

ESSAY

THE FREEDOM OF BUSINESS ASSOCIATION

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Across the First Amendment, the distinction between for-profit businesses and nonprofit organizations is in trouble. In recent years, courts have rejected this distinction in the context of free-speech challenges to campaign-finance restrictions and free-exercise claims to obtain legal exemptions from health-care regulations. Although there is a great deal of popular dissatisfaction with these developments, advocates of expansive corporate rights have gained momentum.

Yet the trend toward recognizing the constitutional rights of for-profits is not inexorable. As presently developed, the First Amendment's freedom of association does not treat for-profit and nonprofit entities in the same way. Nonprofit expressive associations can claim institutional autonomy with respect to membership and internal governance, but commercial associations are only entitled to minimal protection from state regulation. Against the backdrop of recent developments in other areas of the First Amendment, this associational asymmetry is puzzling. Why should nonprofits receive stronger constitutional protections than for-profit business corporations?

This Essay provides a defense of associational asymmetry. It contends that the free formation and expression of personal identity is a central value of association, which makes preserving associational integrity more important in some organizations than in others. As a general matter, for-profit business norms, including but not limited to the shareholder-wealth-maximization norm, crowd out personal identification among participants in commercial association. By contrast, mission-centered norms in the nonprofit sector are more hospitable to personal identification with associations. Viewed from the perspective of identity formation, therefore, the for-profit/nonprofit distinction is a reasonable proxy for an important set of values, and associational asymmetry is best justified on that basis.

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INTRODUCTION

Freedom-of-association law is asymmetrical. Various expressive associations—advocacy groups, political parties, cultural societies, and religious organizations—are eligible to claim some degree of institutional autonomy with respect to membership and internal governance. Commercial associations, however, are only entitled to minimal constitutional protection from state regulation. So, while the Boy Scouts can invoke the power of the First Amendment to resist antidiscrimination laws,¹ no such protection is available to Wal-Mart.

Not everyone is pleased with this associational asymmetry. Indeed, for years critics have forcefully challenged the distinction between expressive associations and commercial associations.² These critics claim

1. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that Boy Scouts of America has a constitutional right to exclude gay troop leaders).

2. See, e.g., Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 139–41 (2000) [hereinafter Epstein, *Constitutional Perils*] (arguing that all private associations should be entitled to freedom-of-association protection, including commercial businesses); Jed Rubenfeld, *The First Amendment's Purpose*, 53 Stan. L. Rev. 767, 812 (2001) (arguing that almost all associations, including most commercial businesses, engage in expressive activity); Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 Wash. U. L. Rev. 1403, 1412–17 (2012) [hereinafter Vischer, *Right of Assembly*] (arguing that at least some commercial associations deserve the same level of constitutional protection as expressive associations); Larry Alexander, *What Is Freedom of Association, and What Is Its Denial?*, Soc. Phil. & Pol'y, Summer 2008, at 1, 13–14 (arguing that it is conceptually impossible to distinguish between different kinds of human association); cf. John D. Inazu, *Factions for the Rest of Us*, 89 Wash. U. L. Rev. 1435, 1450–54 (2012) [hereinafter Inazu, *Factions*] (arguing that there is no principled way to distinguish commercial associations from expressive associations).

not only that the distinction is elusive but also that it is substantively unfair. That is, they claim that there is no principled justification for treating commercial organizations worse than any other voluntary association.

Although these challenges are not new, they have become all the more pressing in light of recent developments elsewhere in the First Amendment. In *Citizens United v. FEC*, for example, the Court rejected the notion that a speaker's commercial identity matters when it comes to protecting political speech.³ In the course of doing so, the Court explicitly declined to draw any distinction between nonprofit and for-profit speakers.⁴ In the context of religious free exercise, the government proposed a line between nonprofit and for-profit organizations,⁵ but the Supreme Court rejected that line in *Burwell v. Hobby Lobby Stores, Inc.*⁶ Against this backdrop, proponents of associational asymmetry have their work cut out for them.

Existing defenses of asymmetry, however, fall short. Arguments from democracy—which seek to show that commercial associations provide poor training for citizenship or are not sufficiently connected to public discourse—fail to demonstrate that businesses are worse than other associations in this regard.⁷ Arguments from the checking power of associations—which contend that businesses cannot provide a counterbalance to overreaching by the state—overlook the degree to which businesses already limit government power and the ways in which corporate organization, motivation, and resources are crucial for this purpose.⁸ Finally, arguments from equality—which hold that discrimination in the commercial context poses the greatest threat to equal citizenship—only apply to associational claims that resist antidiscrimination laws and, even there, struggle to fully justify asymmetry in competitive markets.⁹

This Essay attempts to overcome the deficiencies of existing defenses by providing an alternative account. It argues that the free formation and expression of personal identity—or personhood—is a central value of association, which makes preserving associational integrity more important in some organizations than in others. As a general matter, for-profit business norms, including but not limited to the shareholder-

3. 130 S. Ct. 876, 912–13 (2010).

4. *Id.* at 913 (holding that “the Government may not suppress political speech on the basis of the speaker’s corporate identity” and that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations”).

5. Brief for the Petitioners at 15–22, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354), 2014 WL 173486 (arguing that the Religious Freedom Restoration Act does not grant free-exercise rights to for-profit corporations).

6. 134 S. Ct. at 2770–75.

7. See *infra* Part III.A.

8. See *infra* Part III.B.

9. See *infra* Part III.C.

wealth-maximization norm, crowd out personhood interests among participants in commercial association. By contrast, norms in the non-profit sector are more hospitable to individual identification with associations. Of course, not all nonprofits are closely connected with their members' personal identities. And even when nonprofits do promote identity formation, not all of their associational claims should succeed against various competing interests. Instead, this Essay argues that the for-profit/nonprofit distinction is a reasonable proxy for an important set of moral values and that associational asymmetry is best justified on that basis.

This Essay proceeds as follows. Part I describes how existing law reflects associational asymmetry. Part II distills and articulates two principal objections to that asymmetry. In an initial effort to rehabilitate the doctrine, Part III examines existing defenses. Finding those defenses unsatisfactory, Part IV argues that the moral value of identity formation and expression provides a coherent and attractive account of associational asymmetry.

I. ASSOCIATIONAL ASYMMETRY

Although the Supreme Court has never explicitly endorsed the distinction between expressive associations and commercial associations, that basic dichotomy is commonly accepted in the law.¹⁰ Expressive associations—including advocacy groups, political parties, and religious organizations—are entitled to searching review of laws that burden their interests in associational freedom.¹¹ Commercial organizations, by contrast, are generally excluded from that same robust protection.

10. See, e.g., David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 Wm. & Mary Bill Rts. J. 619, 626 (2001) (assuming that freedom-of-association law does not permit claims by for-profit business entities); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515, 1564 (2001) (arguing that the distinction between expressive associations and commercial associations drives case results); Lawrence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepp. L. Rev. 641, 657–58 (2001) (arguing that the Court would not extend freedom-of-association protection to commercial businesses); see also Epstein, *Constitutional Perils*, supra note 2, at 139 (arguing that, under current law, business associations have minimal freedom-of-association rights). This Essay focuses on claims of organizational autonomy, including an association's right to control membership. In related contexts, for example when an organization or individual asserts a right not to be compelled to subsidize speech, any kind of asymmetry between expressive and commercial domains is less than clear. See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (striking down a compelled subsidy for advertisements promoting mushroom sales).

11. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding that compelled disclosure of affiliation with the NAACP violates freedom of association); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577–82 (2000) (holding that a California law mandating open primaries violated political parties' rights of expressive association); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Thomas, J., concurring) ("Religious groups are the archetype of associations formed for expressive

In her concurring opinion in *Roberts v. United States Jaycees*, Justice O'Connor offered an initial explication of the expressive-commercial dichotomy.¹² In *Roberts*, the Court rejected an all-male organization's challenge to a state antidiscrimination law, holding that admission of women would not significantly undermine the group's expressive message.¹³ Justice O'Connor agreed that the group should not prevail, but argued instead that, as a predominantly commercial organization, the Jaycees was entitled to only "minimal constitutional protection" of its associational activities.¹⁴ In a memorable rhetorical flourish, Justice O'Connor declared that "[a]n association must choose its market," and that "[o]nce it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."¹⁵ Rather than delve deeply into the substance of the association's message, as did the majority, Justice O'Connor urged that the expressive or commercial nature of the association itself should determine the extent of its constitutional protection.¹⁶

In *New York State Club Ass'n v. City of New York*, Justice O'Connor reiterated her view that the strength of the right to freedom of association should vary according to the nature of the organization.¹⁷ In *New York*, much like in *Roberts*, the majority found that large private clubs in New York City had failed to show that admission of women or minorities would jeopardize their expressive messages.¹⁸ In another concurring opinion, this time joined by Justice Kennedy, Justice O'Connor returned to the distinction between expressive associations and commercial associations. She explained that some private clubs, even ones large enough to fall within the scope of New York's antidiscrimination law, may have expressive interests that deserve significant constitutional protection.¹⁹ But "predominantly commercial organizations," she insis-

purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."); see also Ronald D. Rotunda & John E. Nowak, 5 *Treatise on Constitutional Law: Substance and Procedure* § 20.41(b) (5th ed. 2013) (stating that rights of expressive association "cannot be limited by the government unless the limitation serves a compelling governmental interest unrelated to the suppression of ideas and this governmental interest cannot be furthered through means which are significantly less restrictive of the associational or expressive freedom").

12. 468 U.S. 609, 631-40 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

13. *Id.* at 627 (majority opinion).

14. *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).

15. *Id.* at 636.

16. See *id.* at 636-37 (discussing the need to draw lines between expressive and commercial associations).

17. 487 U.S. 1, 18-20 (1988) (O'Connor, J., concurring).

18. *Id.* at 13-14 (majority opinion).

19. *Id.* at 19 (O'Connor, J., concurring).

ted, have no claim under the First Amendment to exemption from the law.²⁰

Although Justice O'Connor's approach did not command a majority in *Roberts* or *New York*, lower federal courts and state courts were quick to seize on the expressive–commercial dichotomy and apply it against for-profit businesses.²¹ For example, in *IDK, Inc. v. County of Clark*, the Ninth Circuit quoted Justice O'Connor's *Roberts* concurrence at length to support its conclusion that escort services fall outside the scope of constitutional protection.²² The court identified several “overtly expressive association[s]”—including political parties, civil rights organizations, churches, and unions—that would be entitled to searching review of burdens on association.²³ But the court found that escort services are “primarily commercial enterprises” and therefore subject to the full array of ordinary commercial regulation.²⁴

More recently, in *Boy Scouts of America v. Dale*, the Supreme Court implicitly endorsed associational asymmetry.²⁵ In *Dale*, the Boy Scouts challenged the application of New Jersey's public-accommodations law, which prohibited discrimination on the basis of sexual orientation, to their practice of excluding gay scoutmasters.²⁶ Nobody in the case seriously argued that the Boy Scouts was a commercial organization, and so the expressive–commercial dichotomy was not centrally at issue. But in his opinion for the Court, Chief Justice Rehnquist did lament New Jersey's expansive interpretation of the term “public accommodation,” and suggested that if the term had been limited to its traditional coverage of “clearly commercial entities,” there would be little occasion for conflict with the First Amendment rights of organizations.²⁷ In other words, the Court indicated that it did not consider the associational

20. *Id.* at 20.

21. See, e.g., *IDK, Inc. v. Cnty. of Clark*, 836 F.2d 1185, 1195 (9th Cir. 1988) (holding that escort services do not have freedom-of-association rights to resist state regulation of their activities because they are primarily commercial associations); *Rivers v. Campbell*, 791 F.2d 837, 840 (11th Cir. 1986) (rejecting a freedom-of-association claim brought by a snow-cone vendor because it was a commercial enterprise); *Storer Cable Commc'ns v. City of Montgomery*, 806 F. Supp. 1518, 1560–61 (M.D. Ala. 1992) (rejecting a claim by cable-television franchisee, programmers, and distributor that cable-television ordinances violated their right to associate for commercial purposes).

22. 836 F.2d at 1195.

23. *Id.*

24. *Id.*

25. 530 U.S. 640, 657 (2000); see also Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 *Minn. L. Rev.* 1591, 1628 (2001) (arguing that the majority opinion in *Dale* implies that commercial associations have substantially diminished freedom-of-association rights); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 *Minn. L. Rev.* 1639, 1665 (2001) (arguing that antidiscrimination laws retain considerable force in the commercial sector after *Dale*).

26. 530 U.S. at 645.

27. *Id.* at 657.

interests of commercial organizations to be nearly as significant as those of expressive groups like the Boy Scouts.

Although the Supreme Court has only obliquely addressed associational asymmetry, lower courts have consistently applied it as a matter of First Amendment doctrine. For example, in *Wine & Spirits Retailers, Inc. v. Rhode Island*, the First Circuit denied a liquor franchisor's claim that state statutes prohibiting the retail sale of alcoholic beverages by franchisees violated the company's freedom-of-association rights.²⁸ In a pithy statement echoing Justice O'Connor, the court made the asymmetry plain: "While the state cannot regulate the right of speakers to band together to convey a common message in the marketplace of ideas, it most assuredly can exercise control over the efforts of market players to exploit the principle of strength in numbers in the marketplace of goods."²⁹ To hold otherwise, the court explained, would call into question the constitutionality of the antitrust laws, and indeed a wide swath of ordinary commercial regulation.³⁰

Similarly, in *United States v. Bell*, the Third Circuit rejected a freedom-of-association claim advanced by the operator of a fraudulent tax-advice business.³¹ More specifically, the owner was subject to an injunction that required him to provide the government with a list of his customers, and he sought to resist that demand on freedom-of-association grounds.³² The court explained, however, that his operation was "primarily a commercial enterprise, not a political group," and that "commercial transactions do not entail the same rights of association as political meetings."³³ Courts have taken a substantially similar approach to recent freedom-of-association claims brought by a parking-management company,³⁴ a nightclub operator,³⁵ a pizza company,³⁶ and a hookah

28. 418 F.3d 36, 53 (1st Cir. 2005).

29. *Id.* at 51–52.

30. *Id.* at 51. The *Wine & Spirits* court went on to explain that claimed exemptions from regulations of collusive behavior in the marketplace only apply when there is a core free-speech right at issue. *Id.* at 52.

31. 414 F.3d 474, 485 (3d Cir. 2005).

32. *Id.* at 477, 485.

33. *Id.* at 485.

34. *Int'l Parking Mgmt., Inc. v. Padilla*, 634 F. Supp. 2d 174, 188–90 (D.P.R. 2007) (holding that the First Amendment does not protect associations "geared towards purely economic and commercial ends").

35. *Rittenhouse Entm't, Inc. v. City of Wilkes-Barre*, 861 F. Supp. 2d 470, 485 (M.D. Pa. 2012) (rejecting the idea that the relationship between a nightclub and its patrons is a protected form of association).

36. *Desi's Pizza, Inc. v. City of Wilkes-Barre*, No. Civ.A 3:CV-01-0480, 2006 WL 2460881, at *26 (M.D. Pa. Aug. 23, 2006) (holding that a "purely . . . commercial association" could not state a freedom-of-association claim).

lounge.³⁷ In all of these cases, courts have sharply distinguished between expressive and commercial associations and held that burdens on the latter are not entitled to serious constitutional review.

Under the First Amendment, then, the freedom of association is asymmetrical. Courts commonly identify commercial associations as different in kind from expressive associations and relegate them to lesser constitutional status. What began as an alternative theory in *Roberts* is now the prevailing approach to associational rights of commercial organizations.

II. AGAINST ASYMMETRY

Although commonly accepted by courts, the practice of distinguishing between expressive associations and commercial associations has faced severe scholarly criticism. The critics raise two principal objections to asymmetry. First, they argue that the task of identifying which groups are expressive and which are commercial is both conceptually and judicially unworkable. I will call this the *elusiveness objection*. Second, critics of asymmetry argue that, even if it were possible to draw a coherent line between expressive and commercial associations, doing so would unjustifiably denigrate commercial interests. I will call this the *unfairness objection*. The elusiveness objection and the unfairness objection present the most serious challenges to the expressive–commercial dichotomy, and any attempt to defend associational asymmetry must answer them.

A. *Elusiveness*

Critics of asymmetry point out how difficult it can be to determine whether an association is expressive or commercial.³⁸ This difficulty has plagued the asymmetrical approach since its inception. Indeed, almost as soon as Justice O'Connor proposed the expressive–commercial dichotomy, she acknowledged that such judgments are far from straight-

37. *Karout v. McBride*, No. 3:11cv1148 (JBA), 2012 WL 4344314, at *4 (D. Conn. Sept. 21, 2012) (maintaining that there is no associational right to celebrate a cultural practice in any particular business).

38. See, e.g., Inazu, *Factions*, supra note 2, at 1450–54 (discussing the difficulty with a binary distinction between commercial and expressive groups); Vischer, *Right of Assembly*, supra note 2, at 1412–17 (discussing examples of commercial associations expressing viewpoints); Rubinfeld, supra note 2, at 812 (noting that nearly all associations, including commercial businesses, engage in expression); Alexander, supra note 2, at 13–14 (arguing that commercial associations cannot be neatly separated from other kinds of associations); see also Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Laws*, 66 *Stan. L. Rev.* 1205, 1231 (2014) (arguing that “the line between expression and commerce is conceptually indistinct”); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 *N.Y.U. L. Rev.* 144, 217 (2003) (arguing that the distinction between expressive and commercial associations is “unsupportable”).

forward.³⁹ Nevertheless, she argued that courts should aim for the “ideal of complete protection” for expressive groups while allowing pervasive regulation of commerce.⁴⁰

Although Justice O’Connor acknowledged that there would be close cases, critics of associational asymmetry have argued that the difficulty goes much deeper than she recognized. At the most fundamental level, critics contend that the whole project of identifying the essential nature of an organization and assigning it a particular label is metaphysically naïve.⁴¹ Associations do not neatly adhere to ideal forms. Instead, in the real world, every association mixes various kinds of purposes and activities.⁴² That is, all of the groups to which people belong are at once social, ideological, civic, and commercial. To claim that any one of these activities is predominant or overriding would be to engage in a sort of “misguided Platonism” that has no connection to the messy and complicated reality of associational life.⁴³

One preliminary response to this charge might be that even if the expressive and commercial labels are misleading on the margins, they still track some real differences among groups. For example, while it may be naïve to declare with confidence that the Jaycees is either expressive or commercial, one might be less concerned about passing judgment on Wal-Mart or the NAACP. That is, while there may well be a problem with essentializing some associations, there are obvious and uncontroversial differences among various kinds of groups that seem to justify some efforts at categorization.

Critics of the expressive–commercial dichotomy, however, are not persuaded. On their view, the problem with permeable conceptual boundaries is not confined to marginal cases. Instead, the interplay of expressive and commercial elements runs throughout the associational landscape.⁴⁴ Take Wal-Mart, for example. With over \$400 billion in annual revenue, the chain of megastores appears to be the paradigm case of a commercial association.⁴⁵ That is, if Wal-Mart is not commercial,

39. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O’Connor, J., concurring in part and concurring in the judgment) (“Determining whether an association’s activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive.”).

40. *Id.* at 635.

41. See, e.g., Alexander, *supra* note 2, at 13 (“Attempting to find the essential nature of any particular association . . . is a bootless quest . . .”).

42. See *id.* at 14 (“I cannot emphasize enough how impossible it is to divide any particular domain of associations from the other associative domains.”).

43. *Id.* at 13.

44. See Vischer, *Right of Assembly*, *supra* note 2, at 1413 (arguing that a diverse array of commercial firms have engaged in expressive activities, “ranging from Wal-Mart, to law firms, to dating services, to pharmacies” (footnotes omitted)).

45. Wal-Mart Stores, Inc., Annual Report (Form 10-K), at 5 (Mar. 21, 2014), available at <http://services.corporate-ir.net/SEC.Enhanced/SecCapsule.aspx?c=112761&fid=9351219> (on file with the *Columbia Law Review*).

then nothing is. But Wal-Mart is also expressive in many ways. For example, until recently, Wal-Mart refused to sell emergency contraceptives in any of its stores, taking a distinctly expressive (not to mention dissenting) stand in the commercial marketplace.⁴⁶ Other examples abound, including eHarmony's refusal to include gays and lesbians in its online dating service⁴⁷ and Chick-fil-A's contributions to anti-gay causes.⁴⁸ In short, even the hardest-charging commercial organizations often have significant expressive aspects.

Critics contend that the same permeability is also apparent on the other side of the expressive–commercial boundary. Just as many commercial associations are expressive, even the most expressive organizations are not walled off from the marketplace.⁴⁹ Consider, for example, the affairs of the NAACP. The NAACP has to compete with other advocacy groups in the highly competitive market for membership.⁵⁰ To carry out its operations, the NAACP needs to raise a significant amount of money, which it does by recruiting new members, charging membership fees, and soliciting donations. It also employs a sizeable professional staff that concerns itself on a daily basis with the efficient allocation of limited resources.⁵¹ This point about the commerciality of expressive groups extends beyond large national advocacy organizations and applies across the board to various civic, social, and ideological groups. Even churches actively recruit members, solicit donations, employ a staff, and budget resources to build new buildings or to run their own schools.⁵² In other words, commerce is omnipresent—concerns about funding, budgeting,

46. See Robert K. Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* 192 (2010) [hereinafter Vischer, *Conscience*] (discussing Wal-Mart's refusal to sell the "morning-after pill" in its stores).

47. See Ellen McCarthy, *On Dating: Gay Man Rejected by eHarmony Wins Lawsuit; Company to Set Up Alternative Site*, Wash. Post (Dec. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/11/AR2008121101164.html> (on file with the *Columbia Law Review*) ("eHarmony (founded by a conservative Christian) doesn't accept gay and lesbian customers.").

48. Dan Gilgoff, *Chick-fil-A Controversy Shines Light on Company's Charitable Giving*, CNN: Belief Blog (Aug. 3, 2012, 8:41 AM), <http://religion.blogs.cnn.com/2012/08/03/chick-fil-a-controversy-shines-light-on-companys-charitable-giving/> (on file with the *Columbia Law Review*) (discussing criticisms of Chick-fil-A's donations to anti-gay groups).

49. See Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917, 1927 n.49 (2001) ("Expressive associations can have substantial commercial aspects: a pervasively religious private school, for example, is as expressive as an expressive organization can be, but it is also undeniably a commercial enterprise dealing in the marketplace of consumers as well as in the marketplace of ideas.").

50. See Alexander, *supra* note 2, at 13 (arguing that purportedly noncommercial entities compete in a competitive market for members).

51. See NAACP, *Affirming America's Promise: 2011 Annual Report* 50–51 (2011), available at http://naacp.3cdn.net/ada2d00b580c17a393_mlbrsxybh.pdf (on file with the *Columbia Law Review*) (listing over 100 professional staff members).

52. See Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 Fordham L. Rev. 2161, 2167 (2001) (arguing that a "wide variety" of nonprofits engage in clearly commercial activity).

and contractual exchange are inescapable aspects of any association, no matter how expressive.

The commerciality of expressive associations can also be seen in the development and cultivation of business relationships. As the majority in *Roberts* correctly recognized, nonprofit organizations like the Chamber of Commerce facilitate business contacts that spill over into the commercial world.⁵³ But business networks are not only formed in associations specifically designed for networking. They are also formed in tennis clubs, advocacy organizations, political parties, and church groups.⁵⁴ As many entrepreneurs can attest, some of the most successful business partnerships are conceived and consummated in contexts that seem remote from the marketplace.⁵⁵ An association need not have an explicit commercial purpose, therefore, in order to promote and facilitate commercial enterprise.

At the heart of the expressive–commercial fallacy, some critics believe, is one central mistake—the failure to recognize the continuity of the person.⁵⁶ The key contention here is that if commercial organizations are composed of people,⁵⁷ then they will *always* be expressive, social, and ideological, because people are expressive, social, and ideological. People do not leave their whole selves at home when they enter the marketplace. Employers take their beliefs and commitments with them when they run businesses.⁵⁸ Employees do not shed their identities when they clock in at work.⁵⁹ And customers express their beliefs, ideas, and preferences through their purchases.⁶⁰ The expressive–commercial dichotomy,

53. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) (noting that business contacts are among the “commercial programs and benefits” for an organization’s members).

54. See William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 93 (1986) (arguing that membership in a variety of civic groups may be crucial to developing businesses networks and taking advantage of commercial opportunities).

55. For example, Bill Gates and Paul Allen were childhood friends at Lakeside School in Washington before they cofounded Microsoft in 1975. Alyson Shontell, *10 Super Successful Cofounders and Why Their Partnerships Worked*, *Bus. Insider* (June 4, 2011), <http://www.businessinsider.com/10-super-successful-cofounders-and-why-their-partnership-s-worked-2011-6?op=1> (on file with the *Columbia Law Review*).

56. See, e.g., Vischer, *Conscience*, supra note 46, at 202 (“[L]iving out deeply held moral convictions on the job makes meaningful ethical and moral dialogue possible.” (emphasis omitted)); Alexander, supra note 2, at 14 (“[N]either employers nor their employees leave their creeds behind when they enter the office.”).

57. This condition is not satisfied by some corporate entities, including holding companies, which are “formed to control other companies.” *Black’s Law Dictionary* 339 (10th ed. 2014).

58. See Vischer, *Conscience*, supra note 46, at 196 (contending that there has been a rise in faith-based activity in the corporate workplace).

59. See Timothy L. Fort, *Business as Mediating Institution*, 6 *Bus. Ethics Q.* 149, 160 (1996) (arguing that employees constitute their identities in the workplace).

60. See Alexander, supra note 2, at 14 (discussing customers who express ideological and social preferences through purchase of Shaker-made furniture and Native American jewelry).

then, fails to recognize that the marketplace does not strip people of their identities, and that commercial associations made up of those people will never be separable from the full range of human hopes, fears, desires, beliefs, and activities.

When it comes to implementing the dichotomy as a matter of law, moreover, the elusiveness objection becomes all the more urgent and powerful.⁶¹ That is, the conceptual trouble with separating expressive associations from commercial associations is particularly fraught with danger in the hands of judges. Justice O'Connor proposed that even in light of some difficulties, judges are capable of determining whether a group is *predominantly* expressive.⁶² But critics of the expressive-commercial dichotomy insist that judges are not capable of quantifying the commercial and expressive activities of an association, nor are they in a good position to evaluate the centrality or importance of those activities and weigh them against each other.⁶³ Instead of principled applications of judicially manageable standards, then, the determination of commerciality will most often depend on familiarity with an organization and perhaps on agreement with its message or sympathy with its objectives. If the conceptual difficulties raised by the elusiveness objection are serious, in other words, then those difficulties will only be highlighted and magnified in the course of application by judges.

B. *Unfairness*

Critics of asymmetry also argue that the expressive-commercial dichotomy is unfair.⁶⁴ That is, even if it were possible to draw a clear line

61. See Wayne Batchis, *Citizens United* and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of *the* Association, 36 N.Y.U. Rev. L. & Soc. Change 5, 20 (2012).

62. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 637 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("The considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are therefore fluid and somewhat uncertain. But the Court has recognized the need to draw similar lines in the past.")

63. See Batchis, *supra* note 61, at 20 ("[C]ourts are poorly equipped to quantify the activities and purposes of organizations in a manner that would avoid claims of unconstitutional vagueness.")

64. See Epstein, *Constitutional Perils*, *supra* note 2, at 139-41 (arguing that the divide between expressive and commercial associations is indefensible); Martin H. Redish & Howard M. Wasserman, What's Good for General Motors: Corporate Speech and the Theory of Free Expression, 66 *Geo. Wash. L. Rev.* 235, 238 (1998) (arguing that it is unfair to grant business corporations less protection than other organizations under the First Amendment); Richard A. Epstein, Should Antidiscrimination Laws Limit Freedom of Association? The Dangerous Allure of Human Rights Legislation, *Soc. Phil. & Pol'y*, Summer 2008, at 123, 124-25 [hereinafter Epstein, *Antidiscrimination Laws*] (defending rights of all forms of association on freedom-of-contract grounds); see also R. H. Coase, The Market for Goods and the Market for Ideas, 64 *Am. Econ. Rev. (Papers & Proc.)* 384, 389 (1974) (arguing that there is no good reason to treat the market for goods differently than the market for ideas); Aaron Director, The Parity of the Economic Market Place, 7

between expressive and commercial organizations—perhaps by focusing exclusively on the profit motive—such a line would be unjustified. On this view, even if we could solve the problems presented by the elusive-ness objection, there is no good reason to single out commercial firms and relegate them to inferior constitutional status.

As an initial matter, critics highlight the voluntary nature of commercial association.⁶⁵ Commercial firms are formed by the free choice of entrepreneurs to pool capital and resources. As the firm grows, employees join on a contractual basis, and nobody is forced to work for any particular commercial business. And despite potentially significant switching costs, people are free to exit commercial firms and go to work for another employer if they so choose. In this way, commercial firms are just like traditional voluntary organizations: They are the result of free individual choices to associate with others in a common enterprise. In fact, as a matter of voluntariness, commercial firms might compare favorably to some associations that receive the highest level of constitutional solicitude, like churches and families.⁶⁶ With regard to the value of free choice, then, there is no reason to distinguish between expressive groups and commercial groups.

Viewing commercial organizations as just another form of voluntary association is not without historical pedigree. Perhaps most significantly, Alexis de Tocqueville, the progenitor of association theory, lumped commercial businesses with other voluntary groups in describing the salutary effects of association.⁶⁷ Tocqueville observed that Americans joined voluntary associations to accomplish things that would be impossible to carry out alone. Those associations included not only political and social groups but also “commercial and manufacturing companies” that enabled people to enhance their own meager powers by uniting in a common aim with fellow citizens.⁶⁸ With Tocqueville on their side, critics of

J.L. & Econ. 1, 6 (1964) (arguing that individuals exercise their moral autonomy just as much in the marketplace as in other areas of social life). See generally Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. Rev. 949, 952–54 (1995) (discussing arguments against asymmetry between market regulation and speech regulation).

65. See Epstein, *Antidiscrimination Laws*, supra note 64, at 124–25 (arguing that freedom of association should be seen as derivative of the broader right to freedom of contract); see also Redish & Wasserman, supra note 64, at 251 (arguing that business corporations are the product of voluntary human choice to organize in a particular form).

66. See Michael Waltzer, *On Involuntary Association*, in *Freedom of Association* 64, 64–65 (Amy Gutmann ed., 1998) (arguing that some vitally important associations, including churches and families, are not voluntary in any meaningful sense).

67. 2 Alexis de Tocqueville, *Democracy in America* 106 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840) (listing a variety of commercial and noncommercial associations).

68. *Id.*

asymmetry claim strong authority for the parity of economic organizations and other voluntary associations.⁶⁹

Not only do critics emphasize the voluntariness of commercial firms, they also insist upon their fundamental humanity. Businesses are made up of real people, despite the popular inclination to describe corporations as faceless or soulless entities.⁷⁰ Critics reject the image of corporations as artificial creatures, preprogrammed to pursue their own good while completely ignoring the ends and interests of actual human beings. Instead, when we look behind the entity and see the people who compose the business enterprise, we see that the interests of real people are at stake.⁷¹

When we look at those real interests, moreover, we see that economic matters are often of paramount importance.⁷² Most people spend the bulk of their waking hours engaged in commercial affairs. They work for commercial firms; they make investments; they make decisions about budgeting and saving; and they purchase goods and services in commercial markets. As a matter of subjective importance, moreover, people often care far more about their commercial activities than about any of their ideological or political positions.⁷³ The point here, it seems, is that if we paid more attention to how people actually choose to allocate their time and their own attitudes about the economic issues that concern them, perhaps we would be less likely to downgrade the status of commercial associations.

This contention about the importance of economic affairs extends beyond mere instrumental goals. Indeed, critics of asymmetry contend, commercial activity is not just important to people because it enables them to pursue other ends—that is, because it provides them the means to pursue their *real* interests outside the marketplace. Instead, commercial activity is an important and essential aspect of autonomy in its own

69. See generally Ronald J. Colombo, *The First Amendment and the Business Corporation* (2015) (arguing that Tocqueville's writings support corporate First Amendment rights).

70. See, e.g., Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 60 (2004) (arguing that the norm among corporate directors to maximize shareholder wealth makes corporations "psychopathic creature[s]").

71. See Epstein, *Antidiscrimination Laws*, supra note 64, at 152–53 (arguing that the burden of corporate regulation falls on individual shareholders and members rather than on abstract entities); see also Redish & Wasserman, supra note 64, at 254 (arguing that corporations are merely voluntary organizations in which individuals pool their resources to achieve efficiency).

72. See Director, supra note 64, at 6 (arguing that "freedom of choice [for] owners of resources" is at least as important to them "as freedom of discussion and participation in government"); see also Coase, supra note 64, at 385–86 (arguing that people's economic choices are more important to them than ideological positions); Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 *Harv. J.L. & Pub. Pol'y* 91, 98 (1987) (arguing that economic rights are more important to people than social and political rights).

73. See Coase, supra note 64, at 385–86; Easterbrook, supra note 72, at 98.

right.⁷⁴ In the marketplace of goods, just as in the marketplace of ideas, people use their human faculties of perception, prioritization, discrimination, and choice to direct the course of their own lives.⁷⁵ In the commercial world, we make choices that have great personal consequences, and we have to live with those choices. The process of using our faculties to make important decisions is in large part how we write the story of our own lives. Economic decisions, including decisions about and within commercial associations, are therefore an integral part of individual self-authorship.⁷⁶ And if self-authorship is the core of exercising autonomy, it follows that excluding marketplace activities at the outset is arbitrary and unjustified.

In light of these considerations, critics remain puzzled by the persistence of the expressive–commercial dichotomy. If commercial organizations are just voluntary associations in which people join together to achieve goals that they could not attain on their own, and if activity in those associations is important to people both instrumentally and intrinsically, why are they still disfavored as a matter of constitutional law?

One view is that the persistence of the dichotomy is just a matter of politics. This view has a pragmatic and a partisan form. On the pragmatic view, there may not be a good theoretical explanation for excluding commercial organizations from the freedom of association, but the prospect of arming large corporations like Wal-Mart with the ability to resist antidiscrimination laws is simply beyond the pale politically.⁷⁷ On the partisan view, the dichotomy is grounded in the preference of liberals who worry that if commercial organizations are not reined in, they will support the right-leaning politics of deregulation.⁷⁸ Both views, however,

74. See Redish & Wasserman, *supra* note 64, at 252–54 (arguing that commercial associations promote individual self-realization); see also John Tomasi, *Free Market Fairness* 89–90 (2012) (identifying market participation as an important aspect of individual autonomy).

75. See Redish & Wasserman, *supra* note 64, at 252 (arguing that corporations serve as catalysts for people to develop their human faculties and control their own destinies); see also Director, *supra* note 64, at 9 (arguing that the free market provides an opportunity to choose one’s ends and the means for attaining them).

76. See Tomasi, *supra* note 74, at 94–95 (arguing that economic liberties are crucial for responsible individual self-authorship).

77. See Inazu, *Factions*, *supra* note 2, at 1450–51 (emphasizing the pragmatic or “political” nature of the distinction between commercial and noncommercial groups); John D. Inazu, *Virtual Assembly*, 98 *Cornell L. Rev.* 1093, 1127 (2013) (describing the commercial–noncommercial distinction in freedom-of-association law as a political compromise); Vischer, *Right of Assembly*, *supra* note 2, at 1415–16 (“Giving Wal-Mart a constitutional right to ignore legal mandates—though that right would not enjoy blanket immunity from countervailing state interests, I assume—may understandably be a bridge too far.”).

78. See, e.g., Redish & Wasserman, *supra* note 64, at 292, 296 (arguing that hostility to corporate First Amendment rights stems from the political preferences of liberal academics).

share the common conclusion that there is no *principled* justification for associational asymmetry.

Another view is that the expressive–commercial dichotomy is the product of intellectual elitism. Academics and judges, who have often insisted on the exclusion of commercial organizations from robust constitutional protection, seem to be relying on the idea that commerce is less worthy than expression. Such a bias in favor of ideas over commerce, they say, should not be surprising—it reflects only a natural tendency to prefer one’s own trade (ideas) over the ordinary business practices of the masses.⁷⁹ Maintaining the dichotomy allows these elite actors to regulate others while avoiding regulation themselves.⁸⁰ In any event, the bias that supports the dichotomy is merely a form of viewpoint discrimination that is both illicit and unfair.⁸¹

Together with the elusiveness objection, the unfairness objection presents a major challenge to the expressive–commercial dichotomy. The question remains whether there is a persuasive defense of associational asymmetry that does not succumb to these objections. The next section takes a look at existing defenses of asymmetry in an initial effort to answer that question.

III. IN SEARCH OF A THEORY

This Part surveys and distills the most prominent existing defenses of associational asymmetry. It includes arguments from democracy, checking state power, and equality. Although initially attractive, each account ultimately fails to justify the doctrine.

A. *Democracy*

One set of arguments for associational asymmetry relies on democratic premises. These arguments seek to show that commercial associations do not play the same vital role as other associations in our system of self-government. Some of the arguments from democracy emphasize the function of nonmarket associations in developing the skills, social

79. See Director, *supra* note 64, at 6 (suggesting that intellectuals naturally favor “the pursuit of truth” over “merely . . . earning a livelihood”).

80. See Coase, *supra* note 64, at 386 (“That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to ensure that, while others are regulated, regulation should not apply to them.”).

81. Redish & Wasserman, *supra* note 64, at 291–94 (arguing that the exclusion of corporations from First Amendment rights “generally amounts to little more than an indirect form of viewpoint discrimination”); see also Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *Loy. L.A. L. Rev.* 67, 68–73 (2007) (arguing that a variety of scholarly arguments against full protection of commercial speech boil down to constitutionally impermissible viewpoint discrimination).

connections, and dispositions necessary for democratic citizenship.⁸² Others aim to show that business associations are not sufficiently connected to political participation to deserve special treatment in the law.⁸³ Both accounts purport to show that commercial associations can be distinguished from other associations in a way that justifies according them lower constitutional priority.

1. *Civic Education.* — The first kind of argument from democracy—which focuses on educating citizens—starts with a basic contention about the salutary effects of associations in general. A wide variety of associations, on this view, prepare individuals for the demands of self-government.⁸⁴ This preparation occurs at both an individual and a social level. As a matter of individual development, associations provide the training grounds on which people can practice and perfect their skills of communication, organization, leadership, and recruitment.⁸⁵ Those skills, in turn, can be used in the political arena to participate, advocate, and govern more effectively.

On a social level, associations produce connections, networks, and norms that make widespread social cooperation possible.⁸⁶ In modern parlance, associations produce “social capital” that allows citizens to accomplish a variety of tasks and objectives together without relying on the favor of wealthy or powerful patrons.⁸⁷ Isolated individuals, who have

82. See, e.g., Barbara Bucholtz, Reflections on the Role of Nonprofit Associations in a Representative Democracy, 7 Cornell J.L. & Pub. Pol’y 555, 571–76 (1998) (highlighting the role of nonprofit associations in developing democratic skills and promoting mutual toleration and civility); Jason Mazzone, Freedom’s Associations, 77 Wash. L. Rev. 639, 694–711 (2002) (discussing the role of associations in promoting self-governance and social capital); see also Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 367 (William Rehg trans., MIT Press 1996) (1992) (noting that nonmarket voluntary associations institutionalize “problem-solving discourses on questions of general interest inside the framework of organized public spheres”); Mark E. Warren, Democracy and Association 70–77 (2001) (describing how civic associations inculcate democratic virtues among citizens).

83. See, e.g., Paul Horwitz, First Amendment Institutions 243–47 (2013) [hereinafter Horwitz, First Amendment Institutions] (arguing that corporations are not essential to the infrastructure of public discourse and thus merit diminished protection); Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 999–1001 (2011) (arguing that business organizations do not deserve heightened associational protection because democratic participation and influence are not their primary goals).

84. See, e.g., Warren, *supra* note 82, at 72–77 (discussing how associations help their members develop a variety of skills and dispositions relevant for democracy); Bucholtz, *supra* note 82, at 574–76 (arguing that nonprofit associations prepare individual citizens for self-government); Mazzone, *supra* note 82, at 697–98 (discussing how individuals develop democratically relevant skills inside of associations).

85. See Mazzone, *supra* note 82, at 697–98 (discussing how associations teach skills that promote self-governance).

86. See *id.* at 701–11 (discussing how associations allow their members to develop social capital).

87. For influential work on this topic, see Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

few social connections and little experience in networks of reciprocity and trust, will find that the barriers to cooperation are often too high for joint action.⁸⁸ Associations lower those barriers and produce a more cooperative and mutually trusting populace.⁸⁹

Some defenders of associational asymmetry argue that commercial associations do not produce these same democratic effects.⁹⁰ The skepticism here tends to focus on the instrumental nature of commercial organizations and on their often hierarchical and coercive structure.⁹¹ Because these features tend to dominate commercial organizations, particularly large business firms, those associations will not produce the same democratic effects as other associations. On the strength of these disparate democratic effects, then, defenders of associational asymmetry claim justification for the exclusion of commercial groups from constitutional solicitude.⁹²

Although there is some intuitive appeal to these arguments from democracy, they ultimately crumble upon closer inspection. To begin with, it is hard to deny that people acquire democratically relevant skills in commercial associations.⁹³ Employees often receive training in communication with customers or with coworkers and supervisors. They may get practice in recruiting others to join their business or in writing letters to local political officials. They are also sure to encounter challenging business circumstances that require cooperation with coworkers and ultimately compromise in service of a common goal. Granted, all of these activities are likely to occur within the hierarchical strictures of an organizational chart. But an association need not be democratically organized to produce democratic effects.⁹⁴ In fact, because of their superior resources and desire for a high-functioning workforce, commercial firms will often provide better training than their

88. See *id.*; see also Tocqueville, *supra* note 67, at 100–01, 107 (explaining how isolation inhibits collective action).

89. See generally Putnam, *supra* note 87.

90. See, e.g., Mazzone, *supra* note 82, at 760 (“Most business entities are neither high in social capital, nor politically oriented, and they do not have a valid claim to freedom of association.”).

91. See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 *Wm. & Mary L. Rev.* 267, 289 (1991) (stating that, in the workplace, “an image of dialogue among autonomous self-governing citizens would be patently out of place”).

92. See, e.g., Mazzone, *supra* note 82, at 760 (arguing that the “government should have greater latitude to regulate these kinds of groups”).

93. For important work on the democratic effects of the workplace, see Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 *Geo. L.J.* 1 (2000) [hereinafter Estlund, *Working Together*].

94. For an extended argument that the internal governance of private associations need not mirror that of the state to be compatible with democracy, see Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* 47–70 (1998) [hereinafter Rosenblum, *Membership and Morals*].

counterparts in the nonprofit sector.⁹⁵ And there is no reason to believe that the skills developed in those firms will fail to translate into more effective political participation. So, even (or perhaps especially) considering their demands of efficiency and profitability, commercial firms provide ample opportunity for individuals to develop skills that are relevant for public life.

Much like the argument from individual competencies, the attempt to distinguish commercial firms on the basis of social capital cannot be sustained. As an initial, if obvious, observation, participants in commercial businesses interact on a daily basis with other members of their organization. They talk to fellow employees, to subordinates, and to supervisors, and they collaborate on common tasks. Within the organization, norms of cooperation and civility are pervasive. To get along reasonably well in a commercial organization, and to achieve goals set for various roles, employees need to work together, cooperate, and treat each other with at least a modicum of consideration and respect.⁹⁶

One initial objection to this account seems particularly pressing. Although participants in commercial organizations have daily contact with coworkers and supervisors, that interaction is on very different terms than in classic voluntary associations. To be sure, the dominant orientation of a commercial organization is instrumental. Guided by the objective of turning a financial profit, managers enforce demanding norms of productivity and efficiency. Those norms are underscored by the pervasive use of financial incentives and implicit threats of punishment to motivate worker output.⁹⁷ In contrast to the formation of deep identity and affection in the so-called “voluntary” sector, the instrumental nature of commercial firms might seem to undermine the mutual trust and reciprocal norms at the heart of social capital.

In response to this objection, however, it is useful to distinguish between two kinds of social capital: *bonding* social capital and *bridging*

95. According to a recent study, businesses spend up to \$100 billion a year on training for their employees. See Aaron DeSmet, Monica McGurk & Elizabeth Schwartz, Getting More from Your Training Programs, McKinsey Q., Oct. 2010, available at http://www.mckinsey.com/insights/organization/getting_more_from_your_training_programs (on file with the *Columbia Law Review*).

96. See Estlund, Working Together, *supra* note 93, at 12 (discussing norms of civility in the workplace).

97. See Sung Min Park & Jessica Word, Driven to Service: Intrinsic and Extrinsic Motivation for Public and Nonprofit Managers, 41 *Pub. Personnel Mgmt.* 705, 710 (2012) (discussing how for-profit employees are motivated by extrinsic rewards); see also George A. Boyne, Public and Private Management: What's the Difference?, 39 *J. Mgmt. Stud.* 97, 112 (2002) (discussing support for proposition that private-sector managers are strongly motivated by pay); Lynn A. Stout, Killing Conscience: The Unintended Behavioral Consequences of “Pay for Performance,” 39 *J. Corp. L.* 525, 532–35 (2014) (discussing the rise of incentive-based pay for corporate executives).

social capital.⁹⁸ Bonding social capital refers to the normative social ties among homogenous groups of people.⁹⁹ These are the ties of solidarity and mutual identification that tend to form in voluntary associations, especially in groups like churches and other tight-knit communities. Bridging social capital, on the other hand, refers to the norms and networks that form in and among heterogeneous groups. These features support communication and exchange with others from diverse backgrounds, enabling and facilitating cooperation without ties of kinship or mutual affection.¹⁰⁰

Given the instrumental nature of most commercial firms, they are not likely sites for producing significant amounts of *bonding* social capital. But because businesses bring together people from different cultural, ethnic, religious, and socioeconomic backgrounds, they are able to produce far more *bridging* social capital than are classic voluntary groups.¹⁰¹ In fact, the instrumental and commercial orientation of businesses is essential to the process of connecting people who might not be predisposed to interact or cooperate with each other.¹⁰² Because of the hierarchy and regimentation that often attends commercial workplaces, businesses tend to be full of “weak ties”—those relatively detached and superficial relationships that might fit with names like “coworker” or “acquaintance” rather than “friend” or “confidant.”¹⁰³ But the seemingly

98. See Putnam, *supra* note 87, at 22 (explaining the distinction between forms of social capital); see also Ross Gittel & Avis Vidal, *Community Organizing: Building Social Capital as a Development Strategy* 15 (1998) (same); Michael Woolcock & Deepa Narayan, *Social Capital: Implications for Development Theory, Research, and Policy*, 15 *World Bank Res. Observer* 225, 227 (2000) (distinguishing bonding social capital from bridging social capital).

99. See Simon Szreter, *The State of Social Capital: Bringing Back in Power, Politics, and History*, 31 *Theory & Soc'y* 573, 576 (2002) (stating that bonding social capital forms when “others are considered to be ‘like’ one’s self and so no further justification is required for a default assumption that cooperation and trust are appropriate”).

100. See Putnam, *supra* note 87, at 22–24. As Putnam describes the distinction, “Bonding social capital constitutes a kind of sociological superglue, whereas bridging social capital provides a sociological WD-40.” *Id.* at 23.

101. Several strands of social theory, including the work of Marx, Weber, Simmel, and Durkheim, emphasize that market-based social organization tends to undermine the traditional bonds of family and community, leading to alienation and anonymity. See Paul S. Adler & Seok-Woo Kwon, *Social Capital: Prospects for a New Concept*, 27 *Acad. Mgmt. Rev.* 17, 28 (2002) (discussing the traditional view that market-based associations destroy social capital). But Albert Hirschman has discussed at length the competing historical idea that commercial interaction gives people who lack traditional social ties a reason to cooperate in service of their financial interests. See Albert O. Hirschman, *The Passions and the Interests* 69–93 (1977) (arguing that market-based ties help strengthen social connections).

102. See Estlund, *Working Together*, *supra* note 93, at 47–50 (discussing development of bridging social capital in the workplace).

103. See Ronald L. Breiger & Philippa E. Pattison, *The Joint Role Structure of Two Communities’ Elites*, 7 *Soc. Methods & Res.* 213, 222 (1978) (finding that business ties are weaker than ties found in social and community networks); Mark Granovetter, *The*

inferior or demoted status of the former terms is misleading. In fact, the superficial nature of those relationships is vital to bridging the largest gaps between individual citizens.¹⁰⁴ If bridges of mutual trust and reciprocity could only be built on the basis of complete interest identification, it would be just about impossible to connect widely varying groups of citizens in a diverse polity.¹⁰⁵

This value of weak ties in a heterogeneous society resonates with important historical arguments for commercialization and capitalism in general.¹⁰⁶ One of the chief virtues of commerce, on this account, is that it serves to soften or civilize people so that they can cooperate for instrumental and self-interested reasons.¹⁰⁷ Consider an evocative hypothetical: As you are engaged in a violent brawl, you decide to throw a heap of money in the air, and then observe the other participants divert their attention to the important matter of collecting and dividing it all.¹⁰⁸ The moral of this story is that the very instrumental nature of commerce provides a reason for people to put aside their destructive passions and cooperate in service of their interests.¹⁰⁹ Commercial organizations may not be well suited to collective identification and shared self-definition, but that does not mean that weaker ties are of no use to society.

2. *Political Participation.* — Proponents of a second set of arguments from democracy contend that associational asymmetry is justified on the grounds that commercial organizations are not sufficiently connected to political participation to merit constitutional privilege.¹¹⁰ On this view, the principal value of associations lies in their structural role within democratic politics. In an extended republic, it can be difficult for individuals to participate meaningfully in self-government on their own.

Strength of Weak Ties: A Network Theory Revisited, 1 Soc. Theory 201, 224 (1983) (reporting that business and professional ties tend to be weak as compared to social and community-affairs ties).

104. On the importance of “weak ties” in extending individual discussion networks beyond intimate and cohesive groups, see Robert Huckfeldt et al., Political Environments, Cohesive Social Groups, and the Communication of Public Opinion, 39 Am. J. Pol. Sci. 1025, 1028–29 (1995).

105. See Estlund, Working Together, supra note 93, at 72–73 (arguing that the instrumental and hierarchical orientation of commercial workplaces encourages cooperation among diverse groups of people that might not otherwise come into contact with each other).

106. See generally Hirschman, supra note 101, at 9–66 (discussing historical arguments for the social and political value of capitalism).

107. Id. at 56–66 (discussing the idea of “*doux commerce*,” which “denoted politeness, polished manners, and socially useful behavior in general”).

108. A version of this story is told, in somewhat more colorful language, by Amartya Sen in his foreword to Albert Hirschman’s *The Passions and the Interests*. Amartya Sen, Foreword to Hirschman, supra note 101, at ix–x.

109. See Hirschman, supra note 101, at 31–42 (tracing the development of the idea that economic activity tempers humanity’s malign impulses).

110. See, e.g., Horwitz, First Amendment Institutions, supra note 83, at 243–47; Bhagwat, supra note 83, at 1024–25.

But in associations, individuals are able to have a much greater effect on the political process and political outcomes.

The argument for excluding commercial organizations based on their tenuous connection to politics comes in a narrow form and a broad form. On the narrow view, associations merit constitutional protection if they seek to influence the operation of state power.¹¹¹ That is, associations should be protected if they are actively engaged in the political process. The most obvious example of a protected association, on this account, would be a political party. Protection would also extend, on a relatively straightforward basis, to advocacy organizations like the NAACP, the NRA, the ACLU, and PETA.¹¹² Although these groups may not be nominating their own candidates for office, they are directly engaged in an effort to affect political and legal outcomes. Commercial organizations, however, operate in the medium of markets rather than in the medium of politics, and so there is an insufficient political nexus for those associations to deserve constitutional protection.¹¹³

As an initial observation, this narrow conception of political participation seems to unduly restrict the set of organizations that might plausibly receive constitutional protection. Most notably, it would exclude all organizations that are primarily concerned with social or intellectual development, like affinity groups, bowling leagues, debating clubs, or philosophical societies.¹¹⁴ But even if this restrictive approach survived our pretheoretical intuitions about various nonpolitical groups, it would not be restrictive enough (or restrictive in the right way) to exclude many commercial organizations. As has become all too apparent of late, business firms are frequently oriented toward affecting state power and political outcomes.¹¹⁵ Businesses devote extensive resources to lobbying, legislative drafting, and supporting political initiatives and candidates.¹¹⁶ One might object, with significant justification, that businesses have become *too* involved in shaping the law and influencing

111. Mazzone, *supra* note 82, at 748–50 (arguing for heightened constitutional protection of associations that seek to influence state power, but do not exercise it themselves).

112. See *id.* at 750 (suggesting that a variety of advocacy groups deserve strong associational protection).

113. *Id.*; see also Warren, *supra* note 82, at 136–37 (classifying business firms as associations that operate in an economic medium rather than in a political or social medium).

114. It would also seem to exclude the Boy Scouts, which prides itself on its member organizations' independence from political involvement. See, e.g., Mazzone, *supra* note 82, at 766–67 (concluding that the Boy Scouts does not deserve strong associational protection).

115. See John C. Coates IV, Corporate Politics, Governance, and Value Before and After *Citizens United*, 9 J. Empirical Legal Stud. 657, 673 (2012) (“Most of the S&P 500 is politically active, with 71 percent engaged in annual lobbying on average, and 70 percent sponsoring PACs making donations.”).

116. *Id.* at 684–90 (detailing increase in corporate political activity and spending in the years since the Supreme Court decided *Citizens United*).

elections. But it seems almost precisely backwards to suggest that businesses can be carved out of the freedom of association because they are not sufficiently connected to political participation.

The broad form of the political-participation argument is more nuanced and sophisticated. Rather than focusing on direct political advocacy, it locates the value of associations in their structural (or infrastructural) role in facilitating public discourse.¹¹⁷ On this view, while commercial associations may be engaged in political affairs, they are not an essential part of the exchange and deliberation among citizens that ultimately legitimates democracy itself.¹¹⁸

Initially, this account seems hard to square with the empirical reality of the workplace. Americans spend an increasing amount of time at work and, for most of them, work is a commercial association.¹¹⁹ While they are working, people talk about issues related to politics and public affairs. They talk about conditions, wages, and hours, but they also exchange views on social policy and current events.¹²⁰ The effort to define workplace conversations out of the realm of public discourse, therefore, appears to be a bit hasty.

The public-discourse form of the argument from democracy can be reformulated in an effort to deflect these empirical observations. For example, rather than claim that public discourse is absent from commercial organizations (which is implausible), several commentators have instead argued that public discourse is merely incidental or coincidental in those organizations.¹²¹ That is, although political and social conversations happen at work, commercial organizations are neither set up to

117. See Horwitz, *First Amendment Institutions*, supra note 83, at 247 (arguing that corporations are “not sufficiently central to the infrastructure of public discourse to merit the distinctive autonomy that applies to First Amendment institutions”); Bhagwat, supra note 83, at 1025 (“Most for-profit corporations have the primary goal of making profits, a goal with no relevance to self-governance.”).

118. See Post, supra note 91, at 289 (arguing that the workplace is not an important site of public discourse).

119. See Lester M. Salamon et al., *Holding the Fort: Nonprofit Employment During a Decade of Turmoil* 3 (2012) (reporting that nonprofit employment makes up 10.1% of total private employment in the United States).

120. See Cynthia L. Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* 118–21 (2003) (describing the workplace as a “leading site of public discourse” where “citizens converse with each other about shared concerns, social issues, and public affairs”).

121. See Horwitz, *First Amendment Institutions*, supra note 83, at 246 (arguing that politically relevant conversations in business corporations are “incidental” to the structure of those organizations); Bhagwat, supra note 83, at 1001 (arguing that political participation and influence are either “instrumental or coincidental” in commercial organizations); cf. Carpenter, supra note 10, at 1582 (arguing that commercial associations are not the “primary venues” for discussing ideas).

host those conversations,¹²² nor are they an essential ingredient in producing them.¹²³ Commercial organizations, then, are just an irrelevant contextual detail without any significant connection to public discourse itself.

It is true that most commercial organizations are not set up with the express goal of achieving political results.¹²⁴ Instead, whatever lobbying a firm does—or whatever political contributions it makes—is in service of its overall goal of making a profit. In fact, proponents of the shareholder-primacy view of corporate law claim that any political activity undertaken by a firm must be in the interests of producing value for shareholders.¹²⁵ But the fact that commercial organizations are formed to achieve instrumental goals does not mean that they are less relevant to the process of democratic deliberation at the heart of public discourse. In fact, the instrumental goals of commercial organizations serve as a powerful force to connect people who might not ordinarily associate with one another.¹²⁶ That is, the instrumental financial goals serve to unite citizens who do not share traditional forms of identity. Commercial organizations, then, are not merely the backdrop of conversations that could just as easily happen elsewhere in society.¹²⁷ They are instead a unique location in which citizens can hear about the experiences of those from different backgrounds, find mutual interests across a wide range of social groups, and enlarge their store of empathy for the concerns and conditions of others. If these conversations did not happen in commercial organizations, they likely would not happen at all.

It seems, then, that arguments from democracy fail to justify associational asymmetry. Rather than undermining their function as training grounds for citizenship or as sites of public participation and discourse, the instrumental nature of commercial organizations is exactly what allows them to carry out those functions so well. The search for a principled argument to justify associational asymmetry, therefore, needs to look beyond these democratic premises.

122. See Bhagwat, *supra* note 83, at 1024 (contrasting commercial associations with associations whose purpose it is “to organize individuals who share[] its . . . political views and to express those views”).

123. See Horwitz, *First Amendment Institutions*, *supra* note 83, at 244 (arguing that the same conversations about public affairs that happen in the corporate workplace could just as easily take place in a variety of other locations).

124. Politically oriented newspapers and magazines seem to be particularly notable exceptions, as are commercial lobbying firms.

125. See generally Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 *Harv. L. Rev.* 83 (2010) (arguing that corporate political speech should reflect shareholder preferences and proposing reforms to ensure that corporate speech is aligned with shareholder interests).

126. See Estlund, *Working Together*, *supra* note 93, at 5–6 (arguing that psychological and economic features of the workplace facilitate integration).

127. *Contra* Horwitz, *First Amendment Institutions*, *supra* note 83, at 244.

B. *Checking Power*

Another argument for associational asymmetry is that commercial associations cannot check the power of the state in the same way as other associations.¹²⁸ The institutions of “civil society”—clubs, leagues, civic associations, and churches—serve as genuinely independent centers of countervailing power that can fend off the claims of an ambitious government.¹²⁹ These centers of power tend to form around distinctive (and often dissenting) normative viewpoints and provide an institutional base for efforts to challenge the state’s encroachment on the private sphere.¹³⁰ But commercial organizations, because they are already pervasively regulated, cannot serve this checking function. The so-called “logic of congruence,” which demands that the internal governance of groups mirror that of the state,¹³¹ has already won the day in the commercial sphere and stripped businesses of the independence and distinctiveness necessary to serve as a counterweight to government power.

As an initial matter, it seems that the sharp distinction between independent “voluntary” sector and pervasively regulated commercial sector might be somewhat overdrawn. For example, charitable organizations are often dependent on government subsidies to conduct their operations, and conditions on that funding demand that those charities satisfy a variety of state requirements.¹³² Those organizations are also subject to state regulatory authority that both constitutes and polices charitable purpose, as well as federal control of internal governance through the IRS’s administration of the tax laws.¹³³ In the commercial sphere, it is

128. See Bucholtz, *supra* note 82, at 576 (noting that instead of checking state power, corporations pose their own threats to individual liberty); Aviam Soifer, “Toward a Generalized Notion of the Right to Form or Join an Association”: An Essay for Tom Emerson, 38 Case W. Res. L. Rev. 641, 667 (1988) (suggesting that corporations do not check state power in the same way as nonprofits).

129. See John D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* 5 (2012) [hereinafter Inazu, *Liberty’s Refuge*] (stating that associations provide a “buffer between the individual and the state that facilitates a check against centralized power”); see also Tocqueville, *supra* note 67, at 324 (arguing that associations are “powerful and enlightened member[s] of the community, which cannot be disposed of at pleasure or oppressed without remonstrance”).

130. See Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841, 1853 (2001) (arguing that associations are “hedgerows of civil society” or “wrenches in the works of whatever hegemonizing ambitions government might be tempted to indulge”).

131. See Rosenblum, *Membership and Morals*, *supra* note 94, at 36–41 (identifying and criticizing the “logic of congruence”).

132. Lester Salamon refers to the partnership between government and the institutions of civil society as “third-party government.” Lester M. Salamon, *Partners in Public Service: Government–Nonprofit Relations in the Modern Welfare State* 41 (1995) (internal quotation marks omitted).

133. See James J. Fishman, *Stealth Preemption: The IRS’s Nonprofit Corporate Governance Initiative*, 29 Va. Tax Rev. 545, 550–57 (2010) (discussing and critiquing the IRS’s pervasive regulation of nonprofits); Dana Brakman Reiser, *Foreword: The Federaliza-*

true that businesses are subject to comprehensive regulatory schemes regarding worker safety, fair-labor standards, and the provision of health insurance and other benefits.¹³⁴ But the advent of corporate self-regulation and co-regulation, particularly with regard to global governance issues, complicates the image of businesses passively complying with all-encompassing government edicts.¹³⁵

A more significant problem with the argument from checking, however, is that it seems to fly in the face of what we know about commercial firms. Even in the post-New Deal era, where the government's extensive regulation of the market has largely prevailed, businesses have hardly taken these developments lying down.¹³⁶ Companies instead spend massive amounts of money on lobbying efforts aimed at deregulating their industries, make large contributions to political candidates that might ease their regulatory burdens, and fund research that shows how invasive governmental policies are inefficient and burdensome job killers.¹³⁷ In short, it is hard to see how commercial associations are outside the scope of a theory that focuses on exercising power in opposition to the government.¹³⁸

Take, for example, the Obama Administration's decision to delay the implementation of the employer-responsibility provision of the Patient Protection and Affordable Care Act.¹³⁹ The provision at issue, which requires organizations with over fifty employees to provide health insurance that meets minimum-coverage standards, was a key aspect of

tion of Nonprofit and Charity Law, 99 Ky. L.J. 637, 637 (2010) (discussing escalating federal regulation of nonprofits).

134. See I.R.C. § 4980H (2012) (regulating employer provision of health insurance); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012) (regulating labor practices); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (regulating workplace safety).

135. See Virginia Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* 8–19 (2001) (arguing that many companies develop new international standards that go above and beyond what is required by national law).

136. *Contra* Horwitz, *First Amendment Institutions*, *supra* note 83, at 227 (arguing that commercial firms are “more likely to accept or even welcome regulation by the state”).

137. See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 Cornell J.L. & Pub. Pol’y 643, 653 (2011) (“Given PACs, issue advocacy, lobbying, and the enormous influence of corporations on the political process and governance generally, the corporate voice [can] be heard loud and clear in elections and in Washington.”); see also Amy J. Hillman et al., *Corporate Political Activity: A Review and Research Agenda*, 30 J. Mgmt. 837, 837–38 (2004) (documenting pervasive interests of business in influencing public policy).

138. See Redish & Wasserman, *supra* note 64, at 261–64 (arguing that corporations are particularly well suited to check governmental power).

139. See Jackie Calmes & Robert Pear, *Crucial Rule Is Delayed a Year for Obama's Health Law*, N.Y. Times (July 2, 2013), <http://www.nytimes.com/2013/07/03/us/politics/obama-administration-to-delay-health-law-requirement-until-2015.html> (on file with the *Columbia Law Review*) (reporting announcement of delay).

comprehensive health-care reform.¹⁴⁰ But after relentless lobbying and political advocacy by businesses, which insisted that the provision would burden their operations and force them to cut jobs, the Administration announced that its full implementation would be delayed.¹⁴¹ This is certainly not to suggest that businesses will ultimately be successful in fending off the regulation, much less in keeping the government out of employer-provided healthcare. But the episode at least makes clear that commercial organizations are capable of exercising a significant amount of countervailing power.

None of this should be surprising, given that organization, motivation, and resources are crucial in exercising a check on the government.¹⁴² Commercial businesses are some of the most highly organized groups in society. Many modern corporations divide labor into an array of discrete tasks that are often accompanied by specific and tightly controlled role descriptions. Those roles are integrated through a well-defined organizational chart that is designed to operate with maximum efficiency in achieving business goals.¹⁴³ That kind of organizational discipline is rarely matched by voluntary and civic associations.

Similarly, managers of commercial firms are likely to have tremendous motivation to counteract the reach of state regulation. Managers are expected to maximize the value of the firm for shareholders.¹⁴⁴ If they do not work effectively toward that end, they will be at significant risk of removal. Those incentives are often supplemented by compensation packages that aim to align managerial incentives with shareholder interests.¹⁴⁵ Government regulation can interfere with maximizing profits

140. See I.R.C. § 4980H (2012) (regulating employer provision of health insurance).

141. See Calmes & Pear, *supra* note 139 (describing criticisms of the requirement that led to delay).

142. See Redish & Wasserman, *supra* note 64, at 263 (“Checking is a question of power, resources, and incentive to perform the function; corporations generally possess all three.”); see also Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 *Am. B. Found. Res. J.* 521, 529–44 (examining sources and premises of the idea that free expression is valuable in part because of its ability to check the abuse of official power).

143. See Rainer Strack et al., *Bos. Consulting Grp., Creating People Advantage 2013: Lifting HR Practices to the Next Level 15* (2013), available at https://www.bcgperspectives.com/Images/Creating_People_Advantage_Oct_2013_tcm80-147615.pdf (on file with the *Columbia Law Review*) (concluding that successful companies “have clearly defined performance criteria for each job function”).

144. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *Geo. L.J.* 439, 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 *U. Pa. L. Rev.* 2063, 2073 (2001) [hereinafter *Roe, Shareholder Wealth Maximization Norm*] (“Norms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth . . .”).

145. See Stephen M. Bainbridge, *Corporation Law and Economics* 418 (2002) [hereinafter *Bainbridge, Corporation Law*] (“Tying up a proportion of directors’ personal

in a variety of ways: It can impose costs on operation, increase overhead, delay turnaround time, and limit growth opportunities. Managers have powerful motivation, therefore, to leverage the firm's power to resist regulations that jeopardize its bottom line.

Finally, commercial firms often possess the superior resources necessary to achieve their regulatory objectives. Through sales and investment, commercial firms can build up monetary assets that few individuals or noncommercial actors can equal. Those assets, in turn, can be deployed in the political process to great effect. If limiting the ambition of the state turns on the number of powerful nongovernmental actors, it would be hard to ignore the presence and influence of business corporations.¹⁴⁶

None of this, of course, is to say that commercial organizations will wield this countervailing power wisely. In fact, given their structural incentives, the only safe bet is that they will do so in the interests of the financial value of the firm. But if associations deserve constitutional protection because they serve as sites of countervailing power, then the exclusion of commercial organizations from that protection lacks a convincing justification.

C. *Equality*

The argument from equality offers the most plausible existing account of associational asymmetry. The basic claim, according to its proponents, is that in a market economy, nondiscriminatory access to the channels of commerce is necessary for equal citizenship.¹⁴⁷ To participate in society on an equal basis, in other words, all citizens must have fair access to basic material resources.¹⁴⁸ And because those resources are predominantly distributed by commercial organizations, those firms cannot be given a free hand to adopt exclusive practices, either toward employees or toward customers. As Justice O'Connor noted in *Roberts*,

wealth in stock of the corporation . . . further align[s] the directors' interests with those of shareholders."); see also Eliezer M. Fich & Anil Shivdasani, *The Impact of Stock-Option Compensation for Outside Directors on Firm Value*, 78 *J. Bus.* 2229, 2229 (2005) (noting rise of stock-based compensation for corporate directors).

146. See Redish & Wasserman, *supra* note 64, at 263 ("In the context of the checking function, the greater the number of motivated and powerful private speakers, the smaller the danger of undue power centralization and unchecked governmental excess.").

147. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 632 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (noting the importance of "nondiscriminatory access to commercial opportunities"); Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 *Nw. U. L. Rev.* 839, 877-78 (2005) (discussing the importance of equal access to essential resources); cf. Carpenter, *supra* note 10, at 1585-86 ("In a capitalist economy, once a person has economic means, other benefits tend to follow, though less easily for members of certain groups.").

148. See Shiffrin, *supra* note 147, at 878 ("[P]rinciples of equal opportunity have specific application where significant access to fundamental resources is at stake . . .").

states must be able to pursue “the profoundly important goal of ensuring nondiscriminatory access to commercial opportunities in our society.”¹⁴⁹

At the outset, it is important to clarify a few aspects of the equality argument. First, the claim is not about the strength of the associational interest in commercial organizations. It says nothing about the worth or value of associating for commercial purposes, either in terms of individual autonomy or in terms of democratic theory. Rather, the argument focuses on the strength of competing interests at stake when commercial organizations claim a right to discriminate in employment or service.

Second, the relevance of the equality argument is limited to the context of antidiscrimination law. It focuses on the distribution of resources in a market-oriented society and the harm that would result if commercial organizations *exclude* certain segments of the population from access to those resources. The equality argument is relevant, then, in cases involving organizations claiming a right to discriminate, but not when an organization is claiming a constitutional interest in resisting different burdens on its association.¹⁵⁰

Thinking carefully about these two clarifications, however, reveals why the argument from equality is unpersuasive, or at least incomplete. If one accepts that individual-autonomy interests in commercial associations are on par with those interests in nonmarket associations (and the argument from equality provides no reason to reject this proposition), then one might reasonably look for a way to solve the problem of equal access while infringing on those interests as little as possible. In other words, one might look for a way to make sure that the “channels of commerce” remain clear to potentially marginalized groups while narrowly tailoring the solution to the scope of the problem.

But it seems that the strategy of maintaining restrictions on all market participants is an overly blunt way to achieve the equality objective.¹⁵¹ Many, if not most, commercial firms, particularly those that operate in thick and competitive markets, pose no realistic threat to equal access. If a commercial firm, contrary to its own economic interests in most locations and scenarios, adopted a discriminatory policy toward employees or customers, the excluded individuals would be free to obtain employment

149. *Roberts*, 468 U.S. at 632 (O'Connor, J., concurring in part and concurring in the judgment).

150. See, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 21–23 (1989) (involving a freedom-of-association challenge to an age restriction on the use of recreational dance halls); *NAACP v. Alabama*, 357 U.S. 449, 451–53 (1958) (involving a freedom-of-association claim challenging the application of a state law requiring disclosure of membership lists); *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 41–42 (1st Cir. 2005) (involving a freedom-of-association challenge to a state statute prohibiting the retail sale of alcoholic beverages by franchisees).

151. See Epstein, *Constitutional Perils*, supra note 2, at 132 (arguing that discrimination by one firm does not necessarily lead to economic harm).

or services from a host of other commercial firms.¹⁵² The real threat of equal access to basic resources, on this view, only emerges when a commercial firm enjoys market power, such that employees or customers face substantially diminished exit options.¹⁵³

Perhaps, then, a sincere concern about access to basic resources would indicate some kind of monopoly–nonmonopoly dichotomy in freedom-of-association law, rather than an expressive–commercial dichotomy. In other words, a better inquiry might focus more closely on the context of particular markets and transactions and on the presence of monopolistic or quasi-monopolistic features that raise credible concerns about access to goods and services. Indeed, several commentators have proposed that a monopoly test would be more principled and defensible than the current approach.¹⁵⁴ To be sure, this line of argument is subject to objections about the feasibility of administering a monopoly–nonmonopoly distinction. It is also subject to serious concerns about the social message of caste and subordination that might be sent by discriminating firms and the dignity harms that would result. But it is important to observe that these concerns are not limited to the commercial arena.

Relatedly, the limited scope of the equality argument—which only applies when antidiscrimination laws are in question—fails to explain why the expressive–commercial dichotomy should apply to other kinds of freedom-of-association claims. Consider the facts of *Wine & Spirits Retailers, Inc. v. Rhode Island*, for example.¹⁵⁵ The claim in that case, as discussed above, was that a state statute prohibiting the retail sale of alcoholic beverages by franchisees violated the company’s freedom-of-association rights.¹⁵⁶ That claim was rejected on the strength of the proposition that participants in the commercial marketplace do not have the same freedom-of-association interests as participants in the marketplace of ideas.¹⁵⁷ But the concerns motivating the argument from equality are entirely absent from the equation. The liquor company was trying

152. See *id.* (arguing that as long as the market is open, those who are discriminated against are perfectly free to join another firm or obtain goods or services elsewhere). This assumes, of course, that there is no concerted action among multiple firms.

153. See *id.* (arguing that, in the absence of monopoly power, private discrimination does not pose a real threat to equal access); see also Nancy L. Rosenblum, *Compelled Association: Public Standing, Self-Respect, and the Dynamic of Exclusion*, in *Freedom of Association*, *supra* note 66, at 75, 87 (arguing that equal access to material resources is not threatened when commercial opportunities are readily available elsewhere).

154. See, e.g., Epstein, *Constitutional Perils*, *supra* note 2, at 120 (arguing that associations do not jeopardize equal access unless they have monopoly power); Vischer, *Right of Assembly*, *supra* note 2, at 1416 (arguing that monopoly, rather than commerciality, triggers equal-access concerns); Inazu, *Factions*, *supra* note 2, at 1452–53 (acknowledging that an antimonopoly approach may be superior to the commercial–noncommercial distinction).

155. 418 F.3d 36.

156. *Id.* at 51–52.

157. *Id.* at 51–53.

to bring more businesses within its network, not trying to exclude any group of people from employment or enjoyment of its services.

A similar skepticism of associational interests pervades the Supreme Court's opinion in *City of Dallas v. Stanglin*.¹⁵⁸ In that case, the Twilight Skating Rink in Dallas had challenged a city ordinance that limited the use of recreational dance halls to individuals between fourteen and eighteen years of age.¹⁵⁹ The skating rink claimed that its patrons had a right to associate with other customers outside that age range.¹⁶⁰ Although the Court recognized that interactions at a dance hall fit within the ordinary meaning of "association," it confidently proclaimed that mere "patrons of the same business establishment" do not enjoy associational rights on that basis.¹⁶¹ Once again, the expressive–commercial dichotomy is doing real work without any perceptible connection to concerns of equal access to basic resources on the part of disadvantaged groups. So, while arguments from equality might provide some traction in explaining asymmetry when antidiscrimination laws are challenged, they provide no explanation for the persistent intuition that the expressive–commercial dichotomy extends more broadly in cases involving freedom of association.

* * *

Existing accounts of associational asymmetry do not justify the doctrine. Arguments from democracy fail to distinguish commercial associations from other associations on the grounds of training for citizenship or contribution to public discourse. The argument from checking cannot show that businesses are incapable of limiting overreach by the state. And arguments from equality struggle to justify asymmetry in competitive markets or outside the context of antidiscrimination law. Associational asymmetry, therefore, remains in serious need of a principled defense.

IV. IN DEFENSE OF ASYMMETRY

Considering the failure of existing defenses, it might be useful to look at the puzzle of associational asymmetry from a different angle. In this Part, I will argue that we can find a more convincing justification by looking at association from the perspective of *personhood*.¹⁶² The concept of personhood is notoriously slippery—though no more so than concepts like autonomy or equality—so a more detailed specification is required.

158. 490 U.S. 19 (1989).

159. *Id.* at 20.

160. *Id.* at 22.

161. *Id.* at 24.

162. See generally Margaret Jane Radin, Property and Personhood, 34 *Stan. L. Rev.* 957 (1982) (offering "personhood perspective" on property law). This Part builds on an argument I began to develop in the context of religious liberty claims. See James D. Nelson, Conscience, Incorporated, 2013 *Mich. St. L. Rev.* 1565, 1575–1610.

But enough can be said at the outset to give a sense of what is to come. From the personhood perspective, associations are valuable primarily because they are the environments in which people constitute themselves. To say this is not to take the radical communitarian stance that individuals are merely the products of associations.¹⁶³ But the personhood perspective does recognize that, to a significant degree, people develop their identities within and through associations.¹⁶⁴

The personhood perspective is a powerful tool. It provides an account of how some associations come to have moral weight. When affiliation with a group or organization becomes bound up with personhood—with the identity and self-constitution of individuals—that association demands respect.¹⁶⁵ If the state is obligated to respect individual personhood and to take steps to avoid interfering with its free development and expression, then the state will be similarly limited in interfering with associations in which personhood is developed and expressed.¹⁶⁶

Although the personhood perspective is useful, it is not a tool for all occasions. Just as some associations are intimately connected to the development of identity, others seem to be far removed from that value. That is, some associations are bound up with personhood and some are not. The value of personhood, then, can serve as a normative basis for justifying the freedom of association, while also allowing us to make distinctions among various kinds of groups.¹⁶⁷

This introduction to the personhood perspective has been deliberately abstract, and the connection between personhood and association needs considerable development. Before the personhood perspective can be used to distinguish among categories of association and to make

163. See Amitai Etzioni, *Contemporary Liberals, Communitarians, and Individual Choices*, in *Socioeconomics: Toward a New Synthesis* 59, 68 (Amitai Etzioni & Paul R. Lawrence eds., 1991) (identifying “strong” communitarian position as positing that individuals are entirely constituted by communities).

164. See Michael J. Sandel, *Liberalism and the Limits of Justice* 150 (1998) [hereinafter Sandel, *Limits of Justice*] (arguing that people’s identities are *partially* formed by various associations and communities); cf. Garnett, *supra* note 130, at 1849–56 (highlighting the educative function of associations); George Kateb, *The Value of Association*, in *Freedom of Association*, *supra* note 66, at 35, 36 (arguing that associations are “integral to a free human life”).

165. Cf. Radin, *supra* note 162, at 959 (discussing how people constitute themselves through their relationships with property).

166. See Amy Gutmann, *Identity in Democracy* 86–116 (2003) (arguing that the free expression of identity is a core value of voluntary associations); cf. Shiffrin, *supra* note 147, at 840–41 (arguing that “social associations” are valuable because they are sites where people develop and test out ideas). Shiffrin’s important account is in some ways compatible with the personhood perspective, but it focuses more on purely cognitive aspects of idea formation than on the affective states that foster development of personal identity. *Id.* at 880.

167. Cf. Radin, *supra* note 162, at 986 (arguing that the value of personhood provides moral grounds for making distinctions among different kinds of property).

wider observations about the weight of associational interests, one needs to see just how personhood becomes intertwined with the affairs of certain groups.

A. *Constructing Personhood*

At first it might seem that there is some tension between the idea of personhood and a focus on associations. Personhood is a matter of autonomy and individual development. It is about constructing a narrative about the self—about who we are as persons. We are each responsible for writing our own life stories. Persons are separate, autonomous, and self-creating.¹⁶⁸ Personhood, in other words, is personal.

But persons do not write their own stories without input from the social world. There is, in other words, a “relational dimension” to identity creation.¹⁶⁹ That relational dimension includes the many ways in which individuals construct their identities through interaction in a variety of groups.¹⁷⁰ Some people have more robust communal ties than others, but all of our identities are built, at least in part, through membership and participation in associations.¹⁷¹

The idea of constructing personhood through affiliation with associations might seem overly metaphorical, but it need not take that cast. We can make the basic mechanism more concrete by describing

168. Michael Sandel has criticized liberal individualism, and particularly the work of John Rawls, on the grounds that it assumes an “unencumbered” self that is totally separate from communities and affective attachments. See Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *Pol. Theory* 81, 87 (1984). In a similar vein, Charles Taylor has criticized liberal theory for its “atomism” or its failure to recognize the cultural and social preconditions of autonomy. See Charles Taylor, *Atomism*, in 2 *Philosophy and the Human Sciences: Philosophical Papers* 187, 187–210 (1985). Although these criticisms may be appropriate for some libertarian theories, they miss the mark with regard to contemporary liberalism, particularly when it comes to Rawls’s work. See C. Edwin Baker, *Sandel on Rawls*, 133 *U. Pa. L. Rev.* 895, 897–905 (1985) (refuting the critique that Rawls’s work depends on an atomistic conception of the person); see also Shiffrin, *supra* note 147, at 867 n.82 (noting that social cooperation is the starting point for Rawls’s work).

169. See generally Vischer, *Conscience*, *supra* note 46 (discussing the “relational dimension” of conscience).

170. See Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 *Soc. Psychol. Q.* 284, 285 (2000) (discussing how individuals construct their identities in various groups, organizations, communities, and institutions). See generally George H. Mead, *Mind, Self, and Society* (1934); Robert K. Merton, *Social Theory and Social Structure* (1957).

171. See Sheldon Stryker, *Identity Salience and Role Performance: The Relevance of Symbolic Interaction Theory for Family Research*, 30 *J. Marriage & Fam.* 558, 558–61 (1968) (discussing research on the development of identity in family life); see also Larry May, *The Morality of Groups* 181 (1987) (“[N]o person fails to be a member of at least one social group.”).

how individuals *identify* with various social groups.¹⁷² Identification is a process by which individuals come to see their roles in groups as deeply tied to their own personal identities. These roles, in turn, must be integrated with other core projects and commitments and ordered in a way that creates a unified conception of self.¹⁷³

Although it is possible to identify with a wide variety of groups, a few familiar examples might help to clarify the basic idea. To begin with, it is typical for parents to identify with their roles in families. Parents tend to form strong emotional attachments to the family unit and strive to ensure that their other projects and priorities are consistent with that role. Similarly, many members of religious organizations regard their roles in spiritual communities as prominent aspects of their identities. These kinds of relationally thick associations might be thought of as paradigm cases, but the basic phenomenon of identification extends beyond the home and the church.

Identification with groups, however, is not the only way in which people interact with the social world. Our membership in families and religious organizations is important, but it is hardly typical of how we connect with associations. If all of our relations were as deep as those of family and church, it would be nearly impossible to balance conflicting demands, prioritize among commitments, or change the course of our lives in light of new circumstances.

Perhaps more typical are those memberships or affiliations with which we do not identify. We might be members of Sam's Club or a hotel rewards program. We might be investors in the same security or customers of the same bank. We might also be members of a video store, a rental car service, or a credit card loyalty system. In these kinds of affiliations—which might be called instrumental or calculative—there is little connection between membership and personhood.¹⁷⁴ People do not typically define who they are by reference to these associations, nor do they tend to form deep emotional attachments to them.

The key to the distinction between these two kinds of affiliation—and therefore the key to understanding how associations come to implicate personhood—is in the subjective attitudes of individuals who participate in groups. Individual identification with an association involves psychological attachment to group goals and adoption of group perspectives.¹⁷⁵ It is an active process of integrating one's membership in

172. Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. Chi. L. Rev. 1213, 1223 (1994) [hereinafter Dan-Cohen, *Between Selves and Collectivities*] (describing the process of identification with social roles); see also Kwame Anthony Appiah, *The Ethics of Identity* 66–69 (2005) (describing the role of identification in constructing identity).

173. Dan-Cohen, *Between Selves and Collectivities*, supra note 172, at 1220–25.

174. See id. at 1225 (discussing performance of “detached” roles).

175. See Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* 129–35 (2007) (describing the process by which members of a group come to act for collec-

an association with central aspects of the self and arranging that role in relation to other important projects and commitments.¹⁷⁶

Although this process is largely subjective, it is patterned by social norms and expectations for behavior within different groups.¹⁷⁷ Some kinds of affiliations cry out for deep, constitutive relationships. In modern societies, where romantic love is the ideal of domestic partnership and children are no longer regarded primarily as a source of supplementing family income, norms of family life encourage deep attachment.¹⁷⁸ Likewise, the traditions and doctrines of many faiths demand that religious community be at the center of the believer's identity. But nobody expects deep attachment to a mutual fund or a car insurance company. In fact, such attachments would likely be treated as inappropriate or potentially a symptom of some sort of character defect. Identifying with groups may be a matter of individual psychology, but it typically follows a set of social expectations that significantly influences how people relate to certain kinds of associations.¹⁷⁹

By looking at the dominant pattern of individual attachment to different kinds of associations, we can begin to make distinctions among them. Some associations are made up of people who have deep normative and affective ties to the group. In these associations, individuals identify with the group and view their membership as an important aspect of their personhood. These associations, in other words, are genuine communities that are constitutive of their members' identities.¹⁸⁰ Call these communities *constitutive associations*.

tively constructed group reasons); see also Dominic Abrams & Michael A. Hogg, Collective Identity: Group Membership and Self-Conception, in *Blackwell Handbook of Social Psychology: Group Processes* 425, 425 (Michael A. Hogg & Scott Tindale eds., 2001) [hereinafter *Blackwell Handbook*] (describing the psychological connection between self and various social groups).

176. Abrams & Hogg, *supra* note 175, at 439.

177. See Joel Cooper et al., Attitudes, Norms, and Social Groups, in *Blackwell Handbook*, *supra* note 175, at 259, 262 ("When people see themselves as group members, group norms will be more likely to influence the ways in which they form, act upon, and change their attitudes."); cf. Hanoach Dagan, Unjust Enrichment: A Study of Private Law and Public Values 44 (1997) (arguing that construction of identity through relations to property is "neither universal, nor subjective, but instead primarily socially constituted").

178. See Andrew Cherlin, Changing Family and Household: Contemporary Lessons from Historical Research, 9 *Ann. Rev. Sociology* 51, 52-55 (1983) (describing how industrialization led to an increase in paid labor outside the household, which caused a corresponding shift from viewing family members as fellow laborers to viewing them as objects of affection).

179. See Dan-Cohen, Between Selves and Collectivities, *supra* note 172, at 1223 ("[A]lthough identification describes an inner or subjective process by which the self is shaped and modified, it is unlikely to be, in general, idiosyncratic."); see also Dagan, *supra* note 177, at 44 (arguing that social meaning determines the resources with which we are expected to identify).

180. See Meir Dan-Cohen, Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State, 79 *Calif. L. Rev.* 1229,

In constitutive associations, individual members internalize the life of the group and integrate it into their sense of self. The group's goals become their own goals and the collective good is intertwined with their own good. In these normatively rich associations, individuals have a shared interest in free development of identity through the group.¹⁸¹ These shared interests in self-development are not merely coincidental, such as when drivers on a congested highway share an interest in getting to their destinations as quickly as possible. Instead, individuals are engaged in a common project of working out a shared vision of the good.

From the personhood perspective, then, we can see why state interference with the internal governance of associations poses a significant threat of harm to individuals. When the state places burdens on constitutive associations, it endangers the authenticity of identity creation. To be sure, not all government intrusions pose the same threat. State regulations that, in effect, rewrite the basic script of membership in a group present an enormous burden on personhood development. For example, a ban on religious discrimination in hiring might undermine the constitutive function of a church or similar association.¹⁸² Certain routine filing or disclosure requirements, however, might not be as significant.

The interest in free development of identity through a community, however, is only powerfully at stake within constitutive associations. That interest is a central normative value of association. From the personhood perspective, that value can serve as a basis for distinguishing among different categories of associations and for assessing the moral weight of their claims to autonomy.

B. *Of Profit and Personhood*

To see how the personhood perspective can shed light on the problem of associational asymmetry, consider the entity at the core of the common intuition about commercial associations—the modern business corporation. The idea that Wal-Mart or AT&T might be able to invoke the freedom of association to resist laws regulating the marketplace tends

1254–61 (1991) (distinguishing between organizations, communities, and the state); see also Sandel, *Limits of Justice*, supra note 164, at 150 (describing a “constitutive conception” of community); Nelson, supra note 162, at 1581–83 (building on Sandel’s conception of constitutive community).

181. See Gutmann, supra note 166, at 86–116 (describing the value of voluntary groups for identity formation); cf. Randall P. Bezanson et al., *Mapping the Forms of Expressive Association*, 40 *Pepp. L. Rev.* 23, 73 (2012) (distinguishing shared goals of a group from those pursued for “atomistic rewards”).

182. See Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 *Nw. U. L. Rev.* 1183, 1187–96 (2014) (discussing the importance of church autonomy in matters relating to the employment of clergy).

to produce a skeptical reaction.¹⁸³ But as we saw from the unfairness objection, mere skepticism is not enough to justify asymmetrical treatment.¹⁸⁴ Instead, an adequate defense must provide a more detailed description of the legal, social, and economic norms that govern modern corporate life and an account of how those norms undermine strong personal identification among various constituencies.¹⁸⁵

Consider the modern shareholder in a large, publicly traded business corporation. Public corporations exhibit a separation of ownership and control. Individual investments in the firm are not typically accompanied by significant managerial authority.¹⁸⁶ Instead, professional managers have control over the ordinary operations of the firm.

Given this state of affairs, modern shareholders tend to be “rationally apathetic” about the companies in which they invest.¹⁸⁷ When shareholders are widely dispersed, and their own investment portfolios are diversified across many different businesses,¹⁸⁸ they have only weak incentives to become involved in corporate governance. Rather than use their resources to become fully informed and to place themselves in a position to influence corporate policy or strategy, rational retail investors will adopt a passive role that leaves virtually all decisions to management.¹⁸⁹

This shareholder passivity, in turn, leads individual shareholders to value the corporations in which they invest primarily, if not exclusively, for the instrumental financial returns they promise. Shareholders, on this model, are best thought of as residual claimants on corporate assets,

183. See Paul Horwitz, Comment, *The Hobby Lobby Moment*, 128 Harv. L. Rev. 154, 179 (2014) (noting that, for most people, the idea that businesses have freedom-of-association rights “falls . . . into the realm of ‘unutterability’”).

184. See *supra* Part II.B.

185. For a discussion of the relationship between corporate norms and personal identity in the context of religious free exercise, see Nelson, *supra* note 162, at 1586–1610. Although the analysis in this section does not include every conceivable corporate stakeholder, it focuses on those constituencies that have the most plausible claim of membership in the business association.

186. See Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* 117 (1932) (“[W]ith the increasing dispersion of stock ownership in the largest American corporations . . . there are no dominant owners, and control is maintained in large measure apart from ownership.”); see also Bainbridge, *Corporation Law*, *supra* note 145, at 199 (“[T]he diffuse nature of U.S. stock ownership and regulatory impediments to investor activism insulate directors from shareholder pressure.”).

187. See Mark J. Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* 10–11 (1994) (discussing the impact of a rationally apathetic shareholder on management); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 Harv. L. Rev. 1735, 1745 (2006) (noting minimal shareholder incentives to participate actively in decisionmaking).

188. See generally Richard A. Brealey & Stewart C. Myers, *Principles of Corporate Finance* 153–94 (6th ed. 2000).

189. See, e.g., Bainbridge, *Corporation Law*, *supra* note 145, at 512 (noting that control of public firms is “vested in the directors and their subordinate professional managers”).

rather than as full owners of corporate property.¹⁹⁰ Accordingly, their focus will naturally be on the financial value of their residual claims.¹⁹¹

From the personhood perspective, there is little reason to give these associational interests significant moral weight. It is certainly true that money is important to people, and investment income might enable them to realize certain goals and aspirations that would be impossible without it. But these instrumental financial interests are largely fungible. Those same goals and aspirations could be achieved just as well—and in precisely the same way—if the money were to come from a different source. For typical shareholders in modern corporations, there is no significant personhood interest in their corporate association.

If the personhood interest among individual shareholders is slight, it is even more remote among modern institutional investors. In the United States, a great deal of corporate stock is owned through institutions, including public pensions, mutual funds, and hedge funds.¹⁹² These institutions may not be as rationally apathetic as individual investors,¹⁹³ but they do provide an additional layer that tends to filter out any residual personhood interests in corporate investments. Fund managers are expected to increase the financial value of their portfolios and are generally judged by beneficiaries on the basis of the fund's performance.¹⁹⁴ Those managers—particularly ones who control hedge funds—

190. See, e.g., Oliver E. Williamson, *The Mechanisms of Governance* 184 (1996) (describing shareholder purchase of a residual claim); see also Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 *J. Pol. Econ.* 288, 290 (1980) (criticizing the idea that shareholders own the firm).

191. Bainbridge, *Corporation Law*, supra note 145, at 512–14 (discussing limited shareholder control and corresponding focus on financial returns).

192. See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 *Colum. L. Rev.* 863, 865 (2013) (noting that, in 2011, “institutional investors owned over 70% of the outstanding stock of the thousand largest U.S. public corporations”); D. Gordon Smith, *The Role of Shareholders in the Modern American Corporation*, in *Research Handbook on the Economics of Corporate Law* 52, 58 (Claire A. Hill et al. eds., 2012) (discussing the rise of institutional investors); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 *Yale L.J. Online* 53, 56 (2009), http://www.yalelawjournal.org/pdf/823_pa5w1bp2.pdf (on file with the *Columbia Law Review*) (“[A] large amount of U.S. household stock ownership is [held] through mutual funds, 401(k) accounts, or other pension or retirement plans.”).

193. See, e.g., James P. Hawley & Andrew T. Williams, *The Rise of Fiduciary Capitalism: How Institutional Investors Can Make Corporate America More Democratic* 125 (2000) (describing the monitoring function performed by institutional investors); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 *Harv. L. Rev.* 833, 891 (2005) (arguing that institutional investors are likely to be well-informed on corporate governance matters in the context of shareholder initiatives); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 *Mich. L. Rev.* 520, 523 (1990) (arguing that an increase in institutional-investor share ownership undermines the shareholder-passivity narrative).

194. Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* 91 (2012).

tend to do so through rapid turnover of stock holdings.¹⁹⁵ In this situation, many individuals have little awareness of which companies they are funding at any given time. Again, this kind of corporate affiliation does not significantly implicate the personhood interests of association.

The same pattern of behavior and incentives generally holds in close corporations as well. Although ownership is not typically separated from control, financial objectives tend to dominate even without the presence of widely dispersed public ownership. Controlling shareholders in close corporations owe fiduciary duties to minority shareholders that require them to pursue overall share value.¹⁹⁶ In fact, the shareholder-wealth-maximization norm developed in response to issues that arise in close corporations,¹⁹⁷ and the two strongest judicial statements of shareholder primacy come from cases involving close corporations.¹⁹⁸ So, although shareholders in close corporations are not as passive and rationally apathetic as those in public companies, their behavior and attitudes generally follow the same financially focused pattern.

Looking next to corporate managers, it appears that their personhood interests in the firm will often be minimal. To begin with, managers are expected to run businesses in the interests of shareholder wealth.¹⁹⁹ The conventional view of corporate law holds that directors and officers are required to pursue shareholder returns above other objectives, including those of a social or political nature. Directors and officers are not supposed to use the corporation as a means of developing their own

195. See Iman Anabtawi, Some Skepticism About Increasing Shareholder Power, 53 UCLA L. Rev. 561, 579–80 (2006) (discussing short-term stockholding among hedge funds). But see Alon Brav et al., Hedge Fund Activism, Corporate Governance, and Firm Performance, 63 J. Fin. 1729, 1731–32 (2008) (arguing that critics of hedge-fund activists overstate their focus on short-term returns).

196. See D. Gordon Smith, The Shareholder Primacy Norm, 23 J. Corp. L. 277, 310 (1998) (discussing directors' "fiduciary duty to serve *all* of the shareholders of the corporation, not just a select group"); see also eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 26 (Del. Ch. 2010) ("[C]ontrolling stockholders are fiduciaries of their corporations' minority shareholders." (citing Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987))).

197. Smith, *supra* note 196, at 305–20.

198. See *eBay Domestic Holdings*, 16 A.3d at 35 (involving craigslist); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684–85 (Mich. 1919) (involving the Ford Motor Company, which was not publicly traded at the time). For further discussion of these cases, see *infra* notes 201–207 and accompanying text.

199. See, e.g., Hansmann & Kraakman, *supra* note 144, at 439–41 ("[M]anagers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders . . ."); Roe, Shareholder Wealth Maximization Norm, *supra* note 144, at 2073 (noting that the pressure to maximize shareholder wealth is both legal and cultural).

personal or moral identities. On the contrary, they are expected to fulfill their fiduciary duties by pursuing financial gain for shareholders.²⁰⁰

The classic example of how corporate law can squeeze out personhood interests is *Dodge v. Ford Motor Co.*²⁰¹ In *Dodge*, Henry Ford had decided not to issue a special dividend to shareholders so that the Ford Motor Company could employ more workers, increase wages, and lower the price of cars for consumers. When questioned about the rationale for his decision, Ford explained his view that the purpose of the firm was philanthropic and that making money was “incidental” to that purpose.²⁰² But when minority shareholders challenged that decision, the Michigan Supreme Court held that “[a] business corporation is organized and carried on primarily for the profit of the stockholders” and that corporate directors are not permitted to use the corporation to pursue other purposes.²⁰³ According to the court, the point of business corporations is to produce financial gain for shareholders, not to provide managers with an opportunity to develop their personal identities.²⁰⁴

In a much more recent case, *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Court of Chancery endorsed this view of shareholder primacy.²⁰⁵ In *eBay*, two of the founders and directors of craigslist attempted to justify various nonmaximizing decisions by appealing to their community-based vision of the company. In response, the court held that they had breached their fiduciary duties to the company’s shareholders.²⁰⁶ Echoing *Dodge*, the court rebuked the craigslist directors for disregarding principles of shareholder wealth maximization and proclaimed that the “Inc.” after the company name required them to pursue shareholder value.²⁰⁷ In the face of a claim to thicker association in a business corporation, corporate law once again served as a roadblock.

To be fair, there is an ongoing and lively debate about whether the principles of *Dodge* and *eBay* are good law—that is, about whether shareholder wealth maximization is legally required. Some have argued that the traditional view from *Dodge* is outmoded or irrelevant.²⁰⁸ Others claim

200. See Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 576 (2002) (stating that shareholder wealth maximization is a basic feature of corporate ideology).

201. 170 N.W. 668.

202. Alexander R. Crabb, *Birth of a Giant: The Men and Incidents That Gave America the Motorcar 359* (1969), quoted in M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in *Corporate Law Stories* 37, 62 (J. Mark Ramseyer ed., 2009).

203. *Dodge*, 170 N.W. at 684–85.

204. *Id.*

205. 16 A.3d 1 (Del. Ch. 2010).

206. *Id.* at 35.

207. *Id.* at 34–35.

208. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 Va. L. & Bus. Rev. 163, 166 (2008) (arguing that *Dodge v. Ford Motor Co.* is “a doctrinal oddity largely irrelevant to corporate law and corporate practice”).

that it is simply wrong, either because the business judgment rule effectively insulates director decisions from serious review or because modern “constituency statutes” explicitly authorize directors to consider the interests of stakeholders other than shareholders.²⁰⁹ Taken together, these arguments present a serious challenge to the conventional view of fiduciary duties.²¹⁰

Although there are good reasons to think that the traditional view is alive and well,²¹¹ it is perhaps more important to note that shareholder wealth maximization is a widely accepted social norm among business

209. See, e.g., M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in *Corporate Law Stories* 37, 66 (J. Mark Ramseyer ed., 2009) (“[C]ourts generally will not enforce [] strict shareholder wealth maximization on all firm decisionmaking”); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *NYU L. Rev.* 733, 772–76 (2005) (“[S]ome discretion to sacrifice profits is an inevitable byproduct of the business judgment rule.”).

210. Another challenge comes from the Supreme Court’s recent opinion in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In his opinion for the majority, Justice Alito contends that there is no legal requirement to maximize shareholder wealth. *Id.* at 2770–72. But Justice Alito only focuses on the flexibility of corporate *purpose*—i.e., the declaration made in a business’s articles of incorporation about the aim of the enterprise. *Id.* Statements of corporate purpose, however, are not the source of the legal requirement to maximize shareholder wealth. Instead, that requirement comes from an interpretation of the *fiduciary duties* of directors and officers. See, e.g., *eBay Domestic Holdings*, 16 A.3d at 34–35 (“Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form[,] [which] . . . include acting to promote the value of the corporation for the benefit of its stockholders.”). Given this oversight, and the fact that the Supreme Court does not have authority to reinterpret state corporate law, one should be cautious before concluding that the opinion stands for new fundamental principles of corporate law.

211. See, e.g., Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 *Va. L. & Bus. Rev.* 177, 190 (2008) (criticizing the view that other constituency statutes and the business judgment rule undermine the shareholder-wealth-maximization imperative); David G. Yosifon, *The Law of Corporate Purpose*, 10 *Berkeley Bus. L.J.* 181, 183–230 (2013) (arguing that scholars who deny the legal requirement to maximize shareholder wealth are mistaken); see also Nelson, *supra* note 162, at 1595–1601 (defending the traditional view that shareholder wealth maximization is legally required). In recent years, many states have passed “benefit corporation” legislation, which provides a for-profit organizational form in which directors are not required to maximize shareholder wealth. See, e.g., *Cal. Corp. Code* §§ 14600–31 (West 2014). At first it might seem that this development challenges the traditional view of directors’ fiduciary duties. See *Hobby Lobby Stores*, 134 S. Ct. at 2771 (discussing benefit corporations). But much of the force behind the push for this legislation came from a recognition that ordinary corporate law does not permit directors to deviate from the pursuit of shareholder wealth. See William H. Clark, Jr. et al., *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* 7–14 (Jan. 18, 2013) (unpublished working paper), available at http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf (on file with the *Columbia Law Review*) (arguing that existing legal frameworks do not accommodate for-profit mission-driven companies). The emergence of legislation enabling benefit corporations and similar hybrid organizational forms, therefore, may carve out a new space for combining profit and social purpose, but it also sharpens and crystallizes the focus on shareholder wealth under ordinary corporate law.

leaders.²¹² That social norm, in turn, has a profound effect on the behaviors and attitudes of those who manage firms. Even in the absence of a clear and unequivocal legal obligation, managers are encouraged to think of their role as properly directed to producing value for shareholders.²¹³ That is, managers are primed to think that a focused pursuit of shareholder returns is part of their role morality.

Again, from the personhood perspective, there is little connection between the roles of modern corporate director and officer and the free development of identity. These managerial positions are not designed or structured to produce deep identification with companies and are not likely to be constitutive of personhood.

In the modern corporate workplace, there is also an increasingly tenuous connection between employee identity and business firms. For most of the twentieth century, the relationship between business employees and their companies was governed by the “old psychological contract.”²¹⁴ According to this traditional model, businesses provided an implicit promise of lifetime employment in exchange for employee commitment to the firm. Even when formal contracts specified at-will terms, the old psychological contract assured workers that their jobs would be safe as long as they were loyal to their employer.²¹⁵

But in the last several decades, the terms of businesses’ psychological contracts with employees have undergone a radical change.²¹⁶ In the wake of various modern market developments,²¹⁷ firms are seeking new and creative ways to decrease labor costs and maximize efficiency within

212. See Roe, Shareholder Wealth Maximization Norm, *supra* note 144, at 2073 (discussing the expectation that managers maximize the value of the firm for shareholders).

213. See Rakesh Khurana, From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession 317–26 (2007) (describing the process by which shareholder primacy became a dominant social norm); Darrell West, Brookings Inst., The Purpose of the Corporation in Business and Law School Curricula 11–13 (July 19, 2011), available at http://www.brookings.edu/~media/research/files/papers/2011/7/19%20corporation%20west/0719_corporation_west.pdf (on file with the *Columbia Law Review*) (discussing the prevalence of the shareholder-wealth-maximization norm in business-school and law-school curricula).

214. See Katherine V. W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 UCLA L. Rev. 519, 526–39 (2001) (describing the “old psychological contract” between employers and employees).

215. See *id.* at 523 (describing the “tacit promise” that if employees “did their job and refrained from disruptive oppositional conduct, they would have a job for life”).

216. See *id.* at 549–72 (describing the “new psychological contract” among modern employers and employees).

217. See Nelson, *supra* note 162, at 1603–04 (discussing changes in the marketplace and the emergence of new business strategies that have undermined employee commitment to business firms).

their organizations.²¹⁸ Among the most popular responses to these new conditions are strategic downsizing and reliance on external labor markets (that is, outsourcing).²¹⁹ These techniques have, in turn, eroded the sense of job security among the American labor force and raised employee awareness of businesses' bottom-line thinking.²²⁰

As the basic premise of the old psychological contract has become anachronistic, businesses and employees have developed a new model to take its place. This new psychological contract replaces the notion of "lifetime employment" with the idea of "lifetime employability."²²¹ Businesses are no longer willing to make implicit promises of job security, and as a result employees cannot allow themselves to make deep and ongoing commitments to those organizations.²²² Instead, employees are demanding greater on-the-job training opportunities, whereby they acquire generalizable, rather than firm-specific, skills.²²³ Employers are also providing increased networking opportunities for their employees, increasing social capital both within the firm and outside its walls.²²⁴ In the modern business world, employees understand that it is their responsibility to remain competitive in the general labor market, and they have negotiated new employment terms according to which they will

218. See Peter Cappelli, *The New Deal at Work: Managing the Market-Driven Workforce 17–22* (1999) (explaining how "changes in the way firms operate" have impacted the psychological contract).

219. See Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in *Research Handbook on the Economics of Corporate Law*, supra note 192, at 85, 101–02 (noting that the trend of outsourcing "continues to break down relationships that were traditionally within the firm").

220. See, e.g., Hannah K. Knudsen et al., *Downsizing Survival: The Experience of Work and Organizational Commitment*, 73 *Soc. Inquiry* 265, 268–69, 279–80 (2003) (discussing the mentality of workers after surviving corporate downsizing); see also Lyman Johnson, *Re-Enchanting the Corporation*, 1 *Wm. & Mary Bus. L. Rev.* 83, 101 (2010) (arguing that employee commitment has declined in part because of a "perceived lack of loyalty to employee well-being").

221. See Franco Gandolfi & Magnus Hansson, *Reduction-in-Force (RIF)—New Developments and a Brief Historical Analysis of a Business Strategy*, 16 *J. Mgmt. & Org.* 727, 738 (2010) (discussing evidence of this "paradigm shift"); see also Peter Cappelli, *Career Jobs Are Dead*, 42 *Cal. Mgmt. Rev.* 146, 147 (1999) (discussing the decline in long-term job security and the resulting focus on external opportunities for career advancement).

222. See Daniel Yankelovich, *Profit with Honor: The New Stage of Market Capitalism 112–13* (2006) (describing the connection between loss of job security and declining employee commitment).

223. See Mila Lazarova & Sully Taylor, *Boundaryless Careers, Social Capital, and Knowledge Management: Implications for Organizational Performance*, 30 *J. Org. Behav.* 119, 120–23 (2009) (discussing employee demand for experiences and training that develop "career capital").

224. See Holly J. Raider & Ronald S. Burt, *Boundaryless Careers and Social Capital*, in *The Boundaryless Career: A New Employment Principle for a New Organizational Era 187, 197–98* (Michael B. Arthur & Denise M. Rousseau eds., 2001) (explaining the internal and external benefits to employers of developing employee social capital).

work to accomplish particular tasks in exchange for opportunities to advance their own careers.

Not surprisingly, the new psychological contract encourages lower levels of personal identification with modern business organizations. One particularly visible sign of this transformation is the striking level of employee mobility in the United States.²²⁵ Modern workers move freely between employers, particularly in the business sector, and increasingly embrace the idea that career advancement is better achieved through changing jobs than through working their way up the corporate ladder.²²⁶ In today's corporate workplace, deep affective commitment to an employer is largely a thing of the past, and instrumental goals of employee self-development are the new normal.

Within this volatile and instrumental framework, workers are primed not to identify too closely with their corporate employer. Such identification may be not only foolish, but also dangerous, both economically and psychologically. From the personhood perspective, the new psychological contract between businesses and their employees tends to marginalize the kind of constitutive affiliation that carries moral weight and demands the state's respect.

Proponents of the unfairness objection bristle at the idea that profits alone should disqualify an organization from freedom-of-association protection. They are quite right—profits are not some sort of talisman that miraculously transforms a constitutive association into a corporate automaton. But when an organization structurally commits to the production of profits for a particular constituency, that commitment tends to undermine the internal conditions that are necessary for authentic formation of identity within the group. From the personhood perspective, then, the moral weight of a business corporation's associational claim is likely to be minimal.

C. *The Nonprofit Difference*

At the outset, it would seem that the argument from personal identity is subject to a potentially devastating criticism, namely, that nonprofit organizations are just like for-profit organizations.²²⁷ That is, participants

225. According to recent figures from the Bureau of Labor Statistics, the average employee tenure is 4.6 years, but demographic trends suggest that this number will decline as older workers leave the workforce. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Tenure in 2014*, at 5 tbl.1 (2014), <http://www.bls.gov/news.release/pdf/tenure.pdf> (on file with the *Columbia Law Review*).

226. See Jacquelyn Smith, *The Pros and Cons of Job Hopping*, *Forbes* (Mar. 8, 2013, 4:12 PM), <http://www.forbes.com/sites/jacquelynsmith/2013/03/08/the-pros-and-cons-of-job-hopping/> (on file with the *Columbia Law Review*) (noting that the norm of frequent job change has replaced the norm of advancement within one organization).

227. See Mark H. Moore, *Managing for Value: Organizational Strategy in For-Profit, Nonprofit, and Governmental Organizations*, 29 *Nonprofit & Voluntary Sector Q.* 183, 192 (2000) (discussing the common accusation that nonprofit managers are just like for-profit

in nonprofits are subject to the same set of constraints and norms that crowd out deep identification in the for-profit sector. Nonprofits need to run efficiently to meet their objectives, and indeed some scholars argue that increased competition in the “voluntary” sector requires that they be run on principles of ordinary business strategy.²²⁸ In light of these criticisms, it may be tempting to think that the nonprofit/for-profit dichotomy is either terribly fuzzy or entirely illusory.

Nonprofit organizations, however, remain distinguishable from for-profits in at least one fundamental respect. As famously observed by Henry Hansmann, the defining legal feature that distinguishes the two forms is the nondistribution constraint.²²⁹ The nondistribution constraint refers to the prohibition on nonprofits distributing residual income to those who control the organization. Whereas for-profits are operated to produce a return for investors, nonprofits are required to retain any excess revenue and to reinvest it toward institutional goals.²³⁰

The conventional economic explanation for the nonprofit form is that the nondistribution constraint helps to solve contract failure.²³¹ In ordinary economic transactions, it is typical for the purchaser of a good or service to be the one who ultimately enjoys what she purchases. But in some circumstances—say when a family member pays a nursing home to take care of an elderly parent—the purchaser of the service is not the recipient. This situation can lead to information asymmetries. That is, the purchaser of the service cannot directly observe the quality of care that is being delivered (or the costs of monitoring quality would be prohibitive). In these situations, where ordinary market mechanisms do not provide adequate information about quality, purchasers will seek a proxy.²³² The nondistribution constraint, on this account, sends a signal

managers); see also Michael V. Tidwell, *A Social Identity Model of Prosocial Behaviors Within Nonprofit Organizations*, 15 *Nonprofit Mgmt. & Leadership* 449, 450 (2005) (discussing the high level of competition in the nonprofit sector). But see Usha Rodrigues, *Entity and Identity*, 60 *Emory L.J.* 1257 (2011) (arguing that nonprofits can provide a special form of “warm-glow” that cannot be replicated by for-profits).

228. See Aviv Shoham et al., *Market Orientations in the Nonprofit and Voluntary Sector: A Meta-Analysis of Their Relationships with Organizational Performance*, 35 *Nonprofit & Voluntary Sector Q.* 453, 454–58 (2006) (summarizing the arguments in favor of applying market-based approaches to nonprofits).

229. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L.J.* 835, 838 (1980) [hereinafter *Hansmann, Role of Nonprofit Enterprise*].

230. *Id.*

231. *Id.* at 845.

232. See *id.* at 843–45 (suggesting that “nonprofit enterprise is a reasonable response to a particular kind of ‘market failure,’ specifically the inability to police producers”); see also Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 *J. Econ. Literature* 701, 716 (1996) (suggesting that the nonprofit form may provide a solution to information asymmetries in the nursing-home context).

of quality, because purchasers can be assured that the organization is not skimping on services in order to maximize profits.²³³

But there is at least one major problem with the contract-failure hypothesis. As it turns out, nonprofits do not typically emphasize their nonprofit status in advertisements.²³⁴ If the nonprofit form is primarily a way to signal quality to potential donors or other stakeholders, it would seem that nonprofits should be shouting that status from the rooftops. Instead, at least when it comes to services delivered in hospitals and day-care facilities, many nonprofits are now competing on the strength of the services they deliver.²³⁵

Although the economic function of the nondistribution constraint remains obscure, its normative effect is easier to observe. The nondistribution constraint formally restricts nonprofit managers from running the organization for the private benefit of insiders.²³⁶ While it is true that enforcement mechanisms are notoriously weak in nonprofits,²³⁷ and managers can easily mask private benefit in the form of inflated salaries or other employment perquisites,²³⁸ the constraint itself instantiates a widely accepted norm of behavior in the nonprofit sector. That norm, in short, is one of shared commitment to the *mission* of the organization rather than the production of private financial benefit.²³⁹

The mission-centered conception of the nonprofit sector is deeply entrenched as a matter of social norms.²⁴⁰ The mission of a nonprofit

233. Lester M. Salamon, *America's Nonprofit Sector: A Primer* 11–13 (2d ed. 1999) (describing the function of the nondistribution constraint in the nursing-home context); Hansmann, *Role of Nonprofit Enterprise*, supra note 229, at 899–901 (analyzing the nonprofit form as a screening and signaling device).

234. Anup Malani & Guy David, *Does Nonprofit Status Signal Quality?*, 37 *J. Legal Stud.* 551, 555 (2008).

235. See Rodrigues, supra note 227, at 1278 (suggesting that contract failure does not explain the nonprofit status of hospitals and daycares because “these organizations compete largely on the strength of [their] services”).

236. Hansmann, *Role of Nonprofit Enterprise*, supra note 229, at 838–40.

237. See James J. Fishman, *Improving Charitable Accountability*, 62 *Md. L. Rev.* 218, 268–69 (2003) (“Holding fiduciaries accountable through an efficient enforcement procedure is an ongoing problem.”); see also Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 *U. Pa. L. Rev.* 497, 606–08 (1981) (discussing restrictions on standing for donors and beneficiaries).

238. Hansmann, *Role of Nonprofit Enterprise*, supra note 229, at 844.

239. See Peter F. Drucker, *Managing the Non-Profit Organization* 45 (1990) (“Non-profit institutions exist for the sake of their mission.”).

240. See Moore, supra note 227, at 186, 189 (contrasting mission-centered norms of the nonprofit sector with profit-centered norms in the for-profit sector); see also William A. Brown & Carlton F. Yoshioka, *Mission Attachment and Satisfaction as Factors in Employee Retention*, 14 *Nonprofit Mgmt. & Leadership* 5, 5–7 (2003) (discussing the centrality of mission in nonprofit organizations); Thomas L. Greaney & Kathleen M. Boozang, *Mission, Margin, and Trust in Nonprofit Health Care Enterprise*, 5 *Yale J. Health Pol’y L. & Ethics* 1, 5, 39 (2005) (describing the norm of fidelity to mission in nonprofit health-care organizations).

organization is the focal point around which various participants—including managers, employees, volunteers, and donors—join in collective effort. The expectation that accompanies these roles is one of fidelity to shared goals. The nondistribution constraint not only signals a nonprofit's commitment to its mission, which makes it easier to attract committed stakeholders, but also reinforces that mission by serving as a continual reminder of shared organizational priorities.²⁴¹

The popular idea of “mission drift” helps to illustrate the mission-centered conception of nonprofits. When a nonprofit organization is accused of mission drift, it is just that—an accusation. There is an implicit (and often explicit) normative judgment that there is something wrong with a nonprofit organization moving away from its original *raison d'être*.²⁴² If a prominent university were to shift focus to its affiliated macaroni business, for example, there would be sharp cries of “mission drift,” both from inside the institution and from the public at large.²⁴³ But nobody gives GEICO a hard time for expanding its customer base beyond government employees,²⁴⁴ and nobody passes moral judgment on Dunkin' Donuts for moving the bulk of its business away from sugary treats.²⁴⁵

The mission-centered conception of nonprofits, in turn, leads to considerable behavioral and attitudinal differences among participants as compared to their counterparts in for-profit organizations. To begin with, although nonprofit managers formally have the same fiduciary duties as for-profit managers, those duties are understood in very different ways.²⁴⁶ Whereas managers in business corporations are traditionally

241. Moore, *supra* note 227, at 190 (arguing that a nonprofit's mission is “the metric that is used in judging past performance and assessing future courses of action”); see also Rose-Ackerman, *supra* note 232, at 719 (arguing that the absence of equity investors reinforces the commitment of nonprofit employees); cf. Rodrigues, *supra* note 227, at 1284–85 (arguing that profit distribution would undermine the “prestige” of nonprofits).

242. See Marshall B. Jones, *The Multiple Sources of Mission Drift*, 36 *Nonprofit & Voluntary Sector Q.* 299, 300–03 (2007) (describing commercial activities and other causes of mission drift as “threat[s] to mission integrity”); Moore, *supra* note 227, at 192 (discussing sources of the norm to “stay true to the traditional mission of the organization”).

243. For almost forty years, New York University owned the Meuller Macaroni Company and used its profits to support the law school. Henry B. Hansmann, *Unfair Competition and the Unrelated Business Income Tax*, 75 *Va. L. Rev.* 605, 608 (1989).

244. See GEICO's Story from the Beginning, GEICO, <https://www.geico.com/about/corporate/history-the-full-story/> (on file with the *Columbia Law Review*) (last visited Nov. 15, 2014) (discussing the continued expansion of GEICO).

245. See Stephen Rodrick, *Average Joe*, *N.Y. Mag.*, <http://nymag.com/nymetro/news/bizfinance/biz/features/15139/> (on file with the *Columbia Law Review*) (last visited Nov. 14, 2014) (discussing the expansion of Dunkin' Donuts and its focus on coffee).

246. See Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 *J. Corp. L.* 631, 641 (1998) (“The obligation of nonprofit directors and officers with respect to the corporation's mission creates a more difficult and complex decision-making process for them than their for-profit peers.”).

expected to maximize shareholder profit, nonprofit managers are principally concerned with effective pursuit of the nonprofit's mission.²⁴⁷ Nonprofit managers are often faced with the decision of whether to sacrifice revenue in order to pursue other values that are central to the organization's purpose. In these circumstances, nonprofit managers are typically encouraged to make those nonmaximizing decisions, while for-profit managers are constrained to a much greater degree by bottom-line concerns.²⁴⁸

Some commentators talk about the norm of fidelity to mission in terms of a nonprofit manager's "duty of obedience."²⁴⁹ The idea behind the duty of obedience is that nonprofit managers have an obligation to remain faithful to their organization's stated mission.²⁵⁰ As a formal matter, for-profit directors also owe a duty of obedience to corporate purpose. But in the wake of modern general incorporation laws, which allow businesses to organize for any lawful purpose,²⁵¹ and the decline of the ultra vires doctrine,²⁵² which at one time policed actions taken outside of purposes specified in corporate charters, the duty of obedience is now an idea that applies especially, if not exclusively, in the nonprofit sector.²⁵³ Indeed, modern guidelines for nonprofit directors highlight the duty of obedience,²⁵⁴ but similar manuals for business leaders make no such mention.²⁵⁵ In short, nonprofit directors are expected to commit to

247. *Id.*

248. *Id.* (providing an example of a nonprofit board making a nonmaximizing decision in accordance with its fiduciary duties).

249. E.g., Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. Pa. J. Bus. L. 347, 355 (2012).

250. *Id.* at 356.

251. David Millon, *Theories of the Corporation*, 1990 Duke L.J. 201, 205–11 (tracing the emergence of general incorporation laws).

252. See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 186–88 (1985) (discussing the historical evolution of the ultra vires doctrine).

253. See Hazen & Hazen, *supra* note 249, at 386 ("The duty of obedience is especially significant in the case of nonprofit corporations."); Peggy Sasso, Comment, *Searching for Trust in the Not-For-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability*, 50 UCLA L. Rev. 1485, 1530 (2003) ("The duty of obedience . . . does not have a for-profit counterpart.").

254. See, e.g., Bus. Law Section of the N.C. Bar Ass'n & N.C. Ctr. for Nonprofits, *Guidebook for Boards of Directors of North Carolina Nonprofit Corporations* 31 (2d ed. 2003), available at <https://users.wfu.edu/palmitar/Books/Guidebook-2ed.pdf> (on file with the *Columbia Law Review*) (discussing the duty of obedience); Charities Bureau, N.Y. Office of the Att'y Gen., *Right from the Start: Responsibilities of Directors of Not-for-Profit Corporations* 7–8 (2009), available at <http://www.charitiesnys.com/pdfs/Right+From+the+Start+Final.pdf> (on file with the *Columbia Law Review*) (same).

255. See, e.g., Nat'l Ass'n of Corporate Dirs. & The Ctr. for Bd. Leadership, Report of the NACD Blue Ribbon Commission on Director Professionalism 3–8 (2005) (omitting mention of the duty of obedience in its discussion of the responsibilities of directors).

organizational missions in a way that would be almost unthinkable in the for-profit sector.

Much like nonprofit managers, ordinary employees in nonprofit organizations tend to identify more closely with the mission and values of their institutions.²⁵⁶ That is, nonprofit employees, on the whole, are more affectively and normatively committed to their organizations than are for-profit employees, who are often motivated by extrinsic financial incentives.²⁵⁷ Nonprofit employees are more likely to regard their organizations as a continuation of their own projects and commitments rather than merely as sources of income to pursue those endeavors elsewhere.²⁵⁸

This pattern of intrinsic motivation and organizational identification is even clearer among nonprofit volunteers. Once again, there is strong support for the idea that personal identification with the values and mission of an organization is the driving force behind volunteer work.²⁵⁹ This finding is not surprising, given common intuitions about the relationship between volunteers and nonprofits. Volunteers donate time and effort without financial remuneration out of commitment to the mission of the organization and expect that managers will reciprocate that commitment.

The same goes for nonprofit donors. Philanthropic gifts are often a way for individuals to express their personal identification with certain groups.²⁶⁰ Donations provide an opportunity to affiliate with a shared social project that is personally meaningful and allow people to work out

256. See Park & Word, *supra* note 97, at 712 (discussing research supporting the idea that nonprofit employees are motivated by “intrinsic rewards”); see also Brown & Yoshioka, *supra* note 240, at 5 (“[M]ission statements are recognized as a strong management tool that can motivate employees and keep them focused on the organization’s purpose.”); Paul C. Light, *The Content of Their Character: The State of the Nonprofit Workforce*, *Nonprofit Quarterly* (Sept. 21, 2002), <https://nonprofitquarterly.org/management/109-the-content-of-their-character-the-state-of-the-nonprofit-workforce.html> (on file with the *Columbia Law Review*) (discussing intrinsic motivation of nonprofit workforce); Gregory A. Mann, *A Motive to Serve: Public Service Motivation in Human Resource Management and the Role of PSM in the Nonprofit Sector*, 35 *Pub. Personnel Mgmt.* 33, 40–41 (2006) (discussing data on intrinsic motivation and mission commitment of nonprofit employees).

257. See, e.g., Park & Word, *supra* note 97, at 712; see also Light, *supra* note 256, at 10–11.

258. See Light, *supra* note 256, at 10–11; Park & Word, *supra* note 97, at 712; see also Brown & Yoshioka, *supra* note 240, at 7 (“The nature of nonprofits places an expectation on employees to work for the cause, not the paycheck.”).

259. See, e.g., Edwin J. Boezeman, *Volunteering for Charity: Pride, Respect, and the Commitment of Volunteers*, 92 *J. Applied Psychol.* 771, 773 (2007) (“[P]ersonal normative beliefs are considered a general driving force in the field of volunteer work . . .”).

260. See Francie Ostrower, *Why the Wealthy Give: The Culture of Elite Philanthropy* 98 (1995) (“Philanthropic gifts . . . express the individual’s relationship to, and identification with, particular social groups.”).

their own sense of identity and self-definition.²⁶¹ Of course it is true that some individuals are at least partially motivated by tax benefits when they make charitable contributions.²⁶² But donors have to choose from among many potential recipients of their funds, and that choice itself reflects the degree to which those individuals identify with organizational values, ideals, causes, and missions.²⁶³ That is, the process of selecting which organizations will receive contributions is an exercise in defining oneself through affiliation with various social groups.

Moreover, these donative relationships tend to be continuous and long lasting. Nonprofit organizations carefully cultivate donor relationships, encourage escalating contributions over time, and are often able to heighten a donor's sense of organizational investment in the process.²⁶⁴ This kind of ongoing identification is most apparent when it comes to educational and religious giving, but the phenomenon stretches more broadly to include nonprofit organizations dedicated to health, the environment, and various social causes.²⁶⁵ The typical duration of these organizational relationships reinforces the identity connection of donors and stands in sharp contrast to the often short-term focus of shareholders in the for-profit context.

Here a critic might object that this is an overly rosy view of the nonprofit world. People participate in the nonprofit sector for a variety of reasons, and not all nonprofit actors live up to the ideal of deep commitment to organizational mission. By the same token, some nonprofit organizations look to be quite remote from the value of personhood development.²⁶⁶ But even if there is some force to this potential criticism at the margins, the existence of the nondistribution constraint—the central legal feature that distinguishes the nonprofit world from the world of for-profit business—on the whole tends to encourage and sustain individual identification with organizational mission. The nondistribution constraint, in other words, is not only a legal restriction on doling out profits to insiders, but also reflects powerful social norms that pervade the nonprofit sector and encourage shared commitment to joint projects.

261. See Allison Anna Tait, *The Secret Economy of Charitable Trusts* 44–47 (Feb. 2014) (unpublished manuscript) (on file with the *Columbia Law Review*) (“Charitable giving provides further benefit to the donor by affording the donor an opportunity to participate in a project that is personally meaningful and that contributes to her individual sense of self-definition.”).

262. See I.R.C. § 170 (2012) (allowing tax deductions for charitable contributions).

263. See Peter Frumkin, *Strategic Giving: The Art and Science of Philanthropy* 259–60 (2006) (discussing factors that affect a donor's choice of organization).

264. See Ostrower, *supra* note 260, at 32–34 (explaining the importance of cultivating lasting relationships with donors).

265. See Tait, *supra* note 261, at 45 (describing the process of identification with educational, religious, and other associations).

266. A prominent example might be the National Football League, which qualifies for tax exemption under Section 501(c)(6) of the Internal Revenue Code.

From the personhood perspective, this shared commitment is intimately connected to a powerful justification for freedom of association. If shared interests in defining ourselves through our associations lend moral weight to claims of institutional autonomy, the nonprofit status of an organization can serve as a reasonable proxy for the kinds of organizations that ought to be eligible for protection from state intrusion.

* * *

With its focus on the free formation and expression of personal identity, the personhood perspective provides the strongest justification for treating for-profit businesses differently from nonprofit associations. On one side, because for-profit businesses are not generally bound up with deep ties of identity and attachment, they should not be eligible to make claims based on the freedom of association.²⁶⁷ On the other side, norms in nonprofit organizations tend to be more hospitable to individual identification, and some associational rights should follow.²⁶⁸ The personhood perspective, therefore, provides a conceptually clean and normatively attractive account of associational asymmetry.

D. *The Civil Rights Objection*

One possible objection to my account is that recognition of freedom-of-association claims by *any* kind of organization, for-profit or nonprofit, threatens to roll back the hard-fought victories of the civil-rights movement.²⁶⁹ A proponent of this objection might point out that, as a historical matter, the freedom of association was often invoked by those who sought to impede the progress of integration and racial equality.²⁷⁰ If we recognize freedom of association claims at all, at least in the context of challenges to antidiscrimination laws, we will thereby lend

267. The underlying normative theory of constitutive association does not necessarily require a bright-line rule that excludes all commercial businesses from associational protection. As a matter of doctrinal implementation, the theory could also support a presumption against for-profit associational claims that might be rebutted by strong evidence of identification within a particular company. But courts have generally chosen to use a rule that excludes commercial businesses at the outset, and that choice is both normatively justified and administratively clean. A focus on for-profit status also largely avoids the problems of elusiveness described above. See *supra* Part II.A.

268. To be clear, the claim here is not that all nonprofits deserve strong associational protection, but instead that nonprofit status is a reasonable condition of eligibility for claiming freedom-of-association rights.

269. See Bagenstos, *supra* note 38, at 1208 (highlighting the threat of freedom-of-association arguments to public-accommodations law).

270. See *id.* at 1207 (noting that, during the civil rights era, opponents of integration “framed their arguments in terms of . . . freedom of association . . .”); Kevin M. Kruse, *The Fight for “Freedom of Association”: Segregationist Rights and Resistance in Atlanta, in Massive Resistance: Southern Opposition to the Second Reconstruction* 99, 108–09 (Clive Webb ed., 2005) (describing how freedom-of-association arguments were employed in an attempt to maintain school segregation).

constitutional authority to some of the most retrograde and destructive forces in society.

This worry about constitutionalizing inequality, however, elides a crucial distinction between the *coverage* of freedom-of-association law and the *protection* of certain associational activity that might otherwise violate equality norms.²⁷¹ To describe that distinction in brief, the coverage question is about what kinds of associations can even raise constitutional claims—that is, what kinds of associations can trigger constitutional scrutiny of burdens on their activities. The question about protection, by contrast, is whether claims made by covered associations will ultimately be vindicated by the law. The personhood account of associational asymmetry operates on the level of constitutional coverage. The argument is that nonprofit status ought to be a condition of eligibility for claiming associational rights, not that all (or even most) of those claims should ultimately prevail.

The distinction between coverage and protection helps to illustrate why associational asymmetry does not lead inexorably to widespread violation of civil rights. Nonprofit organizations may be eligible to raise freedom-of-association claims, but those claims would be subject to override by a host of competing governmental interests. The history of freedom-of-association law is replete with examples of just this kind of doctrinal dynamic.²⁷² For example, the majority opinion in *Roberts* treated the Jaycees as an organization that could bring a freedom-of-association claim—and thereby trigger constitutional scrutiny—but in short order rejected that claim on the strength of competing interests in women's equality.²⁷³ And although segregationists frequently invoked the language of freedom of association, especially in the context of education, courts repeatedly rejected those claims as well.²⁷⁴ The same sort of analysis could be applied consistently to claims resisting a variety of antidiscrimination laws, including those related to race, gender, sexual orientation, and disability.

The ability to raise a claim is not the same thing as the ability to win a case. For-profit associational arguments may be doomed at the outset,

271. On the distinction between coverage and protection, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *Vand. L. Rev.* 265, 276 (1981).

272. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (holding that a law mandating inclusion of women in a private club is justified by the compelling interest in women's equality); *Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (holding that a private school's right of association does not permit invidious discrimination).

273. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The Court also held that admission of women would not undermine the Jaycees' ability to express its message. *Id.* at 626–27.

274. See Kruse, *supra* note 270, at 99, 103 (“Although the courts refused to accept the ‘freedom of association’ rationale, segregationists still clung to it.”); see also Inazu, *Liberty's Refuge*, *supra* note 129, at 122–24 (2012) (discussing the Court's rejection of freedom-of-association claims in the context of educational discrimination).

but most nonprofit claims will meet the same fate when they come up against the powerful competing interests at stake in the context of civil rights.

CONCLUSION

In many ways, business associations are just like other associations. They are sites where people join together to accomplish things that they could not do on their own. Freedom-of-association law's asymmetrical treatment of these associations, then, presents a genuine puzzle. Why shouldn't businesses be eligible to claim some degree of institutional autonomy based on associational interests?

While existing accounts fall short, viewing asymmetry from the perspective of personhood provides a solution to the puzzle. It connects individual interests in the free development of identity to our collective projects and describes the conditions under which those interests call for protection of associational integrity. It also provides the best account of why for-profit businesses should fall outside the scope of the freedom of association.

The distinction between profit-making institutions and other organizations is in trouble across the First Amendment. It has been all but wiped out as a matter of protecting political speech and religious free exercise. Under these conditions, proponents of associational asymmetry need a stronger foundation for their contention that business associations are, in fact, not like other associations when it comes to freedom-of-association values. With its focus on developing personal identity through associations, the personhood perspective provides that foundation.

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