COMMENTS

ABANDONING CORPORATE ONTOLOGY: ORIGINAL ECONOMIC PRINCIPLES AND THE CONSTITUTIONAL CORPORATION

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INTRODUCTION

The economic principles underlying the Constitution are not readily apparent from a cursory reading of the text. As Charles Beard notes, the Constitution "places no property qualifications on voters or officers; it gives no outward recognition of any economic groups in society"; and "it mentions no special privileges conferred upon any class."[1] It delegates Congress's power to regulate economic activity through, for instance, interstate commerce[2] and taxation,[3] but makes little mention of express grants of economic rights to individuals.

Despite the written Constitution's omission of economic rights, Americans have enjoyed constitutional protections in forwarding their economic interests, including in forming and operating business corporations.[4] Since corporations gained standing to defend their interests in an Article III court in *Bank of the United States v. Deveaux*,[5] they have won a number of constitutional rights previously believed to only apply to natural persons.[6] Although the academic and jurisprudential debate on the interpretation of corporate rights has ebbed and flowed, the interpretive

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1 CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 152 (1913).

2 U.S. CONST. art. 1, § 9.

3 *Id*.

4 *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS xviii (2018) (beginning a discussion of how corporations won constitutional rights through the courts).

5 Bank of the U.S. v. Deveaux, 9 U.S. 61, 92 (1809).

6 WINKLER, *supra* note 4, at xviii; *see also* discussion *infra* Part II.

gymnastics needed to square these rights with the Constitution's original text and history have been consistently derided by scholars across the ideological spectrum. Most recently, the debate has been reignited by the Court's decision in *Citizens United*—which provided corporations with a constitutionally protected right to political speech under the First Amendment[7]—a decision which has been repeatedly criticized as an abrogation of sound interpretive principles.[8]

The convoluted and polarizing history of corporate constitutional rights begs important questions. Which interpretive tools justify the delegation of constitutional protections to business corporations, when the original text and history of the document present such scant guidance? Can the Constitution's limited discussion of economic rights allow us to definitively declare what the law *is* regarding the rights of business corporations? Under what circumstances do we consider a business corporation to be a "person" or "citizen" deserving constitutional protection?

So far, these questions have largely been answered through competing theories of corporate ontology: theories of the nature of a business corporation and the relationship between its constituent parts. The history of the debate shows a struggle between two dominant camps of thought—the aggregate theory and the real entity theory—which offer competing accounts of what a corporation is, and therefore, which constitutional rights they ought to be assigned.[9]

This Comment argues that focusing solely on competing theories of corporate ontology is an inadequate method of interpreting the constitutional protections applicable to business corporations. It then provides an exploration of other means of elucidating corporate rights using the Constitution's text and history pertaining to economic rights. In particular, it looks at the Constitution's treatment of property and contracts to ascertain a new perspective on the rights of business corporations, and the people who form them.

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7 Citizens United v. FEC, 558 U.S. 310, 372 (2010).

8 For a discussion of the reaction to *Citizens United*, *see infra* Part II.B.

9 A third theory worth mentioning is the concession theory, in which the corporation is a legal fiction "created and empowered as a 'concession' from the state political authority." *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 68 (1992) (noting the conflicts between concession theory and other theories of corporations). However, as Elizabeth Pollman notes, though popular in the early 19th century, the theory lost relevancy once incorporation shifted from a special privilege granted by the state to a legislative formality. *See* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1661–62 (2011) ("[T]he description of corporations as a concession from a particular state seems a poor fit in our modern, global environment"). As a result, it has largely fallen out of favor in the contemporary debate.

Part I.A provides a condensed overview of the historical debate between competing corporate ontology theories. Part I.B discusses the critical response to *Citizens United*, surveying the critiques employing corporate ontology and those which seek alternative frameworks. Part II argues that competing theories of corporate ontology have been a largely inadequate framework for discerning whether or not business corporations enjoy a certain constitutional protection, due to their inconsistent application and tenuous relationship with the text and history of the Constitution. Part III.A explores the Constitution's structural treatment of economic rights to derive a constitutional principle of economic liberty, which serves as an alternative tool for evaluating corporate rights. Part III.B then applies that principle to arrive at two prescriptive conclusions concerning the interpretation of corporate rights. First, because the Constitution values one's ability to contract and obtain property without unjust impairment by the government, courts should not distinguish between the ontology of different contract/property arrangements. Second, business corporations ought to be granted a constitutional protection otherwise attributable to natural persons only if it serves the constitutional provision's function of enhancing economic liberty. In other words, the protection must enhance the corporation's free agency to obtain and hold property and enter into its optimal contractual arrangements.

For the purposes of this Comment, I will only be discussing the rights of for-profit business corporations. Comparing the rights of for-profit corporations relative to non-corporate business entities, or to nonprofit advocacy groups, is beyond the scope of this Comment. Although my analysis includes important landmark decisions concerning nonprofit corporations and membership associations, the discussion of these cases serves only to parse their subsequent impact on the constitutional rights of for-profit business corporations.

I. A BRIEF OVERVIEW AND EVALUATION OF THE CORPORATE ONTOLOGY DEBATE

A. An Abbreviated History of Dueling Ontological Theories

The Constitution makes no mention of the word "corporation," "business entity," or any other synonym.[10] At the time of the first corporate constitutional rights cases, the typical corporation was wholly different than the modern corporation. Corporate charters were only granted by the state for the performance of specific public purpose, such as building bridges, digging canals, and establishing trade and transportation routes.[11] The corporation was regulated solely through its charter, which outlined both the special privileges granted to the corporation and the limitations on its operations.[12] The concept of protecting these enterprises through the Constitution was thus a novel one, since corporations were not only scarce,[13] but also considered "quasi-public" arms of the state.[14]

Nevertheless, the Marshall Court's approach to the first corporate constitutional rights cases sidestepped the quasi-public nature of the early corporation, adopting a prototypical version of what would later be referred to as the aggregate theory of corporate personhood. In *Bank of the United States v. Deveaux*,[15] the earliest corporate constitutional rights case to reach the Supreme Court, the Marshall Court held that corporations are "citizens" for the purpose of Article III standing.[16] Chief Justice Marshall reasoned that, because the natural people composing the corporation—the "real parties" in the case—were "citizens" for the purposes of Article III, their citizenship ought to allow them to sue in their collective corporate name.[17]

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10 JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970 , at 113 (1970).

11 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 72–73 (1992) (discussing the reconceptualization of the corporation in the late nineteenth century).

12 *See* HURST, *supra* note 10, at 45–47, 157 (noting the fear of corporate ambition that led to limits imposed through the corporate charter).

13 *See* WARREN J. SAMUELS & ARTHUR S. MILLER, CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 2 (1987) ("Only approximately 300 corporations, each comparatively small in size, were present as late as 1800"); *see also* Oscar Handlin & Mary F. Handlin, *Origin of the American Business Corporation*, 5 J. ECON. HIST. 1, 4 (1945).

14 Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 428 (2003).

15 Bank of the U.S. v. Deveaux, 9 U.S. 61 (1809).

16 *Id.* at 91.

17 *Id.*

Ten years later, in *Dartmouth College v. Woodward*, the Marshall Court ruled that corporations were private entities whose charter was a binding contract between the state and the natural persons who formed the corporation.[18] This contract was thus protected by the contracts clause in the same way that any other private contract would be protected, and was thus rendered by the Court to be unalterable by the New Hampshire state legislature.[19] Both *Deveaux* and *Dartmouth College* opted to pierce the corporate veil,[20] disregarding the corporate form to allow corporations to exercise the same rights as its members. For Marshall, the corporate form was an "invisible, intangible, artificial" being that the Court should bypass in order to focus on the individual members of the enterprise.[21]

As the Marshall Court became the Taney Court, a wave of populist reformers sought to make the corporate form available to more business owners, rather than a small handful of elites for whom the state granted special privileges.[22] But as the corporate form became more democratized, the Taney Court simultaneously rejected the Marshallian view that corporate rights ought to be determined through veil piercing to reach corporate participants. In the *Charles River Bridge* case[23] and in *Bank of Augusta v. Earle*,[24] the Supreme Court rejected veil-piercing in favor of an approach that limited a corporation's ability to seek constitutional protection. To the Taney Court, "whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members."[25] Whereas citizens of foreign states could do business anywhere under the comity clause of Article IV, corporations were distinct and separate entities from their members and could not claim such protection.[26]

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18 Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 691 (1819).

19 *Id.*

20 This Comment adopts "piercing the corporate veil" as used by Winkler to describe the process of looking past the corporate form to reach the individuals comprising the corporation. *See* WINKLER, *supra* note 4, at 66.

21 *Deveaux*, 9 U.S. at 73.

22 Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1634 (1988) (discussing the Jackson-era critiques of special privilege incorporation and subsequent reforms); WINKLER, *supra* note 4, at 92 (describing the introduction of "general incorporation" laws during the Jacksonian period).

23 Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

24 Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839).

25 *Id.*

26 WINKLER, *supra* note 4, at 101

Furthermore, the *Earle* decision rejected the bank's argument that, if corporations were "citizens" for the purposes of the Article III standing post-*Deveaux*, they ought to be "citizens" under Article IV comity.[27] The Taney Court would further restrict corporations' claims to "citizenship" for the purposes of Article III standing, again on the basis that the corporation was a separate legal entity from its individual members.[28] The Taney Court therefore forwarded the idea that corporations were separate and distinct entities afforded less protection than natural persons. However, the Court did so in a way that unmoored the doctrine of corporate constitutional rights from any form of consistent application of the text and its original meaning. It merely set corporations apart as separate legal entities, with little guidance on exactly how and when constitutional personhood applied differently to corporations.

Reconstruction and the Gilded Age saw a revival of the aggregate theory in Supreme Court jurisprudence, this time in the Fourteenth Amendment. Most notably, in *Santa Clara County v. Southern Pacific Railroad*, Justice Field's opinion held a railroad corporation to be a "person" for the purposes of the Fourteenth Amendment, entitling a corporation's property to the same equal protection rights as individual stockholders.[29] Although the Supreme Court originally avoided the question of whether the railroad corporation was a "person" for the purposes of the Fourteenth Amendment, the Supreme Court reporter ended up stating that the justices were in agreement that they were.[30]

Two years later, the Court would reaffirm the *Santa Clara* "holding" in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, ruling that "corporations are merely associations of individuals united for a special purpose . . . . The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State."[31] Not only did the Court articulate the view that a corporation was a mere association of individuals with identical interests to those constitutive individuals, but also that corporations should receive constitutional protection of shareholder property rights equal to the

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27 *Id.* at 100.

28 *Id.* at 103.

29 Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

30 *Id.*

31 Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888); *see also* St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 33 (1889) (holding that the Fourteenth amendment applied to protect railroad companies).

protection given to unincorporated businesses or persons, such as sole proprietorships and partnerships.[32] As Winkler notes, calling corporations "persons" was the textual hook for affording Fourteenth Amendment protection. However, this was not to say that they had rights in and of themselves; their rights were an instrument to protect the property rights of shareholders.[33]

The *Lochner* Court, however, refused to pierce the corporate veil to extend the aggregate theory beyond deprivation of property under the Fourteenth Amendment, forming a split between property rights and liberty rights. This split would play out in the Court's handling of the corporate criminal defendant. In *Hale v. Henkel*, the Court held that corporations were protected by the Fourth Amendment's limit on unreasonable searches and seizures, but not the Fifth Amendment's self-incrimination clause.[34] Although, at one point, Justice Brown refers to corporations as "associations of people,"[35] his opinion relies on the view that the corporate form is a distinct legal actor, separate from its members (in this case, the company's employees).[36] Whereas individuals owe "no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to incriminate him," corporations are not protected by the same rationale.[37]

The Court remained consistent with the property/liberty dichotomy found in previous *Lochner* Era cases. Whereas the Fourth Amendment was inherently a protection of property, and thus appropriately attributable to the corporation, the Fifth Amendment was one of personal liberty that the Court would not extend.[38] Their explanation sought to justify why corporations were considered "persons" for the Fourth Amendment but not the Fifth, but in the end only served to confuse the debate further. With *Hale* still on the books, its treatment of the Fifth Amendment remains an outlier of its time in its rejection of veil piercing and embrace of the real entity theory.

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32 *See* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 174 (1985). *See also* Hovenkamp, *supra* note 22, at 1645.

33 WINKLER, *supra* note 4, at 159–60; *see also* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1695 (2015) (describing the Fourteenth Amendment protections afforded to corporations during this period as "derivative" rights, in that they "derived from the rights of natural persons behind the corporation").

34 Hale v. Henkel, 201 U.S. 43, 69–70, 73 (1906).

35 *Id.* at 76.

36 WINKLER, *supra* note 4, at 187.

37 *Hale,* 201 U.S. at 74.

38 *See* Brandon L. Garrett, *The Constitutional Standing of Corporations*,163 U. PA. L. REV. 95, 129 (2014). (discussing the liberty/property distinction).

The *Lochner* Court explicitly would not pierce the veil in order to grant rights considered to be liberty rights, rather than property rights.[39] However, changes in the makeup of the Court during the Great Depression ushered in an expansion of liberty rights in two key areas—association and speech—that paralleled the contemporaneous expansion of civil rights. In *NAACP v. Alabama ex rel. Paterson*, the Court held that members of a nonprofit membership corporation were protected by the Fourteenth Amendment against state-compelled disclosure of the group's membership list, which restrains the members' freedom of association.[40] The Court based their decision to pierce the veil on the fact that the NAACP was not a business corporation, and instead a voluntary association of members using the corporate form to advocate for their political ends.[41] There was a unique "nexus" between the corporation that made the two "in every practical sense identical."[42] Although the Court adopted the aggregate theory due to the NAACP's nonprofit, voluntary membership form of organization, the Court noted that it was "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters" when deciding whether a given state action curtailing the freedom to associate is subject to strict scrutiny.[43]

The broad language of *Patterson* gave enough leeway for the expansion of corporate speech rights for business corporations using the aggregate theory in *First National Bank of Boston v. Bellotti* and *Citizens United*. In *Bellotti*, the Court rejected the argument that the First Amendment rights of a corporation derive purely from their business and property interests.[44] Instead of the kind of veil piercing seen in *Santa Clara*, *Bellotti*'s conception of corporate speech rights rested on the rights of the public to inform themselves, casting off the "identity of its source, whether a corporation, association, union, or individual" as irrelevant.[45] Rather than explicitly calling corporations "associations of people," the Court suggested that the same treatment ought to apply for a corporation as to individuals, including the individuals

39 *See, e.g.*, W. Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907) (holding that corporations do not have a right to freedom of association).

40 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958).

41 *See id.* ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment").

42 *Id.* at 458–59.

43 *Id.* at 460–61.

44 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783–84 (1978).

45 *Id.* at 777.

comprising the corporation and the individuals who would be informed by the corporation's "speech."

The Court later followed the same strategy in *Citizens United* to strike down the Bipartisan Campaign Reform Act's restrictions on corporate spending as violative of First Amendment speech rights, overturning two previous cases (*McConnell*[46] and *Austin*[47]) and expanding corporate First Amendment rights to allow corporations to spend unlimited amounts of money on any kind of election.[48] Unlike in *Bellotti*, however, Justice Kennedy's majority opinion largely hinges on an explicitly aggregate view of the corporation. "If the First Amendment has any force," Kennedy reasoned, "it prohibits Congress from fining or jailing citizens, or *associations of citizens*, for simply engaging in political speech."[49] Restricting corporate spending (speech) was therefore a persecution against the "association of citizens" that comprised the corporation and "the right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self- government and a necessary means to protect it."[50]

B. Modern Responses to Corporate Ontology: Doubling Down and Exploring Alternatives

Citizens United was met with, and still garners, harsh criticism. Many of the most prominent objections to the decision chose the aggregate theory of corporate personality as their main point of contention. Throughout his dissent, Justice Stevens railed against the majority's theory of the corporation, arguing for a strict dichotomy between natural individuals and

46 McConnell v. FEC, 540 U.S. 93 (2003).

47 Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

48 Citizens United v. FEC, 558 U.S. 310, 460 (2010) (Stevens, J., dissenting).

49 *Id.* at 349 (majority opinion) (emphasis added). Although the corporation involved in *Citizens United* was a nonprofit, Justice Kennedy refused to confine his decision to nonprofits, despite the Solicitor General's invitation to limit the decision to nonprofits that are "funded overwhelmingly by individuals." *Id.* at 327–29. Instead, Justice Kennedy reasoned that the same First Amendment protections must be afforded to for-profit corporations as nonprofit corporations. *See id.* at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

50 *Id.* at 339.

corporations.[51] Responding to dismal polling of the decision's popularity,[52] political figures from across the ideological spectrum derided the opinion as a symptom of pervasive corporate influence in elections, using the opinion as a rallying cry for campaign finance reform measures. There was even a proposed constitutional amendment to codify the real entity theory, definitively separating corporations from natural persons.[53]

As for the academic debate, numerous constitutional and corporate law scholars have criticized *Citizens United* by arguing that the Court's decision is based on a fundamental misunderstanding of the nature of the corporation.[54] Notably, Chief Justice Leo Strine of the Delaware Supreme Court (along with two co-authors) has written a trio of articles attacking *Citizens United* in which he argues that the case not only misconceived the nature of the corporation, but was also irreconcilable with the originalist doctrines espoused by many of the conservative justices signing onto the majority opinion.[55] These critiques echo those levelled at the aggregate theory since the height of the Taney Court, calling for a real-entity interpretation in order to limit corporate constitutional rights and reduce the outsized influence of corporate special interests.[56]

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51 *See, e.g.*, *id.* at 394 (Stevens, J., dissenting) (distinguishing corporations and natural human speakers in the context of public office elections); *id.* at 423–24, (discussing the disparate ramifications of limiting corporate spending on elections as opposed to individual spending); *id.* at 428 (arguing that the Framers "had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind").

52 *See* Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' with Constitutional Amendment*, PUB. RADIO INT'L (May 10, 2018, 11:45 AM), https://www.pri.org/stories/2018-05-10/study-most-americans-want-kill-citizens-united-constitutional-amendment.

53 *We the People, Not We the Corporations*, MOVETOAMEND (Jan. 6, 2018), https://movetoamend.org/we-people-not-we-corporations-2.

54 This Comment will not exhaust the scholarly objections to the decision here, but for a particularly biting critique, *see, e.g.*, Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. OF BOOKS, Feb. 25, 2010, at 65 (asserting that *Citizens United* is wrong on the basis that corporations should not be afforded First Amendment protections).

55 *See generally*, Leo E. Strine Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335 (2015); Leo E. Strine Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877 (2016); Leo E. Strine Jr. & Jonathan Macey, Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451 (2019). For an alternative discussion on *Citizens United*'s irreconcilability with originalism, see also Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115 (2012); Amanda D. Johnson, *Originalism and* Citizens United*: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187 (2010).

56 Chief Justice Strine is not the only scholar to question *Citizens United* using corporate ontology theory. *See generally* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014) (arguing that the concession theory of corporate ontology ought to play a more prominent role in the corporate-constitutional debate).

Others have shied away from employing corporate ontology in criticizing *Citizens United*, and corporate rights more broadly, and have suggested alternative frameworks. For example, Elizabeth Pollman has suggested a framework that looks to the "purpose of the constitutional right at issue, and whether it would promote the objectives of that right to provide it to the corporation."[57] A similarly functionalist approach is forwarded by Jess Krannich, who argues for an abandonment of corporate ontology in favor of an approach that examines "the values and policies underlying each constitutional right."[58] Brandon Garrett recognizes the inconsistencies of the Supreme Court's approach and instead argues that the rights of business corporations ought to be framed in terms of organizational standing doctrine under Article III.[59] These alternative frameworks provide valuable contributions to a reframing of corporate constitutional rights. However, these accounts do not resolve the central question posed by Strine: when, if at all, does granting corporations constitutional rights comport with originalist principles? They are thus not likely to satisfy those seeking an approach that is rooted in the text and history of the Constitution.

II. THE PROBLEM WITH CORPORATE ONTOLOGY

From the precarious evolution of corporate rights doctrine, it is no surprise that competing theories of corporate ontology continue to stoke debate. In fact, it is the method's very malleability that makes it prone to controversy. As evidenced in the cases described above, the Court has failed to apply a consistent framework when it comes to deciphering the nature of the corporation.

This is not necessarily the Court's fault. The corporate form has undergone significant changes since *Deveaux*. With the introduction of: limited liability; broader federal and state regulation; increased political and social power; and the growing separation between passive investors and active management,[60] the relationship between shareholders, the corporation, and the state has shifted drastically. The growing complexity of

57 *See* Pollman, *supra* note 9, at 1631.

58 Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 64 (2005).

59 Garrett, *supra* note 38, at 101–02.

60 This is what Berle and Means refer to as the "separation of ownership and control." *See generally* ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

the corporate form inevitably allows for multiple conceptions of the corporation that are facially correct, or at least defensible.

However, as Pollman argues, "oscillating between these conceptions demonstrates the weakness of this approach,"[61] and creates vulnerabilities for exploitation. The Supreme Court's ad hoc approach can be seen less as indecisiveness on corporate ontology, but rather the opportunistic use of one's preferred theory to achieve the desired ends in the case.

This legal realist view was forcefully advanced by John Dewey in his influential article, *The Historic Background of Corporate Legal Personality*.[62] Dewey argues that the debates over the attributes of a "person" were wrongly imported into the legal discussion.[63] As a result, "[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends."[64] Dewey's critique is an effective one, especially post-*Citizens United*, as both the aggregate theory and the real entity theory have been used to forward other interests.[65] For example, Justice Taney's use of the real entity theory can arguably be seen as an instrument to pursue preference for states' rights and a disdain for special corporate privileges that inhibited free market competition, as opposed to neutral use of a theory rooted in constitutional best practices. *Santa Clara* could be seen as an example of using the associational theory for similar jurisprudential sins. Some commentators have suggested the case represents a concerted effort to frame corporations as associations of "people" in order to hide their underlying political and economic agenda.[66] Without a guiding, underlying principle rooted in the Constitution's text and history, the Court is seemingly incentivized to supply their own in justifying their interpretive rules of corporate ontology.

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61 *See* Pollman, *supra* note 9, at 1630.

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

63 *Id*. at 658.

64 *Id*. at 669.

65 *See* Blair & Pollman, *supra* note 33, at 1731 ("The Court has extended constitutional protections to corporations when it is a necessary or convenient way to protect the rights of the natural persons assumed to be represented by the corporation in question, at least with respect to the issue at stake.").

66 *See generally* Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938) (arguing that Justice Field saw the function of Fourteenth Amendment personhood status for corporations as a means for implementing a laissez-faire economic policy for business interests and establishing constitutional rights of property on an almost absolutist basis). A similar criticism has been leveled against the *Citizens United* decision as framing corporate speech rights as protecting both the members and the public in order to advance a corporatist agenda. *See generally* Dworkin, *supra* note 54 (arguing that *Citizens United* "displays the five justices' instinctive favoritism of corporate interests," and blasting the use of veil piercing to treat corporations like "real people" as "preposterous").

Ad hoc rationalizations using theories of corporate ontology also invert the ideal relationship between the original meaning of the Constitution's text and constitutional rules that are derived from them—namely, that the original meaning of the text ought to constrain constitutional actors in crafting constitutional rules.[67] Proponents of the aggregate and real entity theories alike are guilty of trying to fit a square peg into a round textualist hole, so to speak.

Take the Fourteenth Amendment, for instance, prohibiting state action from depriving "any *person* of life, liberty, or property, without due process of law," or denying "to any *person* within its jurisdiction the equal protection of the laws."[68] Conceptualizing the corporation as an association of natural persons for the purposes of grounding a given rule in the text may help rationalize why individual members ought to be entitled to a given Fourteenth Amendment protection, as those individuals are well within the original meaning of "person." However, it largely ignores the diversity of forms that the corporation takes, and the unique relationships between individual members and the corporate form. It also fails to provide a cogent approach for discerning which "people" or "citizens" constitute the association.[69] Most importantly, it offers no rationalization for why a corporate association—as its own entity, litigating in its own name—should be granted rights derivatively from their members. As Blair and Pollman argue, this would require a detailed inquiry into whether or not a given corporation can be viewed as an aggregate of its members.[70] Calling corporations associations of natural "persons" and then pointing to the text as conclusive in supporting the grant of a given right thus fails to do the actual work of connecting the text to a conclusive rule.

On the other hand, those who criticize the Court's approach to corporate rights under the real entity theory employ a similarly reductive analysis of the text. To real entity theorists, the equation is simple. The Fourteenth

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67 This statement asserts a version of the "constraint principles," thought to be one of two defining characteristics of originalist constitutional interpretation, as defined by Lawrence Solum. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

68 U.S. CONST. amend. XIV, § 1.

69 The "people" that the Court has sought to protect most often are shareholders. Chief Justice Strine and Macey have refuted this theory by arguing that shareholders are not empirical owners of the corporation, but rather owners of "investment interests" whose relationship to the firm is "purely statutory and contractual." *See* Strine & Macey, *supra* note 55, at 4.

70 *See* Blair & Pollman, *supra* note 33, at 1733 ("The derivative nature of rights for corporations requires the Court to pay attention to distinctions, to explicitly acknowledge that, for some purposes, some corporations can usefully and functionally be regarded as aggregates of their members from whom rights could be derived, while other corporations serve other purposes, and cannot be regarded as representing any particular natural person or group of natural persons.").

Amendment protects "persons." A corporation is not a "person" within the original public meaning of the word; it is an entity separate and distinct from the natural persons composing it (nor is the word "corporation" found anywhere within the Constitution). Therefore, the Fourteenth Amendment does not protect corporations. This ignores the argument that, even if corporations do not equal "persons," that the "persons" comprising the corporation nevertheless ought to be protected *derivatively* in some circumstances. Decisions employing the real entity theory thus struggle to reconcile their textual absolutism that corporations do not equal "persons" or "people" with the legitimate need to protect the natural persons comprising the corporations in certain situations.

Rather than admitting that the text is vague and using principled construction, competing theories of corporate ontology often try to manipulate the corporate form to fit squarely within the text's definition of "person" or "citizen." But as argued above, the Constitution's text does not fit squarely within any theory of corporate ontology. Therefore, looking to the nature of the corporation and whether or not it is a "person" or "citizen" as a monist method of interpreting a given constitutional provision is not a sufficiently consistent or comprehensive means of examining the corporation's relationship to the text. Rather than the text constraining the interpretation of the rule, corporate ontology theories constrain the text to fit a view of the corporation that supports a pre-determined outcome.

III. DEFINING AND APPLYING THE PRINCIPLE OF ECONOMIC LIBERTY

The Constitution does not refer to "corporations" or any other business enterprises in and of themselves, nor does it explicitly make mention of purely economic rights of individuals. Thus, the text alone does not include enough communicative content to paint a clear enough picture to justify the grant or denial of a given right to a corporation.[71] "Gaps may be the product either of genuine oversight by constitutional drafters or of delegation to future political decision-makers."[72] While the Constitution clearly delineates individual rights to "the people," "person(s)," and "citizens," it does not explicitly dictate how to treat those individuals collectively when they decide to form a corporation, nor does it anticipate the vast changes in the corporate

71 This can be seen as a "gap" in the Constitution's text, as defined by Solum and Whittington. Solum, *supra* note 67, at 471; Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 123 (2010).

72 Whittington, *supra* note 71, at 123.

form over the centuries since the Founding. Alternatively, one could reasonably infer that the Framers intended to leave the determination of corporate rights to the states, since at the time, the states had the sole purview to regulate corporate charters.[73] In this way, corporate rights can be considered both a constitutional "oversight," as well as a delegation to other political decisionmakers.

This gap puts the question of which rights to grant to a corporation into the realm of constitutional construction.[74] It is therefore imperative to examine the text and history of the Constitution pertaining to economic rights in order to derive a principle that may be applied to corporate constitutional rights cases. This involves two steps. First, since the initial interpretive analysis of the "gap" of explicit constitutional provisions pertaining to corporations proves the Constitution facially under-determinative, this Comment will look to other areas of the Constitution where the text implicitly or explicitly communicates principles relating to the economic rights of individuals. This will be done in a way that both interprets the text and constructs general principles derived from what the text communicates. The end result of this preliminary inquiry is to discern a principle of economic liberty. Second, this Comment will show how the principle may be applied to the issue of when to delegate a given constitutional right to a corporation. The goal of this two-level analysis is not to definitively answer which rights apply to corporations. Rather, it is to create a guiding tool in determining the nature and extent of corporate constitutional rights that is rooted in the Constitution's structural treatment of economic rights.

A. Defining the Principle of Economic Liberty

In his *Lochner* dissent, Justice Holmes asserts that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire."[75] This kind of orthodox separation between the Constitution and economic rights

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73 *See supra* discussion in Part II; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

74 *See* Solum, *supra* note 67, at 475 (defining the "Construction Zone" as "[t]he set of constitutional issues and cases for which the communicative content of the constitutional text underdetermines legal effect, e.g., the legal content of constitutional doctrine and the resolution of constitutional cases.").

75 Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

has been consistently forwarded by populists and political progressives to rail against *Citizens United*. Others see ample support for the proposition that the Constitution was constructed to support and maintain a Smithian classical political economy.[76] Discerning a neutral principle of economic liberty from the original Constitution, free of partisan economic ideology, becomes important if we are to then consistently apply that principle to corporate constitutional rights cases. For the purposes of this discussion, this Comment adopts Randy Barnett's definition of economic liberty as "the right to acquire, use, and possess private property and the right to enter into private contracts of one's choosing."[77] The following discussion explores the scope of the Constitution's treatment of economic liberty.

1. Property

The Constitution's protection of the right to private property is an important facet of the document's broader treatment of liberties that we may consider "economic."[78] Property rights in the United States ultimately flow from English property theory. John Locke revered "lives, liberties and estates" as natural rights;[79] this reverence is embraced in the Constitution's theory of property and is adopted in its text.[80] Blackstone also saw property as an "absolute right, inherent in every Englishman . . . which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[81] Beyond the natural rights underpinnings of English property law, property ownership was seen as a key driver of economic growth at the time of the Constitution's enactment. In crafting the property rights of individuals, however, the Framers had to

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76 *See, e.g.*, James W. Ely Jr., *Economic Liberties and the Original Meaning of the Constitution* 1 (Vand. U. L. Sch. Pub. L. & Legal Theory Working Paper No. 07-17, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018754 (arguing that "by the time of the constitutional convention in 1787 the growing commitment to a market economy was eclipsing the older mercantilist regime as the dominant paradigm in political culture, and that this development in turn influenced the process of constitution drafting").

77 *See* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 5 (2012).

78 Merriam Webster's dictionary defines the word "economic" to mean "of, relating to, or based on the production, distribution, and consumption of goods and services." *Economic*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/economic?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Jan. 18, 2020).

79 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT IX, §123 (C. B. MacPherson, ed., Hackett 1980) (1690).

80 *See, e.g.*, U.S. CONST. amend. V (protecting against deprivation of life, liberty, and property)

81 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

balance the natural and economic rights of individuals with the government's interest in reasonably regulating private property.

Property rights are governed by the Due Process Clauses of the Fifth[82] and Fourteenth[83] Amendments, as well as through the Fifth Amendment's Takings Clause.[84] "Persons, houses, papers, and effects" are additionally protected by the Fourth Amendment from "unreasonable searches and seizures."[85] The Fourteenth Amendment's language extends that protection to all "persons" in the United States.[86] Taken collectively, the surface-level communicative content of these clauses is relatively unambiguous. The government may not infringe or seize upon a "person's" private property, without adequate legal processes entitled to the landowner, either through "just compensation" or through "due process of law."[87]

In requiring procedural protections, the text does not give any explicit limits as to how property is to be used or alienated. It makes no distinction between personal and economic uses of property. Using a given piece of land to build a house or a factory, for example, does not alter the prohibition on governmental "takings." Omitting distinctions on use leads to the reasonable interpretation that the Constitution is facially neutral when it comes to how a given piece of property is used. Although the Takings Clause does not create limits on how the government may regulate the creation and transfer of private property, it does require the government to refrain from imposing general legislation that treats individuals or classes of individuals disadvantageously without due process.[88] This suggests that different uses and arrangements of property are protected from disparate treatment.

There remains some debate over whether there is an absolute right to private property *ownership*, or whether owning private property is a mere privilege subject to greater government regulation. Some have argued that

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82 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

83 U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

84 U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation.").

85 U.S. CONST. amend. IV.

86 U.S. CONST. amend. XIV; Mapp v. Ohio, 367 U.S. 643, 655 (1961)

87 Ensuring that searches and seizures of one's person and property are not "unreasonable" for the purposes of the Fourth Amendment acts as a similar limitation to government infringement on private property. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018).

88 Edward L. Rubin, Does Property Have Constitutional Rights? 12 (October 10, 2016) (unpublished manuscript), https://www.law.berkeley.edu/wp-content/uploads/2016/10/Property-Rights-Edward-L.-Rubin.pdf.

the individual right to property is bolstered by the Framers' alleged affinity for strong property rights as inalienable natural rights. Barnett, for example, has looked at the Ninth Amendment and various state constitutions to extrapolate "the natural, inherent, and inalienable rights retained by the people," including "the rights to acquire, possess, and protect private property . . . ."[89] Stuart Bruchey similarly argues, using social and historical data, that "the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights."[90] Others see private property ownership as a mere social instrumentality that may be regulated through the Constitution's scheme of a strong national government.[91] One can, for example, point to the government's constitutional power to enact general legislation that deprives individuals from their property without compensation in certain circumstances as evidence of the Framers' rejection of an unfettered right to property ownership.[92]

Natural rights constructions of inherent property rights that reach beyond the enacted property clauses in the Constitution's text are ultimately superfluous to discerning the scope of the property clauses themselves. By placing "property" on the same plane as "life" and "liberty," and implementing procedural steps to limit the government's ability to infringe on the use of such property without due process, property rights are undeniably essential to the Bill of Rights' framework. Although it is debatable as to whether there is a fundamental right to *own* private property (as opposed to a mere aspiration or guiding value embraced by the Framers), preventing *deprivation* of property ought to be a right on the same plane as protecting against the deprivation of life and liberty. Procedural protections further allow a property owner to ensure that, once acquired, the property may be used as the owner wishes without the threat of discriminative takings.

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89 *See* Barnett, *supra* note 77, at 5–7.

90 *See* Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (1980).

91 *See generally* Edward L. Rubin, *The Illusion of Property as a Right and its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573 (2013) (arguing that the right to own property as "not a right, but a social instrumentality" for governance and increasing wealth).

92 *See id.* at 603 (pointing to the public use doctrine as an example of how the Constitution limits property rights under the Due Process Clause by explicitly subject private property to governmental intervention).

2. Contract

The Contract Clause reads that "No State shall . . . pass any . . . law impairing the Obligation of Contracts."[93] The Clause's text alone does not supply an adequate level of guidance as to who it covers, the types of contracts to which it is applicable, or when the government is deemed to have "impaired" the "obligation" of a contract. Due to its textual ambiguities and the under-determinative historical record surrounding the clause, the Contract Clause's communicative content gives inadequate substantive content for a sound interpretation. In light of this ambiguity, Richard Epstein has suggested two "extremes" of interpretation of the Contract Clause. He posits:

> At one extreme, the clause could be limited to prohibiting legislation directed to the blanket discharge of existing debts. At the other extreme, the clause could insulate contractual relations against any and all forms of state regulation, whether by legislature or court, including even so modest an intervention as a statute of limitations.[94]

Both extremes lead to starkly different constructions for the purposes of the principle of economic liberty.

An examination of the limited legislative history reveals that the clause pertains to state intervention in the obligations of private contracts, particularly those of debtors and creditors.[95] There is little evidence that the Framers contemplated the clause applying to public land grants or corporate charters between the state and entrepreneurs.[96] It was only under the Taney Court that the Contract Clause began to expand into the realm of public corporate charters in cases like the *Charles River Bridge* case. Along with continuing to protect creditors from state debtor relief statutes,[97] the Taney Court's Contract Clause jurisprudence allowed for more intensive state regulation of corporations.[98] The change in Contract Clause interpretation between the Marshall Court's *Dartmouth College* decision and the Taney Court's *Charles River Bridge* case aptly illustrates the distinct "private" and

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93 U.S. CONST. art. 1, § 10.

94 Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 708 (1984).

95 *See* Hovenkamp, *supra* note 22, at 1604 (explaining that the Constitution's Framers were "principally concerned with state attempts to relieve debtors from their creditors.").

96 *Id.*; *see also* BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 15–17 (1938). *But see* Epstein, *supra* note 94, at 721 ("Even if the text of the contract clause is ambiguous on the question of whether the prohibition it states extends to public contracts, the theory behind the text calls for such an extension.").

97 *See, e.g.*, Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Gantly's Lessee v. Ewing, 44 U.S. (3 How.) 707 (1845).

98 *See* Hovenkamp, *supra* note 22, at 1605.

"public" branches of Contract Clause doctrine emerging from the era.[99] However, this bifurcation of the Contract Clause does not necessarily stem from the meaning of the original clause. As Hovenkamp notes, it is the result of shifting economic system from a mercantilist "vested" rights system to classical economic "substantive" rights system, and a subsequent evolution of doctrine surrounding the state's role in regulating business corporations.[100] Examining the pre-Taney Contract Clause thus shows that its interpretation lies toward Epstein's first extreme, in which the contract clause provides more limited protection for private contracts. His second extreme, in which the clause protects from state impairment any and all substantive rights pertaining to both state and individual contracts, seems less plausible.

Although I disagree with Epstein's analysis of the Clause's public/private application, his construction of the term "obligation" better fits with the communicative scheme of the Clause. Epstein reads the "obligation" as embracing "the entire relationship," rather than just the debtor's obligations.[101] He also claims that the clause protects other kinds of contracts than those between creditor and debtor.[102] The language—"obligations of contracts"—is too general to include only one form of obligation, namely the debtor-creditor relationship. Although the evidence shows that debtor-creditor relations were a chief concern of the Framers, the text does not limit its communicative content to this relationship alone. Other relationships, could conceivably be impaired by improper state action.[103]

The key limiting factor of protections that the Contract Clause affords to private contractors lies in its application to past, and not future, contracts.[104] The term "obligations" in and of itself implies a pre-existing arrangement to which two or more parties are bound. Historical studies show that the Framers' were concerned with state retroactive impairment of contracts as creating a riskier environment for the investment of capital; if investor contracts could be cancelled at whim, investors were at risk of losing their investment.[105] Applying the Contract Clause prospectively to any and all contracts that one might enter into goes beyond this narrow purpose of the

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99 *Id.* at 1604.

100 *Id.* at 1603.

101 Epstein, *supra* note 94, at 722–23.

102 *Id.* at 721.

103 *Id.*

104 *See* Ogden v. Saunders, 25 U.S. 213, 286 (1827).

105 *See, e.g.*, David Crump, *The Economic Purpose of the Contract Clause*, 66 SMU L. REV. 687, 689–95, 697 (2013) (tracing the history of the contract clause's ratification to conceptualize the clause as a policy of reassuring investors).

clause. The Contract Clause thus gives investors protection against ex post nullification of their investments,[106] but not blanket protections for the contracts that they will prospectively form.

In total, the Contract Clause protects private contracting, but does not apply to any and all contracting. Reading between the lines of the clause reveals that the extent to which it promotes economic liberty is thus more limited than some may hope.

3. The Fourteenth Amendment

The Fourteenth Amendment has been a broad vehicle for expanding the rights of corporations.[107] However, text and history show that the Amendment was enacted as means of promoting social and political equality, and not as a broad expansion of substantive economic rights. This becomes clear when viewing the Amendment in the context of the two amendments that bookend it, the Thirteenth and Fifteenth. Taken together, the amendments represent a common scheme reflecting the rights of recently freed African-American slaves, granting those newly freed people—and by virtue, all citizens—civil and political birthrights.[108]

So-called Substantive Due Process under the Fourteenth Amendment has been used in a number of decisions to strike down state economic regulations.[109] Endemic to *Lochner* Era decisions is a blanket "freedom of contract" principle, purportedly grounded in the Fourteenth Amendment. In *Frisbie v. United States*, the Court then broadly held that, "generally speaking, among the inalienable rights of the citizen is that of the liberty of contract."[110] The same principle was commandeered by the Court, for example, to strike down a state economic act as a broad violation of "liberty of contract,"[111] and to strike down a wage and hour law for bakers in New York.[112]

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106 *Id*.

107 *See* discussion *supra* Part I.A.

108 *See generally* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY, at ch. 10 (2005).

109 *See, e.g.*, Morehead v. New York, 298 U.S. 587 (1936); Lochner v. New York, 198 U.S. 45 (1905); Munn v. Illinois, 94 U.S. 113 (1876).

110 Frisbie v. United States, 157 U.S. 160 (1895).

111 Allgeyer v. Louisiana, 165 U.S. 578 (1897).

112 *Lochner*, 198 U.S. at 57 ("There is no reasonable ground for interfering with the liberty of person or the right of free contract . . . ."). For a complete dissemination of the "freedom of contract" jurisprudence during the *Lochner* Era, see generally David E. Bernstein, *Freedom of Contract*, (George Mason Law & Econ. Research Paper Series, No. 08-51, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1239749.

However, the plain language of the text precludes the kind of expansion of economic liberty under the Fourteenth Amendment that the *Lochner* Era Court envisioned.[113] For one, the text does not add any extra language to distinguish it from the Fifth Amendment's Due Process Clause; it merely extends the same protection of property to the states.[114] Additionally, as with the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment ensures that adequate *processes* are implemented to protect private property ownership. The rights are inherently *procedural*, and not substantive, meaning they do not entitle individuals or corporations to strike down any law that impacts their business. In order to invoke the Clause, one must have been deprived of property due to inadequate procedure, rather than mere inadequate substance of the law. All of this is clear from a fairly superficial interpretation of the text.[115]

An alternate source of substantive economic principles underlying the Amendment could be found in the Equal Protection Clause, as was held in *Santa Clara*.[116] However, like the Due Process Clause, the goal of the Amendment was not an economically substantive one, but one of procedural equality. From a base interpretation, the clause (in context) merely grants that persons will be treated with equal process but does not affirmatively advance explicit or implicit economic principles.

Finally, the Privileges and Immunities Clause offers some hope for economic libertarians as a justification for an expansion of economic liberties. As Akhil Amar notes, "privileges and immunities" can refer to a panoply of rights, including those enumerated in the original bill of rights

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113 The broad "freedom of contract" principle described here has largely waned since the New Deal and the subsequent development of the Fourteenth Amendment's rational-basis test. *See id.* ("As New Deal liberals came to dominate the Court, even the rational basis test, applied literally, seemed too stringent . . . . In general . . . freedom of contract is [currently] almost entirely unprotected under modern constitutional law."). Nevertheless, some modern scholars still cling to the "freedom of contract" principle and advocate for its return, although this viewpoint is in no way mainstream. *See, e.g.*, DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011) (advocating for a rebirth of the *Lochner* Era's freedom of contract jurisprudence).

114 *Compare* U.S. CONST. amend. XIV *with* U.S. CONST. amend V.

115 For further critiques of Substantive Due Process, see generally JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (Harvard U. Press 1980) (arguing that substantive due process is a "contradiction of terms"); Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1059 (1997) (arguing that "substantive due process is not based on the text of the Constitution or the intentions of those who made it" and that substantive due process is an oxymoron).

116 Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886) (stating that a railroad corporation is protected by the Equal Protection clause).

and "other canonical legal sources."[117] John Bingham, the chief drafter of the Fourteenth Amendment, used similar language from the original Bill of Rights in the Privileges and Immunities Clause.[118] The Clause in context therefore entitles citizens to broad, fundamental protections that states were not allowed to infringe upon.[119] As a result, the Privileges and Immunities Clause can arguably be seen as a codification of, *inter alia*, the right of *citizens* to obtain and use private property and enter into contract, although this construction is only discoverable through a historical look into the what the text communicates.

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The preceding examination of the original Constitution illuminates a structural principle of economic liberty. That principle is rooted in a person's right to acquire, possess, and use private property and to contract with others in a way protected from ex post impairment by a state legislature without adequate procedural safeguards. The principle of economic liberty can be broken into three constitutive "sub-principles":

1. The ability to alienate and use one's private property to one's preferences is an essential value to our constitutional order. Private property is thus protected through the procedural safeguards of due process and just compensation from disparate governmental infringement.
2. A person ought to be able to invest capital through private contracting, without fear of retroactive nullification of their investment. Those private contracts are thus protected from nullification by the Contract Clause.
3. The Fourteenth Amendment expands the application of the procedural protections of private property and contract, applying those protections equally and neutrally to all persons. It does not otherwise expand the substantive content of the principle of economic liberty beyond mere codification in the Privileges and Immunities Clause.

B. Applying the Principle of Economic Liberty

Now that this Comment has outlined the Constitution's principle of economic liberty, it is now time to see how constitutional actors can apply the principle in deciding whether a business corporation ought to benefit from constitutional protection. The application of the principle yields two prescriptive conclusions. First, because the Constitution values one's ability

117 *See* AMAR, supra note 108, at 386.

118 *See id.* ("In fact, Bingham borrowed directly from the Bill itself with his language 'No . . . shall . . . make . . . law . . . abridging'—all words lifted directly from the First Amendment.").

119 *Id.* at 387.

to contract and obtain property without unjust impairment by the government, courts should not distinguish between forms of contractual and property arrangements. Second, business corporations ought to be granted a constitutional protection otherwise attributable to natural persons only if the purpose of the protection is economic liberty enhancing, in that it enhances the organization's free agency to obtain and hold property and enter into contracts in the way that it sees fit. Only those rights that protect the corporation and its members' ability to obtain property and enter into contracts support economic liberty. Applying the principle of economic liberty therefore does not allow business corporations to enjoy constitutional rights that pertain to purely political or civil rights (such as speech, religion, and voting).[120]

1. Organizational Neutrality

As explained in the previous Part, the principle of economic liberty places limits on the government's ability to infringe upon one's right to use property and contract to their desired economic ends. Indeed, for the modern entrepreneur, there are a number of different forms that a business enterprise might take, representing an infinite amount of unique arrangements of property ownership and contracting. The entrepreneurs may choose to organize their business into a sole proprietorship, a limited partnership, a limited liability company, a corporation, etc. Choosing to incorporate allows entrepreneurs a number of advantages, including perpetual ownership of corporate property and protection of personal assets from liability. The corporate form also allows for the enterprise to solicit and contract with investors in order to raise capital. If the entrepreneurs choose to incorporate, they may further choose to keep the company closely held or release shares for wide public ownership.

In ensuring equal procedural safeguards for property and contract regardless of the substantive ends, the economic liberty principle suggests that a given constitutional right should be granted if it does not favor a particular structure for the enterprise's property and contracting, or, conversely, penalize the choice of a given form. In other words, the decision of whether or not to incorporate, and the form that the corporation takes, should neither encourage nor discourage any particular use of property and contract. In his article, *Corporate Rights and Organizational Neutrality*, Vincent S.J. Buccola posits that this logic—what he calls the principle of

120 *See infra* Part III.B.2.

"organizational neutrality"—already underlies the scattered history of corporate rights jurisprudence.[121] Although organizational neutrality is advanced as an empirical observation concerning the underlying logic of the Supreme Court's jurisprudence, the economic liberty principle justifies its use as a positive tool of constitutional decision making.

Employing organizational neutrality eliminates the need for the Court to look at the constituent parts of the corporation based on an ad hoc theory of corporate ontology; such theories are unnecessary for deciding whether the corporation's members should be protected derivatively through the corporation. To illustrate, imagine two business enterprises: Alpha and Beta. Alpha is a limited partnership founded by two brothers, Tom and Dave, who each own 50% of Alpha's assets, including a factory where they manufacture thimbles. Beta is a closely-held corporation also founded by two brothers, Bob and Jim, who each own 50% of the company's common stock. Beta also owns a factory for manufacturing thimbles. Both factories are seized by the government, and Alpha and Beta sue in separate cases, asserting that the Fifth Amendment protects them from the unconstitutional taking of their respective factories without just compensation. A judge rules in favor of Alpha, but rules against Beta, on the theory that corporations are separate and distinct entities from their shareholders, and therefore should not be treated the same as the natural "person" shareholders.[122] One could alternatively imagine that the judge could employ the aggregate theory to rule that, because Beta is just an aggregation of the property interests of its shareholders, it should be protected by the Fifth Amendment in order to protect those shareholders. Here, the judge's use of corporate ontology is dispositive of their decision.

The principle of economic liberty eliminates the need to rule on grounds of corporate ontology. Using that principle, the judge can rule that denying Fifth Amendment property protection to the corporation penalizes the act of incorporation by removing the procedural protections of property ownership. It would be against the principle if the constituent natural persons of Beta lose those protections by virtue of the enterprise's decision to arrange their property and contract interests in a certain way, i.e., to incorporate. Whether the corporation is a mere aggregation of shareholder's voices or an entity incapable of speech is irrelevant. Granting the right to corporations unfairly biases the non-corporate form over the corporate form,

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121 *See* Vincent S.J. Buccola, *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499, 503 (2017).

122 For a similar illustration, see *id.* at 503.

rewarding the Alphas of the world and punishing the Betas. In this case, the choice of organization is indeterminate; their ability to freely choose their arrangement was what was impacted. The judge can therefore avoid some of the constitutional missteps brought about by invoking a corporate ontology theory by using this alternative approach.

It is worth noting that commercial speech protections under the First Amendment[123] complicate a black-and-white application of organizational neutrality. This depends on the scope of commercial speech protection provided by the First Amendment.[124] For instance, commercial speech advocates who believe that such speech ought to be fully protected by the First Amendment may argue that, because incorporation would remove a constitutional protection otherwise enjoyed by non-incorporated entities, that organizational neutrality is violated. On the other hand, if one believes that commercial speech ought to be entirely unprotected (or, at least not as robustly protected) by the First Amendment, then there is no penalty to incorporation. Whether the business is incorporated or not, its commercial speech is granted the same level of protection.

2. Property and Contract

Aside from organizational neutrality, the principle of economic liberty suggests that only economic rights, i.e., affecting one's right to the free use of property and contract, should attach to corporations in order to protect their constituent persons. In other words, the right should only be granted to business corporations if granting such a right serves the underlying constitutional provision's function of enhancing some facet of the economic

123 The Supreme Court has held that First Amendment protection applies to commercial speech that proposes a commercial transaction. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (affirming that commercial speech is protected under the First Amendment). According to the Court, full First Amendment protections apply to speech that advocates against a commercial purchase or neutrally describes a product or service. *See* Bose Corp. v. Consumers Union of U.S., Inc. 466 U.S. 485, 512–13 (1984) (holding that an unflattering *Consumer Reports* review of a Bose sound system was protected under the First Amendment). However, speech advocating for a purchase receives reduced protection. Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

124 Perspectives vary greatly on whether commercial speech (i.e., advertising) ought to be protected by the First Amendment. For an argument in favor of expansive commercial speech protections, see, e.g., Martin H. Redish, *Commercial Speech and the Values of Free Expression*, CATO INST., https://www.cato.org/publications/policy-analysis/commercial-speech-values-free-expression#_idTextAnchor000. For arguments against such an expansive right, see, e.g., C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009); Vincent Blasi, *The Pathological Perspective of the First Amendment*, 85 COLUM. L. REV. 449 (1985).

liberty principle. Pollman advances a version of this framework in *Reconceiving Corporate Personhood*, arguing persuasively that, instead of merely substituting one metaphor of corporate ontology for the other, the Court should take a functionalist approach in deciding whether the right is intended to support the economic rights of a the corporation's constituent members, namely the property and contract interests of the shareholders.[125] The principle of economic liberty lends further support for this argument, and links Pollman's framework to the text and history of the Constitution's treatment of economic rights. Adopting such a framework would take the debate back, in a way, to the *Lochner* Era, when the Court was more reticent to extend constitutional rights to corporations that were not substantively protective of property and contract.[126]

To put this idea to work, let's go back to our illustration using non-incorporated Alpha and incorporated Beta. Again, their factories are seized by the government, and again, they both sue in their respective business names, invoking Fifth Amendment protection against takings without just compensation. Alpha wins their case, and now, the same judge has to decide Beta's fate. Rather than having to choose between an aggregate or real entity theory in order to conceptualize Beta's ontology, the judge can first look to whether the function of the Fifth Amendment right is supported by the principle of economic liberty. If it is, the judge can then decide if granting the right to Beta would serve that purpose. Given that the Takings Clause protects the enjoyment and use of private property, its function is supported by the principle of economic liberty. Granting the right to the individual members derivatively through the corporation would serve the purpose of the Takings Clause, because, as Pollman notes, "individuals still ultimately hold rights with economic value related to that property."[127] Therefore, Beta ought to enjoy the same protection as unincorporated Alpha.

Now, let us say that Alpha and Beta are looking to donate to their preferred pro-thimble Super PACs, who plan to blast the airwaves with advertisements supporting the pro-thimble candidate leading up to that year's presidential election. Tom and Dave of Alpha donate $2000 each from their personal bank accounts, whereas Bob and Jim of Beta donate $4000 from their corporate treasury. However, Congress has recently passed a statute that corporations may not use money from their general treasury

125 *See* Pollman, *supra* note 9, at 1671–72.

126 *See supra* Part I.

127 *See* Pollman, *supra* note 9, at 1671.

fund to finance "electioneering communications" promoting a particular candidate, making Beta's donation illegal. Because Alpha's donation was made by natural individuals, they have no issue under the statute. Beta sues, arguing that the prohibition on spending violates their First Amendment right to free speech.[128] In their complaint, Beta argues that their corporation is just an association of two individuals who have a right to free speech, just like their friends over at Alpha. Rather than addressing their corporate ontology argument, the judge can look to whether the purpose of the First Amendment right is supported by the principle of economic liberty. He may then rule that it does not, in that the First Amendment's purpose is to protect political rights, and not to serve an underlying economic liberty function, i.e., protecting property and contract. Granting a First Amendment protection to Bob and Jim through Beta would not serve a purpose supported by the principle of economic liberty. If denying the right to free speech harmed Bob and Jim's economic rights in any way, it would be a tangential harm at worst.

CONCLUSION

Issues surrounding corporate ontology will continue to be debated, but as this Comment has argued, those debates rarely bring about a useful framework for deciding the constitutional rights of business corporations. The principle of economic liberty, constructed using the Constitution's text and history, can act as a guide for discerning corporate rights that replaces the corporate ontology debate. Not only is it a more practical tool, it is also easier to square with the Constitution's text and history. Using the principle of economic liberty can ultimately allow future constitutional actors to decide corporate cases in a more consistent manner than the preceding corporate constitutional case law has shown.

128 Assume for our purposes that *Citizens United* has not been decided yet.