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Reconceiving Corporate Personhood

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RECONCEIVING CORPORATE PERSONHOOD

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I. INTRODUCTION

The Supreme Court's recent decision in *Citizens United v. FEC*[1] put in sharp relief the public's concern about the scope of corporate constitutional rights and the disconnect between protecting corporations and protecting people. Few decisions have been the subject of such immediate and widespread public disapproval. Subsequently, commentators and scholars have treated the First Amendment speech[2] and campaign finance[3] aspects of the case extensively, and others have addressed related concerns regarding corporate governance,[4] corporate criminal liability,[5] and various other matters.[6] This Article breaks from those approaches. It does not focus primarily on *Citizens United*. Instead, this Article examines the origins of corporations as right holders—the doctrine of corporate

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[1] Citizens United v. FEC, 130 S. Ct. 876 (2010).

[2] *See, e.g.*, Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953 (2011); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365 (2010).

[3] *See, e.g.*, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. (forthcoming 2012).

[4] *See, e.g.*, Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999; Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009).

[5] *See, e.g.*, Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of* Citizens United, 65 U. MIAMI L. REV. 1 (2010).

[6] *See, e.g.*, Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207 (2010); Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203 (2010); Toni M. Massaro, *Foreign Nationals, Electoral Spending, and the First Amendment*, 34 HARV. J.L. & PUB. POL'Y 663 (2011); Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post*-Citizens United *Environment*, 120 YALE L.J. ONLINE 17 (2010).

personhood—and offers an alternative approach to determining the scope of corporate rights.

Specifically, this Article traces historical and theoretical developments in the corporation and corporate personhood jurisprudence to show that the roots of the doctrine are based in concerns about the property and contract interests of shareholders. Over time, however, the Court expanded the doctrine without a coherent explanation or consistent approach. It recognized corporations as subject to criminal liability and expanded the scope of corporate rights to include a patchwork of rights related to searches and trials. And, the Court recognized corporations as having commercial and political speech rights.

But the conceptions of the corporation the Court has used in its ad hoc dispensation of rights are substantively flawed and incomplete. Moreover, oscillating between these conceptions demonstrates the weakness of this approach. Viewing the corporation as a concession from the state is a relic of a time before incorporating became a mere administrative formality. Likewise, viewing the corporation as just an aggregate of its shareholders can be incongruent with modern times, particularly in the large public company context. Shareholders in publicly traded corporations are not a static set of identifiable human actors and they do not control day-to-day corporate decision-making. Conceiving of the corporation as a real entity, more than a legal fiction or the sum of its shareholders, does not explain why corporations would receive constitutional protections as people.

Taking account of the doctrine's roots and its expansions, this Article argues that corporate personhood should be understood as merely recognizing the corporation's ability to hold rights in order to protect the people involved.[7] This concept is the only common thread in the case law. But that concept alone does not speak to whether corporations should have a particular right; it only provides a

[7] For different arguments about corporate personhood jurisprudence and its implications, see HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION viii (1995) (arguing that the proper application of the Constitution to the corporation is as a set of private contractual relationships and that "[a]cceptance of this analysis should lead to broader constitutional protection" for the corporation); THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS (2002) (a progressive, historical perspective arguing that corporations have been trying to "steal" rights through corporate personhood and dominate our democracy, and proposing legal reform such as constitutional amendment); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (arguing that the Supreme Court lacks a defensible theory for corporate personhood and proposing a constitutional amendment establishing a presumption favoring the individual over the corporation); Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009) (arguing for an interdisciplinary view of corporations); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523 (2010) (arguing that Bill of Rights protections were created only for individuals and not for corporations).

starting point of analysis—the notion that it is possible for corporations to hold rights. Furthermore, a metaphor or philosophical conception of the corporation is not helpful for the type of functional analysis that the Court should conduct. The Court should consider the purpose of the constitutional right at issue, and whether it would promote the objectives of that right to provide it to the corporation—and thereby to the people underlying the corporation.

In contrast to the Court's ad hoc approach to corporate rights, this Article's alternative approach would offer the advantage of increased judicial legitimacy and transparency. This approach would use a coherent test consistent with the objectives of the underlying rights as well as the realities and dynamics of the modern business corporation. It does not provide a grand theory of constitutional interpretation nor does it prescribe a particular theory of the corporation. Rather, it more modestly asserts that the Court should similarly approach questions of corporate rights, cognizant of the pragmatic assertion of American philosopher John Dewey that the facts and relations involved should be faced and stated in the process.[8]

This Article begins by examining the development of corporations and corporate personhood theories in early America and the nineteenth century. This historical and theoretical background provides critical insight into the narrow property and contract context in which the Court first established its view of the corporation as a person for constitutional purposes. Part III then shows how the Court continued to rely on the corporate-person metaphor in expanding corporate liability and rights beyond the doctrine's roots without regard to the limited explanatory power of the earlier jurisprudence or the changed nature of the modern business corporation. Part IV explains the limitations of the Court's conceptions of the corporation in this jurisprudence. Having established the roots of the doctrine and its ungrounded expansions, Part V critically examines substitutes for the corporate-person metaphor and suggests an alternative approach to determining the scope of corporate rights.

II. DEVELOPMENT OF THE CORPORATION AND CORPORATE PERSONHOOD GROUNDED IN PROTECTING INDIVIDUALS' PROPERTY AND CONTRACT INTERESTS

This section examines the development of corporations and corporate personhood in early America and the nineteenth century to introduce the context in which the Court first established its view of the corporation as a person for constitutional purposes. This shows the limited purview of the corporate personhood doctrine and its grounding in protecting individuals' property and contract interests.

It should be noted at the outset, however, that we did not create the corporate form or the corporate-person metaphor; we inherited and transformed them. Some trace the origins of the corporate form to ancient Rome, and more definitively, to

[8] John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 672–73 (1926).

medieval Europe when churches, guilds, and local governments sought royal authority to incorporate entities for perpetual survival.[9] By the late sixteenth century, several European countries had begun chartering corporations to develop foreign trade and colonies.[10] Some of these early corporations, such as the East India Company and the Hudson Bay Company, became well-known players in American colonial times.[11] English law used the metaphor of the corporation as a person to describe the self-perpetuating nature of the corporation.[12]

A. The Corporation in Early America

Although corporations were known in American colonial times, the Constitution itself includes no specific reference to corporations.[13] Corporate history in early America remains somewhat murky and subject to debate. The Supreme Court's recent decision in *Citizens United* illustrates this with Justice Scalia's concurrence and Justice Stevens' dissent presenting opposing views about whether the Framers disliked corporations, and more fundamentally, about the perceived role of corporations during this period.[14]

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[9] *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 1–3 (1970); David F. Linowes, *The Corporation as Citizen*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 345 (A. E. Dick Howard ed., 1992).

[10] *See* HURST, *supra* note 9, at 4.

[11] *See id.* at 7; Linowes, *supra* note 9, at 345.

[12] For example, Blackstone noted that when members "are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals . . . for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES 468 (7th ed. 1775).

[13] HURST, *supra* note 9, at 113–15.

[14] *See* 130 S. Ct. 876, 925–29 (2010) (Scalia, J., concurring); *cf. id.* at 929–79 (Stevens, J., dissenting). On re-argument, the case concerned the constitutionality of section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibiting corporations and unions from using general treasury funds for independent expenditures advocating for or against candidates in certain federal elections within a certain number of days of those elections. *Id.* at 887. Justice Stevens dissented on multiple grounds, including on the basis that the majority opinion overruled cases that were not inconsistent with "our First Amendment tradition" and "original understandings . . . ." *Id.* at 948. Relying on sources by historians and legal academics, Justice Stevens argued that the Framers "conceived of speech more narrowly than we now think of it," and understood corporations as being subject to "comprehensive[] regulat[ion] in the service of public welfare." *Id.* at 948–50. Justice Scalia concurred separately to respond to the dissent, and argued that the "text offers no foothold for excluding any category of speaker" and that "the dissent offers no evidence about the original meaning of the text to support any such exclusion." *Id.* at 929. Specifically, Justice Scalia asserted that although the number of corporations in America by the end of the eighteenth century seems small, the corporation was "a familiar figure in American economic life" and it is unclear that corporations were "despised" and

Notwithstanding some debate about the role and view of corporations in early America, scholars agree that before independence there were only a small handful of corporations.[15] Most businesses were organized as sole proprietorships and partnerships rather than as corporations.[16] After independence, royal charter was no longer required for incorporation; that authority subsequently resided in each state.[17] By the end of the eighteenth century, the number of corporations increased to around 300.[18] As discussed further below, the great majority of these corporations engaged in quasi-public activities such as infrastructure building, while only a small fraction engaged in general commerce.[19] The corporate landscape therefore looked much different from today's.

B. The Corporation as a Special Privilege or Concession of the State

By the early part of the nineteenth century, although the number had increased since independence, there were still relatively few corporations.[20] State legislatures controlled the authority for businesses to incorporate and before the 1850s, typically granted charters only by special order on an individual basis.[21]

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that even if they were that the Framers would have excluded them from the First Amendment. *Id.* at 925–26. Justice Scalia purported to show that the "lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak" with examples of political speech by a religious corporation and two political advocacy corporations. *Id.* at 926–27. He did not provide any examples of early corporate political expenditures by business corporations.

[15] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188–89 (2d ed. 1985); HURST, *supra* note 9, at 7, 14.

[16] *See* Linowes, *supra* note 9, at 346 (explaining that "[m]erchants at that time had limited need for the advantages of incorporation, preferring more immediate and exclusive control of their businesses"); *see also* ROBERT C. CLARK, CORPORATE LAW 1 (1986); Margaret M. Blair, *Locking In Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 414 (2003).

[17] Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 404 (1982).

[18] FRIEDMAN, *supra* note 15, at 188–89 ("In all of the 18th century, charters were issued to only 335 businesses. Only seven of these were during the colonial period; 181 were issued between 1796 and 1800."); HURST, *supra* note 9, at 14 ("After independence the desire of businessmen to use the corporation mounted rapidly; state legislatures chartered 317 business corporations from 1780 to 1801.").

[19] HURST, *supra* note 9, at 17 ("Of the 317 separate-enterprise special charters enacted from 1780 to 1801 in the states . . . less than 4 per cent were for general business corporations."); Brickey, *supra* note 17, at 404 ("Of the 225 private corporate charters granted prior to 1800, fewer than a third were issued to enterprises whose purpose was to engage in general commercial activity.").

[20] *See* Warren J. Samuels & Arthur S. Miller, *Introduction* to CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 2 (Warren J. Samuels & Arthur S. Miller eds., 1987) ("Only approximately 300 corporations, each comparatively small in size, were present as late as 1800.").

[21] *See* HURST, *supra* note 9, at 15; *see also* Linowes, *supra* note 9, at 346.

Corporations were generally viewed as enterprises owing their existence to the state because their authority to conduct business in corporate form flowed from a state-granted charter.[22]

As a special government "privilege" or "grant," states mainly awarded charters for enterprises that would benefit the public good, such as for building public works like bridges and supplying public transport like operating a ferry.[23] In this sense, most corporations were "quasi-public."[24] The corporate form was particularly well suited to developing these capital-intensive, large-scale businesses.[25] By incorporating, companies could obtain large amounts of capital while limiting investors' participation in management.[26] And unlike a sole proprietorship or a partnership, shareholders of a corporation have limited liability for the corporation's debts—meaning that their losses cannot exceed the amount they paid for their shares.[27]

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[22] HURST, *supra* note 9, at 17; *see also* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (discussed *infra* notes 34–42).

[23] *See* HURST, *supra* note 9, at 15, 17; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 72–73 (1992).

[24] Blair, *supra* note 16, at 428. Blair explained:

> The distinction between these early civic, religious, and charitable corporations and some of the earliest business corporations may not have been obvious. . . . Both types were also intended to serve a broad, quasi-public purpose. . . . In fact, many of these businesses might more appropriately be regarded as public works projects, which the states did not want to have to use their taxing authority to finance. Often they were highly risky enterprises, which not infrequently failed to earn any profits at all. And even when the businesses were able to earn a profit, it was not uncommon that the assets of the business, including the special franchise they had, would revert to the government after some specified period of time.

Id.

[25] *Id.* at 427–28; *see also* Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 29 (Kenneth Lipartito & David B. Sicilia eds., 2004) ("There is general consensus that, by the end of the nineteenth century, corporations were critical to the task of mobilizing capital for large-scale industry.").

[26] *See* Blair, *supra* note 16, at 393.

[27] In the nineteenth century, there was some variation as limited liability gained acceptance. CLARK, *supra* note 16, at 7; *see also* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 3–20 (1993) (discussing general American acceptance of limited liability by early nineteenth century but noting that some states allowed for liability up to double or triple the original capital subscription); HURST, *supra* note 9, at 27–28 (noting a presumption of corporate limited liability existed until the middle to late part of the nineteenth century when statutes clarified this status).

In addition to requiring a special charter, states also subjected corporations to various limitations, such as on the number of shareholders, capitalization, and life term.[28] Further, special charters and early legislation required that the corporate charters define a limiting purpose or field of operation for the business.[29] Early case law, known as the "ultra vires" doctrine, held corporations to actions inside these formal, delineated corporate powers and imposed consequences on actions outside of these powers.[30] Thus, in the late eighteenth century and early nineteenth century, corporations were organized with a quasi-public function and were understood to be subject to strict government limitations.[31]

This view of corporations, as creatures of the state, artificial beings having only those rights explicitly granted to them, is often called the "concession" theory.[32] Under this view the corporation is a legal fiction and incorporation a special privilege or concession awarded by the state. Accordingly, this view supported the government-imposed limitations on corporations of the time because if incorporation is a state grant, it follows that it can be a limited one.

In many respects, the Court developed its personification of the corporation during this early period of corporate development. The context for these cases involved questions of property and contract. The well-known case, *Trustees of Dartmouth College v. Woodward*,[33] illustrates how the concession theory animated the Supreme Court's early view of the corporation and its early jurisprudence using the person metaphor to protect property and contract interests.[34]

In *Dartmouth College*, the Supreme Court held that the state could not unilaterally amend the charter of a private college and effectively convert it into a public institution.[35] Viewing the corporate charter as a contract with the state, the

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[28] *See* HURST, *supra* note 9, at 45–47, 157.

[29] *Id.* at 44.

[30] *Id.* at 157. For a discussion of the rise and fall of the ultra vires doctrine, see Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302–13 (2001).

[31] HURST, *supra* note 9, at 17; *see also* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 110 (1888) ("But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency . . . .").

[32] This notion also goes by the name of variant theories like the artificial entity, creature, grant, or fiction theory. *See* Dewey, *supra* note 8, at 665–68 (explaining some of the finer intricacies of these theories and noting differences between ones often lumped together such as the fiction theory and concession theory).

[33] 17 U.S. (4 Wheat.) 518 (1819).

[34] *See id.* at 636–39. *Dartmouth College* did not involve a business corporation, but commentators have noted its primary significance is with regard to business corporations. HURST, *supra* note 9, at 63; WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 113–14 (10th ed. 2007); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2621 n.175 (2008).

[35] 17 U.S. at 650.

Court struck down a statute attempting to change the charter as a violation of the Contracts Clause of the Constitution, which forbids a state from passing a bill impairing a contractual obligation.[36]

The Court first drew a distinction between a state legislature's ability to act with regard to a public versus a private entity, emphasizing that Dartmouth College was private because its funds derived from private donations and neither its educational activities nor its incorporation changed its private character.[37] According to the Court, a corporation has only the attributes that its charter bestows upon it. In this case the corporation was chartered for private purposes, and would be protected as a private contract.[38]

Writing for the Court, Chief Justice Marshall famously explained that a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law."[39] As "the mere creature of law," the corporation has only the properties conferred by its charter, including "immortality" and "individuality."[40] Incorporation does not change the private nature of the business.[41] The corporation represents the aims of the people who created it by state charter. The decision thus recognized the corporation itself as "an artificial being" having constitutional rights to protect the property interests of its individual donors.[42]

Twenty years after this application of the Contracts Clause, the Supreme Court declared that a corporation is not a "citizen" within the meaning of the Constitution's Article IV Privileges and Immunities Clause in *Bank of Augusta v.*

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[36] *Id.* at 624–50. For later Contracts Clause cases, see Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977).

[37] *Dartmouth College*, 17 U.S. at 629–39.

[38] *Id.* at 636–39. States responded to *Dartmouth College* by reserving authority in the state legislature to amend, change, or repeal charters it granted. HURST, *supra* note 9, at 63.

[39] *Dartmouth College*, 17 U.S. at 636. Chief Justice Marshall imported from Lord Coke the idea of a corporation as "invisible, immortal, and rest[ing] only in intendment and consideration of the law," Case of Sutton's Hosp., 77 Eng. Rep. 960, 973 (1612), and from Blackstone the idea of the corporation as an "artificial person," BLACKSTONE, *supra* note 12, at 467–68. *See also* BLUMBERG, *supra* note 27, at 4–5, 7 (discussing how Chief Justice Marshall borrowed from English characterizations of the corporation). Chief Justice Marshall had earlier expressed this view of a corporation as a "mere creature" of the law deriving its power only from incorporation in *Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch) 127 (1804).

[40] *Dartmouth College*, 17 U.S. at 636.

[41] *Id.* Several years after *Dartmouth College*, in *Providence Bank v. Billings*, Chief Justice Marshall reaffirmed this principle. 29 U.S. (4 Pet.) 514, 560 (1830) ("It has been settled that a contract entered into between a state and an individual, is as fully protected by the tenth section of the first article of the constitution, as a contract between two individuals . . . .").

[42] *Dartmouth College*, 17 U.S. at 636.

Earle.[43] The case concerned whether a bank had legal existence to enter into a valid contract outside of the state in which it was incorporated.[44] The Court noted that in an earlier case, *Bank of the United States v. Deveaux*,[45] it had looked to the individuals composing a corporation to decide whether the corporation had a right to sue in federal court under diversity jurisdiction.[46] But the Court declined to extend this reasoning and look behind the corporation to see if its members were all citizens of Georgia and thereby treat the corporation as entitled to the privileges and immunities of citizens of Alabama.[47]

The Court expressed concern that if it were to look behind the corporation to the aggregate of individuals, as if the corporation were a partnership, it would undermine the rationale for corporate limited liability that was gaining acceptance at the time.[48] The Court explained:

> If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. . . . [and] be liable to the whole extent of [their] property for the debts of the corporation . . . .[49]

The Court, however, noted that states would likely recognize the charters granted by other states as a matter of comity. This practice, the Court reasoned, would treat the corporation as "a person, for certain purposes in contemplation of law," like natural persons who contract in other states and "nobody has ever doubted the validity of these agreements."[50]

Thus, by the mid-nineteenth century, a corporation was not a "citizen" within the meaning of the Article IV Privileges and Immunities Clause, but the corporate charter was protected by the Contracts Clause, the corporation was recognized as

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[43] 38 U.S. (13 Pet.) 519, 586–87 (1839). The Privileges and Immunities Clause provides "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

[44] *Bank of Augusta*, 38 U.S. at 585.

[45] 9 U.S. (5 Cranch) 61 (1809).

[46] *Bank of Augusta*, 38 U.S. at 586.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 588. The Court reaffirmed its decision that corporations are not citizens entitled to the benefits of the Privileges and Immunities Clause in the well-known case, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), but its later Fourteenth Amendment jurisprudence undercut the impact of *Bank of Augusta* and *Paul*. *See infra* Part II.D. Further, corporations' ability to do business in other states was aided by the Court's indication in *Paul* that Congress' power to regulate interstate commerce included interstate transactions involving corporations. *See* KLEIN & COFFEE, JR., *supra* note 34, at 114 & n.9 (discussing *Paul* and permissive corporate enabling laws providing an environment for interstate competition).

having properties of "individuality," and the corporation was conceived of as a "person, for certain purposes in contemplation of law." This protected shareholders' property and contract interests in the entity.[51]

Notably, this personification of the corporation in the constitutional sense was different than the "legal personality" that courts, dating back to earlier English law,[52] had already recognized in giving corporations certain business capabilities. Legal personality of corporations included the ability to contract, own property, sue and be sued in the corporate name. Specifically, the corporate ability to own property[53] and to sue and be sued[54] were considered incident to the corporate form at common law. Courts also recognized corporations as having the ability to contract in their own name, but historically treated this under the ultra vires doctrine as a capacity limited by the corporate charter.[55] These rights allowed the

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[51] For a discussion of classical corporate theory that includes an interpretation of the early corporate personhood doctrine as the Supreme Court's solution to two property-related problems, see Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1640–41 (1988) (noting the doctrine protected corporate property like property held by an individual owner, and allowed the directors or managers, rather than the shareholders, to assert constitutional claims to protect corporate property).

[52] For example, in his 1793 Treatise on the Law of Corporations, Stewart Kyd described a corporation as "vested by the policy of the law, with a capacity of acting, in several respects, as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued." Lamoreaux, *supra* note 25, at 32 (quoting STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS (1793)).

[53] *See, e.g.*, Van Allen v. Assessors, 70 U.S. (3 Wall.) 573, 584 (1865) (quoting Lord Denman in an older English case and referencing as established law: "[t]he corporation is the legal owner of all of the property . . . and . . . can deal with the corporate property as absolutely as a private individual can deal with his own"); *see also* CLARK, *supra* note 16, at 19 (describing functions of legal personality for corporation, including the ability of a corporation to own property in its own name).

[54] *See, e.g.*, Leggett v. N.J. Mfg. & Banking Co., 1 N.J. Eq. 541, 541 (N.J. Ch. 1832) ("The powers of a corporation are, strictly speaking, two-fold; those that are derived from express grant, and those that are incident and necessarily appertain to it, whether expressed in the grant or not. The power to make by-laws, to make and use a common seal, and the right to sue are incident to every corporation."); 9 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4226 (perm. ed., rev. vol. 1999) ("The power to sue and be sued is one of the inherent powers of a corporation and is among the incidental or implied powers that have been attributed to corporations from the earliest period."). *But cf.* Cmty. Bd. 7 of Borough of Manhattan v. Schaffer, 639 N.E.2d 1, 4 (N.Y. 1994) (corporations are creatures of statute and require statutory authority to sue and be sued).

[55] RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 18 (1979); 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:1 (4th ed. 1993) (citing RESTATEMENT (SECOND) OF CONTRACTS § 12, cmt. b). For example, in *Bank of Augusta v. Earle*, the Court made clear that capacity to contract had to be conferred by charter: "a corporation can make no contracts, and do no acts either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner as the charter authorizes." 38 U.S. at 587.

corporation to carry on business as a legal entity separate and distinct from the shareholders.[56] Indeed, recent scholarship has specifically examined the importance of legal personality for providing: (1) a separation of assets between the corporation, shareholders, managers, and creditors,[57] and (2) an environment for maintaining resources and capital in the corporation over the long term.[58]

Although these entity attributes do not directly implicate the doctrine of corporate personhood,[59] this section shows that early corporate personhood cases are nonetheless akin to the concept of legal personality insofar as the constitutional jurisprudence bolstered the corporation as a separate entity from its shareholders and protected the property interests of the shareholders in the corporate property. Recognizing the corporate charter as covered by the Contract Clause and the corporation's property as protected by the Due Process Clause stabilized the corporate form as a viable organization for long-term private investment.

Not only was the corporation a distinct contracting party with a separate pool of assets from its shareholders, managers and creditors, but it was also separate from the government.[60] Furthermore, the notion of legal personality is consistent with early case law such as *Dartmouth College* that recognized corporations as legal fictions having the capacities and characteristics given to them in the corporate charter, such as "individuality."[61] This treated the corporation, for Contracts Clause purposes, as a contract creating a separate entity through which people conducted business or carried out their identified objectives.

C. Trend for General Incorporation and Changing Theories About Corporate Personality

As the personification of the corporation developed under the concession view, such as in *Dartmouth College*, a movement was rising to attack the way that

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[56] *See Bank of Augusta*, 38 U.S. at 587 ("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."); JAMES D. COX ET AL., CORPORATIONS § 1.2, at 2–3 (1997) ("A business corporation is . . . a legal unit with a status or capacity of its own separate from the other shareholders or members who own it. . . . The corporation holds property, enters into contracts, executes conveyances, and conducts litigation in a legal capacity separate and distinct from its shareholders.").

[57] REINIER R. KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 6–15 (2004). Authors Henry Hansmann and Reinier Kraakman had earlier set out their views in *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) [hereinafter Hansmann & Kraakman, *The End of History*], and *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000) [hereinafter Hansmann & Kraakman, *Organizational Law*].

[58] Blair, *supra* note 16, at 387.

[59] *See* Hansmann & Kraakman, *Organizational Law*, *supra* note 57, at 438–39 (distinguishing the authors' discussion of the corporation's essential entity attributes from the literature on the nature of the corporate legal person).

[60] *See id.* at 392–93, 438–39.

[61] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

corporate charters were specially granted. These attacks were based on fears about a concentration of power and wealth as well as political corruption and monopoly.[62] The "free incorporation" movement of the Jacksonian period eventually triumphed in its attack on special chartering.[63] By the 1850s, many states had enacted "enabling" corporate laws eliminating the need for legislative action to incorporate.[64] These general incorporation laws turned the special privilege of incorporation for purposes like public works into a mere administrative formality.[65] By the end of the nineteenth century, general incorporation was the norm across the states, providing simple procedures for obtaining charters for any lawful business, including the manufacturing that fueled the Industrial Revolution.[66]

The economic expansion of the time and the transition from special chartering to general incorporation eroded the persuasiveness of the concession theory, as the connection between a corporate charter and a state act became less significant.[67] States like New Jersey and Delaware began to compete for corporate taxes and fees by offering a liberal legal environment for incorporation.[68] As the ultra vires doctrine had flowed from the concession view of the corporation, courts began to relax their insistence that all corporate actions be taken within the stated purpose of

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[62] *See* HORWITZ, *supra* note 23, at 73. Special charters were viewed as prone to an undesirable concentration of power and wealth because they were understood as often conferring monopoly privileges to conduct a certain business, such as to build or operate a public work. KLEIN & COFFEE, JR., *supra* note 34, at 113–14. They were also viewed as not generally available, as "[t]hose able to lobby state legislatures could obtain a corporate charter, while less influential or affluent people could not." *Id.* at 114. Adding fuel to the criticisms of corporations in the mid-nineteenth century, a number of public scandals occurred involving corporations securing political favors. FRIEDMAN, *supra* note 15, at 512–13.

[63] *See* HURST, *supra* note 9, at 30–36 (discussing the Jacksonian period starting in the 1830s and the movement against special charters); *see also* HORWITZ, *supra* note 23, at 73 ("Despite the Supreme Court's continued hesitance, by 1900 the entity theory had largely triumphed . . . .").

[64] HURST, *supra* note 9, at 18; Linowes, *supra* note 9, at 346.

[65] HURST, *supra* note 9, at 18.

[66] *See id.* at 37.

[67] Linowes, *supra* note 9, at 351; *see also* HORWITZ, *supra* note 23, at 73–74 ("By rendering the corporate form normal and regular, late-nineteenth-century corporate theory shifted the presumption of corporate regulation against the state."); HURST, *supra* note 9, at 135 ("In the early years special chartering reflected the habits of legal thought and the concern with the power of organized groups which found shorthand expression in the concession theory . . . . [n]evertheless, special corporate charters did disappear from 1870's on . . . ."); Piety, *supra* note 34, at 2621 ("[The] concept of the business corporation—as an organization with a quasi-public function and strict regulation by government—situated the corporation in its early days . . . .").

[68] *See, e.g.*, KLEIN & COFFEE, JR., *supra* note 34, at 114; Piety, *supra* note 34, at 2621–22.

the corporation. Instead, courts implied the powers necessary or proper for the corporation's business.[69]

While support for the concession view of the corporation faded, the nature of corporate personality became one of the most prominent legal debates of the time.[70] Although the competing theories took many different names, three views and their variants fundamentally dominated the debate.[71] These theories directly influenced the Supreme Court's nineteenth century view of corporate personality. The first was the concession theory discussed above, which, although on the decline, continued to find voice.

In contrast, the second view, the "aggregate" theory, looked through the corporate form to the individuals behind it. This view regarded the corporation as a collection of its individual members, the shareholders.[72] The theory had roots in a view of the corporation as a partnership or contract among the shareholders.[73]

The third view, the "real entity" theory, was only beginning to emerge in the late nineteenth century America.[74] Also known as the natural entity or person

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[69] HORWITZ, *supra* note 23, at 77–78; HURST, *supra* note 9, at 157–58; *see also, e.g.*, Woods Lumber Co. v. Moore, 191 P. 905, 907–08 (Cal. 1920) (discussing the implied powers initially held by corporations); Equitable Holding Co. v. Equitable Bldg. & Loan Ass'n, 279 N.W. 736, 739–40 (Minn. 1938) (discussing the necessary actions of a corporation's business); State *ex inf.* McKittrick v. Gate City Optical Co., 97 S.W.2d 89, 92 (Mo. 1936) (stating that a corporation has the same rights as a person to contract); *In re* German Jewish Children's Aid, 272 N.Y.S. 540, 546 (N.Y. Sup. Ct. 1934) (holding that corporations have implied powers to carry out those expressly granted).

[70] Martin Wolff, *On the Nature of Legal Persons*, 54 LAW Q. REV. 494, 494 (1938) ("Philosophers and sociologists, historians and jurists have given grave consideration to this matter. Jurists have discussed it particularly in dealing with constitutional law, jurisprudence, legal history, company law, contracts and torts. On the Continent the number of jurists who attempt to grapple with this problem is so large that legal authors may be divided into two groups: those who have written on the nature of legal persons, and those who have not yet done so."); *see also* Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1464–67 (1987) (discussing the modern development of a corporation's legal personality in the United States).

[71] The terminology for these theories can be confusing because commentators and jurists have sometimes used the terms interchangeably, separately, or inconsistently and there are many variations on the theories. *See* HORWITZ, *supra* note 23, at 72–74; Mayer, *supra* note 7; David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201–02 (1990).

[72] Mark, *supra* note 70, at 1457–59; *see also* ROBERT HESSON, IN DEFENSE OF THE CORPORATION xv (1979) (stating that "a corporation is in fact an association of individuals who are entitled to the same rights and legal protections which apply to all other individuals and organizations").

[73] *See* HORWITZ, *supra* note 23, at 75.

[74] *See id.* at 70–71 (arguing that the real entity theory did not fully develop in America until the turn of the century, after the Supreme Court's decision in *Santa Clara*); *see also* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from*

theory, this view regarded the corporation as a real entity with a separate existence from its shareholders and from the state.[75] Some proponents of this view described the corporation as greater than the sum of its parts,[76] and as existing before recognition of law.[77] This view of corporations as "real" and "natural" suggested inherent, inviolable rights.[78]

D. Santa Clara: Recognizing the Corporation as a "Person" under the Fourteenth Amendment

In the midst of this prominent debate about the nature of corporate personality, the Court took another step in the development of its nineteenth century corporate personhood jurisprudence. The famous, or infamous, *Santa Clara* case[79] marks this step, notwithstanding its unusual circumstances. The case has come to stand for the proposition that corporations are "persons" within the meaning of the Fourteenth Amendment.

Santa Clara concerned taxation of railroad property. Specifically, the case posed the relatively mundane question whether a tax assessment was void because the state board improperly included railroad fences that instead should have been assessed by the local authorities.[80] Alternatively, the case posed the larger question whether California property tax laws unconstitutionally treated railroads differently from other corporations and individuals.[81] By the time this case came to the Supreme Court, railroad corporations had already tried unsuccessfully to get federal courts to construe the Fourteenth Amendment as protecting corporations.[82] In this case, the defendant railroads argued that a provision of the California constitution violated the Fourteenth Amendment by providing a deduction for the value of mortgages from property assessed for tax purposes, with the exclusion of

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History, 41 STAN. L. REV. 1471, 1485–91 (1989) (discussing the legal changes that corporations underwent during the latter part of the nineteenth century).

[75] HORWITZ, *supra* note 23, at 73–75.

[76] Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447, 495 (2001).

[77] *See, e.g.*, Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 261 (1911) ("A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity.").

[78] Dewey, *supra* note 8, at 669.

[79] Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 394–95 (1886).

[80] *Id.* at 396–97, 412–14.

[81] *Id.* at 409–11.

[82] *See* Chi., Burlington & Quincy R.R. Co. v. Iowa, 94 U.S. 155, 160 (1876); Peik v. Chi. & N.W. Ry. Co, 94 U.S. 164, 167–68 (1876); Chi., Milwaukee & St. Paul R.R. Co. v. Ackley, 94 U.S. 179, 179 (1876); Winona & St. Peter R.R. Co. v. Blake, 94 U.S. 180, 180 (1876).

railroad corporations.[83] The railroad corporations argued that this imposed "unequal burdens" on them and thus denied them "equal protection of the laws."[84]

John Norton Pomeroy, the railroad lawyer in the *Santa Clara* case, emphasized that associations of natural persons complying with just a few administrative formalities could organize themselves as a corporation and thus corporations should have rights as would the individuals behind them.[85] The focus was on property rights: "The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations IS the property of the individual corporators."[86] This aggregate conception of the corporation was not so different from a partnership or an image of individuals contracting amongst themselves. This was, however, only one aspect of his argument as the case involved other issues and grounds upon which the Court could base its decision.

Before oral argument, Chief Justice Waite stated:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[87]

The court reporter documented this comment in the headnotes to the opinion.[88]

The opinion itself, written by Justice Harlan, based the decision on another ground, that the state board lacked jurisdiction to assess the value of the fences and thus the tax assessment at issue was void.[89] The Court expressly stated in the opinion that because it was basing its judgment on this narrow ground "it [wa]s not necessary to consider any other questions raised by the pleadings and the facts found by the court."[90]

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[83] *Santa Clara*, 118 U.S. at 409.

[84] *Id.*

[85] HORWITZ, *supra* note 23, at 69–70.

[86] *Id.* at 70 (emphasis omitted) (quoting Argument for Defendant, San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1885)).

[87] *Santa Clara*, 118 U.S. at 396.

[88] Preceding the report of Chief Justice Waite's comment, the headnotes state: "One of the points made and discussed at length in the brief of counsel for defendants in error was that Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." *Id.*

[89] *Id.* at 416.

[90] *Id.* Several months later, in preparing the U.S. Reports volume, the court reporter sent a note to Chief Justice Waite asking if he had "correctly caught" the comment before oral argument. Chief Justice Waite replied: "I think your mem. in the California Railroad Tax cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision." Letter from

Subsequently, contrary to normal practice, Chief Justice Waite's pre-argument pronouncement has been taken as a ruling that corporations are persons within the meaning of the Fourteenth Amendment.[91] Because the opinion does not explicitly state this ruling or provide any discussion, reasoning, or authority related to this issue, it is unclear on what basis this pronouncement was grounded.[92]

The case law leading up to *Santa Clara* arguably offers some insight into the rationale for Chief Justice Waite's pronouncement. The Court had earlier construed the Equal Protection Clause of the Fourteenth Amendment as protecting recently freed slaves, not business firms.[93] Not all members of the Court agreed. In a notable dissent, Justice Field had argued for a more expansive construction of the Fourteenth Amendment.[94] Later, in related California tax cases leading up to *Santa Clara*, Justice Field, while sitting on circuit, ruled that the Fourteenth Amendment extended to all persons and that this included corporations. Recognizing corporations as "artificial persons" consisting of "aggregations of individuals," Justice Field emphasized that the corporation represented individuals with property

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Chief Justice Waite to Supreme Court Reporter J.C. Bancroft Davis (May 26, 1886) (quoted in HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 567 (1968)).

[91] *See infra* Part II.E.

[92] As might be expected, the unusual circumstances of this case have evoked skepticism and debate. For example, a "conspiracy theory" arose that corporate lawyers on the joint congressional committee that drafted the Fourteenth Amendment had craftily chosen language or foreseen that "persons" would include corporations. GRAHAM, *supra* note 90, at 566–68 (explaining that the conspiracy theory grew out of a Supreme Court argument by Roscoe Conkling in 1882); John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept*, *in* CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 131, 138 (Warren J. Samuels & Arthur S. Miller eds., 1987) (explaining that the conspiracy theory has been discounted (citing Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 48 YALE L.J. 171 (1938)). Some commentators have characterized the decision as an example of how decision-makers can misuse and manipulate legal concepts to hide underlying ideological preferences. *See, e.g.*, *id.* at 137–39 (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"). Many jurists and scholars have observed that corporations made more use of the Fourteenth Amendment than the individuals the amendment was designed to protect. *See, e.g.*, Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 89–90 (1938) (Black, J., dissenting) (arguing the amendment sought to prevent racial discrimination by the states but that in the first fifty years after adoption more than 50 percent of the cases invoking its protection involved corporations and less than 1 percent involved the racial classes it was meant to protect); Mark Tushnet, *Corporations and Free Speech*, *in* THE POLITICS OF LAW 256 (1982) ("Thus, the Court converted an amendment primarily designed to protect the rights of blacks into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations.").

[93] *See* cases cited *supra* note 82; *see also* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (interpreting the meaning and application of the Fourteenth Amendment).

[94] *See Slaughterhouse Cases*, 83 U.S. at 89–111 (Field, J., dissenting).

interests.[95] Even though shareholders do not own specific corporate assets, Justice Field explained that shareholders' interests had "an appreciable value, and is property in a commercial sense" so that their property interests were implicated in depriving the corporation of property or burdening it.[96]

E. Post-Santa Clara and Corporate Due Process Rights

If there was any question about the status of the *Santa Clara* pronouncement in the court reporter's headnotes, the Court shortly made clear that it would rely upon it as precedent. In a number of subsequent cases, the Court recognized the *Santa Clara* pronouncement and expanded the ruling to due process. The context for these cases again involved the enjoyment and protection of property and contract interests. The Court did not, however, provide consistent reasoning to undergird *Santa Clara* in these subsequent decisions.

As a preliminary matter, two years after *Santa Clara*, the Court relied on the decision and expressed the aggregate view of the corporation that Justice Field had championed while sitting on circuit. In *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*,[97] involving a corporation raising a Fourteenth Amendment claim, the Court explained:

> Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. . . . 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.[98]

However, in rejecting an alternative claim that the Privileges and Immunities Clause applied to corporations, the Court relied on an earlier case and rationale that emphasized the concession theory: "[T]he term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to

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[95] The Railroad Tax Cases, 13 F. 722, 740–44 (C.C.D. Cal. 1882) ("[W]e think that it is well established . . . that whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property, or affords to them means for its protection, or prohibits legislation injuriously affecting it, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.").

[96] *Id.* at 747 ("To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense; and whatever affects the property of the corporation necessarily affects the commercial value of their interest.").

[97] 125 U.S. 181 (1888).

[98] *Id.* at 189.

the State, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed."[99]

Thus the Court recognized the *Santa Clara* pronouncement in *Pembina*, but oscillated in its reasoning between viewing a corporation as an aggregate of individuals meriting rights and alternately as a concession of the state justifying limitations on rights. Accordingly, as in its earlier case law, the Court accorded corporations equal protection with regard to property interests as it would similar associations but did not confuse corporations with individuals themselves, who have citizenship rights under the Privileges and Immunities Clause.[100]

One year later, in *Minneapolis and St. Louis Railroad v. Beckwith*,[101] the Court relied on *Santa Clara* and *Pembina Mining* to hold that corporations could invoke Fourteenth Amendment due process protections.[102] Specifically, the Court stated:

> It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question [the Fourteenth Amendment]. It was so held in *Santa Clara County v. Southern Pacific Railroad Co*., and the doctrine was reasserted in *Pembina Mining Co v. Pennsylvania*. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the Constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.[103]

Although the Court discussed the scope of the due process protection, the Court did not further explain the basis for allowing corporations to invoke it.[104] The case provided merely an affirmation of the right and its property-based rationale.

The Court also extended Fifth Amendment due process protection to corporate property in *Noble v. Union River Logging Railroad Co.*,[105] in which an act of the secretary of the interior would have revoked and annulled an existing grant of public lands to a railroad corporation.[106] The Court did not explain why the Fifth Amendment Due Process Clause should apply to corporations, but noted that it viewed the revocation as "an attempt to deprive the plaintiff [corporation] of its property without due process of law."[107]

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[99] *Id.* at 187–88.
[100] *See id.*
[101] 129 U.S. 26 (1889).
[102] *Id.* at 27–28.
[103] *Id.* at 28.
[104] *Id.* at 28–36.
[105] 147 U.S. 165 (1892).
[106] The *Noble* Court did not explain its application of the Fifth Amendment to a corporation, but as the defendant was the federal government, the case has been understood as a due process case under the Fifth Amendment. *See* Mayer, *supra* note 7, at 591.
[107] *Noble*, 147 U.S. at 274.

III. BEYOND THE DOCTRINE'S ROOTS: UNGROUNDED EXPANSIONS

While the nineteenth century saw the rise of the corporation and ushered in cases focused on rights related to shareholders' property and contract interests, the twentieth century staged a significant expansion of corporate rights beyond this context. Despite robust debate of corporate personality from the turn of the century to the 1930s, as well as dissenting calls for reexamination of the doctrine, the Court has not grounded the expansions of corporate rights in a coherent concept of corporate personhood nor used a consistent approach in determining the scope of corporate rights. At times, the Court has used varying conceptions of the corporation; it has relied on nineteenth century cases that were decided in the context of property and contract rights; it has focused on the history or purpose of a particular amendment; and it has even accorded a right to corporations without explanation. Mapping the panoply of corporate rights and the rationale for them has become increasingly complex, and what the doctrine of corporate personhood stands for has become obscured.

This section traces this ungrounded expansion beyond the doctrine's roots by examining the Court's recognition of corporate criminal liability, the theoretical debates and the modernization of the business corporation, the calls for reexamination in the post-*Lochner* era, and the later-established suite of corporate rights. The only common thread through the doctrine's origins and subsequent developments is the notion that corporations may hold rights in order to protect the individuals behind them. This is an important principle, but it does not speak to whether corporations *should* have a particular right; it only provides a starting point of analysis.

A. Recognition of Corporate Criminal Liability

Tracing the corporate personhood doctrine in the twentieth century begins with the observation that the flip side of personifying the corporation was increased interest in corporate criminal liability. Some scholars suggest that the personification of the corporation in the law indeed inspired a transformed concept of the corporation as a legal person capable of criminal wrongs.[108] Despite this

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[108] *See* WILLIAM S. LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 11–12 ("*Santa Clara County* personified corporations at a time when states realized that permissive chartering laws could generate vast amounts of needed revenue. In transforming the conception of a corporation from a lifeless, artificial being, to a legal person, by allowing businesses to incorporate freely, and with the divergence of municipal and business corporations, the criminal law became the state's response to all sorts of corporate wrongs, from the indictment of railroad companies for the killing of pedestrians by improperly designed and recklessly operated trolley cars to elaborate prosecutions of conglomerate companies for illegal combinations."). *But see* Steven Walt & William S. Laufer, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263, 263–64 (1991) (arguing that the personality of a corporation should not matter for purposes of criminal liability).

significant departure from the property and contract context in which the Court had established corporate personhood, the Court did not strengthen the reasoning underpinning this expanding reach of the corporate personhood doctrine.

This is striking because many of the constitutional rights that corporations enjoy are an outgrowth of the Court's recognition of the corporation as subject to criminal liability. For example, if corporations were not subject to criminal liability there would be no need to consider whether they should receive double jeopardy protection. One would expect that in this crucial post-*Santa Clara* period the Court would bolster its rationale for the constitutional treatment of corporations, particularly in deciding whether to expose corporations to criminal liability, a different question than the Court had previously addressed in recognizing corporations as persons in order to protect shareholders' property and contract interests in the corporation. But instead, as one commentator has noted, organizational criminal liability grew like a weed without a rationale.[109]

Early common law had rejected the idea of imposing criminal responsibility on corporations because of conceptual obstacles such as attributing an act and intent to a corporation,[110] but by the early twentieth century courts found a broader approach to imposing liability. With little theoretical grounding, courts imported tort and agency principles to hold corporations vicariously liable for criminal acts performed by corporate agents within the scope of employment.[111]

In *Hale v. Henkel*, decided in 1906,[112] the Supreme Court held that a corporation did not have the Fifth Amendment right against self-incrimination, but did have a Fourth Amendment right against unreasonable searches and seizures.[113]

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[109] Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 21 (1957) ("Nobody bred it, nobody cultivated it, nobody planted it. It just grew.").

[110] *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909) (citing Chief Justice Holt and Blackstone and explaining that early common law held a corporation could not commit a crime); 1 WILLIAM BLACKSTONE, COMMENTARIES 476 (1765) ("[A] corporation cannot commit treason, or felony, or other crime, in it's [sic] corporate capacity."). For a more detailed history of corporate criminal liability in England and America, see Brickey, *supra* note 17, at 396–400, 404–15.

[111] *See, e.g.*, United States v. Van Schaick, 134 F. 592, 609 (S.D.N.Y. 1904); United States v. John Kelso Co., 86 F. 304, 308 (N.D. Cal. 1898); *see also* Brickey, *supra* note 17, at 404–15 (discussing the evolution of corporate accountability in the United States); Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 115 (2010) (discussing the impediments to holding a corporation criminally liable).

[112] 201 U.S. 43 (1906).

[113] *Id.* at 69–70, 76–77. The Fifth Amendment provides that "No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend IV. The Court's treatment of corporations in *Hale* does not seem to rest on a textual basis as the Fourth Amendment uses the word "people" whereas the Fifth Amendment uses the word "person." One scholar has suggested that pragmatism may have driven this decision as granting corporations the privilege against

In so holding, the Court oscillated between reasoning based on the concession, aggregate and real entity views, balancing the recognition that "[c]orporations are a necessary feature of modern business activity," with the sense that the state that creates the corporation must preserve its ability to regulate.[114]

In *New York Central and Hudson River Railroad Co. v. United States*, decided in 1909,[115] the Supreme Court definitively recognized corporate criminal liability and expanded the respondeat superior approach based on "public policy" rather than any particular view of the corporation.[116] The case involved a government indictment against a railroad and two of its officers for giving unlawful rebates under the Elkins Act. The corporation argued that the Elkins Act was unconstitutional because Congress lacked authority to impute criminal acts to a corporation, which would effectively punish innocent stockholders and deprive them of due process. The Supreme Court rejected the corporation's aggregate-style argument on the "public policy" basis that doing otherwise would give the corporation "immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime."[117] According to the Court, this "would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."[118]

Thus, relying on multiple views of the corporation and "public policy," the Court expanded the corporate-person metaphor to the criminal context, involving a different set of questions than the protection of property and contracts. The limitations of the Court's conceptions of the corporation became apparent as the Court oscillated between them, sometimes even in the same opinion.[119] The only unifying strand between these disparate cases was the recognition of corporations as capable of holding rights or liabilities.

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self-incrimination could have critically impeded criminal prosecution of corporations, whereas giving corporations some protection against unreasonable government searches and seizures would not entirely insulate corporations from criminal enforcement. *See* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 797 (1996).

[114] *See Hale*, 201 U.S. at 69–76.

[115] 212 U.S. 481 (1909).

[116] *See id.* at 483, 494–96.

[117] *Id.* at 496.

[118] *Id.*

[119] *See* Hale v. Henkel, 201 U.S. 43, 69–76 (1906); *see also id.* at 79–83 (McKenna, J., concurring) (noting the internal incoherence between the Court's Fourth and Fifth Amendment analysis); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 599–601 (1996) (discussing the Court's use of multiple conceptions of the corporation and pragmatism, noting "the Court's preposterous classifications of the same corporation as both an artificial and a natural entity.").

B. The Rise of the Modern Business Corporation and the "End" of the Theoretical Debate About Corporate Personhood

In the early twentieth century, debate about corporate personality reached a fever pitch, spanning the United States and Europe, the fields of law and philosophy, and then faded just as the business corporation entered a transformative period.[120] The direction of the legal debate about corporations and their ontological nature moved to legal realism, the view that theories of corporate personality, such as reflected in the concession, aggregate, and real entity views, were indeterminate. Many commentators view John Dewey's 1926 Yale Law Journal article as having put an end to the corporate personhood debate.[121] Dewey dismissed the debate as pointless because "'person' signifies what law makes it signify."[122] Building on the English jurist Frederic Maitland's statement that the corporation is "a right-and-duty-bearing unit," Dewey pragmatically argued that "person" "convey[s] no implications, except that the unit has those rights and duties from which the courts find it to have."[123]

According to Dewey, the significance of "person" in common speech or philosophy is irrelevant.[124] Assumptions about inherent attributes that a unit must have to be a juridical person, such as implied concepts of personality or inherent essence, were wrongly imported into legal discussion and generated "confusion and conflict."[125] Dewey concluded that "there is no clear-cut line, logical or practical, through the different theories which have been advanced"; "[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends."[126] In brief, political ideology was driving adherence to the competing theories. Accordingly, he advocated "eliminating the *idea* of personality until the concrete facts and relations involved have been faced and stated on their own account: retaining the *word* will then do no great harm."[127] The corporate personality debate needed a more concrete understanding of society's interests and the functional relations involved.

Around this time, Adolf Berle and Gardiner Means also published their influential book, *The Modern Corporation and Private Property*.[128] The book

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[120] HORWITZ, *supra* note 23, at 100–05.

[121] Multiple commentators have observed that Dewey's article put an end to the debate, for example HORWITZ, *supra* note 23, at 68; Bratton, Jr., *supra* note 74, at 1491; David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1527 (2004) (reviewing REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2004)).

[122] Dewey, *supra* note 8, at 655.

[123] *Id.* at 656.

[124] *Id.*

[125] *Id.* at 658.

[126] *Id.* at 669.

[127] *Id.* at 673.

[128] ADOLF A. BERLE JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

came after the beginning of a major transformation at the turn of the twentieth century. Corporations exploded in number and size,[129] corporate ownership diversified and dispersed, and a national stock market emerged.[130] Stock ownership was on the rise: the number of shareholders of American corporations more than quadrupled between 1900 and 1928.[131] The rise of a national stock market[132] hastened the development of a class of corporate managers and the conversion of shareholders' role into passive investors.[133] Whereas previously large businesses had often been owned by an individual or small group of individuals, large businesses were increasingly owned by a dispersed group of shareholders.[134]

In their well-known work, Berle and Means focused attention on this growing dispersion of stock ownership and the separation of ownership and managerial control in corporate governance.[135] This concept eroded the view of shareholders as "owners" of the corporation and revealed the conflicting interests of the people involved with the corporation.[136] Delegating control of the corporation to professional managers created costs as the managers might not act for the benefit of the shareholders. Shareholders had moved from a position of private ownership to merely acting as passive recipients of capital returns. According to Berle and

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[129] The number of corporations increased exponentially in the nineteenth century and state corporation laws eased their earlier strictures. Whereas by 1800 there were about 300 corporations, mostly with a quasi-public purpose, by the turn of the twentieth century, there were approximately 500,000 business corporations. Blair, *supra* note 16, at 389 n.3. Corporations were no longer associated with achieving a quasi-public purpose for the public benefit; many enterprises engaged in manufacturing and trade for private gain. States' relatively strict reign of corporations through limited powers granted in charters, rules prohibiting stock ownership in other corporations, and other limitations had faded away. *See, e.g.*, HORWITZ, *supra* note 23, at 73–74, 80–84; Mark, *supra* note 70, at 1444–45.

[130] *See* ALFRED CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); HORWITZ, *supra* note 23, at 94–95.

[131] BERLE & MEANS, *supra* note 128, at 53, 56.

[132] Between 1890 and 1893, the New York Stock Exchange began to list "industrials." HORWITZ, *supra* note 23, at 95. After 1897, companies publicly offered shares of stock. *Id.* This replaced the previous system of private subscriptions. *Id.* Between 1896 and 1907, the number of shares traded on the Stock Exchange increased from 57 million to 260 million. *Id.*

[133] *Id.* at 95–97.

[134] *See* CHANDLER, JR., *supra* note 130, at 79–205, 287–89.

[135] BERLE & MEANS, *supra* note 128; *see also* CHANDLER, JR., *supra* note 130 (discussing the development of the modern business corporation and the rise of managerialism in the mid-nineteenth and early twentieth century); Mark, *supra* note 70, at 1475 (discussing Ernst Freund's views and contributions to management hierarchy in modern corporations); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) (discussing the development of the large corporation with dispersed share ownership in the context of American politics).

[136] *See* MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS 18–19 (1986) (discussing the impact of Berle and Means); BUTLER & RIBSTEIN, *supra* note 7, at 2–3.

Means, "[c]orporations . . . ceased to be merely legal devices through which the private business transactions of individuals may be carried on."[137]

In any event, "[b]y 1930 the dialogue had largely run its course, with the general consensus being that a corporation was an important legal form which was more than a mere contractual aggregation but which could not truly be equated with a natural person."[138] After this debate quieted, most corporate law scholars simply accepted corporate personhood as a given, without pushing for a particular philosophical conception of the corporation to ground this concept.[139]

C. A Transitional Period in Judicial Approach

In the legal world, the nineteenth century cases that provided corporations with equal protection and due process rights had built a foundation for corporations—as constitutional "persons"—to seek substantive due process in the early twentieth century. After the landmark *Lochner* decision in 1905,[140] corporations posed many challenges to state statutes under the Fourteenth Amendment and the substantive due process doctrine.[141] Thus, protecting corporations from a wide variety of government regulation emerged as a broader effect of recognizing corporate personhood.[142]

In the mid-1930s, the Court changed its direction with the substantive due process doctrine.[143] The Court did not reconsider its interpretation of the Fourteenth Amendment with respect to corporate personhood, however, despite

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[137] BERLE & MEANS, *supra* note 128, at 56 (Table VIII) (estimated number of shareholders in the United States in 1900 was 4.4 million and in 1928 was 18 million).

[138] Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456, 479 (2004). Some literature around this time suggests that there was at least a trickle left of discussion. *See, e.g.*, ALEXANDER NEKAM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY (1938); E. Merrick Dodd, Jr., *Corporate Personality*, 44 HARV. L. REV. 309 (1930) (book review); Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932); Martin Wolff, *On the Nature of Legal Persons*, 54 LAW Q. REV. 494 (1938).

[139] Skeel, Jr., *supra* note 121, at 1527.

[140] Lochner v. New York, 198 U.S. 45, 52–54 (1905) (invalidating a state statute limiting the working hours of bakery employees by reading into the Fourteenth Amendment a requirement for economic substantive due process and freedom of contract).

[141] Mayer, *supra* note 7, at 588–92.

[142] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 613 (3d ed. 2006) ("[I]n 1886, the Supreme Court held that corporations were 'persons' under the due process and equal protection clauses. This meant, of course, that corporations could use the Constitution . . . to challenge government regulations."). Some have argued that this constitutes a relative narrowing of individual rights and power. *See, e.g.*, Flynn, *supra* note 92, at 132.

[143] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling a liberty of contract decision, Adkins v. Children's Hosp., 261 U.S. 525 (1923)); *see also* CHEMERINSKY, *supra* note 142, at 622–25 (discussing the Court's move away from the *Lochner* era).

several notable dissents as well as the significant corporate changes and the end of the debate about corporate personality, as discussed above.

For example, in *Connecticut General Co. v. Johnson*,[144] applying precedent treating corporations as persons under the Fourteenth Amendment, the majority held that a California statute violated the Due Process Clause by taxing a Connecticut insurance company on receipt in Connecticut of reinsurance premiums for risks originally insured in California.[145] No act related to the contracts took place in California and the performance of the contracts did not depend upon any privilege or authority granted by California.[146] In his dissent, Justice Black emphasized that the history and plain meaning of the Fourteenth Amendment "sought to prevent discrimination by the states against classes or races" and did not include corporations.[147] Invoking the Court's recent *West Coast Hotel*[148] decision that changed direction on the substantive due process doctrine, he called on the Court to overrule precedents interpreting the Fourteenth Amendment as including corporations:

> I do not believe the word "person" in the Fourteenth Amendment includes corporations. The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. This Court has many times changed its interpretations of the Constitution when the conclusion was reached that an improper construction had been adopted. Only recently the case of *West Coast Hotel Co. v. Parrish*, expressly overruled a previous interpretation of the Fourteenth Amendment which had long blocked state minimum wage legislation. . . . I believe this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.[149]

Justice Black explained the lack of historical and textual basis for interpreting the Fourteenth Amendment as including corporations.[150] He characterized the implication of this interpretation as "granting new and revolutionary rights to corporations" that "deprive[d] the states of their long-recognized power to regulate corporations."[151] Further, he argued that the people and the states did not adopt the amendment with the intent of granting these rights or with the knowledge that it would be so construed: "The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control

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[144] 303 U.S. 77 (1938).
[145] *Id.* at 80–82.
[146] *Id.* at 81.
[147] *Id.* at 89 (Black, J., dissenting).
[148] 300 U.S. 379 (1937).
[149] *Conn. Gen. Co.*, 303 U.S. at 85 (Black, J., dissenting).
[150] *Id.* at 85–90.
[151] *Id.* at 86, 89.

of state governments."[152] Justice Black concluded that the Court should not construe the Fourteenth Amendment to include corporations, and noted that if Americans wanted to give corporations this protection they could amend the Constitution.[153]

Some years later, together with Justice Black, Justice Douglas dissented on the same basis in *Wheeling Steel Corp. v. Glander*,[154] another case concerning taxation of an out-of-state corporation.[155] However, in the majority opinion, Justice Jackson deemed it unnecessary to reconsider Fourteenth Amendment corporate personhood, and wrote separately to explain:

> It was not questioned by the State in this case, nor was it considered by the courts below. It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws, at least since 1886, and that it entitles them to due process of law, at least since 1889.[156]

Justice Jackson continued, "[i]n view of this record I did not, and still do not, consider it necessary for the Court opinion to review the considerations which justify the assumption that these corporations have standing to raise the issues decided."[157]

A critical opportunity to clarify the Court's reasoning and approach to corporate personhood was thus lost. The Court had recently reexamined its Fourteenth Amendment jurisprudence with respect to substantive due process[158] and could have likewise reconsidered the basis for corporate personhood. It was still relatively early in the development of corporate rights, while the corporation was beginning to modernize, and Dewey had drawn attention to the indeterminacy of the existing corporate personality views.[159] Instead, the Court formalistically relied on the conclusion that a corporation is a constitutional person. To be sure,

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[152] *Id.* at 87.

[153] *Id.* at 90 ("If the people of this nation wish to deprive the States of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own state boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An Amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose.").

[154] 337 U.S. 562 (1949).

[155] *Id.* at 576–81 (Douglas, J., dissenting).

[156] *Id.* at 574 (Jackson, J., concurring).

[157] *Id.* at 576 (Jackson, J., concurring).

[158] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937) (overruling a previous interpretation of the Fourteenth Amendment concerning the freedom of contract, which had blocked state wage legislation).

[159] *See supra* Part III.B.

Justice Douglas and Justice Black valiantly called attention to the need for reconsideration and the lack of historical and textual support for the corporate person conclusion. But their dissents are also problematic in that they failed to explain why the individuals behind the corporation should be deprived of the protection they would receive if they acted through an unincorporated business.[160]

D. The Annex of Corporate Constitutional Rights Jurisprudence

The 1960s marked the beginning of a major expansion of corporate constitutional rights and protections.[161] At times, the Court has simply accorded a right to corporations without explanation.[162] Sometimes echoes of earlier conceptions of the corporation have reverberated in the case law or the Court has focused on the history or purpose of the amendment at issue on an ad hoc basis.[163]

In doing so, the Court often relied on case law that was made in the different context of protecting investors' property and contract interests, at a time when many corporations were significantly different. Through this process, corporations have received many, but not all, of the protections and guarantees that are afforded to natural persons.[164] These can loosely be categorized as rights relating

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[160] As discussed in Part II.D, the view that the corporation represented individuals with protectable property interests may have animated the Court's pronouncement in *Santa Clara*. The majority in *Connecticut General*, subtly echoing this view, stated: "A corporation which is allowed to come into a state and there carry on its business may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law." Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S 77, 79–80 (1938). Although Justice Douglas made strong historical and textual points about the Fourteenth Amendment in his *Wheeling Steel* dissent, he did not explain how to reconcile that under his view people acting in an unincorporated business would receive protections that people acting through the corporate form would not.

[161] Mayer, *supra* note 7, at 620–51.

[162] *See id.* at 621, 629 ("The Court retreated to pragmatism in response to criticisms of corporate personhood theory. . . . Frequently the Court looked to the history of the amendment in question to justify corporate rights, as in the case of the fourth amendment; occasionally the Court examined the underlying purposes of an amendment, as in its handling of the first amendment; and sometimes the Court conferred Bill of Rights protections on corporations with no explanation, as with the fifth, sixth, and seventh amendments."); Henning, *supra* note 113, at 798–99 & n.19 (discussing double jeopardy jurisprudence as an example of the Court assuming without explanation that constitutional protections apply to corporations).

[163] *See* Mayer, *supra* note 7; Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1317 (1996); Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1644–45 (1982) ("There is no way to bring unity to these many decisions [regarding corporate constitutional rights], for they rest on radically different conceptions of the person whose rights and duties receive judicial definition.").

[164] In this Article, the term "rights" refers to legal rights or privileges, not moral rights. For a discussion of whether moral rights should be ascribed to corporations, see

particularly to property and contract interests,[165] rights related to the criminal context such as searches and trials, and finally speech rights.

While the corporate rights relating particularly to property and contract interests are at the root of the nineteenth century corporate personhood doctrine, corporate rights related to searches and trials did not originate until the turn of the twentieth century and have continued to develop since then.[166] As noted, corporations enjoy Fourth Amendment safeguards against unreasonable regulatory searches, but do not have a Fifth Amendment privilege against self-incrimination.[167] Corporations enjoy Fifth Amendment protections for liberty and against double jeopardy,[168] and arguably Sixth and Seventh Amendment entitlements as "persons" to trial by jury.[169]

Finally, perhaps receiving the most public attention, corporate speech is protected under the First Amendment.[170] Broadly speaking, both commercial and

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PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984); PATRICIA H. WERHANE, PERSONS, RIGHTS AND CORPORATIONS 60–75 (1985).

[165] *See* Mayer, *supra* note 7, at 590–91 & n.71; *supra* Part II.B, D, E.

[166] In a sense, many of the constitutional rights that corporations enjoy are the outgrowth of the Court's recognition of the corporation as subject to criminal liability. For arguments against corporate criminal liability, see V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1484–88 (1996) (arguing on efficiency grounds that corporate criminal liability serves no purpose); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 322 (1996) (arguing that corporate criminal liability "is inferior as a practical matter to an appropriate corrective on the civil side"); *cf.* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 846 (2000) (arguing the modern corporation has an "independent identity" based on "an identifiable persona and a capacity to express moral judgments," and thus corporate criminal liability can serve a retributive purpose).

[167] Hale v. Henkel, 201 U.S. 43, 75–77 (1906). For a discussion of the development of corporate rights under the Fourth and Fifth Amendments, see Henning, *supra* note 113, at 826–40; Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 814–18 (2005).

[168] United States v. Martin Linen Supply Co., 430 U.S. 564, 575–76 (1977) (discussing double jeopardy); Fong Foo v. United States, 369 U.S. 141 (1962) (discussing double jeopardy); Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 969 (D.C. Cir. 1980) (discussing liberty interests under the Fifth Amendment Due Process Clause). For a discussion of some restrictions on double jeopardy protection, see Khanna, *supra* note 166, at 1517 n.211.

[169] Ross v. Bernhard, 396 U.S. 531, 532–34 (1970); Khanna, *supra* note 166, at 1518 & n.216.

[170] These corporate speech protections are not without limit. Whereas courts apply strict scrutiny when reviewing burdens on corporate political speech, under the commercial speech doctrine, courts apply a lower standard, and states may regulate the content of commercial speech for truthfulness. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y., 447 U.S. 557, 561–66 (1980) (using a balancing test to determine restrictions on corporate commercial speech); *cf.* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776–786 (1978) (applying strict scrutiny to restrictions on corporate political speech). In addition, corporations have been long subject to mandatory silent periods and

political speech protections date back to the 1970s for corporations.[171] The Court has also recognized that corporations have the right not to speak or be associated with speech of others.[172] The Court's mode of analysis has varied considerably, but in many cases, including most recently in *Citizens United*, the Court has relied on the idea that the First Amendment concerns the rights of listeners and the "marketplace of ideas" rather than the speaker's identity.[173]

While the Court has significantly expanded corporate rights, it has not grounded these expansions in a coherent concept of corporate personhood. For example, in the 1978 case *First National Bank of Boston v. Bellotti*,[174] one of the first Supreme Court cases to broadly protect corporate political spending as speech, the Court struck down a state law that prohibited corporations from spending money to influence the vote on referendum proposals having no material effect on the property, business, or assets of the corporation.[175] The majority opinion by Justice Powell reframed the question answered by the courts below—whether corporations have or should have First Amendment rights coextensive with those of natural persons—to instead examine whether the statute "abridge[d] expression

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compelled disclosures under federal securities laws that have been in effect since the 1930s. *See* BUTLER & RIBSTEIN, *supra* note 7, at 93–106 (arguing that federal securities laws contain provisions in violation of the First Amendment); Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 871 (2007) (noting that if the Court were to recognize a broad corporate right to speak about matters of public concern then important federal securities laws would be in question). And, campaign finance laws continue to restrict direct corporate contributions for the election of candidates. Tillman Act, Pub. L. No. 59–36, 34 Stat. 864, 864–65 (1907) (prohibiting corporate campaign contributions); *see* Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (striking down Federal Election Campaign Act limits on candidate and independent campaign expenditures while upholding contribution limits, reasoning that the government's interest in preventing corruption and the appearance of corruption in the electoral process was adequate to justify only the latter).

[171] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–70 (1976); *Cent. Hudson Gas*, 447 U.S. at 561–66 (commercial speech); *Bellotti*, 435 U.S. at 776–86 (political speech). The Court had earlier held unconstitutional a state license tax imposed on newspaper corporations selling advertising space as an impermissible abridgment of the freedom of speech or speech of the press under the Due Process Clause of the Fourteenth Amendment. Grosjean v. Am. Press Co., 297 U.S. 233, 243–44 (1936). The Court relied on precedents holding that corporations are "persons" for Fourteenth Amendment purposes and precedents holding that the Due Process Clause of the Fourteenth Amendment safeguards freedom of speech and of the press against abridgement by state legislation. *Id.*

[172] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 2 (1986) (holding unconstitutional under the First Amendment a state regulation allowing an advocacy group to enclose inserts in a public utility's newsletter mailing).

[173] For a critique of the marketplace of ideas approach, see Tushnet, *supra* note 92, at 253. For an argument that corporate personhood has played a smaller role in shaping corporate speech rights than some believe, see Winkler, *supra* note 170, at 863–68.

[174] 435 U.S. 765 (1978).

[175] *Id.* at 768.

that the First Amendment was meant to protect."[176] This is consistent with the language of the First Amendment, which is not framed as the grant of an individual right and does not refer to "persons."[177]

To answer this reframed question, the Court identified the case as concerning speech about a referendum issue, a type of political speech within the purview of the First Amendment, and then concluded that the statute was invalid under the First and Fourteenth Amendments because it impinged this speech, regardless of the identity of the speaker.[178] The Court based this decision on the idea that the purpose of the First Amendment is to protect a marketplace of ideas and that the source of the speech is not determinative.[179]

However, the Court also invoked jurisprudence under the corporate personhood doctrine, noting that First Amendment freedom of speech is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment, and that "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."[180] The Court cited *Santa Clara* without explanation.[181]

At this point, the Court's analysis might arguably appear as a sleight of hand. The Court first stated that the question was not about the rights of corporations, but then pointed to corporations' rights as persons under the Fourteenth Amendment.[182] The Court relied on this Fourteenth Amendment jurisprudence to apply the First Amendment to the state action at issue in the case.[183] Citing precedent stating the corporation is a "person" within the meaning of the Fourteenth Amendment does not explain, however, the extent to which a corporation is protected in spending money to influence referenda not materially affecting the business of the corporation.[184] To this extent, the Court's analysis was both internally contradictory and substantively incoherent.

Further, the Court left largely unexamined the various types and dynamics of corporations and their impact in considering whether the statute met the strict scrutiny standard.[185] For example, in response to an argument that the statute served state interests in protecting shareholders against the use of corporate funds to support views they opposed, the Court stated: "Ultimately shareholders may

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[176] *Id.* at 775–76.

[177] *See* U.S. CONST. amend. I ("Congress shall make no law . . . . abridging the freedom of speech, or of the press . . . .").

[178] *Bellotti*, 435 U.S. at 784.

[179] *See id.* at 810 (White, J., dissenting).

[180] *Id.* at 778–80 & n.15 (citing Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394 (1886)).

[181] *Id.* at 780 & n.15.

[182] *Id.* at 778–80.

[183] *See id.*

[184] *See* BUTLER & RIBSTEIN, *supra* note 7, at 173 n.61 (noting that the characterization of the corporation as a "person" in *Bellotti* "does not help clarify the scope of constitutional protection of corporate political speech").

[185] *See Bellotti*, 435 U.S. at 789–95.

decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[186] This view ignores, however, that "the reality of the large corporation is far from democratic, because shareholders rarely have the incentive to exercise their legal rights."[187] Moreover, this view ignores the fact that the procedures of "corporate democracy" do not actually empower shareholders to control the corporation's political spending in a meaningful way.[188]

Justice White, joined by Justices Brennan and Marshall, grappled with this modern corporate context in his dissent. Instead of unquestioning reliance on *Santa Clara*, Justice White argued that "an examination of the First Amendment values that corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not."[189] According to Justice White, corporate speech should be protected when it furthers the shareholders' self-expression, such as when corporations are formed to advance particular ideological causes shared by all members or press corporations formed to disseminate information and ideas.[190] For-profit corporations are not formed for achieving self-expression; "[s]hareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes."[191] That is, shareholders in for-profit corporations lack a common purpose with regard to what the legislation at issue in *Bellotti* prohibited—corporate spending to influence public opinion or votes on referenda having no material connection to the corporation's business or property. Thus, in Justice White's view, the majority failed to appreciate that the state's decision in balancing competing First Amendment interests in the legislation relating to such corporate expenditures would pass "even the most exacting scrutiny."[192]

IV. THE COURT'S FLAWED CONCEPTIONS OF CORPORATE PERSONALITY

The notion of the corporate person in constitutional jurisprudence is rooted in concerns about protecting contracts and property, resembling the ethos of the legal

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[186] *Id.* at 794–95.

[187] BUTLER & RIBSTEIN, *supra* note 7, at 2 (discussing the contractual theory of the corporation).

[188] Pollman, *supra* note 4, at 55–58.

[189] *Bellotti*, 435 U.S. at 804 (White, J., dissenting).

[190] *Id.* at 805.

[191] *Id.* Justice White concluded that the state had therefore struck a permissible balance between the First Amendment interests involved in the case. *Id.* at 821–22 ("The electoral process, of course, is the essence of our democracy. It is an arena in which the public interest in preventing corporate domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporate expenditures are integral to the economic functioning of the corporation is at its weakest.").

[192] *Id.* at 804.

personality doctrine giving the corporation its ability to function as a separate legal unit.[193] Key constitutional precedents like *Dartmouth College* and *Santa Clara* expressed the notion that real people exist behind the corporation and their property and contract interests should be protected, as they would have been if they had not acted through the corporate form.[194]

Later taking an ad hoc approach to determining the scope of corporate rights, the Court expanded these rights by relying on the older cases, or assumptions stemming from them, without explaining their application in new contexts such as in criminal law and, at times, in First Amendment jurisprudence.[195]

Although the three conceptions of corporate personality from the nineteenth century still find their way into opinions, they do not bolster the Court's reasoning because each conception is flawed or incomplete and the Court's variance with them only adds to the inconsistency of its approach. None of these conceptions fully explain why corporations should or should not receive constitutional rights and what the scope of those rights should be. It appears that not much has changed since John Dewey's observation that "there is no clear-cut line, logical or practical, through the different theories which have been advanced . . . [e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends."[196] The concession theory sometimes emerges when the Court, or a justice writing in dissent, is justifying a limitation on corporate power.[197] A sign of this rhetorical move is a quote of Chief Justice Marshall's famous characterization of

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[193] *See* discussion *supra* Part II.B; *see also* Hovenkamp, *supra* note 51, at 1640–41.

[194] *See* discussion *supra* Part II.B, D.

[195] *See* discussion *supra* Part III.A, D.

[196] Dewey, *supra* note 8, at 669. For example, while in *Bellotti*, 435 U.S. at 778 n.14, Justice Powell called the concession view "an extreme position [that] could not be reconciled with the many decisions . . . affording corporations the protection of constitutional guarantees," he later used the view to justify the decision in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987). *CTS* concerned the constitutionality of a state anti-takeover regulation under the Commerce Clause. Justice Powell quoted Chief Justice Marshall's famous characterization of the corporation as a state-created "artificial being"—the same view Justice Powell had previously called "extreme." *Compare id.* at 89 (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 638 (1819)), *with Bellotti*, 435 U.S. at 778 n.14.

[197] *See, e.g.*, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation."); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 653, 660, 680 (1990), *overruled by* Citizens United v. FEC, 130 S. Ct. 876 (2010); *CTS*, 481 U.S. at 89 ("We think the Court of Appeals failed to appreciate the significance . . . of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. As Chief Justice Marshall explained: 'A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.'").

the corporation as "an artificial being, intangible, and existing only in contemplation of law."[198] The Court sometimes invokes the aggregate and real entity views when justifying recognition of corporate power or protection, and sometimes when justifying the contrary position.[199]

Regarding the substantive weaknesses of these views, the concession theory may still describe an important aspect of corporations, but it does not fully mesh with contemporary times; it envisions more state action and control than is the case when incorporating is a mere administrative formality. As incorporation is no longer a special grant there is also no longer any sense of an associated monopoly power. Arguably the only concessions from the state are limited liability and legal personality itself,[200] which scholars have noted cannot be practicably achieved through contracting.[201] However, many legal thinkers do not see this as enough justification for the state to retain a tight leash on corporations, or to explain our current jurisprudence that has moved beyond this view.[202] Further, as corporations can change their place of incorporation, switching state or even country, the

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[198] *Dartmouth College*, 17 U.S. at 636; *see, e.g.*, *Citizens United*, 130 S. Ct. at 948 (Stevens, J., dissenting) (citing Marshall's characterization of the corporation in support of the idea that the Framers assumed corporations could be comprehensively regulated for public welfare and arguing that the majority's rejection of restrictions on corporate political spending was a "radical departure from what had been settled First Amendment law"); *CTS*, 481 U.S. at 89 (citing Marshall's characterization of the corporation to support the constitutionality of a state regulation of corporate governance, specifically a state anti-takeover statute); Hale v. Henkel, 201 U.S. 43, 77–79 (1906) (Harlan, J., concurring) (quoting Marshall's characterization of the corporation to argue that corporations should not receive Fourth Amendment protections); *see also* Fleck & Assocs., Inc. v. Phoenix, 471 F.3d 1100, 1105 (9th Cir. 2006) (citing Marshall's characterization of the corporation to support enforcement of a city ordinance prohibiting the operation of live sex act businesses, against a challenge that the ordinance violated the corporation's privacy rights under the Fifth and Fourteenth Amendments).

[199] For example, in *Marshall v. Barlow's, Inc*., the Supreme Court explained that the defendant corporation had a Fourth Amendment right against unreasonable search because "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." 436 U.S. 307, 312 (1978) (quoting See v. Seattle, 387 U.S. 541, 543 (1967)). Seemingly, the Court was looking to people behind the corporation, per the aggregate theory, although it is not clear whether that was to the managers or shareholders. Compare this with the entity phrasing in *Dow Chemical Co. v. United States*, in which the Court explained: "Plainly a business establishment or an industrial or commercial facility enjoys certain protections under the Fourth Amendment." 476 U.S. 227, 235 (1986).

[200] Perhaps one might expand upon this notion to add "perpetual life, separation of ownership and control, and favorable treatment of the accumulation and distribution of assets." *See Citizens United*, 130 S. Ct. at 971 (Stevens, J., dissenting).

[201] *See* Hansmann & Kraakman, *Organizational Law*, *supra* note 57, at 390.

[202] *See* Stephen Bainbridge, *Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory*, PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 4:05 PM), www.professorbainbridge.com ("It has been over half-a-century since corporate legal theory, of any political or economic stripe, took the concession theory seriously.").

description of corporations as a concession from a particular state seems a poor fit in our modern, global environment.[203]

The aggregate view offers the advantage of explaining why corporations should have constitutional protections because it recognizes that human actors exist behind the corporation. But like the concession view, the aggregate view can be incongruent with modern times, at least in the large company context where it is not clear whose rights are being protected and what the scope of those rights should be. In the case of a small, non-profit political advocacy corporation, for example, its members might be readily identifiable as pursuing shared goals. The shareholders in large publicly traded corporations, however, number in the thousands[204] and are not a static set of identifiable human actors. They are often institutional, short-term investors, which change frequently and add layers of distance in terms of decision-making and monitoring from the humans who invested their capital.[205] Shareholders may also come from outside of the United States.[206] Shareholders do not control corporate decision-making in any real sense, nor is it necessarily desirable for them to do so. Indeed, the average investor may be rationally ignorant of the details of the corporation's governance.[207] Further, while shareholders may share an interest in the firm's value, they may not share other social and political interests.[208]

The real entity view perhaps meshes best with common conceptions about corporations. When people think of corporations they do not likely think of creatures of the state or of clusters of people. As a general matter, they likely think of corporations as different from human beings. They likely think of the large companies that are most salient in our daily lives. These corporations are neither individuals nor the government; they are in their own category. Further, the real entity view benefits from not being tied to an outdated view of the corporation as a state concession or as a group of shareholders to be protected.

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[203] *See generally* Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563 (1998) (discussing arbitrage of securities laws and the increasingly globalized securities markets); Robert Reich, *Who Is Us?*, 32 HARV. BUS. REV. 53 (1990) (discussing the increasing globalization of American-owned corporations and foreign corporations' employment of American workers).

[204] *See, e.g.*, Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 792 (2007) ("It is difficult and expensive to arrange for thousands of dispersed shareholders to express their often-differing views on the best way to run the firm.").

[205] *See id.* at 807; Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751–53 (2006).

[206] *See* Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1031 (discussing how the debate about the nature of the corporation has reignited with the rise of multinationals and noting that "shareholders now tend to come from many countries").

[207] *See, e.g.*, BUTLER & RIBSTEIN, *supra* note 7, at 6.

[208] *See, e.g.*, Grant Hayden & Matthew T. Bodie, *Shareholder Democracy and the Curious Turn Toward Board Primacy*, 51 WM. & MARY L. REV. 2071, 2095–96 nn.126–30 (2010) (discussing how shareholders' interests diverge).

But this view does not illuminate why corporations would receive constitutional protections. That is, it does not follow ineluctably from looking at the corporation as a real entity, with unique organizational qualities, that it would have rights as a person. The Constitution does not mention corporations and we owe no allegiance to corporations as reified entities, without reference to the idea that people are involved.

A fundamental problem thus exists with the traditional understanding of corporate personhood as a unified doctrine based on a conception of the corporation, and as covering the panoply of recognized corporate rights. If the Court has moved beyond thinking of corporations in terms of the concession theory and aggregate theory, then how do we understand continued reliance on the case law that is based on those views? As discussed above, the real entity theory was not a common view until after some of the key early precedents such as *Santa Clara* and so it is not a part of their reasoning.[209] And, even the real entity theory is incomplete in that it fails to illuminate why the entity should receive constitutional protection as a person and what the scope of that protection should be. Besides the mere recognition that corporations may hold rights there is no conceptual core that ties together this doctrine. There has been no consistently used test or procedure for determining whether corporations should hold a certain right.

V. AN ALTERNATIVE APPROACH TO THE CORPORATE PERSONHOOD DOCTRINE

Tracing the evolving theories of corporate personality and the Court's shifting approach shows the need to develop a better way to understand and explain the legal treatment of different kinds of associations of people, in particular the constitutional rights of public corporations dominating our culture and economy. That corporations have a "legal personality" allowing them to contract, own property, sue and be sued is not controversial. Nor should it be controversial—these are essential features necessary for corporations' practical use. This Article asserts that the roots of the corporate personhood doctrine are likewise akin to these essential features of legal personality. But there is a growing sense among the public, and perhaps on the Court,[210] that corporations no longer fit a person metaphor for purposes of expanding constitutional rights.

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[209] *See supra* note 74 and accompanying text.

[210] During re-argument in *Citizens United*, Justice Sotomayor questioned the Court's personification of the corporation, perhaps rhetorically:

> Going back to the question of stare decisis, the one thing that is very interesting about this area of law for the last 100 years is the active involvement of both State and Federal legislatures in trying to find that balance between the interest of protecting in their views how the electoral process should proceed and the interests of the First Amendment.
>
> And so my question to you is, once we say they can't, except on the basis of a compelling government interest narrowly tailored, are we cutting off or would we be cutting off that future democratic process? Because what you are

One measure of this is the remarkable public reaction to the recent *Citizens United* decision on corporate political speech. Public opinion polls by ABC News and the Washington Post found that 80% of Americans opposed the Court's *Citizens United* ruling.[211] Anecdotally, a surprisingly large number of online newspaper articles and blogs covering the case that allow for public comment had posts rejecting the idea of corporations as persons.[212] Reform organizations have proposed constitutional amendments to preclude corporations from claiming Bill of Rights protections. One such proposal would amend the Constitution to provide that "the U.S. Constitution protects only the rights of living human beings."[213]

The irony is that the notion of the corporate person was embraced to protect the rights of living human beings—to protect the property of individuals regardless of whether it is held in the corporate form. However, the public reaction to *Citizens United* shows that while some corporations can still be easily imagined as vehicles through which individuals pursue their goals, as with other organizations, it has become increasingly difficult to envision and identify real people behind large corporations whose diverse rights in various contexts should necessarily be protected in this form. This is particularly true when the right at issue does not clearly correspond to the business or economic realm for which shareholders are assumed to be acting when they invest in a business corporation.

The importance of this task is not limited to a particular case, such as the recent controversial *Citizens United* decision. Even accepting that the First Amendment is a negative restriction on government, not tied to the identity of the

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> suggesting is that the courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with, not *Austin* or *McConnell*, but the fact that the Court imbued a creature of State law with human characteristics.

Transcript of Oral Argument at 33, Citizens United v. FEC, 130 S. Ct. 876 (2010) (No. 08-205), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-205[Reargued].pdf. Justice Sotomayor joined in Justice Stevens' dissent. Citizens United v. FEC, 130 S. Ct. 876, 929–80 (2010).

[211] *See* Gary Langer, *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABCNEWS.COM POLLS (Feb. 17, 2010, 7:00 AM), http://blogs.abcnews.com/thenumbers/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents.html. The survey language for these polls left much to be desired in terms of precision, but the magnitude of public disapproval was notable. *See* Matt Sundquist, *Imprecise Language and* Citizens United *Polling*, SCOTUSBLOG (Mar. 5, 2010, 4:34 PM), http://www.scotusblog.com/2010/03/imprecise-language-and-citizens-united-polling/.

[212] *E.g.*, Michael D. Shear, *Obama Calls Citizens United Ruling a "Huge Blow"*, WASH. POST (May 1, 2010, 6:00 AM), http://voices.washingtonpost.com/44/2010/05/obama-calls-citizens-united-ru.html (user comments).

[213] *Proposed Constitutional Amendments*, RECLAIMDEMOCRACY.ORG, http://reclaimdemocracy.org/political_reform/proposed_constitutional_amendments.html (last visited Nov. 23, 2011).

speaker, that corporate spending is speech,[214] and that disclosure rules could address other concerns—this does not tell us how to understand the new battlegrounds that are sure to come. How will the Court analyze the constitutionality of the responses to *Citizens United*? Further attacks on campaign finance laws such as direct campaign contribution limits?[215] Disclosure rules?[216] How does this apply to unincorporated businesses and other types of organizations? Foreign nationals?[217] Long-standing federal securities laws?[218] Furthermore, other areas such as privacy are developing that may test the understanding of corporate personality.[219] If the Court continues its approach, the public will likely continue to view decisions that broaden corporate rights in a negative light.

Substitute metaphors or concepts of the firm may provide a useful starting point for more analytical thinking about the legal treatment of modern corporations. These include the well-known nexus of contracts theory and the intelligent machine metaphor.[220] However, a unifying metaphor or philosophical theory of the corporation is not needed for the functional analysis in which the Court should engage. Metaphors and theories of the corporation may in fact impede or muddy consideration of what is important for that functional analysis—

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[214] For an argument that restrictions on giving and spending money do not constitute restrictions on speech, see Hellman, *supra* note 2, at 953–56; *see also* Pac. Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting) (warning that ascribing business corporations the intellect and conscience for First Amendment self-expression is "to confuse metaphor with reality"); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005, 1019 (1976) (arguing that "[m]oney . . . may be related to speech, but money itself is not speech" and "nothing in the First Amendment commits us to the dogma that money is speech").

[215] *See* Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243 (2010) (discussing the potential impact of *Citizens United* on campaign finance law, including corporate contributions).

[216] *See* Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of* Citizens United, 120 YALE L.J. 622 (2010) (discussing the constitutionality of broad disclosure and disclaimer regulations after *Citizens United*).

[217] *See* Massaro, *supra* note 6, at 664–67.

[218] *See* Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019 (2011).

[219] For example, the Supreme Court expressly left open the question of whether corporations have a constitutional right to privacy in recently holding that the "personal privacy" exemption under the Freedom of Information Act does not encompass corporations. FCC v. AT&T, 131 S. Ct. 1177, 1179 (2011) (noting the case "[did] not call for the Court to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law").

[220] *See* discussion *infra* Part V.A.

real people and the implications for the proper scope of corporate rights.[221] The following discussion explains the limits of substitutes to the corporate-person metaphor, and presents an alternative approach.

A. The Limits of a Substitute Metaphor

1. The Corporation as Contract

The predominant metaphor in corporate law is not of the corporation as a person, but rather as a nexus of contracts. According to this view, the firm is the common party that contracts with all of the firm's inputs and outputs.[222] Corporations are "simply legal fictions that serve as a nexus for a set of contracting relationships among individuals."[223]

In *The Corporation and The Constitution*, Henry Butler and Larry Ribstein "articulate a contractual theory of the corporation that is based on the modern economics of the firm" and then "apply this theory to the interpretation of constitutional doctrine."[224] They argue that constitutional treatment of the corporation should focus on the economic reality of the corporation, which is not an artificial government-created entity, but rather a set of contracts created through private ordering that should be protected from government interference.[225]

They do not present the nexus of contracts concept as a metaphor for the corporation; they state that a corporation is in fact a set of contracts.[226] Under this

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[221] *See* Robert Sapolsky, *This is Your Brain on Metaphors*, N.Y. TIMES OPINIONATOR (Nov. 14, 2010, 4:32 PM), http://opinionator.blogs.nytimes.com/2010/11/14/this-is-your-brain-on-metaphors/ (discussing, neurologically, how the brain handles metaphors).

[222] For foundational work on the economic concept of the firm as a "nexus of contracts," see Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972), and Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[223] Jensen & Meckling, *supra* note 222, at 310; *see also* Frank Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989) ("More often than not a reference to the corporation as an entity will hide the essence of the transaction.").

[224] BUTLER & RIBSTEIN, *supra* note 7, at viii; *see also* Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95 (1995) (arguing that the "different theories of the corporation lead to different conclusions about the appropriate extent of corporate constitutional rights").

[225] BUTLER & RIBSTEIN, *supra* note 7, at viii–ix, 143–144.

[226] *E.g.*, *id.* at viii ("Contractarians view the corporation as a set of private contractual relationships among providers of capital and services."); *id.* at 27 ("The book is based on two general principles. First, in deciding how to apply constitutional principles, the corporation should be viewed as a set of private contractual relationships subject to complex market forces. Second, an important implication of this is that corporations, like other contracts, must be protected from the acts of political agents and private parties who seek to circumvent contracts through the political process."); *id.* at 143 ("[T]he corporation

notion, corporate contracts should be treated the same as other contracts under the Constitution.[227] "[P]ersonal rights" should be applied to individuals rather than to the corporation.[228] Furthermore, "courts should take into account economic principles that relate to the particular context in which the Constitution is being applied."[229] This means that "courts should not necessarily apply constitutional provisions in the same way to all subjects," and the authors give as an example that contractual choice of law should be the subject of a special theory of the Commerce Clause rather than having an "unmanageable 'grand unified theory' of the commerce clause."[230]

Importantly, Butler and Ribstein's work draws attention to the need to update the constitutional treatment of corporations with the economic and business reality of the corporation. Their work makes a large contribution to a surprisingly undeveloped area. Their contractual theory approach is subject to several criticisms, however.

First, the contract view has been characterized as simply a reinvention of the aggregate theory representing the opposite pole in a debate with the classic concession theory.[231] This reinvention criticism fairly observes that the contract view aims to refute the concession theory. And in light of Part III.B's discussion of the history of the corporate personhood debate, perhaps the contract theory should indeed be viewed with skepticism in the constitutional context, as other unified conceptions of the corporation have been called out as rhetorical devices to support their normative implications.[232] However, the reinvention criticism notably does not consider possible differences between the contract view and aggregate view of the corporation that may be worth exploring.

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is fundamentally a set of contracts . . . [and] the law should permit and enforce these contracts.").

[227] *Id.* at 1; *see also* Ribstein, *supra* note 224, at 103 ("Thus, it does not follow either from potential externalities inherent in limited tort liability or from the filing prerequisite to obtaining limited liability that the corporation is not entitled to the same treatment under the Constitution as other contracts. The extent to which potential externalities justify regulation is a normative question.").

[228] *See* BUTLER & RIBSTEIN, *supra* note 7, at 143–44.

[229] *Id.* at 144.

[230] *Id.*

[231] *See, e.g.*, Stephen Bottomley, *The Birds, the Beasts and the Bat: Developing a Constitutional Theory of Corporate Regulations*, 27 FED. L. REV. 243, 255 (1999) (arguing for "corporation constitutionalism" in which both the concession and contract views are appreciated: "corporations are more than just artificially created legal institutions . . . and they are more than just economic institutions"); Bratton, Jr., *supra* note 74, at 1476–77 (outlining two variants of the "new economic theory" that emerged in the 1970s, tracing their roots to neoclassical economics and institutional economics, respectively); Millon, *supra* note 71, at 203 (arguing "the private aggregation idea has assumed the garb of neoclassical economics under the 'corporation as a nexus of contracts' rubric").

[232] *See* Dewey, *supra* note 8.

Second, the nexus of contracts theory for corporate personality has been criticized as lacking clear boundaries to define the relevant group.[233] For example, Daniel Greenwood has argued in the context of the First Amendment that corporations are illegitimate political speakers because, amongst other reasons, they lack mechanisms to ensure that corporate actions are representative of the people involved.[234] According to Greenwood,

> If employees, bondholders, customers, neighbors or other stakeholders are considered part of the corporation, or if the corporation is seen not as the shareholders joined together but as a nexus of contracts in which employees can be thought of as hiring capital just as easily as the other way around, then the boundaries of the corporation are no longer clear.[235]

Greenwood maintains that this problem is significant because group boundaries profoundly affect the legitimacy of actions on the group's behalf.[236]

Third, Butler and Ribstein rely on the idea that "it follows . . . from the fact that the corporation is a nexus of contracts rather than a creature of state law, that personal rights in the Constitution should be applied to individuals connected with the firm rather than to the firm itself," but do not provide a way to know when a right qualifies as personal.[237] This is a different sort of line-drawing issue than the boundary problem noted above.

The Court itself has used this phrasing, stating that "[c]ertain 'purely personal' guarantees . . . are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals."[238] Whether a right is personal "depends on [its] nature, history, and purpose."[239] The quintessential example of a right the Supreme Court has deemed "purely personal" is the Fifth Amendment privilege against self-incrimination.[240] But Butler and Ribstein do not seem to be relying on the Court's

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[233] Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1030–31 (1998).

[234] *Id.*

[235] *Id.* at 1031.

[236] *Id.* at 1022, 1031.

[237] BUTLER & RIBSTEIN, *supra* note 7, at 143–44 ("Our theory of the Constitution and the corporation has implications for other constitutional provisions that we do not discuss. It follows, for example, from the fact that the corporation is a nexus of contracts rather than a creature of state law, that personal rights in the Constitution should be applied to individuals connected with the firm rather than to the firm itself. Thus, just as the state-creation theory and personification of the corporation should not play any role in the determination of corporations' rights under the First Amendment, contract clause, or commerce clause, so they should not determine the application of the privilege against self-incrimination in the corporate context or entitle foreign corporations to the privileges and immunities of citizens.").

[238] *Bellotti*, 435 U.S. at 779 n.14.

[239] *Id.*

[240] United States v. White, 322 U.S. 694, 698, 700 (1944).

analysis for what would be "personal," as they give as an example that it was "clearly wrong for the Court to deny a sole owner or shareholder the Fifth Amendment privilege of not being forced to incriminate himself by producing business documents, merely because he had incorporated the business."[241]

Accordingly, as the authors do not make clear how to tell what is a "personal right in the Constitution," their view does not elucidate which rights corporations should have and how to determine this. Their work aims to refute the concession view of the corporation, but does not, and perhaps did not intend to, provide an overarching way of understanding how the Constitution applies to the corporation.

Finally, in the context of corporate governance, some scholars have tried to reconcile theories about whether the corporation should be accountable to shareholders or a larger group of stakeholders or society. They have done so by arguing that regardless of whether corporations are viewed as concessions or contracts, they should be regulated when it is in the public interest to do so.[242] This point applies equally well in the corporate personhood context; indeed, it evokes John Dewey's argument for analysis without regard to the idea of personality. Labels for the corporation do not have to be agreed upon in order to understand the purpose of a constitutional protection and whether according it to corporations would serve its intended purpose.

2. The Corporation as an Intelligent Machine

Another alternative metaphor for the corporation is Meir Dan-Cohen's idea of the corporation as an "intelligent machine."[243] This metaphor likens a corporation to a business run entirely by computers without human involvement. Dan-Cohen offers the metaphor in story format to encourage reflection on what features of the organization should matter for its legal treatment. In the first stage of the story, an entrepreneur and a few individuals go into business, decide to incorporate and within a few years go public and grow to a large corporation.[244] Next, the corporation purchases its entire outstanding stock and completely automates with computers its operations, management, and decision-making processes.[245] At this point, the corporation is like an intelligent machine. There are no human beings involved with the corporation and Dan-Cohen posits that the legal treatment of the corporation would not significantly change.[246] In the final stage, the corporation

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[241] BUTLER & RIBSTEIN, *supra* note 7, at 144 (citing Braswell v. United States, 487 U.S. 99 (1988)).

[242] Hansmann & Kraakman, *The End of History*, *supra* note 57, at 441 n.5 (2001) (arguing the contract view, which champions shareholder primacy, is effectively "an assertion that social welfare is best served by encouraging corporate managers to pursue shareholder interests").

[243] DAN-COHEN, *supra* note 136, at 41–51.

[244] *Id.* at 46.

[245] *Id.* at 47.

[246] *Id.* at 47–48.

confronts economic difficulties that trigger the computers to sell stock to outsiders and the new shareholders reinstate human managers who hire employees again.[247]

The intelligent machine metaphor is a thought experiment about the legal treatment of corporations. It evokes John Dewey's view that using the word "person" to refer to a corporation could have meant simply that it is a legal unit that bears whatever rights and duties it is assigned.[248] It would be a person for some purposes, but not for others. Unlike the person metaphor, however, which poses a danger of implicit assumptions because we already have a set of laws that apply to individuals, the intelligent machine metaphor does not carry its own consequences. And, even if the intelligent machine metaphor seems implausible because it contemplates a corporation without human involvement, [249] it nonetheless serves the purpose of forcing consideration of which groups of persons should matter for a particular legal treatment of corporations and what their relationships must be like to justify this treatment. For example, why should a corporation have double jeopardy protection but not the privilege against self-incrimination?

In sum, the contractual theory and the intelligent machine metaphor imply that there are weaknesses in the way the Court has applied the Constitution to the corporation. But they also highlight that a different theory or metaphor for the corporation may be unnecessary. The response to the contractual theory—that regardless of whether corporations are viewed as concessions or contracts they should be regulated when in the public interest to do so—brings us essentially back to where the corporate personality debate ended in the 1930s.[250] And a sensible view of the intelligent machine metaphor may be that it simply captures the problem of finding a rationale for protecting corporations when it is not clear what human interests would justify it. It does not itself explain how to apply the Constitution to the corporation.

B. An Alternative Approach

As this Article has shown, the roots of the corporate personhood doctrine are based in concerns about the property and contract interests of shareholders, but beyond these roots the doctrine is not unified in topic or in approach. This lack of coherence means that the corporate personhood doctrine stands for little more than the mere recognition that corporations can hold rights. The Court should not rely on corporate personhood cases created in different contexts—concerning different rights and with changing conceptions of the corporation—as rationale for

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[247] *Id.* at 49.

[248] Dewey, *supra* note 8, at 656.

[249] Daniel Greenwood provides another way of thinking about this with his argument that corporate law excludes actual shareholders from participation and instead uses the idea of "a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation." *See* Greenwood, *supra* note 233, at 1033–34.

[250] *See* discussion *supra* Part III.B.

expanding or contracting the scope of corporate constitutional rights. This would only exacerbate the incoherence in the case law and raise concerns about the Court's legitimacy and transparency. Viewed properly, the doctrine of corporate personhood is only a starting point for analysis of whether corporations should hold a particular right at issue.

Furthermore, the Court does not have to substitute a different view or metaphor for the corporation in its analysis. As Dewey observed, although perhaps underestimating the lasting power and influence of words,[251] retaining the word "person" will "do no great harm" once "concrete facts and relations involved have been faced and stated on their account."[252]

The goal should be to accord constitutional protections to corporations when it promotes the objectives of those protections. This premise is consistent with the early corporate personhood jurisprudence such as *Dartmouth College* insofar as the Court treated the corporate charter as a contract warranting Contracts Clause protection just like any other contract.[253] The same concept applies to due process protection for corporate property. Although shareholders do not have direct control over the corporation's property, the objective of protecting property from government interference is served by protecting corporate property like other property because individuals still ultimately hold rights with economic value related to that property. At least as a starting point of analysis, this Article maintains that, as a general matter, people should not give up constitutional protections by virtue of acting through a corporation.

Moving beyond this premise, there may be reasons to deny corporations some protections or to find that their scope is limited. The objectives of the right at issue may not be served by according it to all corporations.

For example, the Supreme Court may have correctly denied the Fifth Amendment privilege against self-incrimination to corporations, or to most corporations. The privilege's objective is often described as protecting against the "cruel trilemma of self-accusation, perjury or contempt."[254] The Court has explained that its purpose is to protect, among other things, a fair individual-state balance, an "accusatorial rather than inquisitorial system of criminal justice," and "respect for the human personality and of the right of each individual to a private enclave where he may lead a private life."[255] It may indeed be the case that, in

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[251] For a discussion of cognitive metaphor theory and the relationship between words and metaphoric ideas, see Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004). For a discussion of the complex relationship between corporate theory, legal doctrine and social developments, see Millon, *supra* note 71.

[252] Dewey, *supra* note 8, at 672–73.

[253] *See* discussion *supra* Part II.B.

[254] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[255] *Id.* Of course, as discussed below, over time the Court typically varies in descriptions of objectives and historical purpose. For a discussion and critique of various

most circumstances, it is not necessary to accord the privilege to a corporation in order to protect against the "cruel trilemma." Notably, the Court has failed to explain why that is the case, however, and why this would hold in all cases involving corporations.[256]

Promulgating all of the consequences of corporate rights using this pragmatic approach is outside the scope of this Article. However, the question remains whether the approach is workable. There are multiple pitfalls.

One difficulty in achieving predictability and coherence with this approach may be that the objectives of the constitutional rights at issue are subject to multiple interpretations. And, with changing views about the purposes of the First Amendment, for example, it is likely there would be changing views about whether protecting corporate "speech" serves those purposes.[257] Likewise, how broadly or narrowly the purposes of an amendment are construed could have a large impact on the result. This would likely be the case with Fourteenth Amendment analysis that has long proven controversial.

Another difficulty is in identifying who is being protected when corporations are granted certain rights. This has been a persistent problem in the case law, particularly with the rise of the modern business corporation. It probably explains, at least in part, why the connection between protecting corporations and protecting people has been seemingly lost to the public. Older cases relying on concession or aggregate views of the corporation tend to identify, implicitly or explicitly, the people behind the corporation as the shareholders. Because the real entity view tends to reify the corporation, it obscures the connection to people. For the reasons explained in Part IV, none of these conceptions of the corporation provide a workable answer.

Identifying who is at the core of the corporation has been the subject of heated debate in corporate law for decades. While most scholars would probably agree that shareholders are not really "owners" in the traditional sense,[258] the question of

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Fifth Amendment justifications, see Ronald J. Allen, *Theorizing About Self-Incrimination*, 30 CARDOZO L. REV. 729, 731–33 (2008).

[256] *See* Hale v. Henkel, 201 U.S. 43, 69–70 (1906) (conclusorily stating that corporations do not have the privilege against self-incrimination because it is "purely a personal privilege of the witness" and any human to speak for the corporation is an agent, who does not speak for "*himself*").

[257] For a discussion of different views of the First Amendment, see Sullivan, *supra* note 2.

[258] *See supra* text accompanying notes 135–136; *see also, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 260–61 (1999) (critiquing a property rights view of the corporation); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 396 (1983) (noting that shareholders are not owners under the nexus of contracts theory); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996) (arguing that shareholders do not "own" corporations and the law constructs fictional shareholders); Martin Lipton & Paul K. Rowe, *The Inconvenient Truth About Corporate Governance: Some Thoughts on Vice Chancellor Strine's Essay*, 33 J. CORP. L. 63, 66 (2007) ("The whole point of the corporate form is to make clear that

where the locus of corporate power resides or should reside—in directors or shareholders or a broader group of stakeholders—is unresolved.[259] This Article's approach does not purport to resolve the question for purposes of corporate law; rather it identifies this as an area for further development in the literature about corporate rights.

For purposes of rights analysis, it may make sense to continue viewing shareholders as the subjects of protections that primarily serve property and contract interests. Although shareholders are not exactly "owners" of the corporate property, some stability in the corporation as a separate entity that can hold locked-in capital free from government takings and disruption to corporate charters is necessary for an investment environment. Recent scholarship on the doctrine of legal personality has shown this with respect to the essential functions of the corporation.[260] To wit, this stability also protects the executives, directors, and other employees, who invest human capital in the corporation, although that may not be considered a property or contract interest.

For rights stemming from corporate criminal liability, the question is much harder. More than a century after *New York Central*, there is still debate about whether corporations should even be subject to corporate criminal liability.[261] Assuming the premise of corporate criminal liability, the question arises whether corporations hold rights related to searches and trials because these are simply system features or if it is to protect shareholders or employees or some other individuals behind the corporation. To say, as the Court has in the Fourth Amendment context, that a corporation is "but an association of individuals under an assumed name and with a distinct legal entity" or that "corporations are a necessary feature of modern business"[262] does not explain whether it serves the purposes of the right at issue, nor does it explain whose interests would be

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shareholders are not owners—that their share ownership gives them no right to claim or exercise control over their pro rata share of the corporation's assets or profits."). *But see* Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 897, 901 (noting that "there is substantial agreement among legal scholars and others in the academy that shareholders do not own corporations," but arguing that the traditional view of shareholders as owners has not been disproven).

[259] *See* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1385–86 (2008) (discussing the ongoing debate in corporate law). A number of prominent scholars have advanced a board-centric view of corporate governance. *E.g.*, STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008). An alternative "team production" theory focuses on corporate law as a means of mediating various stakeholder groups. Blair & Stout, *supra* note 258. In contrast, others have advanced a shareholder-centric view of corporate governance. *E.g.*, Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

[260] *See supra* text accompanying notes 57–58.

[261] *E.g.*, Fischel & Sykes, *supra* note 166; Friedman, *supra* note 166; Khanna, *supra* note 166; Andrew Weissman & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411 (2007).

[262] Hale v. Henkel, 201 U.S. 43, 76 (1906).

protected. If Fourth Amendment protection of corporations is for shareholders' benefit, then the right must be, at least in a sense, to protect their property or economic investment since that is generally the nature of shareholders' relation to the business corporation. If it is for employees' benefit, one is left to wonder how it actually serves them, since the employee retains his or her own rights as to prosecutions in an individual capacity. The difficulty of making sense of which persons behind the corporation are being protected by the Fourth Amendment, and other rights related to searches and trials, suggests that inadequate attention has been paid to this question. This deserves greater examination in future challenges to the scope of these rights, as well as related rights like privacy.

For rights regarding corporate speech, as illustrated above with explanation of the *Bellotti* dissent,[263] the limited control of shareholders in corporate affairs and their typically heterogeneous social and political interests may factor into analysis of the constitutionality of campaign finance legislation.[264] In particular, it may factor into analysis of whether a particular regulation meets the applicable standard of scrutiny. Although it did not win the day, the reasoning in the *Bellotti* dissent came much closer to an internally consistent explanation that takes account of the corporate context and the dynamics of the people underlying corporations. *Citizens United* failed in that regard, refusing to consider who actually speaks through corporate spending and relying on *Bellotti*'s flawed admonition that any abuses could be corrected "by shareholders through the procedures of corporate democracy."[265]

Finally, while the focus in this Article has been on large business corporations, there are persistent challenges in considering the rights of different types of business associations—for example, partnerships, limited liability companies, as well as different types of corporations, like non-profit corporations and closely held corporations. Between these different types of associations, the dynamics of the people underlying the entity differ as does the purpose of the entity. This adds a wrinkle of complexity in determining whether it furthers the objective of a particular right to provide it to all business associations or all corporations. Drawing meaningful lines between them also poses challenges.[266] In

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[263] *See supra* notes 189–192 and accompanying text.

[264] For further discussion of this point, see Pollman, *supra* note 4.

[265] 130 S. Ct. 876, 911 (2010); *see also id.* at 972 (Stevens, J., dissenting) ("It is an interesting question 'who' is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate . . . . Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.").

[266] For example, in *Citizens United* the majority was not willing to decide the case on the narrower grounds of the BCRA's Snowe-Jeffords Amendment that would exempt from section 203's expenditure limit certain non-profit corporations. *Id.* at 891–92 (majority opinion). The majority found the approach unworkable for finding in favor of Citizens United, a political advocacy non-profit corporation, and stressed the notion that the First Amendment protects the "open marketplace" of ideas, which does not depend on the identity of the speaker. *Id.* at 891–92, 899, 906. In addition, the majority rejected *Austin*'s

the context of speech, the treatment of media corporations is often raised as rationale against regulating for-profit corporations.

Despite these difficulties, the approach proposed in this Article at least forces the identification of people whose rights are being protected through the corporate form. It may be an exceedingly difficult task, and empirical study of the impact on different groups of people from granting corporations rights would be helpful. Where the task proves too difficult and there is uncertainty regarding whether the objective of the right is being carried out, perhaps the answer is that in those instances the corporation should not be accorded such right, or should hold only a limited right.

In addition, a major benefit of the approach would be at least using a consistent method rather than an ad hoc one that has meant that sometimes the Court has accorded a right to corporations without explanation or with oscillating conceptions of the corporation. A consistent test would bolster the transparency of the Court's decision-making and its institutional legitimacy in this controversial area of the law.

VI. CONCLUSION

Drawing on the relevant historical, theoretical, and doctrinal background, this Article demonstrates that the doctrine of corporate personhood should not be understood as a justification or methodology for granting corporations any particular right. Instead, the doctrine merely recognizes that corporations can hold rights as a means of protecting the rights of humans involved in them. This is an important principle, but a distinctly limited one. It recognizes that corporations are human endeavors capable of holding rights, but does not explain which rights they have or how to make this determination.

In addition, the Article proposes that courts should use a pragmatic approach for determining the scope of corporate rights rather than current ad hoc approaches. Courts should grant corporations a particular constitutional right only when doing so would serve the purpose of that right. Courts do not have to use a substitute metaphor or unifying view of the corporation for a functional analysis that considers the rights at stake and the people involved. Indeed, this Article has offered a critical view of the Supreme Court's conceptions of the corporation and the use of metaphors in corporate rights determinations. These insights may add an important dimension to ongoing discussions about constitutional rights in the context of corporations and contribute to a theoretical framework for better understanding the constitutional treatment of corporations.

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anti-distortion rationale on the basis that it could be used to ban the political speech of media corporations. *Id.* at 905–06.