. Arguably, inmates do not voluntarily choose to enter such institutions.[143] Several communities of color—most notably African American and Latino males—are disproportionately punished in schools, making them far more likely to end up in the criminal justice system.[144] Even if the waiver argument does apply to prisoners, some have argued that it should cause them to lose only a narrow set of rights—those that must be abridged in order to maintain the safety and operation of the prison.[145]

Many also argue that students do not truly make a voluntary decision to attend public school.[146] School attendance is, of course, compulsory for children in the United States.[147] Because public schools are typically the default form of education provided to students, parents are forced to opt out and bear the costs of private school or home school if they do not wish for their children to enter the institution.

Yet despite these criticisms, the Court has continued to use waiver as a rationale for limiting the rights of people in government workplaces, prisons, and public schools under an institutional tailoring framework. In the following sections, I argue that waiver applies with equal—if not more—force to corporations, and can therefore also serve as a justification for limiting corporate constitutional rights.

### 1. Waiver and Corporations

The founders of corporations undeniably make a voluntary choice when they choose to incorporate a business. State incorporation statutes set forth a

143. *See, e.g.*, Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1708 (2009); Moss, *supra* note 10, at 1652.

144. ACLU, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 147–48 (2007), http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf [https://perma.cc/5RBA-LFY8]. A 2013–14 study by the U.S. Department of Education found that African American K–12 students were 3.8 times more likely to be suspended as compared to white students. OFFICE FOR CIV. RTS., U.S. DEP'T OF EDUC., 2013–14 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016), http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/9KMG-DYGY]; *see also* Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 91S–92S (2011) (arguing that the high rates of imprisonment for these populations is at least partly due to "unconscious bias in the use of discretion, allocation of resources, or public policy decision making" by law enforcement and prosecutors).

145. *See* Moss, *supra* note 10, at 1652.

146. *See, e.g.*, Lee, *supra* note 143, at 1716; *id.* at 1648.

147. For a history of laws surrounding compulsory education in the United States, see Chelsea Lauren Chicosky, *Restructuring the Modern Education System in the United States: A Look at the Value of Compulsory Education Laws*, 2015 B.Y.U. EDUC & L.J. 1, 11–20 (2015).

procedure people must follow in order to form a business corporation. In California, for example, starting a corporation requires people to: (1) choose a business name;[148] (2) find and appoint directors for the corporation;[149] (3) prepare and file articles of incorporation with the Secretary of State;[150] (4) create the corporation's bylaws;[151] (5) file a Statement of Information with the Secretary of State;[152] (6) issue stock certificates to initial owners of the corporation;[153] and (7) take care of any necessary tax or other regulatory registrations for the corporation.[154] The decision to incorporate is not only voluntary—the steps required to do so require time and effort on behalf of the business owners.

Moreover, incorporation is by no means a prerequisite to a business's success. "Over 70 percent of U.S. businesses are owned and operated by sole proprietors or sole traders,"[155] and in 2008, unincorporated businesses produced over 722 billion dollars in net income.[156] The owners of Hobby Lobby could very well have elected to do business in their individual capacities rather than in the corporate form and thus not have been subject to the ACA's contraceptive mandate. Instead, the owners chose to take the affirmative steps to incorporate. As Solicitor General Donald B. Verrilli, Jr. said to the Court during his *Hobby Lobby* argument: "[O]nce you make a choice to go into the commercial sphere . . . you are making a choice to live by the rules that govern you and your competitors in the commercial sphere."[157] The choice to incorporate thus provides a strong justification for the waiver of certain constitutional rights under the Court's institutional tailoring framework.

148. *See* CAL. CORP. CODE § 201 (West 2014).
149. *See* CAL. CORP. CODE § 210 (West 2014).
150. *See* CAL. CORP. CODE § 204 (West 2014).
151. *See* CAL. CORP. CODE § 211–12 (West 2014).
152. *See* CAL. CORP. CODE § 1502 (West 2014).
153. *See* CAL. CORP. CODE § 416 (West 2014).
154. *See, e.g.*, *What Is the Minimum Franchise Tax?*, ST. CAL. FRANCHISE TAX BOARD, https://www.ftb.ca.gov/businesses/faq/712.shtml [https://perma.cc/LDV6-E3W5].
155. Caron Beesley, *Sole Proprietorship—Is This Popular Business Structure Right for You?*, U.S. SMALL BUS. ADMIN.: STARTING A BUS. (Feb. 27, 2013), https://www.sba.gov/blogs/sole-proprietorship-popular-business-structure-right-you [https://perma.cc/GBU6-RTVZ].
156. U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.744 (2012), http://www.census.gov/library/publications/2011/compendia/statab/131ed/business-enterprise.html. By comparison, business corporations produced 984 billion dollars in net income that same year. *Id.*
157. Transcript of Oral Argument at 81, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1165 (10th Cir. 2013), *aff'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (June 30, 2014) (Nos. 13-354, 13-356) (Briscoe, C.J., concurring in part and dissenting in part) (noting that the certificate of incorporation for Hobby Lobby makes no mention of religion).

There is also a second, related reason why the government may limit corporate constitutional rights when businesses choose to take the corporate form. The Supreme Court has held that when the government offers private parties a benefit, it can sharply limit what can be done with that benefit.[158] This principle was established in *Regan v. Taxation With Representation*,[159] in which the Court upheld a regulation that granted tax-exempt status only when no substantial part of the organization's activities were "carrying on propaganda, or otherwise attempting to influence legislation."[160] The Court ruled that this restriction had not infringed on the organization's First Amendment rights, despite the fact that they would have to forego their constitutional right to engage in substantial lobbying in order to receive the tax exemption and tax deductibility.[161]

Not all funding conditions that restrict constitutional rights are permissible. The Court has struck down conditions that preclude alternative channels of expression[162] or restrict speech based on viewpoint.[163] Nevertheless, the Court has several times sustained the principle of *Regan*,[164] including in one decision relating to corporate rights. In *Austin v. Michigan Chamber of Commerce*, the Court upheld the regulation of corporate expenditures in part on the theory that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants" restrictions on the First Amendment rights of corporations.[165]

Just as the organization in *Regan* gained a government benefit through the tax exemption, businesses gain several government benefits when they incorporate. Corporations earn advantages such as "limited liability, perpetual life, and

158. *See* Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).
159. 461 U.S. 540 (1983).
160. *Id.* at 542 n.1.
161. *Id.* at 546.
162. *See, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364, 402 (1984) (striking down a condition on federal funding to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds).
163. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (striking down a condition of government grants that prevented attorneys from representing clients wishing to challenge the constitutionality or statutory validity of welfare laws).
164. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 177–78 (1991) (upholding a regulation that provided federal funding to organizations provided the organization agreed not to use the funding to promote abortion as a method of family planning); United States v. Am. Library Ass'n., Inc., 539 U.S. 194, 211 (2003) (upholding a regulation that provided federal funding only to libraries that agreed to install internet filters designed to prohibit the viewing of obscene images).
165. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

favorable treatment of the accumulation and distribution of assets."[166] Because corporations are juridical entities unto themselves, they shield shareholders and owners from personal legal liability, even if the corporation files for bankruptcy.[167] Limited liability allows business owners to separate and protect their own assets from personal harm, even if a corporation is sued or sees its profits drop. As a result, limited liability allows for capital formation without immediate risk to shareholders.

Corporations also receive a number of tax advantages that allow them to be more economically productive than a private citizen.[168] These include deductibility of health insurance premiums paid on behalf of employees, savings on self-employment taxes, and the exclusion of interest on certain bonds held. Together, these tax benefits give corporations a number of financial advantages that individuals cannot claim.

More generally, corporations offer the preeminent vehicle for raising business capital by selling equity to investors. Public corporations have the ability to raise capital in public markets. This not only allows people to invest in the company, but also helps corporations reach new potential customers and partners.

It is indisputable, therefore, that corporations are formed voluntarily and receive benefits from the government. And while these benefits certainly help corporations generate economic revenue, they are by no means necessary to do so. Consistent with the Court's waiver rationale underlying its institutional tailoring doctrine and the fundamental principle of *Regan*, courts should find that corporations give up certain constitutional rights in exchange for the many government benefits they receive when they choose to incorporate.

### B. High Risk of Judicial Error

The Court has suggested that judicial error in granting full constitutional protections to people in government workplaces, prisons, and public schools could be especially harmful to the proper functioning of these institutions and may have especially bad consequences for society. In government workplaces, for instance, the Court has allowed restrictions on employees' free speech rights

166. *Id.* at 658–59.

167. *See generally* Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565, 1596 (1993); Frank H. Easterbook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 90 (1985).

168. *See generally* MARK P. KEIGHTLEY & MOLLY F. SHERLOCK, CONG. RESEARCH SERV., R42726, THE CORPORATE INCOME TAX SYSTEM: OVERVIEW AND OPTIONS FOR REFORM (2012).

due to a fear that if public employers did not have "a significant degree of control over their employees' words and actions . . . there would be little chance for the efficient provision of public services."[169] Because government employees "often occupy trusted positions in society," their speech can "express views that contravene governmental policies or impair the proper performance of governmental functions."[170]

Likewise, in prisons, miscalculating a warden's interest in limiting prisoner communications could result in grave harms such as "riot[s]" or other forms of "violent confrontation and conflagration."[171] And in public schools, failure to appreciate the interests of administrators in maintaining order and discipline may disrupt instruction,[172] fail to teach students about "the boundaries of socially appropriate behavior,"[173] or "send a powerful message to the students . . . about how serious the school [is] about the dangers of illegal drug use."[174]

Courts are equally likely to commit errors in judicial review in these government institutions as they are in other settings. The degree of potential harm, however, is much greater due to the nature of these institutions. Courts therefore uphold otherwise unacceptable restrictions on the constitutional rights of people in these settings to avoid "the potentially deleterious effects of judicial review."[175]

Courts also recognize that heightened judicial review of restrictions within these institutions would lead to—and even encourage—excessive litigation. In government workplaces, for instance, the Court has said that it defers to the government's exercise of managerial discretion to avoid "constitutionaliz[ing] the employee grievance."[176] Justice Breyer has expressed similar concerns in the context of public schools, writing that "the more detailed the Court's supervision

169. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

170. *Id.* at 419; s*ee also* Connick v. Myers, 461 U.S. 138, 151 (1983) ("[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation . . . with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale . . . and ultimately impair the efficiency of an office or agency." (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part))).

171. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132–33 (1977).

172. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986) ("One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.").

173. *Id.* at 681.

174. Morse v. Frederick, 551 U.S. 393, 410 (2007).

175. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1777 (1987).

176. Connick v. Myers, 461 U.S. 138, 154 (1983); *see also* Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).

becomes, the more likely its law will engender further disputes among teachers and students. Consequently, larger numbers of those disputes will likely make their way from the schoolhouse to the courthouse."[177] By granting deference to government officials in restricting the rights of people in these settings, the Court prevents every limitation upon rights from "plant[ing] the seed of a constitutional case."[178]

Some scholars, however, have criticized this justification for institutional tailoring as unconvincing. "Courts regularly have less knowledge or expertise than do the initial government decisionmakers on the conditions that might justify" restricting constitutional rights, and yet are regularly tasked with adjudicating such disputes.[179] The high risk of judicial error should not "preclude heightened review because those sorts of issues ultimately entail relatively straightforward, commonsense empirical judgments."[180] Indeed, some believe that courts are more expert at adjudicating cases involving government institutions as compared to other cases involving technical and niche issues.[181]

Others argue that the risk of harm is not enough to justify the restriction of government employees', prisoners', and public school students' constitutional rights. The Supreme Court has made clear in other contexts that a fear of harm is not sufficient to justify prophylactic rules restricting constitutional conduct alongside otherwise unprotected conduct. In *McIntyre v. Ohio Elections Commission*, for instance, the Court struck down a state's ban on anonymous speech about ballot measures, holding that the government's legitimate interest in reducing fraud could not justify such an "extremely broad prohibition" on First Amendment rights.[182] Similarly, in *Martin v. City of Struthers*, the Court held that a concern about residential burglaries could not justify a ban on door-to-door canvassing.[183] Rather than deferring to the concerns of government officials, the Court held that the city must expend additional resources punishing criminals.[184] Lower courts have similarly refused to allow broad restrictions on people's rights even when granting constitutional rights brings with it a risk of harm.[185]

177. *Morse*, 551 U.S. at 428 (Breyer, J., concurring in part, dissenting in part).
178. *Connick*, 461 U.S. at 149.
179. Lee, *supra* note 143, at 1725; *see also* Moss, *supra* note 10, at 1666–67 ("Contrary to the premise that judges cannot handle cases in fields in which they lack expertise, judges always adjudicate cases in fields alien to them . . . .").
180. Lee, *supra* note 143, at 1725.
181. Moss, *supra* note 10, at 1666–67.
182. 514 U.S. 334, 351, 357 (1995).
183. 319 U.S. 141, 149 (1943).
184. *Id.* at 147.
185. *See, e.g.*, Rideout v. Gardner, 838 F.3d 65, 76 (1st Cir. 2016) (refusing to defer to the government's concern of avoiding vote buying and voter intimidation in striking down a ban on ballot

The high risk of judicial error, however, continues to underlie the Court's institutional tailoring doctrine. Just as granting unrestricted rights to government employees, prisoners, and public school students could significantly harm the functioning of their respective institutions, granting corporations unlimited rights can likewise produce several tangible harms.

### 1. High Risk of Judicial Error and Corporations

As illustrated by *Hobby Lobby*, granting a full set of constitutional rights to corporations can directly interfere with the constitutional and statutory rights of individuals.[186] Corporations such as Hobby Lobby that refuse to provide their employees with contraception coverage may deny many the exercise of what they see as their religious liberty.[187] Some Christians, for example, believe that contraception is necessary to prevent what they view as immoral pregnancies that fail to satisfy the requirement that "[i]n bringing new life into the world human beings must be sure that the conditions into which the new life is being born will sustain that life in accordance with God's intention for the life to be fulfilled."[188] Thus, enabling a corporation to follow its conscience can make it significantly more difficult, if not impossible, for employees with contrary beliefs to follow theirs.

Affording corporations exemptions from health care requirements and other generally applicable laws will also prevent employees from receiving access to basic health care coverage.[189] Signaling such fears, the Supreme Court has expressed skepticism several times about whether religious objectors in any form should receive exemptions from generally applicable laws.[190]

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photography); Church of Am. Knights of Ku Klux Klan v. City of Gary, 334 F.3d 676, 680–81 (7th Cir. 2003) (striking down a requirement of fee payment in order to hold a rally when the risks of harm could instead be prevented through "fencing and barricades that enforce separation of the Klan from other attendees, . . . . separate parking areas [that] must be provided and guarded," and screening "all attendees . . . for weapons").

186. *See infra* Part IV.B.

187. *See* Caroline Mala Corbin, *Corporate Religious Liberty*, 30 CONST. COMMENT. 277, 304 (2015).

188. McRae v. Califano, 491 F. Supp. 630, 700–02 (E.D.N.Y. 1980) (summarizing the testimony of Reverend John Philip Wogaman, an ordained United Methodist minister, about the teachings of Protestant Christian Ethics).

189. *See* Korte v. Sebelius, 735 F.3d 654, 689 (7th Cir. 2013) (Rovner, J., dissenting) ("[B]y permitting the corporate employers to rewrite the terms of the statutorily-mandated health plans they provide to their employees . . . employees are left without a highly important form of insurance coverage that Congress intended them to have.").

190. Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990), *superseded by statute* 42 U.S.C. § 2000bb (2012) ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." (quoting

Significant harms also result from granting corporations unlimited speech rights. Following *Citizens United*, many have raised concerns about the disproportionate influence that corporations wield on the electoral process due to their monetary resources.[191] By pouring their amassed wealth[192] into lobbying efforts and media campaigns, corporations can influence elected offices, thereby controlling much of our policy and law.[193] Although *Citizens United* rejected the argument that the government has a sufficiently important interest in preventing corruption,[194] the Court did not and cannot deny the pervasive influence that corporate spending has on the American political system.[195]

Granting corporations unlimited rights also cuts against a core principle of the First Amendment: the marketplace of ideas.[196] Justice Holmes, who coined the marketplace metaphor,[197] reasoned that society arrives at the ultimate good through the free trade of ideas, and that the "best test of truth is the power of thought to get itself accepted in the competition of the market."[198] Courts have added to the principle by finding that for democracy to properly function, the citizens whose decisions control its operation should have access to

Reynolds v. United States, 98 U.S. 145, 166–67 (1879)); *see also* Oral Argument at 36:48, Zubik v. Burwell, 136 S. Ct. 1557 (2016), https://www.oyez.org/cases/2015/14-1418 [https://perma.cc/4MRK-WZE7].

191. *See, e.g.*, Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 600, 602 (1991); Joanna M. Meyer, *The Real Error in* Citizens United, 69 WASH. & LEE L. REV. 2171, 2175 (2012).

192. Since *Citizens United*, America's largest corporations have steadily increased their revenue. A report by Standard & Poor's found that in 2013, the top eighteen nonfinancial corporations in America held 35.8 percent of all wealth. STANDARD & POOR'S RATING SERVICES, 2014 CASH UPDATE: CORPORATE AMERICA'S 1% KEEP GETTING RICHER 3 (2014). Compare this to the 30.9 percent of wealth that those same corporations controlled in 2010. *Id.*

193. *See* Meyer, *supra* note 191.

194. Citizens United v. Fed. Election Comm'n, 558 U.S. 301, 356 (2010).

195. Michael Hiltzik, *Five Years After Citizens United Ruling, Big Money Reigns*, L.A. TIMES (Jan. 24, 2015, 9:09 PM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-20150125-column.html [https://perma.cc/53PK-K4NX] (describing the increased spending on U.S. Senate elections and the over one billion dollars spent by Super PACs since the *Citizens United* decision).

196. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market . . . ."); Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . [the] truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

197. The original concept of the marketplace of ideas dates back to John Milton and John Stuart Mill. *See* J. MILTON, AREOPAGITICA (1644), *reprinted in* 2 COMPLETE PROSE WORKS OF JOHN MILTON 485, 561 (Ernest Sirluck ed., 1959) ("Let [truth] and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter. Her confuting is the best and surest suppressing."); JOHN STUART MILL, ON LIBERTY 17–53 (David Spitz ed., 1975).

198. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

information that helps them become intelligently informed.[199] Although corporations contribute to this marketplace with their own views, unlimited expenditures by corporate entities drown out the political speech of others who have a less powerful economic status. Corporations can thus dominate the marketplace of ideas thanks to their substantial financial resources, which greatly exceed those available to most individuals. Many, for example, attributed the large influx of money spent in the 2010 midterm elections to the ruling in *Citizens United*.[200]

In addition to their monetary resources, the size of large corporations also raises their potential danger to society. When taken together, the powers of large corporations can "functionally replicate sovereignty."[201] Some corporations serve functions akin to the police and military,[202] and the idea of Second Amendment rights for corporations is not unheard of.[203] Although corporations regularly perform security functions, extending such constitutional rights to corporations could produce harmful consequences, and courts must take into account these potential harms when deciding which rights corporations should receive.

Perhaps more troubling is the possibility that granting corporations such broad constitutional rights could lead to a slippery slope.[204] From what else may

199. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3–4 (1984).

200. *See, e.g.*, T.W. Farnam & Dan Eggen, *Interest-Group Spending for Midterm Up Fivefold From 2006; Many Sources Secret*, WASH. POST (Oct. 4, 2010, 3:01 AM), http://www.washingtonpost.com/ wp-dyn/content/article/2010/10/03/AR2010100303664.html [https://perma.cc/6ETB-66EZ]; *Hidden Money in the 2010 Elections: A Pre-Election Primer on Recent and Recently Exploited Avenues for Secretly Funding Elections*, SUNLIGHT FOUND., https://sunlightfoundation.com/policy/documents/hidden-money-2010-elections [https://perma.cc/L353-5H54].

201. Miller, *supra* note 70, at 949; *see also* Howard M. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME LAW. 173, 174 (1979) (observing that the corporation "has become a basic social institution and a center of power resembling governmental structures" (quoting PHILLIP I. BLUMBERG, THE MEGACORPORATION IN AMERICAN SOCIETY: THE SCOPE OF CORPORATE POWER 1 (1975))); Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 206 (2006) ("The corporation has not only acquired a power of sovereignty over its membership through a steady delegation of sovereign power from the state, it has also managed to attain real powers of government over the broader public.").

202. *See* André M. Peñalver, Note, *Corporate Disconnect: The Blackwater Problem and the FCPA Solution*, 19 CORNELL J.L. & PUB. POL'Y 459, 485 (2010) (noting that the British South Africa Company "established the British South Africa Police, which was, in actuality, the company's standing army" and fulfilled functions such as invading neighbors).

203. *See generally* Miller, *supra* note 70, at 949 (discussing the relationship between the First and Second Amendments with regard to potential corporate constitutional rights).

204. For a thorough discussion of the slippery slope policy argument, see Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003). *See also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) ("Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously

corporations seek to exempt themselves, and what costs may granting exemptions impose on others? Refusals to provide basic social services such as transportation,[205] wedding floral arrangements,[206] or adoption services[207] to gays and lesbians undermines the aspirations underlying the Civil Rights Act's "fundamental object . . . to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"[208]

There is also a similar fear of excessive litigation if the Court does not more readily defer to the government in its restriction of corporate rights. As corporations such as Citizens United and Hobby Lobby succeed in claiming constitutional rights, others will soon rush to follow—claiming an ever-broadening range of liberties. Though the extent to which corporations will argue for further free speech and religious liberty rights remains to be seen, one set of recent cases suggests that such fears are warranted. Just one year after its decision in *Hobby Lobby*, the Court agreed to hear another corporate challenge to the ACA. In *Zubik v. Burwell*,[209] seven religious corporations challenged the exemption granted to closely held corporations by *Hobby Lobby*. These corporations argued that the very act of completing forms in which they voice their objections to the contraception mandate was a violation of their First Amendment rights.[210] Although the Court issued a per curium order declining to address the

grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)?").

205. James Nichols, *Houston Gay Couple Allegedly Kicked Out of Cab for Kissing*, HUFFINGTON POST (Oct. 15, 2014), http://www.huffingtonpost.com/2014/10/15/gay-couple-kissing-taxi_n_5983188.html [https://perma.cc/2VQB-4VAM] (describing the "completely legal" actions of a Yellow Cab driver who refused service to a gay couple after observing them kissing).

206. See generally Brief of Respondents Ingersoll and Freed, Washington v. Arlene Flowers, Inc., No. 91615-2 (Wash. Dec. 23, 2015), 2015 WL 11110492, for a case concerning a Washington corporation that refused to sell flower arrangements to a customer because he was gay.

207. *See* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1025 (N.D. Cal. 2007). For an excellent discussion of how granting accommodations to all that claim exceptions from generally applicable laws can impose significant material and dignitary harms upon third parties, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2566–78 (2015). NeJaime and Siegal's concerns with situations in which "the consequences of accommodation may be amplified" apply all the more strongly to corporations, which generally serve more customers than unincorporated business. *Id.* at 2566.

208. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16–17 (1964)).

209. 136 S. Ct. 1557 (2016).

210. Brief for Petitioners in Nos. 14-1418, 14-1453 & 14-505 at 19, Zubik v. Burwell, 136 S. Ct. 1557 (2016).

merits,[211] two Justices made clear that the Court had decided nothing.[212] Several scholars have agreed and suggested that the case is bound to return to the Supreme Court soon.[213]

### C. Lesser Value Rights

Courts have also suggested that the interest in granting people in government workplaces, prisons, and public schools a full set of constitutional rights is less significant because of the nature of these institutions and their function. Each of these institutions is "formally established for the explicit purpose of achieving certain goals"[214] and thus serves a primary purpose—government workplaces to deliver public services, prisons to incarcerate convicted criminals, and public schools to "prepare pupils for citizenship in the Republic" and "inculcate the habits and manners of civility as values in themselves."[215] The exercise of individual rights in these institutions has limited importance "because of the [rights'] lesser value or significance" in those contexts,[216] and because their exercise does not promote the values underlying the constitutional rights.[217]

211. Zubik v. Burwell, 136 S. Ct. 1557 (2016).

212. Justice Sotomayor, joined by Justice Ginsburg, issued a concurring opinion making clear that the Court's decision "expresses no view on the 'merits of the cases,' 'whether petitioners' religious exercise has been substantially burdened,' or 'whether the current regulations are the least restrictive means of serving' a compelling government interest. . . . Today's opinion does only what it says it does: 'afford[s] an opportunity' for the parties and Courts of Appeals to reconsider the parties' arguments . . . ."

213. *See, e.g.*, Justin R. Pidot, *Tie Votes and the 2016 Supreme Court Vacancy*, 101 MINN. L. REV. HEADNOTES 107, 118 (2016) ("[T]he Justices issued a unanimous order *delaying* their consideration of the merits of challenges to the opt-out provisions." (emphasis added)); Garrett Epps, *The U.S. Supreme Court's Nonsense Ruling in* Zubik, ATLANTIC (May 16, 2016), http://www.theatlantic.com/politics/archive/2016/05/the-supreme-courts-non-sensical-ruling-in-zubik/482967 [https://perma.cc/H234-LDR3] ("No matter who appoints the next justice, however, the issue will be back in some form."); *see also* BuzzFeedVideo, *BuzzFeed News Exclusive Interview With President Obama*, YOUTUBE at 27:43 (May 16, 2016), https://www.youtube.com/watch?v=WVqZ269kUr8 ("I won't speculate as to why they punted, but my suspicion is that if we had nine Supreme Court justices instead of eight, there might have been a different outcome.").

214. PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS 5 (1962); *see also* CHARLES PERROW, ORGANIZATIONAL ANALYSIS: A SOCIOLOGICAL VIEW 133 (1970) ("Organizations are established to do something; they perform work directed toward some end.").

215. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

216. Lee, *supra* note 143, at 1709.

217. *Cf.* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 25 (2000) ("Constitutional protections for the category of commercial speech ought to be explicable in terms of the constitutional values the category is created to serve.").

In the context of government workplaces, for example, the Court has said that while First Amendment protections apply to speech about "matters of public concern," private grievances about internal office policy can be restricted.[218] Similarly, only speech that is unrelated to a public employee's job responsibilities is protected; "statements pursuant to [one's] official duties" are not.[219] In articulating these rules, the Court has pointed out the speech's minimal value to the public. Noting that the First Amendment protects speech by "citizens" who make "contributions to the civic discourse," the Court has suggested that communications pursuant to one's job responsibilities—speech as an employee—generally do not enhance public discussion.[220] Indeed, providing further protection for the speech of government employees would be a "Pyrrhic victory for the great principles of free expression."[221]

The Court has also used this rationale to limit the rights of students and prisoners. In *Bethel School District No. 403 v. Fraser*,[222] in which the Court rejected a student's challenge to his suspension for delivering a sexually suggestive speech, the Court stressed that the student's "vulgar and offensive terms" constituted "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[223] In *Morse v. Frederick*,[224] the case involving the "BONG HiTS 4 JESUS" banner, the Court also characterized the speech in question as less worthy of protection after concluding that it was "plainly not . . . about political debate over the criminalization of drug use or possession."[225] The Court has also held that the constitutional rights of prisoners are subordinate to the attainment of "legitimate penological

218. Connick v. Myers, 461 U.S. 138, 154 (1983).
219. Garcetti v. Ceballos, 547 U.S. 410, 420 (2006).
220. *See id.* at 421–23; *see also Connick*, 461 U.S. at 148 (finding the employee's speech to be "mere extensions" of her dispute with her job that would "convey no information at all [to the public] other than the fact that a single employee is upset with the status quo").
221. *Connick*, 461 U.S. at 154.
222. 478 U.S. 675 (1986).
223. *Id.* at 683, 685 (1986) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Notably, the Court has recognized the value of vulgar or offensive statements uttered in contexts outside government institutions and programs. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (protecting vulgar speech in the public corridors of a courthouse); *see also* Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (mem.) (protecting vulgar speech said during a school board meeting); Lewis v. New Orleans, 408 U.S. 913 (1972) (mem.) (overturning a conviction for yelling obscenities at police officers).
224. 551 U.S. 393 (2007).
225. *Id.* at 403 (2007).

objectives of the corrections system," which include the deterrence of crime, the rehabilitation of prisoners, and the internal security of prisons.[226]

At the same time, however, scholars have argued that lesser value rights should not be stripped of all protection. Support for this notion can be found in First Amendment jurisprudence, where the Court has explained that less important speech must be protected as a means of protecting more important speech. In *Gertz v. Robert Welch*,[227] for example, the Court ruled that though false statements of fact have no constitutional value, "[t]he First Amendment requires that we protect [them] in order to protect speech that matters."[228] More recently, two members of the Court reasoned that false statements must receive some constitutional protection because of the many "useful human objectives" they serve, such as protecting one's privacy, preserving a child's innocence, and helping to end panic in the face of an otherwise traumatic situation.[229] Based on this reasoning, scholars have argued that government employees, prisoners, and schoolchildren should not lose their constitutional rights simply because their free speech is of lesser value.[230]

Others have argued that because government employees, prisoners, and schoolchildren spend so much time in their respective institutions, the exercise of rights such as free speech play an important role in promoting their sense of self and autonomy.[231] Public school students, for instance, spend the majority of their days in public schools. Thus, scholars have reasoned that "the nature and extent of their First Amendment rights there greatly affects their capacities for personal development and their abilities to foster relationships with others."[232] Advocates of this position have argued that even if exercising certain constitutional rights can distort public discussion by perpetuating imbalances of power, people should receive such rights so that they can realize their "character and potentialities as a human being."[233]

226. Pell v. Procunier, 417 U.S. 817, 822–23 (1974).
227. 418 U.S. 323 (1974).
228. *Id.* at 341.
229. United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring). Justice Breyer's concurrence was joined by Justice Kagan. *Id.* at 2551.
230. *See* Lee, *supra* note 143, at 1714; POST, *supra* note 10, at 189 ("The public/private distinction must, of course, be understood as inherently unstable and problematic, for all government regulation influences, to one degree or another, the formation of individual identity.").
231. Lee, *supra* note 143, at 1714–15.
232. *Id.* at 1715.
233. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970); *see also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 N.W. U. L. REV. 1212, 1225–26 (1983) (presenting the theory that the First Amendment is designed to promote effective self-government and self-fulfillment).

Despite these critiques, the argument that the exercise of constitutional rights in certain settings does not promote the ideals underlying those rights, and is thus of lesser value, has been used to restrict the rights of people in government workplaces, prisons, and K–12 public schools under an institutional tailoring framework. And the lesser value rights argument applies with the same force to corporations. Indeed, institutional tailoring does not limit the constitutional rights of government employees, prisoners, and public school children simply because they are in government institutions. Rather, "[c]ategorizing speech as either within or without an [institution] is part and parcel of a more fundamental judicial task of recognizing, defining, and attributing constitutional values" to the exercise of constitutional rights.[234] Courts decide whether to grant these parties constitutional rights based on the extent to which the exercise of those rights leads to "the achievement of those constitutional values."[235]

As I argue below, the primary purpose of corporations is to produce profit. While this should by no means disqualify them from having constitutional rights, it should motivate the Court to limit the constitutional rights of corporations under an institutional tailoring framework.

### 1. Lesser Value Rights and Corporations

Institutional tailoring jurisprudence requires courts to "inquire much more deeply into the specific character of the institution[] and the functions it serves" in order to determine the rights that people in those institutions deserve.[236] The Court has done this in the context of government workplaces, prisons, and K–12 public schools by analyzing the purpose that those institutions serve and reasoning that the exercise of constitutional rights within those institutions are of lesser value because their exercise does not promote the values underlying those rights and may even cause harm to society. It is likewise necessary to identify the primary purpose of corporations and conduct a similar analysis.

Business corporations are primarily for-profit organizations intended to generate revenue for their shareholders. As a result, just as the exercise of constitutional rights in government workplaces, prisons, and public schools has lesser value, so too do constitutional rights have lesser value when exercised by corporations.

234. Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995).
235. *Id.*
236. Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 116 (1998).

There is broad consensus that for-profit corporations are economic entities, created for the purpose of benefiting society by creating wealth through the production of goods and services.[237] Although corporations in the early decades of the country were required to benefit the public good,[238] modern corporate law principles require that corporations "enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities."[239] The leading case of *Dodge v. Ford Motor Company*[240] established that corporations owe their shareholders a singular fidelity to maximize shareholder wealth in the form of corporate returns.[241] Similarly, the business judgment rule of corporate law presumes that each director and officer of a corporation will act "in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation."[242]

While it is true that certain members of several for-profit corporations may view their business's primary purpose as something other than producing profit,[243] the lack of a singular corporate voice should compel the conclusion that

237. *See, e.g.*, KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES 125–42 (2006).

238. *See* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 4 UTAH L. REV. 1629, 1634 (2011); *supra* note 27 and accompanying text.

239. Brief of Amicus Curiae American Independent Business Alliance in Support of Appellee on Supplemental Question at 11, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205); s*ee also* Honorable Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 782–83 (2015) (arguing that while corporations may claim to operate in ways other than those focused on maximizing profit, "the problem with that argument is that it does not happen to be true; it is inconsistent with judge-made common law of corporations[,]" for "the idea that directors [of a corporation] can subordinate stockholder interests to other interests of the directors' choosing is strained").

240. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919). While the case was decided by the Michigan Supreme Court, not the United States Supreme Court, it has become "an iconic statement that corporations have no obligations beyond the bottom line." Kent Greenfield, *Corporate Law's Original Sin*, WASH. MONTHLY (Jan./Feb. 2015), http://washingtonmonthly.com/magazine/janfeb-2015/sidebar-corporate-laws-original-sin [https://perma.cc/WN9E-HYZ3].

241. *Dodge*, 170 N.W. at 682; *see also* Nicholas Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265, 288 (1988) (discussing the stock corporation's duty to make a profit for its shareholders).

242. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(a) (1994).

243. The fast-food company Chick-fil-A, for example, is known to close all of its locations on Sundays in order to "rest and tend to ideals deemed more important than business," despite the fact that a large percentage of fast-food profits traditionally come from weekend sales. *Why We're Closed on Sundays*, CHICK-FIL-A, https://www.chick-fil-a.com/About/Who-We-Are [https://perma.cc/3LMB-CMZ4]. Trett Cathy, founder and CEO of Chick-fil-A, has said that the Sunday closure is the "best business decision I ever made." *See* Press Release, Chick-fil-A, Chick-fil-A's Closed-

corporations exist generally to produce economic revenue. There are three problems with attempting to discern the unique collective intent of corporations: boundaries, aggregation, and leadership.[244] First, because most corporations are large in size, there will always exist members within the corporation whose opinions never align with the majority's collective decision.[245] Second, aggregation is a problem because the choices of the management of a company are often unrepresentative of the entire group that it is charged with representing.[246] Third, the increased power of leaders in a company can cause their will to overpower the voices of everyone else involved.[247]

Once employees are factored into the analysis, it becomes even clearer that corporations rarely, if ever, have a unified voice. Whereas people join groups and associations because "they are persuaded by the principles of the association,"[248] people take jobs because they have to work in order to earn a living. And while it is true that certain employees may choose to work for Hobby Lobby or likeminded corporations because of their religious principles, it is certain that all do not subscribe to this view.[249]

Justice Stevens's dissent in *Citizens United*[250] addressed the question of who corporations represent when they act. He argued that the actions of corporations are never fully representative of everyone behind the company, such as employees,

on-Sunday Policy (Feb. 2009), http://www.chick-fil-a.com/media/pdf/closedonsundaypolicy.pdf [https://perma.cc/X2DY-U5FB].

244. Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1021 (1998).

245. *Id.* at 1021–22.

246. *Id.* at 1022. Scholars have compared the idea that corporations can speak with a singular, unified voice to the same collective-intent criticisms levied against the use of legislative history in statutory interpretation. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684–85 (1997) (discussing the textualist critique of legislative intent in statutory interpretation); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 862, 870 (1930) (discussing the difficulty of ascertaining legislative intent because of the impossibility of knowing the intent of each individual legislator); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that legislative intent is an unsound and unpredictable approach to statutory interpretation); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1462 (2007) (describing how, starting in the 1980s, "textualist" interpretation of statutes criticized traditional canons of statutory interpretation as creating new legal fictions).

247. Greenwood, *supra* note 244, at 1025.

248. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 745 (2002) ("[T]he members of a voluntary association join, and remain members, because they are persuaded by the principles of the association . . . rather than because of motivations of money . . . .").

249. Corporate employers themselves, of course, are prohibited by law from hiring employees with certain beliefs. 42 U.S.C. § 2000e-2(a)(1) (2012) (prohibiting employers from refusing to hire, discharging, or otherwise discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

250. 558 U.S. 310 (2010).

shareholders, and union members.[251] He also questioned the majority's assumption that corporations had the capacity to produce political speech that is not economically driven:

> Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm . . . . Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends.[252]

As described in Part III.A.1, incorporation provides business owners with financial benefits that their unincorporated counterparts do not receive. Courts have recognized that "[i]t would be entirely inconsistent to allow [the individual plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."[253] Even advocates of Reverse Veil Piercing (RVP), in which a court disregards the corporation's separate legal personality and instead views the corporation's owners in their individual capacity, acknowledge that RVP would be a discretionary analysis on the part of courts.[254] Distilling the nuanced differences between the primary purposes of corporations, therefore, is an imprecise science that should be avoided by courts to prevent the misappropriation of judicial resources.

Because the purpose of corporations is to produce profit, courts should recognize the reduced constitutional significance of the rights they exercise. Take the First Amendment right to freedom of speech. The principles promoted by free speech—such as the pursuit of truth and democratic self-governance—do not seem very applicable when applied to corporate speech. As one scholar has noted, while "[s]peech is of course prerequisite for both democracy and truth-seeking," "speech alone, in the absence of other necessary social practices, will not

251. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 467 (2010) (Stevens, J., concurring in part, dissenting in part).

252. *Id.*

253. Conestoga Wood Specialties Corp. v. Sebelius, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013). When courts pierce the corporate veil, they disregard the corporate form and treat the individual employees and owners of the corporation as the parties claiming the constitutional right in question. *See generally* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991).

254. *See* Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2D 235, 246–47 (2013) (presenting a list of six factors that courts should consider when determining the existence of a corporation's religious beliefs and arguing that "[t]he more of these factors that a court finds to be present, the more willing the court should be to treat the corporation as the shareholder's alter ego").

yield the values we seek in either democracy or truth-seeking."[255] These social practices are often lacking in corporate speech due to executives' obligation to further the narrow economic interests of the corporation with every decision that they make.

These arguments also apply to the exercise of free speech in the form of unlimited corporate spending. Rather than allowing different views to be heard, corporations' dominant wealth "is inconsistent with both the philosophical meaning and the practical exercise of political equality."[256] While our democratic system serves the purpose of allowing people to participate in the formation of public opinion and to make the state responsive to their diverse ideas and values,[257] unlimited corporate expenditures "drown out the voices of the relatively moneyless" and cause many elections to "turn on the differences in the amounts of money that candidates have to spend."[258]

The lesser value of corporate rights does not justify absolute restrictions, however. Corporations represent the views of large segments of our economy. At the correct volume, corporate speech thus contributes to the free flow of information and can help voters make informed decisions.[259] And certain other constitutional rights, such as the right to property and the right to contract, are incidental to the profit-producing purpose of corporations. But because the exercise of several constitutional rights by corporations does not fulfill the principles underlying those rights, courts should more readily allow restrictions on corporate constitutional rights.

### 2. Lesser Value Rights and Media Corporations

While the primary purpose of corporations as profit-producing entities would reduce their rights under an institutional tailoring framework, this analysis would also account for the "obvious response" to this proposal: that such a framework would likewise reduce the constitutional rights of newspapers, magazines, and other media corporations.[260] The majority in *Citizens United* makes

255. Post, *supra* note 234, at 1272.
256. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 629 (1982).
257. Robert Post, *Democracy and Equality*, 603 ANNALS AMERICAN ACAD. 24, 27–28 (2006).
258. Wright, *supra* note 256, at 631.
259. For a discussion of Alexander Meiklejohn's theory of how the First Amendment promotes democracy, see ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26 (1965).
260. Eugene Volokh, *Lessened Corporate First Amendment Rights and Media Corporations*, VOLOKH CONSPIRACY (Jan. 21, 2010, 5:29 PM), http://volokh.com/2010/01/21/lessened-corporate-first-amendment-rights-and-media-corporations [https://perma.cc/NYQ7-7R6E].

this point at length, arguing that limiting corporate rights could allow "Congress [to] ban political speech of media corporations."[261]

But an analytical framework that "inquire[s] . . . deeply into the specific character of the institution, and the functions it serves"[262] would allow courts to grant media corporations the free speech rights necessary to fulfill their unique role of "gather[ing] and convey[ing] information to the public about newsworthy matters" and "serv[ing] as a check on the government by conveying information to the voters about 'what [their] Government is up to.'"[263] Because the press serves "as an avowedly independent source of news and opinion for the public's benefit," they are entitled to the constitutional rights incidental to fulfilling this purpose.[264] Indeed, the *Citizens United* dissent adopted this position by writing that "one type of corporation, those that are part of the press, might be able to claim special First Amendment status."[265]

And while there is no single, defined "press,"[266] the purpose and function that each media corporation fulfills are clearly different. WikiLeaks and *The New York Times* do not perform the same type of reporting,[267] and thus an institutional

261. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 314 (2010).

262. Schauer, *supra* note 236, at 116.

263. West, *supra* note 18, at 1069–70 (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989)).

264. Randall P. Bezanson, *Whither Freedom of the Press*?, 97 IOWA L. REV. 1259, 1272 (2012).

265. *Citizens United*, 558 U.S. at 431 n.57 (Stevens, J., concurring in part, dissenting in part).

266. The *Citizens United* majority raises this point as an argument in favor of granting all corporations constitutional rights. *See id.* at 352 (Kennedy, J., majority opinion) (stating that corporations deserve the same rights as media organizations because the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers" (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 691 (1990)). Several scholars have agreed. *See, e.g.*, Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 431 (2013) (arguing that there is "no support in precedent or history" for the proposition that the Free Press Clause provides greater protection for certain press corporations but not others); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 538–39 (2012) (arguing that "throughout American history, the dominant understanding of the 'freedom of the press' has followed the press-as-technology model" which guarantees "equal treatment to [all] speakers without regard to whether they are members of the press-as-industry").

267. *See* Bezanson, *supra* note 264, at 1269 ("WikiLeaks simply dumps information while the newspapers disclose only that information deemed useful, important, and reliable pursuant to their editorial standards and policies."); *A Note to Readers*: *The Decision to Publish Diplomatic Documents*, N.Y. TIMES (Nov. 28, 2010), http://www.nytimes.com/2010/11/29/world/29editornote.html [https://perma.cc/M9M6-VUN6]. It does not take a scholar to recognize that different media outlets fulfil different sorts of functions. *See Real Time With Bill Maher* (HBO television broadcast Oct. 28, 2016) (during which Republican pollster Kristen Soltis Anderson said, "[T]here's a difference between something being revealed through the course of an official investigation and something that has been illegally hacked. And I think there's a difference between exposing conversations that are happening about public policy and exposing what persons are saying in private conversations that are not about [the operation of the federal government]").

tailoring framework would regulate their free speech and other constitutional rights to a different extent. In determining the protection that corporate speech deserves, an institutional tailoring framework would assess the extent to which the speech embodies the values underlying the First Amendment. Because the speech of many media corporations "is embedded in the kinds of social practices that produce truth,"[268] it carries higher value as compared to, say, a retail corporation's enormous donations to candidates who oppose environmental regulations or gun control legislation.[269]

And although the *Citizens United* majority claimed that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not[,]"[270] the Court has repeatedly upheld exemptions for media corporations from regulations and other generally applicable laws precisely because of their status as the press.[271] The Court has suggested that the differential treatment of media corporations is unconstitutional only when there is evidence of viewpoint discrimination.[272]

To be sure, the other arguments that justify an institutional tailoring doctrine for corporate rights also apply to media corporations. Media corporations voluntarily incorporate, and granting them unrestricted constitutional rights can

268. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2366 (2000).

269. MAKING CHANGE AT WALMART, AN ANALYSIS OF WALMART & WALTON FAMILY POLITICAL SPENDING 2000–2012, at 8–9, http://makingchangeatwalmart.org/files/2013/06/Political-Giving-Analysis-Jun-2013.pdf [https://perma.cc/7Z3B-K938].

270. *Citizens United*, 558 U.S. at 352.

271. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439, 453 (1991) (upholding a state tax that applied to cable services but not to other corporations). For other examples of the differential treatment of media corporations by statute and by the Court, see Pub. L. No. 96-440, 94 Stat. 1879 (codified as amended at 42 U.S.C. §§ 2000aa(a) (2012) (limiting the federal prohibition against newsroom searches and seizures to work product possessed by those who intend "to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication"); 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2012) (waiving fees for information requested by "a representative of the news media" under the Freedom of Information Act); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247 (1974) (holding that Florida's "right to reply" statute violated the Press Clause of the First Amendment because it was an "intrusion into the function of editors").

272. *See Leathers*, 499 U.S. at 453 ("[D]ifferential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing particular ideas."). Admittedly, this is a somewhat unsettled question. In *Arkansas Writers' Protect, Inc. v. Ragland*, decided four years before *Leathers*, the Court suggested that any law singling out a set of speakers for special treatment was problematic. *See* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) ("[S]elective taxation of the press—either singling out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the state."). In what is widely viewed as the leading case on the differential treatment of media corporations, the Court applied strict scrutiny and struck down a tax scheme that placed special financial burdens on media companies. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 588 (1983).

produce tangible harms given their significant power to shape the public debate. But media corporations require certain free speech and other constitutional rights in order to serve their function of informing citizens about newsworthy matters, and the exercise of these rights more closely embodies the values underlying our Constitution and Bill of Rights. As a result, an institutional tailoring framework would grant media corporations greater constitutional protections as compared to other corporations.

## IV. APPLYING INSTITUTIONAL TAILORING DOCTRINE TO CORPORATE CONSTITUTIONAL RIGHTS

I argued in Part III that the three justifications that the Court and scholars have suggested for institutional tailoring jurisprudence in government workplaces, prisons, and public schools apply with equal or greater force to corporations. This Part illustrates how institutional tailoring could be applied to limit two controversial rights of corporations: free speech and religious exercise.

The Court has not articulated a single standard for analyzing limits on constitutional rights under its institutional tailoring jurisprudence. Rather, as illustrated in Part II, the Court has used different standards to determine the constitutional rights of public employees, prisoners, and public school students based on the function of each institution. Just as the Court has adopted a different standard for each of these institutions, corporations also warrant a specialized standard that is appropriately suited to their role as significant economic institutions. The Court will have to develop its jurisprudence in this new area over time.

With this in mind, this Part suggests the considerations the Court might take into account when determining corporate constitutional rights under an institutional tailoring framework.

### A. Institutional Tailoring Applied to Corporate Free Speech Rights

Under an institutional tailoring framework, corporations should receive those free speech rights that are consistent with their economic purpose. The Supreme Court should limit the scope of their free speech rights, however, so as to not drown out the speech of others.

In deciding *Citizens United*, the majority reasoned that any laws limiting corporate speech created a chilling effect, thereby preventing corporations from

contributing to the marketplace of ideas.[273] Because political speech is an "essential mechanism of democracy" and "must prevail against laws that would suppress it," the Court reasoned that any burden on corporate political spending was a direct violation of corporations' First Amendment rights.[274] In so doing, the majority rejected the two rationales that it had previously relied on to uphold restrictions on corporate speech rights: anticorruption and shareholder protection.[275]

An analysis under an institutional tailoring framework would recognize that because of waiver, the high risk of judicial error, and the lesser value rights of corporations, the Court can more closely scrutinize the consequences of granting corporations unrestricted First Amendment rights. On the one hand, the absence of any corporate free speech rights implies unlimited government power. The lack of any rights to speak about issues that matter to corporations is an undemocratic development.[276] Surely, then, corporations must retain some free speech rights.

On the other hand, there are many dangers that come with granting corporations a full set of free speech rights. The Court should pay more attention to the ways in which granting corporations unlimited free speech rights would diminish the free speech rights of others. Although corporations can contribute to the collective discourse surrounding social and political issues, the "relative volume is extraordinarily important, since it limits or determines the available consensus points."[277] By deploying significant resources to disseminate their political messages, corporations can ensure that their speech overwhelms that of individuals.[278] In this sense, corporate speech beyond a certain level does not contribute to the marketplace of ideas. Rather, it dominates the public sphere to the detriment of citizens' voices.

273. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 334 (2010) ("As additional rules are created for regulating political speech, any speech arguably within their reach is chilled.").
274. *Id.* at 339–40.
275. *Id.* at 349–56.
276. Eugene Volokh, *Constitutional Rights and Corporations*, VOLOKH CONSPIRACY (Sept. 22, 2009, 12:44 PM), http://volokh.com/posts/1253637850.shtml [https://perma.cc/9X57-66KW].
277. Greenwood, *supra* note 244, at 1065.
278. *See* Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 268 (1986) (Rehnquist, C.J., concurring in part, dissenting in part) ("[I]t is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process . . . ."); David Chang, *Beyond Formalist Sovereignty: Who Can Represent "We The People of the United States" Today?*, 45 U. RICH. L. REV. 549, 635 (2011) (discussing the phenomenon of "corporate managers . . . us[ing] that concentrated power in pursuit of corporate interests in ways that could undermine public debate by preventing citizens from effectively identifying and accounting for each other's views").

And this drowning out effect is not only theoretical. Evidence of big spending by corporations exists. Two Minnesota corporations—the Coalition of Minnesota Businesses and the Minnesota Chamber of Commerce—spent over $375,000 in support of Republican candidates in the 2010 election, helping twelve new Republican House members to be elected.[279] The contributions by these two corporations exceeded individual contributions to candidates by an average of two-to-one.[280] Spending by the nation's top retailers has grown over elevenfold since *Citizens United*, with the majority of funds going towards lobbying Congress on issues that would benefit big business.[281] Empirical studies have "illustrated the powerful effects of strategic campaign spending," and confirmed that there does indeed exist a connection "between money spent and voting outcomes."[282] By not restricting corporations' ability to spend, the Court has undercut the democratic rationale of free speech as giving the opportunity for all viewpoints to be effectively communicated.[283]

These results could be avoided if the Court paid more attention to the harms that unlimited corporate speech could produce and the ways in which corporate speech drowns out the speech of individuals. By limiting the free speech rights of corporations, the Court could better protect the sanctity and underlying values of our democratic system. And in so doing, our Supreme Court would not be the first to perform this analysis. Canada's Supreme Court has also analyzed these competing interests, weighing "equality in the political discourse . . . necessary for meaningful participation in the electoral process" against the value of unfettered spending, and deciding that reasonable limits on spending was consistent with freedom of speech.[284]

The Court ought also to give more weight to the government's anticorruption interest, discussed by Justice Stevens's dissent in *Citizens United*.[285] In its

279. TAKE ACTION MINNESOTA, THE 1% VS. DEMOCRACY IN MINNESOTA: FOLLOWING THE MONEY BEHIND THE PHOTO ID AMENDMENT 15 (2012), http://theuptake.org/wp-content/uploads/2012/02/TakeActionPhotoIDReport.pdf [https://perma.cc/FH75-JQ69].

280. *Id.* at 10.

281. CATHERINE RUETSCHLIN & SEAN MCELWEE, RETAIL POLITICS: HOW AMERICA'S BIG-BOX RETAILERS TURN THEIR ECONOMIC POWER INTO POLITICAL INFLUENCE 10 (Nov. 2014). For a list of issues that Wal-Mart, the largest of these six corporate spenders, has advocated, see *Wal-Mart Stores: Issues, 2014*, CTR. RESPONSIVE POLITICS, https://www.opensecrets.org/lobby/clientissues.php?id=D000000367&year=2014 [https://perma.cc/5S4W-FHTE].

282. *See, e.g.*, Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 745 (2010).

283. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (2004).

284. Harper v. Canada, [2004] 1 S.C.R. 827, 872 (Can.).

285. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 447 (2010) (Stevens, J., dissenting) ("On numerous occasions we have recognized Congress' legitimate interest in preventing the money that

analysis, the majority took the narrowest possible view of corruption and found that the government's interest in preventing quid pro quo corruption "is not sufficient to displace the speech here in question."[286] Under an institutional tailoring framework, however, the Court would defer more readily to the concerns of government officials on what it has deemed a constitutionally legitimate government interest.[287] The "substantial body of evidence"[288] of the negative consequences of unlimited corporate expenditures would surely have more significance under such a framework.

### B. Institutional Tailoring Applied to Corporate Religious Rights

In *Hobby Lobby*,[289] the Green family challenged a law requiring employers to provide their employees with health insurance, including certain types of preventative care. Among the contraceptives included were what claimants deemed "abortifacients," which they believed would "risk killing an embryo [and thereby] make[] them complicit in the practice of abortion."[290] As the Court explained,

is spent on elections from exerting an 'undue influence on an officeholder's judgment' and from creating 'the appearance of such influence' beyond the sphere of *quid pro quo* relationships.").

286. *Id.* at 357.

287. For a discussion of why courts should allow the government to take issue with more than just quid pro quo corruption, see generally LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 107 (2011) ("[T]here is an argument—and it is the core argument of this book—that the most significant and powerful forms of corruption today are precisely those that thrive without depending upon quid pro quos for their effectiveness."); ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 93 (2014) (arguing that "[t]he Court has focused far too narrowly on the opaque question of corruption" and advocating for a doctrine that gives higher status to electoral integrity); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013) (arguing that the Court should defer to legislative judgement of what constitutes corruption); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 389–90 (2009) (presenting several cases in which the Supreme Court has acknowledged a legitimate government concern in "something much more expansive than quid pro quo"); Christopher Robertson et al., *The Appearance and the Reality of* Quid Pro Quo *Corruption: An Empirical Investigation* 6 (Ariz. Legal Studies, Discussion Paper No. 16-06, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740615 (presenting the results of an empirical study showing that citizens believe quid pro quo corruption constitutes a much broader range of conduct than what is actually recognized as such by the Supreme Court). *But see* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1441 (2014) ("'[I]ngratiation and access . . . are not corruption.' . . . . Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance." (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010)).

288. *Citizens United*, 558 U.S. at 454 (Stevens, J., concurring in part, dissenting in part).

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

290. Brief for Respondents at 8, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354). Plaintiffs believed that pregnancy begins at fertilization of an egg. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013) ("[O]ne aspect of the Greens' religious

the claimants believed "it [was] immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs."[291] As a result, they sued the Secretary of the Department of Health and Human Services and challenged the contraception requirement imposed upon them by the ACA.

In deciding the case, the Court focused much of its analysis on RFRA.[292] It began by finding that RFRA did apply to for-profit corporations that were closely held, disputing the notion that corporations were incapable of exercising religion.[293] The Court then analyzed the merits of the RFRA claim, and concluded that the government's argument failed strict scrutiny.[294] Because the U.S. Department of Health and Human Services had already offered an accommodation to religiously affiliated nonprofit institutions and exempted employers with fifty or fewer employees, the Court rejected the government's argument that imposing the contraceptive mandate was the least restrictive means of achieving its goals.[295]

Though the Court found it "certainly true that in applying RFRA, 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries,'" it treated these third party harms as minimal to its analysis.[296] Because the government had other means of ensuring that women have access to affordable contraception, the Court wrote that the plaintiffs' religious beliefs could be accommodated with "precisely zero" effect on female employees.[297]

Under an institutional tailoring framework, the Court would more carefully scrutinize the third party harms that could arise from granting corporations such as Hobby Lobby religious freedom rights.[298] There is much evidence that the Court erred in its cursory analysis of the issue.

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commitment is a belief that human life begins when sperm fertilizes an egg."). As a result, because the contraceptives at issue in *Hobby Lobby* operated after fertilization of the egg, plaintiffs believed that the contraceptives ended human life. *Id.* at 1125.

291. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014) (quoting Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 382 (3d Cir. 2013)).

292. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb–2000bb-4 (2012).

293. *Hobby Lobby*, 134 S. Ct. at 2774–75.

294. *Id.* at 2780.

295. *Id.* at 2763–64, 2782.

296. *Id.* at 2781 n.37 (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005)).

297. *Id.* at 2760.

298. Indeed, the very decisions that grounded exemption rights in the Free Exercise Clause before *Emp't Div., Dep't. of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, 42 U.S.C. § 2000bb–2000bb-4, performed this analysis and granted exemptions only when third parties would not be affected. *See* Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (noting that the exemption would not cause "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare"); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (holding that the exemption did not "abridge any other person's religious liberties").

Justice Ginsburg addressed the consequences of granting Hobby Lobby constitutional rights in her dissent. Whereas the majority analyzed "[the issue] as the employers' 'exercise [of] their religious beliefs,'" she saw "as the relevant context the employers' asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers' religious beliefs."[299] Justice Ginsburg argued that the proposed least restrictive alternative in which the government would reimburse women for contraceptives would "[impede] women's receipt of benefits 'by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit.'"[300] Further, because the cost of "an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage," many Hobby Lobby employees may ultimately fail to receive contraceptives without the mandate.[301] Following the 2016 election of Donald Trump as President, many have expressed concern about whether his administration will continue to provide reimbursement for contraceptives to women whose employers are exempt from the ACA[302]—an important assumption made by Justice Kennedy in his *Hobby Lobby* concurrence.[303]

And if the Court's decision did indeed result in fewer women receiving contraceptives, the consequences would be significant. Women take account of costs when deciding whether to use contraceptives.[304] A lack of contraceptives

299. *Hobby Lobby*, 134 S. Ct. at 2796 n.17 (Ginsburg, J., dissenting).

300. *Id.* at 2802.

301. *Id.* at 2800.

302. *E.g.*, Allison K. Hoffman & Jill R. Horwitz, *How Donald Trump's Health Secretary Pick Endangers Women*, N.Y. TIMES: OPINION PAGES (Dec. 28, 2016), http://www.nytimes.com/2016/12/28/opinion/how-donald-trumps-health-secretary-tom-price-endangers-women.html [https://perma.cc/KZ7T-69DG] (arguing that Tom Price, President Trump's selection as Secretary of Health and Human Services, is a stringent opponent of contraceptive care and other family planning services who is likely to take aim at such provisions of the Affordable Care Act); *see also* Erin Gloria Ryan, *Get an IUD Before It's Too Late*, DAILY BEAST (Nov. 2, 2016, 1:07 PM), http://www.thedailybeast.com/articles/2016/11/02/get-an-iud-before-it-s-too-late.html [https://perma.cc/RUD2-P87X] ("A Trump-Pence administration will surely Make Birth Control A Huge Pain In The Ass Again"); Gabriella Paiella, *Here's Why Everyone Is Saying to Get an IUD Today*, N.Y. MAG (Nov. 9, 2016, 8:32 AM), http://nymag.com/thecut/2016/11/why-you-should-get-an-iud-before-trump-becomes-president.html [https://perma.cc/JAR3-8LWM] ("Get an IUD and get one now. . . . The reason? Donald Trump has run on an aggressively pro-life platform, while VP pick Mike Pence has a dismal record of limiting women's health care while he was governor of Indiana.").

303. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

304. *See* Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 REV. ECON. & STAT. 137, 150 (2009) (finding that decreasing the cost of contraceptives leads to a higher usage rate which, in turn, decreases the rate of unintended pregnancies). Several studies have also shown a correlation between the cost of contraceptives and women's health. For example, a 2012 study found that when given free contraceptive care, abortion rates for St. Louis County

may result in unwanted pregnancies, or worse.[305] For women with serious medical conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome, pregnancy can be dangerous, even life threatening.[306]

Further, scholars have questioned the accuracy of the premises that the Court relied on in its RFRA analysis. Because closely held for-profit businesses constitute roughly 90 percent of all employers in the United States, granting accommodation to closely held for-profit businesses expands the number of potential religious claimants and affected employees "from a very small to a quite large percentage of all employers and employees."[307] If the government were required to pay to provide the contraceptives at issue when employers objected on religious grounds, the cost would likely far exceed what the *Hobby Lobby* majority anticipated, and in the views of some, would "not [be] politically viable."[308]

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women between the ages of fourteen and forty-five dropped from a regional average of 13 to 17 percent to 0.4 to 0.8 percent. The study also found that teenage participants receiving free contraceptive care experienced a birth rate of 6.3 per 1000 girls, considerably less than the national rate of 34.3 per 1000. *See* Jeffrey F. Peipert et al, *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTETRICS & GYNECOLOGY 1291, 1291, 1296 (2012). Another study, this one in 2007, found that 52 percent of women (as compared to 39 percent of men) failed to fill a prescription, missed a recommendation test or treatment, or did not schedule a necessary specialist appointment because of cost. *See* SHEILA D. RUSTGI ET AL., COMMONWEALTH FUND, WOMEN AT RISK: WHY MANY WOMEN ARE FORGOING NEEDED HEALTH CARE 3 (2009).

305. Women with unintended pregnancies are less likely to receive timely prenatal care and more likely to smoke, consume alcohol, become depressed, and experience domestic violence during their pregnancy. Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) (to be codified at 26 C.F.R. pt. 54). Unintended pregnancies also prevent women from participating in labor and employment on an equal basis with men. *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 CONTRACEPTION 465, 465 (2012) ("Economic analyses have found clear associations between the availability and diffusion of oral contraceptives, particularly among young women, and increases in US women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men." (footnotes omitted)).

306. COMMITTEE ON PREVENTIVE SERVICES FOR WOMEN & BOARD ON POPULATION HEALTH AND PUBLIC HEALTH PRACTICE, CLINICAL PREVENTATIVE SERVICES FOR WOMEN: CLOSING THE GAPS 103–04 (2011).

307. Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153, 160 (2015); *see also* Jillian Berman, *The* Hobby Lobby *Decision Could Affect Millions of Workers*, HUFFINGTON POST (June 30, 2014, 5:05 PM), http://www.huffingtonpost.com/2014/06/30/hobby-lobby-closely-held_n_5545064.html [https://perma.cc/V2GC-VQ8L] (reporting an estimate that closely held corporations employ 79 percent of workforce).

308. Gedicks, *supra* note 307, at 161; *see also* Andrew Koppelman & Frederick Mark Gedicks, *Is* Hobby Lobby *Worse for Religious Liberty Than* Smith?, 9 ST. THOMAS J.L. & PUB. POL'Y (forthcoming 2016) (on file with author).

An institutional tailoring framework would, however, still allow corporations to exercise certain religious rights, particularly those rights that do not materially affect third party rights. Although some argue that the constitutional principle of avoiding third party harms would undermine nearly all religious accommodations,[309] that is not the case. Several scholars have proposed ways that the Court can reasonably limit the rule against shifting harms to third parties. Some, for example, have argued that the Court should recognize that the government has a compelling interest "in limiting employers to exemptions that impose no more than de minimis harm on employees."[310] Others have drawn from employment discrimination law to argue that courts should reject religious accommodations when they would impose "undue hardship" on third parties.[311] Still others have argued that third party harms should be impermissible if they are "material" or significant enough that others would take them into account in determining their response.[312] The Court may adopt any of these standards, or create its own, when deciding how to limit third party harms from corporate religious rights claims.

And there are several examples of religious accommodations that do not burden third parties. Consider the case of *Holt v. Hobbs*: Though it did not involve corporations, it illustrates a religious right that does not affect the rights of third parties.[313] Gregory Holt, a Salafi Muslim inmate subject to a rule that forbid prisoners from wearing beards, claimed an exemption from the restriction to avoid complicity in what he believed was a sinful act.[314] The Court held that Holt was entitled to an accommodation.[315] Indeed, Justice Ginsburg based her concurrence on the very fact that "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief."[316]

309. *See, e.g.*, Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 143 (2016) ("The government's vindication of third-party dignitary harms has the potential to destroy religious accommodation.").

310. Ira C. Lupu & Robert W. Tuttle, *Symposium: Religious Questions and Saving Constructions*, SCOTUSBLOG (Feb. 18, 2014, 11:12 AM), http://www.scotusblog.com/2014/02/symposium-religious-questions-and-saving-constructions [https://perma.cc/CU8G-KBFG].

311. *See* Nelson Tebbe, Micah Schwartzman, & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, & HEALTH IN THE UNITED STATES (Elizabeth Sepper et al. eds., forthcoming 2017) (U. Va. Sch. Law Working Paper No. 2016-43).

312. *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby*'s Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 337 (Micah Schwartzman et al. eds., 2016).

313. Holt v. Hobbs, 135 S. Ct. 853 (2015).

314. *See id.* at 861.

315. *Id.* at 867.

316. *Id.* (Ginsburg, J., concurring).

Corporations, too, can reflect their religious values without imposing any burden the third-party rights of others. In-N-Out Burger, for example, famously prints passage citations of the Bible on its cups as a "way to reflect the company's Christian beliefs."[317] And since its inception in 1946, Chick-fil-A has remained closed on Sundays as part of its corporate purpose "[t]o glorify God by being a faithful steward."[318]

Even Hobby Lobby—the corporation behind the eponymous Supreme Court decision—exercises its religious rights in many ways that do not interfere with the rights of others. The store "[h]onor[s] the Lord in all we do by operating the company in a manner consistent with Biblical principles," such as closing all stores on Sundays.[319] The company regularly purchases advertisements emphasizing the need for God and the Bible in American society.[320] Religious beliefs also inspire many of Hobby Lobby's business activities. For instance, to avoid promoting alcohol, the company does not sell shot glasses and does not allow its trucks to haul beer.[321] Likewise, stores refuse to install ashtrays due to the founders' belief that "cigarettes are a poor way to take care of the body God created for every human being."[322] Stores play Christian music while customers shop, and each year the company donates millions of dollars to ministries.[323] As demonstrated by these examples, corporations would still be able to exercise their religious rights even under an institutional tailoring framework that denied them accommodations creating third-party harms.

317. Vincent Funaro, *In-N-Out Christian Food Chain That References Bible Verses on Its Cups Is America's Favorite Place to Get a Burger*, CHRISTIAN POST (Apr. 16, 2015, 6:07 PM), http://www.christianpost.com/news/in-n-out-christian-food-chain-that-references-bible-verses-on-its-cups-is-americas-favorite-place-to-get-a-burger-137672 [https://perma.cc/Q4EH-HFWP].

318. Press Release, Chick-fil-A, *supra* note 243.

319. *See About Us*, HOBBY LOBBY, http://www.hobbylobby.com/about-us/our-story [https://perma.cc/UXE4-KTEF].

320. *See generally* STEVEN GREEN, FAITH IN AMERICA: THE POWERFUL IMPACT OF ONE COMPANY SPEAKING OUT BOLDLY (2011); *National Ad Celebrates Independence Day*, HOBBY LOBBY NEWSROOM (July 1, 2016), https://newsroom.hobbylobby.com/articles/ad-celebrates-independence-day [https://perma.cc/K6LE-RBEZ].

321. *See* Brief for Respondents at 9, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

322. Email from Bob W. Miller, Communications Coordinator, Hobby Lobby, to author (Aug. 22, 2016, 12:01 PM) (on file with author).

323. *Id.*

## CONCLUSION

Institutional tailoring is a complicated[324] and often criticized[325] area of the Supreme Court's jurisprudence. And yet, it can serve as an effective analytical framework for courts to decide questions of corporate constitutional rights. A series of examples illustrates why the issue of corporate rights—like that of the rights of government employees, prisoners, and public school students—defies a bright-line rule.

There are scenarios in which few would criticize granting constitutional rights to corporations. In 1971, the government sought to stop *The New York Times* and *The Washington Post*, both corporations, from publishing the leaked Pentagon Papers. Asserting their free speech rights, the two newspapers challenged the government's restraining order. The Supreme Court ruled in favor of the newspapers, finding that they had a First Amendment right to publish what they pleased.[326] As a result of the holding, the published papers revealed to the public, among other things, that "the Johnson Administration had systematically lied, not only to the public but also to Congress."[327]

In other scenarios, most would agree that corporate constitutional rights should be limited. Take the case of *Texfi Industries v. City of Fayetteville*,[328] in which a corporation argued that it should have the right to vote. The Supreme Court of North Carolina, however, rejected the corporation's claim because "[t]he very nature of a corporation prevents it from sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic."[329] Corporations were primarily profit-producing entities that lacked a singular corporate voice.[330] A corporate right to vote, the court reasoned, would thus be "inconsistent with the basis of our republican form of government."[331]

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324. *See, e.g.*, Joseph Blocher, *Implementing First Amendment Institutionalism*, 47 NEW ENG. L. REV. ON REMAND 43, 46 (2012) (describing institutional tailoring jurisprudence as "full of potholes and sharp turns").
325. *See supra* notes 140–147, 179–185, 227–233 and accompanying text.
326. New York Times Co. v. United States, 403 U.S. 713, 714 (1971).
327. R.W. Apple, Jr., *25 Years Later; Lessons From the Pentagon Papers*, N.Y. TIMES (June 23, 1996), http://www.nytimes.com/1996/06/23/weekinreview/25-years-later-lessons-from-the-pentagon-papers.html [https://perma.cc/5QDL-REBQ].
328. 269 S.E.2d 142 (N.C. 1980).
329. *Id.* at 150.
330. *Id.* at 150–51 ("Corporations are artificial entities which are designed for the purpose of managing economic resources. . . . [And] a corporation could not speak with a single voice and resolve without causing competing interests to fall silent.").
331. *Id.* at 150.

Finally, let us imagine a more complicated scenario in which the issue of corporate constitutional rights is far more controversial. After recovering an encrypted iPhone previously used by a terrorist, the U.S. government sought a court order directing Apple to help "unlock" the phone.[332] In resisting the government's order, Apple advanced arguments based on the First Amendment's guarantee of free speech and the Fifth Amendment's guarantee of due process.[333] Several major companies sided with Apple, citing the importance of protecting consumers' privacy against government intrusion.[334] On the other hand, the U.S. government reasoned that its interest in collecting information that could help thwart future terrorist attacks justified compelling Apple to unlock the phone.[335]

As these examples illustrate, there is no simple answer to the question of corporate constitutional rights. Practical considerations and legal precedent require that corporations receive certain constitutional rights. But where do we draw the line? Which rights should corporations receive, and which should be reserved for natural persons only? And what is the proper scope of the constitutional rights that corporations do receive?

An institutional tailoring framework would create a cohesive legal doctrine to answer these questions, and allow us to better understand the reasoning for the Court's decisions. For over a century, the Court has haphazardly granted and denied corporations constitutional rights based on an uncertain reading of how the Constitution should apply to corporations. In the process, it has overruled two

332. *See* Timothy B. Lee, *Apple's Battle With the FBI Over iPhone Security, Explained*, VOX (Feb. 17, 2016, 3:50 PM), http://www.vox.com/2016/2/17/11037748/fbi-apple-san-bernardino [https://perma.cc/84FP-8U3X].

333. Apple Inc's Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *In re* Search of an Apple Iphone, No. CM 16-10 (C.D. Cal., Feb. 25, 2016).

334. Over thirty-two major technology companies—Facebook, Google, Microsoft, Twitter, and Yahoo included—signaled that they would support Apple in its court fight with the FBI. *See* Marco della Cava et al., *Facebook, Google, AT&T Back Apple in FBI Fight*, USA TODAY (Mar. 3, 2016, 7:52 PM), http://www.usatoday.com/story/tech/news/2016/03/03/t-latest-company-back-apples-stance-against-feds/81227900 [https://perma.cc/PV52-9CQB].

335. Government's Motion to Compel Apple Inc. to Comply With This Court's February 16, 2016 Order Compelling Assistance in Search, *In re* the Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. CM 16-10 (C.D. Ca., Feb. 19, 2016), ECF No. 1. This case was ultimately disposed of without adjudication of the corporate constitutional rights issue after the FBI successfully accessed the data stored on the iPhone without Apple's assistance. *See* Government's Status Report, *In re* the Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203, No. CM 16-10 (C.D. Ca., Mar. 28, 2016).

cases within two decades,[336] produced some of the most harsh and vociferous dissents in recent memory, and even caused one Justice to publically declare the *Citizens United* decision as the "most disappointing" in her tenure on the Court.[337] An analytical framework must be adopted, and institutional tailoring is an effective vehicle through which to decide questions of corporate constitutional rights.

336. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010); Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010).

337. Maxwell Tani, *Ruth Bader Ginsburg Reveals the 'Most Disappointing' Supreme Court Decision of Her Career* (July 30, 2015, 10:40 AM), http://www.businessinsider.com/ruth-bader-ginsburg-citizens-united-decision-2015-7 [https://perma.cc/GC98-GDS3].