

Do Corporations Have A Constitutional Right to Bear Arms? and related puzzles in post-national jurisprudence

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Very Preliminary Draft



The Supreme Court has long extended to corporations virtually every right it extends to citizens and even some that citizens lack. In recent years, the Court has reinterpreted the peculiar language of the Second Amendment to include an individual right to bear arms – a right that its popular proponents contend is primarily a right to armed rebellion or vigilante justice, even as opponents castigate it as merely a license for negligent and criminal mayhem. Will the Court extend this right to corporations?

I. The New Second Amendment

One piece of the question centers on the meaning of the New Second Amendment.

The original Second Amendment is a linguistic mess. It begins with a clause that is manifestly false: “A well regulated Militia, being necessary to the security of a free State”. Leaving aside the problem of the odd comma, a militia, well-regulated or otherwise, obviously is not necessary to the security of any state. We abolished the militia a century ago; most other free states, with the possible exception of Switzerland, never had any equivalent. Security has not disappeared from the face of the earth. Worse still, the actual Eighteenth Century militia was mainly concerned with maintaining slavery, which is the opposite of freedom, and conquering Indians, which hardly made them free or secure. To make this clause work, we would have to seriously distort the meaning of “militia,” “necessary,” “free,” and “security.”

Next, the operative clause assumes a pre-existing right of the People rather than creating one. But this right is a mystery. What is it? Where does it come from? Who defines it? Is it alienable? Why is it unknown to the general philosophic and legal traditions of human rights, and how does it relate to the general understanding, dating back at least to Athena’s creation of courts in Athens, that both security and freedom require replacing tribal vigilantism with a governmental monopoly of legitimate violence? To what arms does it extend? The jurisprudence of the jury clause might suggest that it applies only to “arms” that were widely used at the time its writing – but a right to bear front-loading blunderbusses would be more comical than fundamental. What does it mean for the People to have a right rather than individual citizens having a right – is this a collective right and if so how is it collectively exercised? Why does it encompass keeping arms and not, for example, owning them? Whatever tradition the Amendment is referring to has long since died; there is no consensus today on any of these questions.

Finally, the Amendment is in the passive voice. The right of the People “shall not be infringed.” By whom? If the right belongs to the People, presumably the People have the right to define and even waive it. That suggests it is not a right against the elected legislatures and Congress through which the People act. The only alternative to legislatures for a free people to determine and exert its will, especially in the face of deep disagreement, would be by appeal to Heaven – that is, civil war. But civil war is the opposite of security, let alone a free “state.” Alternatively, is this a right against armed individuals or groups that might reduce our security or freedom – a standing army, for example, or the Pinkertons, or foreign aggressors? Does, or did, the market for arms infringe it – is the Amendment a call for socializing weaponry as we socialize on-street parking? We know, after all, that Eighteenth Century citizens often chafed at the expense of rules requiring that they bring their own weapons to militia practice.

But the basic problem is the connection between its two clauses. The natural reading of the language is to take the second comma as meaning “therefore”. This, however, suggests that the Amendment protects the “right of the people to keep and bear arms” in connection with a well-organized militia. Once we abolished the well-organized militia, the Amendment became, on its face, empty.

The historical Amendment seems to have been meant to protect state autonomy to create and manage their own militias, notwithstanding the Federal Government’s ability to requisition them (see, Article 1, Section 8’s grant to the Congress of the power to call forth the militia and provide for organizing,

arming, disciplining them and rules Article 2 Section 2's appointment of the President as commander of the state militias when called out).

On the one hand, this concern was thus closely related to the bar on a standing army. Many eighteenth century thinkers regarded standing armies as a mark of tyranny. The king's mercenaries could be expected, more or less reliably, to follow their paycheck rather than the good of the country. The militia, which consisted of ordinary citizens taken out of their ordinary lives for brief periods of time, commanded by local elites, were more likely to object to shooting at their fellow citizens or being sent on empire-building missions abroad. A government that sought to embark on unpopular foreign adventures or to impose its will on obstreperous localities or popular movements might well find that the militia – unlike a professional army – would simply refuse orders.

On the other hand, the state militias were also critical to maintaining the tyranny of slavery. The slaveholders feared that militia drawn from the free parts of the country might refuse to fight to suppress a slave revolt. The Second Amendment guaranteed that the slave-holding elite would be able to command and staff militia that shared their commitment to the Peculiar Institution without regard to the views of the rest of the country (or their own enslaved population).

These complicated and not entirely consistent motivations – fear of the power of a centralized army of mercenaries, and fear that basic decency might prevail over local power – explain both the Amendments reference to the militia and freedom and its general lack of clarity. Here, as elsewhere in the original Constitution, the framers cloaked provisions protecting slavery in discrete euphemism, paying the usual homage of vice to virtue.

The words dissemble, but their meaning was clear: The states, not the nation, would define and command the militia as the armed citizenry.

The historic motivations for the Amendment are irrelevant today, making its already unclear language virtually incomprehensible in a modern context. We have long since replaced the militia with professional police forces and a standing army of paid soldiers, and regardless of whether this threatens our freedom or security, no popular movement seeks to abolish either. The militia as a bulwark against tyranny is obsolete.

The militia as the bulwark of tyranny is just as defunct. We fought a bitter Civil War to abolish slavery and radically rewrote the Constitution to reduce the autonomy of the states, especially with respect to oppressing their own underclass. The militia defined the citizenry of the states, as the Supreme Court explained, perhaps too correctly, in *Dredd Scott*. Citizens made up the militia; it was inconceivable to the Court that African Americans would bear arms to uphold slavery. The institution of the militia, therefore, placed the Declaration of Independence's promise of inalienable rights in intolerable tension with the Constitution's protection of slavery. So long as slavery was fundamental to the American system, and citizen militias to the survival of slavery, African Americans could not be citizens. The Court could have said the same about women, Indians, and, at least in the early days, non-landowners. But we overruled *Dredd Scott* with the Civil War.

The Civil War amendments leave little scope for the original Second Amendment. Indeed, the simplest reading of the Constitution would be that they repealed it. We no longer have slaves or second class citizens and therefore no longer need a militia to suppress them.¹

The original Second Amendment, then, is dead. We have instead a new one, with the same language but an entirely different meaning.² Modern justifications necessarily ignore its actual language and historical context.

Instead, proponents of the New Second Amendment ignore the militia as a populist replacement for monarchial professional armies and paid police. Rather, they seek to constitutionalize two alternative rationales for private gun ownership: a right to forcibly resist an overweening and overly powerful government, and a right to self-protection based in assumptions of governmental inadequacy and incompetence.

The first is obviously related to the Eighteenth Century fear of professional armies, but takes on a rather different meaning when separated from its core. It often cloaks itself in the language of the Declaration of Independence, placing the United States government in the role of George III, and analogizing gun owners to the Minutemen or other revolutionary heroes. This leads to a certain irony; proponents seem to be using the language of anti-colonial resistance against the Nation itself. They are asserting that a conservative document is, in the name of “security,” enshrining a right to civil war.

Just as puzzling is the circumstances under which proponents believe this right would be useful. Presumably, they envision resisters who are not sufficiently popular or organized to win elections; the great advantage of democracy, after all, is that it allows well-organized and popular movements to prevail without revolution or violence. But how such an unorganized collection of malcontents could prevail against both public opinion and the strongest army in the world is a bit of a mystery. Perhaps they see themselves as the equivalent of the much feared Communist insurgency of the 1950s or the hidden forces of Sharia and jihad – tiny and unpopular minorities that, in defiance of all ordinary politics, pose an existential threat to a, presumably, decayed and decadent system, a colossus with feet of clay (Daniel 2:33).

The second, in contrast, borrows the fear of the slaveholding elite that an oppressed underclass may rise up in seething rage while an unsympathetic majority stands aside. On this view, individuals must be prepared to defend themselves from an omnipresent threat and cannot rely on the police to keep the peace. Presumably, the threat is great and governmental incompetence is enough to overcome the usual problem of private gun ownership: guns are dangerous. Gun accidents, after all, are quite

¹ Akhil Amar has argued for the logical alternative: that the Second Amendment requires that we have a militia, and the Civil War Amendments require that it include all citizens. Still, even he does not urge that we take the language so seriously as to threaten our professional police, military or spying apparatus. Instead, like many popular opponents of gun regulations, he reverses Dredd, redefining “militia” as meaning “armed citizenry” and ignoring “well regulated.”

² Borges, Don Quixote

common, unlike revolts of the underclass.³ Moreover, people, including gun owners, often have short tempers and mistaken understandings of the circumstances they find themselves in; guns turn fights and mistakes fatal all too often. There is no empirical evidence that widespread gun ownership diminishes crime; on the contrary, even leaving aside accidents, the more guns, the worse the injuries from the crime that does exist. Empirical data, however, may not matter to those who, following Hobbes, believe that the right to self-defense is inalienable even when counterproductive.

Neither of these rationales, then, seems to have the kind of weight that would motivate a constitutional right or, for that matter, the fervor with which gun advocates attack even minimally intrusive regulation designed to limit the dangers of guns. Some opponents of gun rights have gone so far as to claim that these arguments are so weak that they must not be real. Instead, they contend, the gun agenda is driven by a coalition of profit-maximizing gun manufacturers and sellers seeking personal profit at the public expense, together with a lobby for criminals, and especially drug dealers, who want weapons not for revolution but personal safety in a lawless environment. This explanation, however, is no stronger than the pro-gun rationales: while the profit motive clearly accounts for a good deal of the money behind the gun lobby, the fact remains that large numbers of Americans find the lobby's arguments persuasive.

Other commentators seeking to understand why Americans, unlike residents of most other rich countries, would favor a system that inevitably leads to unnecessary death and injury while increasing the threat from criminals, have invoked images of masculinity – perhaps gun owners are compensating for the lost virility mourned on talk radio – or simple collapse of mutual trust and community.

³ See, e.g., the collections of incidents at <http://www.dailykos.com/news/GunFail> and <http://www.dailykos.com/news/Gun%20Crazy%20U.S.A>. The CDC reports that in 2009, 31,347 Americans died from gun related causes. The largest group, 18,736, were suicides. 11,493 were homicides, 554 were accidents and 333 were shot by the police. For comparison, roughly similar numbers were killed by liver disease 30,558, more by automobiles, 34,485, more than twice as many by diabetes, 68,705, and far fewer by alcohol, 24,516. I do not know whether alcohol related auto accidents are classified as cars, booze or both. Guns are the method of choice for suicides: 18,736 gun suicides of a total of 36,909. CDC table 18 & 19. Gun injuries run about 10 times higher than death rates.

It is well established that both suicide and homicide are highly situational: that is, if the gun is not handy, the suicide is likely to give up and the fight or crime that escalates into homicide, doesn't. According to the FBI, 53.9% of homicide victims are killed by someone they know (table 10), 41.2% during arguments (table 12) and 71.89% involve firearms (table 8). In 2009, only 215 gun homicides (out of 11,493, i.e., about 1.8%) were classified as "civilian justifiable" – that is crime victims executing a criminal. In contrast, 34.6% were women killed by her husband (table 2, 10). <http://www2.fbi.gov/vcr/cius2009>.

Accordingly, it seems obvious that without readily available guns, far fewer people would be killed by themselves or their husbands and friends, while criminal deterrence – assuming that criminals are making rational calculations of the prospect of being killed by a victim, which is somewhat counterintuitive – would be basically unaffected. Of course, if general acceptance and availability of guns increases the likelihood that people – both while committing crimes and otherwise – think of violence as a solution to their perceived problems, limiting gun availability may reduce crime rates generally.

Most other rich countries view disarming the citizenry as simply the logical next step to disarming the aristocracy, which was, perhaps, the signal achievement of the transition to the modern era.⁴ Disarmed peace is the mark of civilization. Still, it is only a few centuries since the European aristocracies put away their swords and began to use dull knives at the table, and most of us are probably closer than that to honor and revenge based cultures. Hobbes' war of all against all, driven by the insatiable pursuit of glory and status, draws its frightening power from its appeal: it is not so foreign as to be easily dismissed. Moreover, even those who prefer peace to honor may be reluctant to disarm if they believe – correctly or falsely – that their neighbors, or imaginary enemies in black helicopters, could attack them at any moment. Guns are dangerous, but being the only person without one may seem more dangerous still.

The core of this paper, however, is not about the rationales offered by the criminal lobby, popular culture or the Supreme Court for the New Second Amendment. Instead, my primary topic is the treatment of corporations under our Constitution. The New Second Amendment, because it creates a new constitutional right – an individual right to carry modern weapons with no connection to the militia -- without a thick accretion of precedent, gives us a chance to consider the status of corporations as rights bearers on something like first principles. Or, alternatively, to try to understand the many Supreme Court precedents regarding corporations by applying them to a new area that may, or may not, support the older analyses.

II. Corporate Violence

- a. Corporate history begins with the Knights Templar, formed to conquer Jerusalem and after several hundred years of bloody control of Jerusalem, reformed into the Knights of Malta, a quasi-sovereign mercenary force. For early Americans and their British contemporaries, the word, first and foremost must have evoked the East India Company -- John Corporation -- which owned the tea dumped in Boston Harbor and, more importantly, conquered and robbed India in order to addict China to opium, thus solving the key problem of early globalization: what to sell to China to pay for its tea and porcelain.

⁴ Jeffrey Winters, *Oligarchy* (2011) (distinguishing between more and less violent oligarchies); Acemoglu & Robinson, *Why Nations Fail* (asserting that failure often results from self-reinforcing networks of economic and political power protecting incumbents); Schumpeter "creative destruction" (pointing out that capitalist markets succeed by destroying the incumbents)



b.

The US is equally familiar with corporate violence. The Pinkertons – “detectives” for hire – got their start shortly after the Civil War, guarding President Lincoln and hunting former Confederates turned bandits like Jesse James. Then they privatized their market, become union-busters for hire.

Most famously, they were hired by Frick to suppress the union at Carnegie’s Homestead Steel plant in 1892, where the men sought recognition of their union and objected to a proposed 15% pay cuts from already unliveable wages in the midst of the 1890 recession.⁶ Frick stockpiled product, closed and fortified the plant – building a wall with sniper holes -- announced the company would no longer negotiate with the union and then brought in an army of Pinkertons. The workers, only a minority of whom had been members of the union, voted overwhelming to strike, organized and fought back. When several hundred Pinkertons arrived on barges, armed with Winchester rifles, they were met by thousands of workers. A battle broke out. The Pinkertons murdered seven workers and took many injuries themselves before eventually surrendering. After debating whether to execute them all, the strikers forced the Pinkertons to run a gauntlet, beating them (in several cases, to death) and then allowed the survivors allowed to retreat. No legal action was taken against the surviving invaders or their bosses. On the contrary, at Frick’s request the Governor called in the state Militia armed, this time, with Gatling guns. Strikebreakers were shipped in from out of state, often unaware where they were going or that they were scabbing, to get the plant working again. 160 strikers were tried for murder or other crimes and Hugh O’Donnell, a union leader, was prosecuted sequentially for treason (!), murder and assault (every jury acquitted). The overwhelming violence broke the union after four months, and the town remained dominated by the corporation for decades.

⁵ Image from <http://www.battleofhomesteadfoundation.org/battle.php>

⁶Zinn, A People’s History of the United States 276-77;

<http://www.pbs.org/wgbh/amex/carnegie/peopleevents/pande04.html>; <http://libcom.org/history/1892-the-homestead-strike>. Add and correct account from

This was not the only strike broken by Gatling guns: in the infamous Ludlow massacre (1914),⁷ the Rockefellers hired the Baldwin-Felts Detective Agency to break a Mother Jones/UMW strike at a Colorado mine (and company town) they controlled. The detectives used rifles and Gatling guns but were unable to break the strike until the National Guard – paid by the Rockefellers—were called in to attack the strikers' tent colony with machine guns and arson. After executing a strike leader in cold blood, they set fire to the tents; two dozen strikers were killed, including eleven children and two women burned to death hiding in one of the tents.



Homestead, and the other violent attacks on strikers at the end of the nineteenth century, had little to do with the voluntary contracts of our first year course or the free markets of our imagination. Only Robert Nozick believes that agreements made at the mouth of a Gatling gun are voluntary, and even he has a bit of trouble reaching this conclusion.

⁷ Zinn, 354-5

⁸ Image from <http://libcom.org/history/1892-the-homestead-strike>



They did, however, lead to national, if not universal, revulsion at the concept of hired killers battling American workers. Several states passed “Pinkerton Laws” or amended their constitutions to bar companies from importing armed forces into the state. The Federal version, incidentally, is currently back under discussion as some believe it may apply to bar our current outsourcing of war in Iraq and Afghanistan to Blackwater and other contractors.

III. Language

Constitutional law is best understood as a clash of ideals and interests. Supreme Court justices vote in ways that more or less imperfectly reflect the overarching theories of government and metaphors of society that they have absorbed. But the Court is staffed by lawyers and, occasionally, politicians – never by lawyers, theologians or self-conscious students of metaphor. It explains its decisions using the language of the law even when the techniques of the law do not control them.

I begin, therefore, by considering the constitutional question in the way the Court will describe its own reasoning. It will become immediately obvious, however, that in this area, at least, the legal realists had a point. Doctrine and the purported sources of law have little explanatory power.

Constitutional law begins with a text: the Constitution. It is not a unified text, although lawyers often struggle to treat it as if it were.¹⁰ The original text was a political compromise, reflecting the usual

⁹ Image from <http://www.spanamwar.com/Gatling.htm>

¹⁰ Dworkin

incoherence of committee work. In places, the language was all that was agreed upon even at its origin: its authors and enactors found words to conceal their disagreements without ever reaching a consensus on the most important disputes of the day. Later, amendments were added, some of which reflected changes in power of one side or the other of the original compromise. More important, the world changed around the text; the original tiny nation barely emerging from pre-modern aristocracy was transformed again and again by the rise of democracy, industrialization, expansion, migration and technology. Whatever unity it has is imposed on it by its legal readers, who, as a matter of professional training, reject the Documentary Hypothesis in all its forms.¹¹ We seek a single voice even in the loudest cacophony.

For our purposes, the most notable fact about that text is that it has no mention at all of corporations or any similar legal entity. Even municipalities, the most important corporations of the Eighteenth century, are unmentioned. Indeed, it could not mention modern business corporations: the modern institution wasn't invented until several decades after the Civil War.

The Constitution mediates, instead, between Federal and State governments, some of the parts of the Federal government, the People, and various people fully or partially excluded or formerly excluded from the People – slaves and free African Americans sub silentio, Indians explicitly, women and 18 year olds to bring them into fuller membership. De Toqueville's intermediate associations appear not at all, except in the Press clause and, perhaps, the Militia clauses.

Silence, one might think, would end the discussion. The states would have plenary police power to regulate corporations, particularly because a corporation can exist only by virtue of positive law of the state either allowing it to exist or to do business in the state. The Congress would have equally plenary power, at least to the extent that regulation affected interstate commerce, the equal citizenship guaranteed by the Fourteenth Amendment, or otherwise fell within Congress's other enumerated powers. After *Carolene Products*, Congress's power to regulate would obviously extend to every economically significant corporation in our interconnected world.

As against these broad grants of power from the People to their elected representatives, corporations could assert – nothing. Well, not quite nothing: with the decline of Footnote Four and the revival of states' rights, they could argue that Congress had overstepped its power, as the Court has held in cases such as *National League of Cities v. Usery* (1976), *United States v. Morrison*, 529 U.S. 598 (2000) (overturning part of VAWA), or this term's evisceration of the Fifteenth Amendment, *Shelby County v.*

¹¹ The Documentary Hypothesis was a method of Biblical interpretation popularized by German Protestant theologians and scholars in the last half of the nineteenth century. It started with the obvious reality that the Bible as we know it is not a unified novel, history or philosophic work by a single human author in the nineteenth century sense. Rather than seeking to discover a unity – the unity of the editors and redactors and readers who have seen it as a coherent body of work for two millennia – they sought to elucidate the ur-texts. Instead of resolving contradictions, they simply labeled them as different. In the law, only a certain limited strand of Realists and Critical Legal Studies has been satisfied with the Documentary approach. The rest of us either pretend to see unity, work to create it, or celebrate the inevitable unending dispute that precludes it. As a medieval rabbi taught, the beauty of the Eternal Law is that it changes every day.

Holder, 570 U.S. ____ (2013) (inventing hitherto unknown doctrine of equal treatment of states). But such arguments are based on the rights of states – not on the rights of corporations. As far as the explicit language of the Constitution goes, corporations have no rights to assert.

The language is supported by those other mainstays of legal analysis, history, context, structure and general principles. In their most straightforward application, each strongly suggests that the Constitution’s silence should be taken seriously.

Our Constitution is a product of a tradition that maintains that the source of political authority is the People. We have natural rights; our institutions have only the rights we give them. We are ends in ourselves; our government is merely our tool and our governors our servants. The Declaration of Independence proudly asserts that “Governments are instituted among Men, deriving their just powers from the consent of the governed” and the governed retain the right to change the form of government when they find it expedient. The Constitution, a more conservative document, nonetheless reaffirms the People’s sovereignty: it begins “We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

In this great liberal division between citizen and state – end in itself and mere tool – corporations obviously belong on the state side. Like governments, corporations are human institutions made by human and authorized by states, for human purposes. Like governments, they are critical to our happiness and prosperity, but like governments, they can threaten us as well. On first principles, a People that founds its government in a distinction between human beings “endowed by their Creator with natural rights” and human institutions should have no trouble seeing corporations as no more sacred than the governments that empower them.

Moreover, a contextual analysis of the Constitution would have to take seriously the realities of corporate law. Corporations are an ancient form – some historians trace the concept back to ancient Rome, and in any event the concept exists in English law from the mists of the middle ages. But the ancient corporation was a different creature than our modern business corporation, and the latter, in most important respects, dates back only to the last decades of the nineteenth century. Even if the enactors of the Constitution or the Civil War Amendments intended to protect the corporations of their day, they could not have intended to protect those of ours. The form had not yet been invented.

Traditionally, a corporation was a self-governing body recognized by the law as having collective rights: most importantly, the Church, the Aristocracy, universities and cities; in some times and places in medieval Europe, the Jews as well. The defining characteristic of a corporation was that it had the right – by some internal process – to make rules binding on its members. Generally, this included at least partial rights to adjudicate disputes among them (the right of clergy is a famous example). One key mark of the end of the middle ages was the rising national states’ successful moves to limit corporate rights – in particular, the English crown successfully established the principle that corporations could be

formed only by grant of the king in Parliament (with some pre-existing corporations such as the City of London exempted by a legal fiction of a “lost charter”).

Colonial America was quite familiar with corporations – as governments. After the South Sea bubble, the English parliament essentially abolished the joint-stock company as a usable business form in the Bubble Act of 1720. In England, thus, during the colonial period the corporate form was used mainly for charities and municipalities. The primary exception was the great trading companies, which were organized as corporations and given chartered rights to exercise governmental power. Most of the original colonies were founded by chartered trading companies, given corporate rights by the English crown: the Virginia Company, the Massachusetts Bay Company, the Hudson Bay Company (which became the government of Canada). And they were acutely familiar with the most important of all British corporations in their era, the East India Company, which owned the tea that the Tea Partiers dumped in Boston Harbor.¹² The corporations that founded the colonies were granted, by charter, ordinary governmental powers including the right to make laws, issue currency and punish violators of their authority. The East India Company fought wars – at the time the original Constitution was being enacted, it was in the middle of a reign of terror and corruption that ultimately involved the conquest of India and domination of China in order to profit from tea and opium. Even as Burke advocated for the American revolutionaries, he denounced the corruption of the great corporation.

In 1789, to treat a corporation as a person endowed by our Creator with natural rights would have been obviously and exactly equivalent to advocating the divine right of kings. No doubt some people in the young United States would have been happy to make the argument. But our Constitution rejects the divine right of kings, bars the aristocracy and its corporate rights, and left no room for corporate rights against the sovereign people. Or so one would think based on its language and contemporary argument.

By the beginning of the nineteenth century, corporate law was changing. Business corporations were still unusual in the United States, even if not entirely unknown. However, charitable and educational corporations were more common. Several of our oldest universities were chartered corporations well before independence, and cities and towns were regularly incorporated throughout the colonial and early independence period. Moreover, by the turn of the century, states were issuing corporate charters to promote public works – transportation projects such as toll roads, bridges, and, later, canals and railroads – and, more controversially, banks. It seems likely that had Americans thought about corporations in the context of the constitution, they would have been thinking of these sorts of organizations.

Lawyers clearly distinguished between public and private corporations – the former being part of the government, like a municipality, and the later a group of men given the right to act as a single entity independently of the government. As the Dartmouth College case explains (apparently uncontroversially) a corporation was an entity granted by charter the right to be recognized as a single legal actor even though its members and the personnel in charge shifted over time. Dartmouth College

¹² Nick Robins, *The Corporation That Changed the World* 5 (2006)

owned its land and was the party to its contracts regardless of who its President, faculty or trustees were. This remains the core understanding of corporate law until late in the nineteenth century. It still seemed automatic, moreover, that the corporation would have governmental powers to make “law” (today we would say by-laws) binding on its members and subjects.

It would have been obvious to any observer that these were government-like institutions, whether or not they were part of the state. The state granted the charter. Everyone agreed that charters should be granted only for public purposes and major projects that could not be provided by market forces alone – education (most of the non-municipal corporations at independence were universities), transportation infrastructure (toll roads, bridges, canals and, later, railroads), banks and other quasi-utilities. The charter was a special privilege in itself – ordinarily, groups of people do not have the right to coerce minorities within their membership, agreements to act as one party in the market are probably conspiracies in restraint of trade, and no private agreement can tie up land and other assets in violation of the rule against perpetuities. Many charters had additional privileges, often including monopolies, the right to fix prices or other subsidies (see the Charles River Bridge case, or President Jackson’s veto of the Bank of the United States). And the grants of power in almost every charter, despite wide variation in language, referred to the power to make “laws” (today we would say by-laws) binding on members and others subject to the corporation’s rule making authority (such as students and faculty).

Corporate law changed radically in the Jacksonian period, between the original Constitution and its transformation after the Civil War. From the beginning of the century, canal and then (largely after 1830) railroad companies were ordinarily chartered as corporations – entrepreneurs were generally unwilling to build them without special privileges (often including monopoly pricing, land and cash grants, investment of public money and even eminent domain). With corporate privileges, they became fantastically profitable to their organizers (if not always to bondholders and other passive investors). This led to massive bribery of the legislators as well as a certain degree of unhappiness on the part of those excluded from the governmental largess or expected to pay for it in high prices.

Jackson and his supporters vehemently opposed the special privileges of incorporation – but they reformed the law by expanding, not limiting, it. Starting in the 1830s, states began to pass general incorporation laws, setting out rules by which persons wishing to form a corporation could do so without a special act. The privileges of incorporation were generalized and made available to all who wished to avail themselves of them. This meant that land grants and monopolies were no longer routinely part of corporate charters (such subsidies continued, especially for the railroads, but separate from the general incorporation laws). Instead, the standard issue corporate charters created a basic form of governance. At the beginning of the century, this included minimum and maximum capitalization, extensive rules intended to assure that shareholder and bondholder investments were kept separate, bars on owning stock in other corporations (and thus on merger) and other protections for both investors and the general public. The memory of the South Sea Bubble was fading, but regular panics reminded legislatures that joint stock companies could be quite dangerous for investors and the economy as a whole.

More salient was the threat of concentrated wealth to political democracy – a central Jacksonian obsession. The new corporate enterprises were larger bodies of unified wealth than Americans had seen since the failure of the Dutch attempt to create a landed aristocracy in what became New York. Minimum capitalization requirements were to protect creditors, but maximum capitalization requirements (like the practice of issuing charters only for limited periods of time) were meant to protect the political and economic system from concentrated power. For the same reasons, corporations were required to state their intended business and stick to it – any activity outside the bounds of the charter was “*ultra vires*” and void. Although the new laws generally did not require a specifically public purpose to the business – they sought to make incorporation largely ministerial – the minimum capitalization requirements meant that corporate form continued to be used mainly for large, capital intensive investments, like the railroads, where the impersonality of legal personality was essential.

Entity liability (the principle that only the corporation, not its shareholders, is liable for its obligations) was not universal in the early statutes (or, indeed, until the Depression). While the corporation always had primary liability, many statutes provided mechanisms for creditors to insist that shareholders invest additional funds in the firm if it was unable to meet its obligations, which, of course, was a major risk for investors in the days of debtors’ prison. In similarly sharp contrast to modern norms, power to make major firm decisions was often placed in the “members” – and in firms with shareholders, that meant the shareholders, not the board. And the modern norm that votes are proportional to

Indeed, the main nineteenth century hornbooks on corporate law, right through the last quarter of the century, concentrated on municipal law. Cities, then as now routinely organized as corporations, were the most important and characteristic corporation. Charities follow. Even long after the rise of the railroads, business corporations were a distant third.

Thus, for the Eighteenth Century People which enacted our original Constitution and the post-Civil War People that radically enlarged the People and the powers of the national government, the status of corporations as government-like creatures of man should have been even more clear than today. The modern business corporation did not exist at in 1789 or even 1868. The Constitution was silent as to corporations. Its structure concerned the relative authority of the People, individuals, states and the branches of the Federal government. The powers and regulations of corporations are obviously issues of state and Federal legislative power: states clearly had the power to charter corporations, and the Federal government arguably did (the arguments were hard fought on both sides, as can be seen in the repeated debates over the Bank of the United States). To the extent that corporations affected interstate commerce, which increased radically over the Constitution’s first century, the Federal government’s regulatory authority would increase.

But most importantly, nothing in the structure or language of the bill of rights suggests that the traditional rights of American citizens apply to corporations. Municipalities have no rights other than the rights that the state legislature gives them. State legislatures have no rights other than those the People give them in their constitutions. All the much more so, corporations -- chartered by the state legislatures but lacking the internal democracy of municipalities – should have no rights other than

those given to them by we the People acting through our elected representatives. Our Constitution is designed, primarily (and more so after the abolition of slavery) to protect us from our institutions, not the other way around.

IV. The Supreme Court's Constitution.

To be clear, the Supreme Court's jurisprudence on corporations and the Constitution has nothing whatsoever to do with the above discussion. On the contrary. Since the very first time that corporations asserted rights under the Constitution, the Court has granted them the rights of citizens. The few exceptions only prove the rule. Moreover, it has done so virtually without explanation, as if the result were so obvious that it needs no defense. Or perhaps because it is indefensible within ordinary legal discourse.

The first corporate law case is *Dartmouth College v. Woodward*. Dartmouth had been granted a charter by the King before independence. The New Hampshire legislature sought to change the charter, adding new members to the college's board of trustees and otherwise changing its governance; the old board sued, contending that New Hampshire had no authority to do this. The argument was basically about the nature of a corporate charter. Is it legislative in the modern sense, in which case New Hampshire obviously could modify it to reflect perceived changed needs (or corrupt favoritism). Or is it a grant in the feudal sense, that once given can never be modified.

Chief Justice Marshall centers his opinion around his famous and oft quoted description of a corporation as an "artificial entity, existing only in the eyes of the law." Leaving aside that bizarre characterization (did Dartmouth not exist as a sociological entity? Or was its teaching completely unseen?), however, he decides the case on a different ground entirely. The corporate charter, he says, is a contract between the King and the college's donors, and the Contract Clause of the Constitution bars New Hampshire from changing it. Although he called the charter a contract rather than a grant, Marshall ended up with the decidedly pre-modern view that a feudal grant, being a derogation of sovereignty, cannot be withdrawn. The Constitution says nothing about corporations or charters but it does protect contracts, and the Court simply assimilated corporations into the protected category.

The states rejected this doctrine immediately and completely: every charter (and every general incorporation act) since the Dartmouth decision has included a provision reserving the right of the state to change it at any time. When the issue has arisen, the older institutions have turned their charters in for new ones, reflecting the right of the government to regulate them, without future Constitutional litigation.

The Court did not take this as a reason to abandon its basic approach. The next issue that came before it was the question of whether a corporation could assert diversity jurisdiction in the Federal courts. The text of the Constitution is clear: diversity jurisdiction is limited only to a few specified circumstances, most importantly lawsuits between citizens of different states. Corporations are not mentioned. The obvious answer – that corporations litigating state law claims must do so in state court – was not the Court's. Instead, it reasoned that the corporation's most fundamental legal characteristic – its status as an "artificial entity" -- should be disregarded. The corporation's members would have the

right to sue in diversity as individuals (although they'd have no cause of action); they ought to have the same rights when clothed with corporate authority. The argument seems to be less a matter of logic than metaphor – the Court chose to analogize this corporation not to an entity but an aggregate, the same as the people who compose it, despite the fact that basic legal point of a corporation is that it is separate from them.

Within a few years, this rationale would have led to the opposite result. As the economy grew, and corporate law changed, business corporations began to attract investors from across state lines. Looking through the corporation to the citizenship of its members would often have defeated diversity.

Moreover, corporate law changed. Today, business corporations do not have members. The formal name of Harvard, our oldest non-governmental corporation, is the President and Fellows of Harvard College – they are its members. In the Eighteenth Century, they were also its actors and employees. In business corporations with shareholder investors, the members were the equity investors, who governed the firm in a meeting, much like the burgesses of a medieval city or a New England town.

Not so today. Corporations – both business and non-profit – today are run and operated by employees, who are definitely not members of the firm. Neither are the directors who supervise them. Directors act as the corporation, but they are not entitled to do so as members, running it in their own interest and values. Instead, they are fiduciaries, a sort of trustee, for the entity itself.

Shareholders seem closest to the old concept of members – they retain the right to vote and they, alone of all corporate participants, are entitled to act for themselves according to their own interests and values. However, at least since the great revolution in corporate law at the beginning of the twentieth century, American law has been clear that the shareholders have no right to run the firm or make decisions for it. (If they do, the doctrine of piercing the corporate veil directs courts to conclude that they have abused corporate form and refuse to treat the business as a corporation at all. If the shareholders refuse to treat the corporation as actually existing and separate from themselves, the courts will hold them to their actions.)

Nor are shareholders citizens, for the most part; most of the shares of our publicly traded corporations are held by other corporations, trusts, limited partnerships or similar entities. In some cases, it may be possible to look through these enterprises as well to the people who make them up or for whom they are managed (not the same thing), but often that no identifiable owners or beneficiaries exist: who do you reach if you pretend that Harvard “exists only in the eye of the law” and realistically ought to be disregarded? Who are the “citizens” behind a pension fund that is legally required under ERISA to disregard the actual views and interests of the people making contributions and, instead, operate as if its sole beneficiaries were colonial masters, interested only in maximizing their future retirement benefits at any cost to the actual workers or their neighbors? And even when you can penetrate the layers of institutional ownership, you will ultimately reach an international elite of superrich: most shares are held by extraordinarily wealthy executives, founders of major companies, oil wealth, and descendants of robber barons and the real kind – and many of them are foreigners.

When corporations sought access to the Federal courts, it quickly decided that the Constitution's language extending diversity jurisdiction to "citizens" of different states was broad enough to allow corporations – not citizens at all – to sue because the underlying members were citizens. Almost immediately after corporations emerged with "members" from different states, it reversed its rationale, but preserved the result. Corporations, it turned out, were to be treated as if the firm itself were a citizen of a state, regardless of the citizenship of its directors, shareholders, employees, or, to the extent the category still existed, members. The law to this day disregards the plain language of the Constitution. For diversity purposes, a corporation is a citizen of both the state where its headquarters is located and the state where it is incorporated. In other words, corporations are not citizens, except for purposes of the diversity clause, where they are citizens – and unlike real citizens, can change their citizenship without changing their physical location. The rationale reversed, but the result remained: corporations get Constitutional protection regardless of constitutional language.

V. The Civil War Amendments and Substantive Due Process

After the Civil War, the center of constitutional controversy shifted, instead, to the XIV Amendment's protection of due process and equal protection. The Supreme Court had a great deal of difficulty perceiving any violations by segregation or disenfranchisement of African American citizens. *Jim Crow*, in its eyes, raised no equal protection issue (*Plessy*), just as, this term, we learned that the Voting Rights Act is not "appropriate legislation" to enforce citizens' right to vote under the plenary grant of power in the XV Amendment.

But it had no parallel problem protecting business corporations: from the first time the issue was clearly raised, it held that the Civil War Amendments created rights for corporations. This doctrine defies the plain meaning of the XIV Amendment.

The Amendment grants due process and equal protection to "persons," and, to be sure, corporations have long been called "legal persons." But "legal persons" just means "a entity recognized by relevant law as having standing to sue or be sued": boats are legal persons in admiralty law, trust are in estate law, and only sovereigns – not human beings – are legal persons in most of international law. Married couples may, but need not, elect to be a single person under the Internal Revenue Code. Slaves and married women long lacked legal personality in contract law – although they possessed it as criminal offenders (slaves sometimes were not legal persons as criminal victims – the legal victim was the slave's master). Legal personhood is not a package deal, but a label for the rights an actor has in a particular area of law. Thus, the fact that we have long recognized corporations as having legal personality in contract, property, tort and criminal law – otherwise the form would not work – hardly means that it must also be a "person" entitled to equal protection under the Due Process clause. And, indeed, no one thinks that municipalities or government agencies, even if they are incorporated, can assert First Amendment rights to criticize government policies or due process rights to retain their budgets.

In any event, the language of the XIV Amendment is perfectly clear. Persons is ambiguous, but the Amendment twice uses in contexts that make clear that the intent can only be natural persons. After all, only human beings, not corporations, are "born or naturalized," and only human beings, not

corporations, are counted for apportionment. To conclude that “persons” nonetheless includes corporations for Due Process and Equal Protection requires shifting its meaning three times in as many paragraphs. That is not ordinary American legal interpretation.¹³

Even more clearly, holding that the XIV Amendment protects corporations against our legislatures defies the specific history of the Amendment: no one, surely, believes that the Civil War was fought to free American corporations from state regulation.

Nor does it readily fit with the structure of our republican democracy. Republican self-determination requires that we, the People, be able to retain control of – and independence from – our organizational creations, whether they be state agencies, churches, or corporations. The spirit of the eighteenth century liberal constitution might demand giving citizens rights against corporations as they have rights against their governments and churches, but it cannot justify giving corporations unwritten rights against us and our elected representatives. And, of course, the mid-nineteenth century railroad corporations were larger and more concentrated bulwarks of economic and political power than any US corporation had been in the ante-bellum era. A proper republican skepticism of concentrated power, let alone a democratic view that the people ought to control their institutions, would counsel for limiting corporate power, not straining constitutional language to create a new form of entailed property.

Nonetheless, in *Santa Clara*, the US Supreme Court declared that railroad corporations had a XIV Amendment right to equal protection that barred a state from taxing them differently from citizens – and that the XIV Amendment so obviously applied that no argument was necessary. This holding has been repeatedly reaffirmed ever since – although the Court has never explained why.

In the *Lochner* era, the Court used the Fourteenth Amendment’s due process clause to – in Justice Holmes’ famous words – “enact Mr. Herbert Spencer’s *Social Statics*” and interpreted the Constitution to “embody” “an economic theory [*laissez faire*] which a large part of the country does not entertain.”

Laissez-faire means “leave it alone”, but the actual policy was anything but non-interventionist. Instead, *laissez-faire* – much like modern versions of “trickle-down” economics “libertarianism” – meant aligning the massive power of the state with the established economic incumbents, to structure markets to take from ordinary workers and give to the rich. On the contrary, *laissez-faire* only applied when legislatures sought to limit business in its predation: that, the courts said, violated corporations’ natural rights.

A. Structuring the Market – the Majestic Equality of the Law (an excursus on *laissez-faire*)

Laissez-faire, of course, had no objection to legally imposed Jim Crow – not merely legally mandated segregation upheld in *Plessy v. Ferguson*, but the general bars on African Americans voting or freely bargaining for jobs, homes, public accommodations and services and consumer products. Similarly, the

¹³ It would be a perfectly reasonable interpretation of a text in the Mishnah. The Mishnah appears to have been codified to for memorization. As a result, it often groups rules by puns and similar language – it is not uncommon for a similar phrase or word to have radically different meanings in two adjacent clauses. American interpretative norms, however, assume that our important texts are organized by content rather than sound. If the XIV Amendment were intended to give rights to legal persons, it would have been quite easy to say so.

legal system stood neutral in the face of the quasi-legal (and often quasi-official) lynchings that enforced Jim Crow and the manipulations of prosecutorial and jury discretion that assured that its enforcers would be allowed to murder without consequences. While slavery and peonage were barred by the Thirteenth Amendment and the Peonage Act (1867), the states of the former Confederacy nonetheless imposed laws making it a criminal offense for African Americans to be unemployed – or to quit their jobs, or, indeed, for another employer to hire someone under contract. As described in the Peonage Cases, 123 F. 671 (D.C.Ala. 1903) (holding unconstitutional statute that in effect criminalized a farm laborer’s attempt to change jobs for a pay increase), Alabama law created a system where persons accused (even baselessly) of crimes could be coerced into compulsory service. Legally imposed slavery for alleged breach of contract or similar civil offenses – sometimes even chain gangs of black men – even though supposedly unconstitutional after *US v. Reynolds*, 235 U.S. 133 (1914), remained alive and well at least into the 1940s, and in recognizably similar form even today. See, *Bailey v. State of Alabama*, 219 U.S. 219 (1911) (overturning statute providing for criminal conviction and forcible labor where employee left service during contract); *Taylor v. Georgia*, 315 U.S. 25 (1942) (similar); *Pol-lock v. Williams*, 30 322 U.S. 4 (1944), “The Farm: Angola USA” (1998); David M. Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (1997); W.E.B. DuBois, *Black Reconstruction in America* (1935); Pete Daniel, editor, *The Peonage Files of the US DOJ, 1901-1945* (available at cisupa.proquest.com/ksc_assets/catalog/10620.pdf)

The heavy hand of upward redistribution went well beyond re-enslaving the freedmen in the aftermath of Reconstruction. Most obviously, of course, public and sometimes private lands were given to the railway companies, along with monopoly privileges and loans that, scandalously, bankrupted a number of localities. Debt slavery was enforced in the company towns of the coal mines and the Pullman Corporation.

The common law was said to bar employees from uniting to bargain, since that would be a conspiracy in restraint of trade (rather than, for example, a First Amendment protected petition for redress of grievances). Courts issued injunctions barring strikes, upheld the use of private and public force against employees, and presided over show trials of labor activists. They had long treated unions as guilds – illegitimate attempts to gain market power that should be brutally suppressed by state violence (e.g. *Zinn 223* (describing suppression of Union Society of Journeymen Tailors, Locofocos movement and the Philadelphia general strike for the 10 hour day)

In sharp contrast, however, alliances of finance capital united to negotiate as a single body – i.e., corporations – were treated as raising no issue of conspiracy at all. A corporation representing the interests of dispersed investors – remember, that remains the reasoning behind corporate access to diversity jurisdiction, as well as an at least partially realistic view of corporate behavior -- was, instead, a legal person treated as an individual. Even if it was in fact a monopoly (as no union could ever be), it was not liable under the common law because a person cannot conspire with itself (and the many investors who it represented for bargaining purposes apparently did not count).

Similarly, courts adapted common law doctrines of tort to eliminate any employer responsibility for industrial “accidents” or other predictable costs of railroading and factories: new doctrines like

negligence, the fellow worker rule, last clear chance and others meant that businesses were free to injure employees, customers and neighbors without recourse. Accidents were not costs of doing business in the courts' view but acts of a malevolent God, or perhaps the fault of the victims themselves for not better adapting to the powers that be. See, e.g., Horowitz, *Transformation of American Law*. Pollution and environmental depredation were somehow not the responsibility of the industry that caused them; in the eyes of the common law courts, businesses apparently had a pre-legal right to destroy and abuse. Railroads could emit smoke and sparks and run down cattle and people on unfenced rails, mines could dump dangerous tailings or collapse on workers or under homeowners, mills could build dams that catastrophically collapsed or pollute the skies and the land with impunity. By the middle of the nineteenth century, tort law was clear that none of these were takings or theft or in any other respect wrongs for which the law offered a remedy. Similarly, the courts permitted producers to remain silent about dangers in the workplace and from the product (and, under the doctrine of "puffery" even to outright lie, provided that the lies are sufficiently vague). And, of course, the doctrine of "limited" liability means that investors have no responsibility whatsoever for corporate malfeasance. If they have planned well enough to extract their returns from the company before it becomes insolvent, investors may simply walk away if corporate liability exceeds its assets.

Contract and agency law were similarly one sided. Agency law held (and still holds) that employees are servants, required to accept direction from their master, the employer. Employees, as a matter of law, are deemed to have agreed to complete lack of control over their working conditions and work process. Moreover, servants must work solely on the master's behalf and in the master's interest: far from the self-interested maximize of capitalist ideology, the law requires employees to be models of Christian selflessness, bound as fiduciaries to set aside their own interests. The employer, in contrast, has no such fiduciary duty; it is free to treat its servants as mere tools to the employer's end. Similarly, agency law assigns ownership of the employee's work and skill to the employer: the law turns Locke on his head, insisting that everything the servant makes and creates becomes the property and creation of the master.

Contract law, however, is perhaps the leading source of upward redistribution. Going far beyond Anatole France's "majestic equality" that forbids rich and poor alike from sleeping under bridges, since the early nineteenth century the basic principle of contract law has been not specifying reasonable terms but rather enforcing "mutual agreement" – that is, whatever terms the powerful are able to insist the less powerful accept. This is the law of the unsupervised schoolyard and, of course, it largely ratifies the power of the bully. Even if formally neutral, it automatically gives the rich more than the poor: as every self-help book on negotiation points out, the party that can needs a deal less should always be able to seize the bulk of the surplus created by cooperation. Those who need a job to eat are going to sell their labor cheap; those who can replace any given laborer with plenty of others can hold out for a good deal. The agreement they reach will never be fair even if it is an improvement over the alternatives each side faces.

B. Due Process in the Era of Laissez Faire

But the law is rarely formally neutral; usually it actively intervenes on the side of the powerful, and never more so than in the laissez-faire Lochner regime. The bullies – as usual – were not satisfied with grabbing only the surplus. Employers paid employees in scrip accepted only at the company store at prices the employer set, and courts enforced this near-slave regime. Courts created default rules allowing employers to fire employees at will for any reason but barring employees from refusing to perform. Indeed, even without peonage rules, contract law allowed employers to pay wages a year in arrears – and to withhold it all if the employee sought to change jobs. Most dramatically, bargaining took place under the shadow of the Pinkertons: employers could call in private armies, local possees, state militias or the National Guard to force employees back to work or exclude them from the premises in favor of scab replacements.

Claiming that due process barred states from protecting citizens from the workings of market or the depredations of those that Teddy Roosevelt called “malefactors of great wealth,” the Court repeatedly struck down laws meant to increase the bargaining power of employees against their – often corporate – employers, including maximum working day regulations (as in Lochner itself), minimum wage law, child labor laws and safety regulations.

None of these cases stopped to consider whether the Constitution protects business corporations or why individual rights should apply to collective organizations. The Constitution’s language and history point, of course, in the other direction. The basic concern of social contract-based limited government suggests that we ought to worry about abuse of power by institutions and office holders, including private corporations whether or not in alliance with political incumbents.

The division of labor in our government points in the same direction: a capitalist market-based economy is, or should be, dynamic and rapidly changing. Legislatures may struggle to keep up with the changing needs of the market. But judges, who are trained to look backwards, to seek timeless principles rather than timely compromises, aren’t even pointed in the right direction. The Switch In Time recognized fundamental institutional problems with judicial regulation, not just the unpopularity and unworkability of the Old Court’s particular doctrines.

The needs of the market similarly counsel against the Old Court’s economics. Markets only work if incumbents cannot transform past success into current and future blocking power. That means that contract law must assure that agreements are in fact and not only in form voluntary. And tort law must assure that producers pay the full cost of production without stealing from others by creating uncompensated risks. As the markets become more complicated and planners more sophisticated in evading existing limits on bad, but profitable, behavior, law will always struggle to keep up. Backward looking judge made law will struggle more.

Indeed, this result was so clear that the Court has never even felt the need to explain how the Civil War Amendments could possibly have led to new rights for corporation, or how a republican democracy could possibly grant non-citizen organization privileges

VI. Incorporation

At the beginning of the Twentieth Century, and more so after the New Deal's rejection of Lochnerism and laissez-faire, the Court began to give new life to the Bill of Rights, both against the Federal government and, via the Due Process clause, the states. Corporations shared in this expansion on nearly equal terms with citizens – and no more explanation of why than in the earlier cases.

These cases are better known than the earlier ones and I will not discuss them in depth.¹⁴ Suffice it to say that in virtually every case where a corporation has asserted a right under the Bill of Rights, the Court has proceeded to the issue of the scope of the right without considering whether the claimant's status as a corporation matters. Corporations, thus, have First Amendment rights to speak and to spend money to influence politics, Fifth Amendment rights to due process, jury trial, double jeopardy, and compensation for takings. They have virtually all the Sixth, Seventh and Eighth Amendment rights as individuals. And under the Fifth and Fourteenth Amendments, they have rights to exemption from ordinary tort punitive damages if the damages would be large relative to actual damages – even if small relative to the profits the firm derives from the wrongful action.

The First Amendment speech rights is the most developed field. This may be somewhat surprising – for-profit corporations ordinarily shy away from controversy. Generally, there is no reason to antagonize potential customers. Moreover, many of the best known and most beloved defenses of freedom of speech seem obviously inapplicable to business corporations. Corporations obviously cannot “speak” in the ordinary sense. Nor does state law provide any mechanism for business corporations to have party or religious affiliations. Thus, it is hard to see what it would mean for a corporation to violate its conscience or why we would care if it were unable to flourish as a fully developed member of our culture. The enabling statutes for for-profit corporations are primarily designed to create market actors that will produce useful goods and services, decent jobs and profits for investors.

To be sure, corporate board members and employees are human beings and they do, or should, have free speech rights. But it is a cheap rhetorical trick to suggest that granting the corporation rights increases the liberty of its employees, managers or board members. State law imposes a fiduciary duty on board members and corporate agents (employees and managers) alike: they must act in the corporation's interest when they act in their corporate role, regardless of their own interests, the national interests or political or religious values that, ordinarily, might be more important than mere profit. If you are the PR agent for a coal company, it is a violation of state law – not merely a violation of company policy for which you are likely to be fired – for you to state, on behalf of the company, that the world would be better off if your company were made less profitable, and indeed may not survive unless we quickly find a way to make burning coal obsolete. Conversely, if you are that company's CEO and the Supreme Court declares that your company has a constitutional right to speak out against pollution controls, you have a fiduciary duty to speak out in favor of destruction (unless you can find some way to convince yourself that higher profits are not in the company's interest). This is not free speech – it is compelled speech. Now, if the company's leadership all agrees to place their politics or

¹⁴ For more detailed discussions, see, e.g., Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 4 *Hastings L.J.* 577 (1990); Greenwood, *Essential Speech* n 27; *Guns, Inc: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 *NYULR* 887 (2011).

values above the company's interest, there probably isn't anyone who can stop them; the fiduciary duties are quite difficult to enforce. But this isn't free speech either: it is stolen property. Whatever the First Amendment protects, it is not the right of an officeholder to use his or her office for personal purposes.

In *Bellotti*, Justice White suggested that it was the speech of shareholders that is protected when a corporation speaks, in a variant of the "aggregate" theory of *Deveaux*.¹⁵ But this is equally silly. First, in the modern world, the shareholders themselves are likely to be institutions or foreigners with no obvious First Amendment rights. More important, corporate law bars managers from acting according to the will or values of the actual people who own shares (or are the beneficiaries of the actual owners) – the state-mandated fiduciary duty is to act in the interests of the corporation and its shareholders, but that means shareholders taken as shareholders in their shareholder role. It is often in the interest of humans who own shares to have their share values go down – most people would prefer to have lower stock prices than have the company engage in highly profitable murder for hire or child pornography or undetectable adulteration of foodstuffs. But it is never in the interests of the legal construct of a shareholder to drive the stock price down: the fictional shareholder of the law has no other interests or values. In any event, even if managers wanted to follow the desires of shareholders, they have no mechanism for determining what those might be. Shares trade anonymously and rapidly; managers do not know who owns them (and, under ordinary corporate law, have no reason to care).¹⁶

Albert Hirshman famously argued that participants can control an organization by exit or voice, and that voice is nearly always more effective. In the business corporation as we have organized it, no one has effective voice or exit on issues of political concern. Employees who speak up are likely to be fired for insubordination; those who exit will be replaced by others who more willing to set their consciences aside or happen to agree with company policy. Investors have no vehicle for voice and, in most cases, are institutions that are not equipped to have a view in any event. If they sell in protest (as politically motivated shareholders occasionally do), they will simply be replaced by profit-maximizers – with no effect on the stock price or the company. Business corporations are designed to respond to market pressures, not the politics or morals of their participants. There is nothing wrong with this if they are economic actors, but it makes them quite dangerous as political ones: to allow markets to dominate politics is precisely the definition of corruption, and completely incompatible with capitalism.

The Court has never addressed these issues in a straightforward way. Indeed, it is hard to see any evidence that it has even considered whether increasing the freedom of the institution increases the freedom of its participants. The question should be obvious to any student of democratic republicanism: the reason we have limited government in the first place is that we understand that the behavior of the institution may deviate from the interests, let alone the values of the citizenry. Yet, the US Reports proceed as if granting institutions rights automatically increases freedom. *Bellotti* contended that the Court could free "speech" without even considering the identity of the speaker;

¹⁵ *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809) (corporate diversity determined by shareholders, not corp.)

¹⁶ In non-business corporations, there often is some mechanism for the rank and file to have voice. Then, the issue becomes Michel's Iron law of Oligarchy – that the leaders inevitably deviate in values and interests from the led. That problem is beyond the current scope.

Citizens United offers no reason to think that putting political advertising up for bid improves anyone's freedom.

The exceptions are limited. The right against self-incrimination is "personal" and not available to corporations – a prosecutor may prove the government's case from the corporation's own documents or by directing a corporate official or servant to testify (under personal immunity if necessary).

The fourth amendment right against unreasonable searches and seizures, together with the judicial glosses regarding warrants, applies to corporations, but the standards for reasonableness may be lower than for individuals. At least in highly regulated industries, the government may subject businesses to inspections without the grounds for suspicion that would ordinarily required. On the other hand, it isn't obvious that incorporated businesses are treated any differently from unincorporated ones.

Other exceptions are untheorized. The entire securities regulatory regime functions by a system of prior restraint: corporate securities issuers are required to produce certain information and barred from disclosing other information without prior approval by the SEC staff. If this system were subject to First Amendment analysis, it would take extraordinary acrobatics – well beyond my legal abilities – to uphold it without rethinking core First Amendment doctrines and, ultimately, rejecting the Holmesian "free marketplace of ideas" metaphor that drives most First Amendment doctrine today.

Similarly, there is little explanation in the Reports justifying the Court's decision to bring advertising, including purely commercial advertising, under the First Amendment while carving out an exception for false advertising. The exception is essential to prevent the First Amendment from swallowing up and destroying the basic regulatory structure that keeps our markets functioning, but it is by no means clear why the line between fraud and puffery, lies and harmless misleading, should be a function of constitutional free speech doctrine created by courts seeking to understand ancient concepts developed in completely different contexts, rather than the ordinary political process. Surely the efforts of profit-pursuing institutions to sell more product by disclosing the alcohol content of its beer, undercutting the prices of its competitors, or concealing its use of unpopular food production techniques pose problems having little or nothing in common with the classic issues of political or artistic censorship. No one's personal dignity, conscience, ability to dissent or flourishing is involved.

Lower courts have even held that a business corporation has rights to practice religion, although it is hard to understand where in the corporate statute faith or belief are located.¹⁷

And, while American corporations have long hired armed guards and, at times even private armies, and, indeed, fought battles against American citizens, shooting and killing their opponents on American soil, the Supreme Court has not determined whether this activity is protected under the New Second Amendment. Some states have affirmatively held the opposite: in the aftermath of the Homestead Massacre, in which hired Pinkerton guards turned Gatling guns on striking coal miners, about half the states and the Federal government passed statutes, or in the case of many of the states, constitutional

¹⁷ *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1305 (11th Cir. 2006).

amendments barring or limiting corporate mercenaries.¹⁸ While these provisions vary in effectiveness and scope, all of them recognize that the prospect of private corporations using mercenaries to fight battles with Americans is deeply problematic.

Finally, it is worth mentioning that since the Slaughterhouse cases, the Court has been uniformly clear that the People have no constitutional rights whatsoever against private actors, including publicly traded corporations chartered and regulated by state governments, that can act only in accordance with state-mandated fiduciary duties using the powers that state governments have granted them, that are responsible only to the extent of assets state law determines belong to the institution, and that benefit from the intensely Federally regulated public securities markets. Thus, while the XIV Amendment bars state and national governments from discriminating on the ground of race, the Supreme Court held virtually without dissent that corporations existing only by virtue of the law were free to do so under the Constitution (indeed, the 1964 Civil Rights Act was passed under the Commerce Clause because its authors feared that the Supreme Court would hold that not only does the Amendment not bar non-governmental discrimination by its own terms, but it does not authorize the Congress to do so). We have constitutional rights to freedom of speech – but only against the government. Private employers are free to censor their employees. Privately owned television stations granted monopolies over the public airwaves by Federal agencies have a free speech right to determine who speaks on “their” airwaves and what they say; the old Fairness Doctrine is unconstitutional. In sharp contrast, however, no citizen, customer, shareholder or employee of these stations has any right of speech at all against the corporation that controls access to these powerful soapboxes: the corporation’s managers as determined by state law (meaning, its board and the board’s delegates) have the exclusive right to speak for the corporation and determine who uses its property or licensed privileges and how. Private web service providers are free to censor the blogs they serve. Charles Reich’s article *The New Property*, which argued that property rights, themselves protected by the Due Process Clause, might protect citizens against arbitrary action by the various powerful bureaucracies in their lives, was the most widely cited article in the law reviews for many years. His ideas led to significant increases in the process accorded to welfare recipients and certain public employees – but they changed nothing with respect to non-governmental corporations.

In short, under current Supreme Court doctrine, corporations have many of the constitutional rights of citizens against the state and our elected representatives. We, however, have no constitutional rights against them. The Court has never offered a political or legal theory of why this is so, and none is

¹⁸ Utah XII, sec 16 (repealed 1992); Idaho XIV, 6 (also Idaho Code 18-711); Montana III, 31; Wyoming XIX, Police Powers, 1; N. Dakota (All bodies of armed men, except St militia and US army, barred from duty in state); Ariz. Const. art. II, § 26 (“The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.”); Wash. Const. art. I, § 24 (“The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”); NY Anti-Pinkerton Act 40-1845 (1913?); Anti-Pinkerton Act of 1893 5 USC 3108, discussed in *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 462 (5th Cir. 1977)

obvious. However, from a purely predictive perspective, it is fairly easy to understand current law. The Court begins its analysis of corporate rights

VII. The New Second Amendment and Corporations

A central concern – perhaps the central concern – of the liberal political tradition which brought forth our Constitution is to limit illicit power. Might alone does not make right. The post-feudal view is that God’s activity in the world is mysterious; we cannot be sure that those who rule do so with His approbation.

Hobbes founded modern political theory in the claim that states exist to protect us from the menace of a war of all against all – the ultimate armed citizenry. For him, the prospect of men protecting themselves was indistinguishable from civil war; absent government, we would descend into the chaos seen recently in Somalia or Beirut. Similarly, Max Weber claimed that the very definition of a state is its successful claim to a monopoly on legitimate violence.

The new Second Amendment ends this monopoly, if it ever existed in our most violent of republics. If we are to become an armed citizenry, however, the next question is – in which direction will the Court press our new derogation of state power? The answer, as to most questions of the status of corporations under the constitution, must be closely linked to the larger question of what the Court’s vision is of our constitutional democratic republic.

Yet the doctrine offers no hope that the Court will even consider the relevant issues. When the Court first extended speech rights to corporations, it did not consider the organization reality of group talk. When it decided to bring commercial speech within the ambit of the First Amendment, it defended its position with context-less metaphor of the marketplace of ideas mixed with limp and clichéd repetitions of half-understood stories of the invisible hand. Somehow, the truth will out and allowing more advertising will be better. This is Dr Pangloss’s theology, not real life economics.

Similarly, when the Court decided that corporations have a constitutional right to privacy – that we may not create a GAO for the private sector, or insist on ordinary good government measures when the bureaucracy in question controls only our livelihoods or most essential consumer products – it did so by invoking metaphors of a man’s living room.

There are no timeless eternal principles found in our ancient Constitution that tell us how to regulate an economy that changes radically every couple of decades or how to assure that large new institutions, the likes of which we’ve never seen before, act in the public interest rather than selling us to the gods of greed and global warming. Assuring that our markets work for us and not against us is difficult – an ongoing struggle that the political branches are more likely to lose than win. Markets are powerful motivators, and they can be counted on to motivate some people in strongly destructive directions. But courts, pretending to interpret irrelevant texts and seeking principles instead of solutions, will be far worse. That they demonstrated in *Lochner* and repeatedly since.

If I were a legal realist, this paper's conclusion would be simple. The doctrine is incoherent. Courts have ignored the text, history and structure of the Constitution in order to grant rights to corporations that cannot be defended as a matter of political theory. Most of the results, however, can be explained by the crudest form of materialism – Charles Beard slightly updated. Dooley was wrong; the Court doesn't follow the election returns. It simply reinforces the status quo, systematically replacing Schumpeter's creative destruction with, instead, economic incumbent entrenchment. Or, in a more Anglo-Saxon vocabulary, reverse Robin Hood. To those who have much, the Court will give more.

A slightly more interesting explanation points to the power of metaphor: the Court consistently, from the earliest days, has treated corporations as (1) private and (2) unitary. Given those premises, a strong presumption that corporations should have human rights follows almost automatically. The presumption can be overcome only when its consequences are most obviously disastrous – preventing us from regulating industry until after we have individualized suspicion of wrongdoing, for example, and not even always there. But the Court has been too captured by its metaphors and we are, as a result, in danger of being captured by a culture of grift. Corporations are designed to press the limits of regulation; only those who believe that markets come with a God-given and enforced guarantee that all will be for the best would want profit maximizing institutions to set the rules for what is permitted in the pursuit of profit. They are simply too likely to come up with “the right to cheat unpunished.”

The modern business corporation is descended from the great trading companies that conquered the world – the British East India Company, which conquered India and dominated much of China; the Hudson Bay Company, which became Canada; the Dutch East India Company, which operated colonies in the Spice Islands and elsewhere; and the corporations that sent settlers to and were the first governors of Massachusetts, Virginia and others of the original US colonies. These quasi-sovereigns fought wars, imposed “taxes” (or danegeld), negotiated treaties and enforced their own versions of law on both members and subjects.

More recently, major corporations hired Pinkertons to violently suppress unions, bust strikes and pursue bank robbers including Jesse James and Butch Cassidy, in the course of which they killed various gang members and even James' eight year old half-brother. At the Homestead Strike and elsewhere, these private armies murdered strikers to preserve the company's control over labor markets; the Pinkertons were even accused of throwing the bomb that began the Haymarket riots; at Ludlow CO, company guards used machine guns on employees. Indeed, companies hired armed men and snipers to fight hundreds of strikes over the half century beginning in the 1870s. {see e.g., sources cited at <http://web.archive.org/web/20090729182154/http://geocities.com/travbailey/index.html>}

Modern corporations, in contrast, have been largely demilitarized. This is not to say that they are non-violent. We have more private security guards than public ones. New York City, and other localities, allow corporations to hire public policeman, who appear in uniform and with full official powers but enforcing corporate rights according to corporate priorities and subject to the supervision of corporate officials. Large portions of our wars in Iraq and Afganistan have been out-sourced to for-profit corporations, which now supply armed mercenaries for virtually every aspect of military combat. We have recently discovered that the NSA and other security agencies depend heavily on outside

contractors – apparently some significant part of the work of spying on Americans and others is performed by agents of for-profit business corporations subject to corporate, not public, norms.

If the Court extends the New Second Amendment to corporations, officially allowing the rise of private armies and militarized capital, the beginning of a new age of feudalism will not be far behind.

Modern corporate law is clear: corporate managers must use corporate resources to promote corporate interests. It is always in its interest to be given special privileges, such as the ability to break rules others must follow, or to make gambles that will become someone else's problem if they fail. It is always in its interest to externalize its own costs on others, or to squeeze employees or customers until they begin to protest. It is in the interest of nearly every incumbent company to use the law to make life harder for innovative upstarts that don't yet exist. Only the best run companies will notice that public investment, fair rules of the game, adequate transportation and other infrastructure, functioning healthcare and pension systems, well-funded educational systems and basic research, and the other things that make life in a civilized country attractive are also in its long term interest even if they require higher taxes. And even those firms are likely to prefer to get the benefits without paying the price. Worse, they may fear that they cannot consider the long term if their competitors are focused on the short term, because there will be no long term for companies that refuse to compete in every arena – including distorting the political process by “speech” or arms – when their competitors do.

What then happens when a corporation asserts its constitutional right to bear arms? Is Koch Industries entitled to create a private army to defend itself from environmental protestors or over-reaching legislatures that might attempt to limit its profits? Can Citibank dismiss its uniformed New York policeman who, even if they are paid by the firm nonetheless remain public employees, and replace them with armed men of their own choosing who might be less inhibited about moving Occupy on, or visiting the office of elected officials who are inclined to vote against the next bailout?

Once one does, the others will have no choice but to follow. Today, corporate-paid security guards outnumber the public police. Typically, however, they are not armed or privileged to kill and they remain, ultimately if not in day-to-day practice, subject to the will of the legislature. If corporations, however, have a right to bear arms, even if not the full right to violent resistance to democratic rule asserted by Tea Partiers and successors to the lynch mobs of the Ku Klux Klan, these security guards are likely to morph into private armies. Blackwater, after all, already provides mercenaries for hire abroad. And the profit motive that many corporate executives place at the top of their moral hierarchy will ensure that once one major corporation arms, others will follow: force is often quite profitable, and non-resistance to other's threats rarely is.

VIII. A Doctrinal Solution

The Court could, of course, simply rule that the Second Amendment's right to bear arms is a personal right, like the right to remain silent or to the privileges and immunities of citizenship.

Proponents of a militarized corporation will protest: surely our largest aggregations of wealth need a right of self-defense at least as much as random homeowners in the suburbs. Chase, unlike your neighbor, actually has real life enemies, here and abroad, who would like to destroy it and have the means to hurt it. It may not “need” to turn Gatling guns on its employees, as the coal mines and railroads did to end the strikes of the last century. But it has real enemies. And it, or related firms, have promoted revolutions in the past. If the right to revolution now requires that we allow individual maniacs to own unlimited weapons, surely it applies as well to the establishment. In the great tradition of constitutional law of the corporation, the Court could simply decline the challenge.

A better solution, however, would be for the Court to finally assume its responsibility. The time has come to discuss the actual reality of corporations. Metaphors of “artificial” or “natural” entities or aggregates are pointless – they distract rather than illuminate. The question is not whether corporations are formed by the state or by citizens; they could not exist without both. Nor is it whether they are “good” or “bad” – like the state itself, they are essential to civilized life, but also a threat to it.

The issue is simply: is a Constitution enforced by backwards looking judicial review the best way to assure that corporate elites operate these institutions in the national interest? The answer, most of the time, is surely “no”. Generally, economic matters are best left to the political branches. Imperfect as politics is, at least politicians must respond in some fashion to the actual values of the actual living people. Difficult as it is to write and enforce effective regulations, at least regulators are dealing with the actual present economy.

We would be better off if our Congress were not crippled by gerrymandering in the House, the long obsolete and anti-democratic overrepresentation of small states in the Senate, the stultifying rules of supermajority voting, and fixed terms for elections. We would be far better off if we treated our governmental bureaucrats with more respect and, in turn, demanded from them the professionalism of a proper civil service.

But constitutional interpretation is a step in the wrong direction. Neither the 1789 text nor the Civil War Amendments give courts guidance in managing the economy. However much we deify their authors, the fact remains that the Constitution is a human text, written by men who lived and died before the industrial revolution, before electricity, and before the invention of the modern corporation – not only the corporate law I have discussed but the M form organization of the mid-twentieth century and the modern variants I have not. Looking backwards is a poor way to move forwards.

The Court needs to take seriously the limits of its ability and role. The political process is dominated by corporate money and corporate lobbying. To some degree this is inevitable. The largest economic actors are always going to be the primary source of expertise on the economy; there is no possibility of any American government not paying a great deal of attention to their needs. But we need corporate managers to run their companies, not the country. There is no need for courts to step in, making up constitutional doctrine in order to enhance corporate power still more. Whatever our major corporations are, discrete and insular they are not.

The Constitution as enacted by the People does not give corporations any rights at all. The rights they have – and they are many and important – are the result of ordinary legislation. That is as it should be. Legislation is hard enough to change. There is no need to entrench it still further.

To the extent that the Court is tempted to overcome the strong presumption that the Constitution's silence means what it says, it must start by considering the actual reality. No one believes that governmental agencies should have a constitutionally protected right to divert money allocated by the legislature to lobby for more money or greater autonomy for agency decisionmakers. The rule should be the same for business corporations, for exactly the same reason. We give corporate bureaucrats control over vast wealth and vast structures of authority because we believe that by doing so we make it more likely that Americans will find good jobs and be able to buy useful goods and services.

A decent regard for the fallibility of human plans means that we must be prepared for the possibility that our institutions may not be the best vehicles to our ends. Corporate lobbying reduces our freedom; it does not enhance it. Corporate secrecy, too often, simply conceals incompetence or wrongdoing. The degree to which we should allow corporate managers to act according to their own politics or their own view of how best to run the corporation, or, on the contrary, to which they should be responsive to ordinary democratic norms either inside the firm or in the greater community, are political issues that we need to debate. None of this belongs in the Constitution.

What does belong in the Constitution, or perhaps in a legislative bill of rights, is the beginning of a transition to the democratic era. Corporate bureaucracies need to be tamed much as we had to tame the public ones. Google is not the East India Company – but it has an extraordinary concentration of power nonetheless. We need norms protecting internal dissent – free speech for employees. We need norms of transparency and debate to avoid the all-too-well known problems of echo chambers and yes-men. We need countervailing powers and accountability within the firm to break down the autocratic dysfunction of the imperial CEO. We need to give employees more of a voice so that they are less likely to be thinking only about their exit.

Arming the current executives means adding the power of life and death to their already excessive power to enrich or impoverish individual employees, to game the economy, evade rules of fair play, pay themselves and their banker and shareholder cronies excessive and ever growing shares of the surplus created by their employees and customers, and demand bailouts for the problems created by their own mismanagement. This would not be the end of freedom as we know it. But in a world in which nation states increasingly look less powerful and less effective than the multinational corporations that play states off each other to exploit their weaknesses, it is a step in the wrong direction. Do we really want the next banking crisis to end in a violent show-down between the AIG Army and the Goldman Brigades?

IX. Violence and the State (delete or move)

Is its vision anarchistic – something like the prophet Samuel’s elegiac vision of a time in which “every man did what was right in his own eyes,”¹⁹ the yeoman moonshiners of Shay’s Rebellion,²⁰ or a Hollywood version of the Old West, in which taxation and the schools, sewers, roads and parks it buys, perhaps even defense are limited by the power of individuals to execute the revenueurs? This would have a certain resonance with views of some of the Revolutionary Generation – if mainly opponents rather than supporters of the Constitution, which, after all, was in large part a victory of the forces of property and order over the autarchic impulses of the frontier and the leveling mob.²¹

If the Court sees the Second Amendment in this way as an echo of Samuel, limiting government in favor of unorganized frontier justice, then corporations, like the government itself, should appear as threats to freedom. Hobbes described governments as corporations – organized to pursue goals and create rules to difficult for isolated individuals to pursue alone. The image works equally well in reverse: corporations, like every form of organized activity, always threaten to reduce the autonomy of the individual. Samuel’s lament for the lost individualism of wandering herdsmen with no permanent rulers, selecting charismatic prophets and judges only in crisis, rejects organized routinized power in all its forms. Corporate bureaucracy threatens charismatic rule exactly as much as governmental bureaucracy (indeed, in the United States, with its relatively undeveloped government and hypertrophied private sector, perhaps more).²²

Or does it aim, instead, for a mafia or warlord state, in which coalitions or heroes form self-protection associations to impose their will on others, as portrayed by Robert Nozick²³ or lived in every feudal regime²⁴? Leviticus commands that the state provide “one law for the rich and the poor, the stranger and the native-born.” This vision, in contrast, follows the law of the strong as explicated by Nietzsche, Ayn Rand or Herbert Spencer: those who can prey, and those who cannot, pray. The state stands aside, or enforces the will of the powerful, or perhaps simply enforces private agreements; the net result is much the same. When teachers leave the schoolyard and tell the children to resolve issues themselves, the younger children quickly learn to submit to bullies or form coalitions to fight them. When governments enforce “voluntary” agreements, the result is much the same. The powerful use their power to convince the powerless to agree. The unemployed will agree to what they need in order to eat,²⁵ and the wealthy will give only what they must.

This vision of America – a land in which the powerful are free, as closely linked to our slaveholding past as the first is to the Wild West – generates the opposite starting point for corporate rights. In the abstract, leaving aside legal niceties, those who believe that government exists to ensure that the incumbents remain on top should assume that corporations will have the rights of individuals. In our

¹⁹ II Samuel

²⁰ William Hogeland, Shay

²¹ E.g. Hogeland, *supra*; Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); Charles Beard, *Economic Interpretation of the Constitution*.

²² Weber, *Politics as a Vocation*; *Bureaucracy*.

²³ Nozick, *Anarchy, State & Utopia*

²⁴ See Jeffrey A. Winters, *Oligarchy* (2011)

²⁵ Polanyi

economy, after all, business corporations (and their close relatives the non-profit corporations) are among the largest and most powerful agglomerations of wealth and power. We have no Dukes of Westminster in the United States, heirs to landholdings so valuable that a single man can influence the policy of the country (although we do, in the last generation, now have hedge fund managers who pay themselves sums measured in the billions per year, enough perhaps to create hereditary privilege of English magnitude). Our power elite is not made of the descendants of medieval warriors living on the civilized remnants of ancient violence. Instead, our economy (and increasingly our politics) is dominated by large organizations and the men who run, or less often, founded them.

Alternatively, perhaps the Court will take its Second Amendment jurisprudence to be merely a marginal addition to something closer to a *Carolene Products* Footnote 4 understanding of our liberal democratic republic: a system defined by the primacy of the Federal political branches, limited by special judicial concern for ensuring, on the one hand, that majoritarian processes do not unduly oppress discrete and insular minorities, and, on the other hand, that temporary elites do not abuse their office to entrench themselves in power.

Within this framework, the New Second Amendment could be understood as a fundamental individual right – a commitment that the right to own weapons is so fundamental to human personality that the political community has decided to elevate it above collective political decision, much as we protect individual rights to be free of torture or warrantless searches, to practice religion or view art according to the individual’s conscience and taste, or to decide whether to become pregnant and bear children. One version might content that much as some people develop and express themselves through dance or literature, others use guns.

But restrictions on gun control need not be based in a philosophical commitment to the idea that hunting or maintaining unlicensed accident-prone assault weapons at home is as important to our culture, individual conscience or pleasure as the right to bodily integrity, or that push-trigger is as good as poetry.²⁶ Instead, it could be grounded in the pragmatic understanding that many Americans – rightly or wrongly – view gun ownership as as important as prayer. We do not need to accept other people’s religious rituals as true or even culturally important to protect them; on the contrary, the most persuasive defenses of religious freedom start from the assumption that most religions are false (indeed, they must be, at least in part, since nearly every religion insists that it has an exclusive monopoly on certain truths). The reason to protect them is peace, not truth: several millennia of religious war have convinced us that it simply isn’t worth killing people over how they pray. Similarly, the New Second Amendment could be seen as no more than a pragmatic declaration that there are enough Americans willing to fight to keep their guns that appeasement rather than confrontation is the course most likely to keep the peace. Our predecessors enshrined slavery in our Constitution even though they knew it was wrong because they believed that reaching agreement was more important

²⁶ Mill, J.S., "Bentham," in Marshall Cohen (ed),*The Philosophy of John Stuart Mill* (Modern Library 1961) at 50 (quoting Bentham as saying “quantity of pleasure being equal, push-pin is as good as poetry”). According to Wikipedia, Mill is paraphrasing Jeremy Bentham, *The Rationale of Reward* (London: Robert Heward, 1830), [p. 206](#).

than the rights of the enslaved; the New Second Amendment may be a similar judgment that living in peace with gun owners is more important than the preventable deaths and injuries that result.

Or gun ownership could be understood as a political right, related to the political right to speech expounded by Bork or Meiklejohn.²⁷ Guns, to be sure, are even less likely than advertising to lead to the truth. Still, even if we accept that the state must have a monopoly on the legitimate *use* of violence, a certain liberal suspicion of concentrated power might suggest that we ought not to allow the state to monopolize the *means* of violence. One key purpose of free speech, as thinkers such as Vincent Blasi and Michael Walzer have emphasized, is to assure that current officeholders don't use the powers of office – especially propaganda and censorship – to cut off the debate that might lead to their losing office. Guns in the hands of the citizenry, perhaps, serve a similar function. While it is hard to see how an armed citizenry makes democratic rotation in office more likely, it is probable that armed citizens reduce the ability of the government to enforce at least some law. Thus, it is said that Yemen has no tax collectors in large part because an armed citizenry would shoot them, much as Shay's rebels attempted to do early in our own history, and it certainly was the case in the bad years of the crack epidemic that armed drug dealers limited the ability of the police to keep the peace in some sections of our major cities.

Under any of these conceptions, the question will be how to balance respect for this individual or political right with the need of the community as a whole for security and freedom from vigilantism. If we have government to avoid Hobbes' war of all against all and yet allow individuals to retain a right to arms to avoid his all powerful government, there must be a balance somewhere. Even the most fervent supporter of the ordinary citizen's right to rise up in revolt, or romantic supporter of the autonomy and self-development inherent in taking responsibility for one's life into one's hands,²⁸ presumably does not mean to legalize political assassination or school shootings as regular features of our politics. So some regulation must be permitted: if the First Amendment, which specifies that "no" law restricting freedom of speech may be made nonetheless allows many laws regulating freedom of speech, then surely the Second Amendment, which purports to protect a "well-regulated" militia leaves a great deal of room for regulation. Someone – local, state or federal legislatures or courts – must decide where "well-regulated" fades into "dangerously underregulated" on the one hand, or "over-regulated" on the other. The current Court is highly unlikely to defer to the decisions of other branches of our democracy.

This defense of private weapons might be analogized, loosely, to the Footnote 4 understanding of economic regulation. Under Footnote 4, the state (and especially the Federal government) has virtually plenary power to regulate the economy. Nonetheless, we expect that the political process and our collective understanding of the appropriate role of collective and individual enterprise will lead elected officials and regulators to use that plenary power carefully. Even those Americans most in favor of activist governmental intervention in the economic market -- firm supporters of socialized street building, "free" on-street parking, mandatory zoning for one-family and garage housing in the suburbs,

²⁷ Alexander Meiklejohn, Free Speech and Its Relation to Self-Government; Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

²⁸ Compare Shiffren's defense of free speech as protecting and valorizing dissent.

Federal subsidies for mortgage lending and liability relief for polluters, limitations on union activity and trade and interest rate policies designed to limit the bargaining power of ordinary employees – nonetheless believe that broad sectors of the economy should be left to market forces. The government may create the monopolies we call “intellectual property,” thus creating the conditions for incumbent corporations to charge prices far above competitive levels for pharmaceuticals, software or movies, but it does not pick particular drugs or movies or producers to subsidize in this way. It may distort markets to overproduce corn and corn by-products, but it does so in a way that allows market participants to compete within the distorted rules. Home builders may be mandated to provide parking for cars, but they are not required to buy particular cars to park or, if they can find alternative modes of transportation, any cars at all. So, too, courts might conclude that the political process is the best place to determine the line between well-regulated militia and civil war – assured that in the United States that we actually know and live in, there is no more likelihood of an electorally responsive government depriving the population of treasured gun liberties than there is of it adopting Sharia’a law. Gun manufacturers and their customers may or may not be a minority (depending on the boundaries in question), but -- notwithstanding the powerfully anti-democratic procedures and allocation of seats of the Senate or the continuing problem of gerrymandering in the more democratic legislative bodies -- nowhere in the United States are they discrete or insular or in any way barred from political influence.