

# Are Corporations Constitutional Persons?

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## I. INTRODUCTION

What is the proper role of incorporated business in our constitutional order? The short answer is clear: The basic principles of republican democracy and market capitalism require that we control our governing institutions, not the other way around. Accordingly, business corporations ordinarily should have no constitutional rights

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<sup>1</sup> AB Harvard; JD Yale. My apologies to the many scholars from whom I have learned and whom I do not cite by name; if it looks like I am parroting someone else's analysis, it is probably because I am. See Kohelet (Ecclesiastes) 1:9 (וְאִין כֹּל-חֵדֶשׁ תִּחַת הַשָּׁמַשׁ). Special thanks for helpful comments from Kent Greenfield and Victor Brudney and their seminary students, to Michael Dorff and to participants in the Southwestern Law School faculty seminar.

under the Fourteenth Amendment or the Bill of Rights. On the contrary, we should have basic rights against them. Moreover, we should treat the claims of corporate officeholders to be the corporation with the same disdain we reserve for government officials who make similar claims: “l’etat c’est moi” is just as wrong applied to major corporations as it is to the court of Louis XIV or the Department of Motor Vehicles.

This is not to say that business corporations shouldn’t have significant legal rights – but those rights should be statutory, should be designed to limit the ability of corporate leaders to use the powers of their office to influence politics or lobby regulatory agencies, and should be accompanied by significant limitations on their officers and directors comparable to those we place on public officials. In short, the constitutional status of business corporations and their officers should be quite similar to that of municipal corporations, not, as the Supreme Court currently holds, radically different.

The basic principles of liberal social contract theory, applied to corporate law, offer familiar lessons. We need powerful institutions, but we know that power corrupts. Like any power structure, corporate bureaucracies have a potential to do harm as well as good. Indeed, corporate officials and structures can threaten many of the same basic freedoms that state officials and structures can, often in quite similar ways.

The basic principles of liberalism and limited government teach us to suspect overreaching by power centers of all varieties. Liberal republican states, then, ought to limit corporations, and corporate leaders, to their proper sphere, much as they preserve the rights of the people against our equally important and equally troubling legislatures, courts and executive agencies.<sup>2</sup>

Publicly traded business corporations are among the most important and powerful governing institutions on which we depend. On the one hand, they are largely responsible for our livelihoods, communities, necessities and objects of desire – without them, life as we know it today would be impossible. On the other hand, they potentially present grave threats to political, economic and ecological sustainability. Left to pursue the path they follow most easily, they may render our world uninhabitable.

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<sup>2</sup> For an account of the liberal tradition emphasizing the importance of multiple spheres of power and action – and of policing the boundaries between those spheres, see Michael Walzer, *Spheres of Justice*.

Current law is almost precisely the opposite. Since the earliest days of the Republic, the Supreme Court has treated corporations as if they were, like human beings, endowed by their Creator with unalienable rights. But we, not the Creator, created corporations, and neither nature nor our Constitution endows them with any unalienable rights whatsoever. Corporations exist because of the citizens and their state legislatures that authorize them, the promoters who organize them, and the people who work for them, invest in them, sell to them and purchase from them.

In the language of Exodus, to set our creations above us is the sin of idolatry.<sup>3</sup> Our Declaration of Independence makes the same point about government: it is instituted among men to serve our purposes, not to bend us to its. Our major corporate enterprises are no different: they too are human creations for human ends. Neither the text nor the policy of the Constitution requires, or even permits, setting them up as our masters, in violation of the basic principles of the limited government and human freedom.

The time has come, then, to reverse the Supreme Court's long line of precedent. Corporations belong on the state side of the great divide between state and citizen: like other governing institutions, they can be tools for good or bad, but they are always tools, never the goal. The purpose of government is the happiness of citizens, not the success of corporations.

Reconceptualizing corporations as public rather than private, governmental rather than citizen, bureaucratic rather than individual, is not hard: corporate bureaucracies are far more similar to governmental agencies than they are to individual citizens.

The legal and philosophic implications, in contrast, are radical. Moving the long struggle against the illegitimate power of absolutist government – and most of the techniques for restraining power without destroying its utility – into a new sphere will require change as dramatic as the effort to remake governments into our servants instead of our masters. Our Constitution promises to ensure the general welfare and to enhance human freedom. To extend these promises to the corporate

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<sup>3</sup> Exodus 20:2, 4. See also, *Catechism of The Catholic Church*, passage 2113, available at [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c1a1.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c1a1.htm) ("Man commits idolatry whenever he honors and reveres a creature in place of God, whether this be gods or demons (for example, satanism), power, pleasure, race, ancestors, the state, money, etc..").

sector, we need to begin by extending well-understood and basic principles from the public sector to major corporations.

Constitutions should be restricted mainly to the purposes of structuring our fundamental governance institutions and protecting us, as individuals, against the potential that they will abuse their power. Accordingly, business corporations – much like municipal corporations or other government agencies -- should have no standing to assert constitutional rights absent specific textual authorization (there is none in the US Constitution).

Instead, the first stage in our continuing Eighteenth Century struggle against absolutism is to establish the fundamental point that corporations exist for us and not the other way around. Corporate officeholders, as much as their governmental counterparts, are – or should be -- fiduciaries responsible for and to those they govern. Similarly, investors in our largest business enterprises, important as they are, are no more their owners, than are investors in our municipal corporations. We do not think that we should run our cities primarily to make the bondholders rich; there is no more reason that we should imagine that the primary purpose of our employers is to make their investors rich.

Then, we need to consider which of the other dramatic differences between our public and corporate sectors are simply atavistic remnants and which reflect real human needs. Should we extend the principles of separation of powers to the corporate sector?<sup>4</sup> Are there real political and economic justifications for the extraordinary power we grant to corporate officeholders, or are the agency law concept of “employment at will” and the corporate law concept of a board unanswerable to those it governs simply left over from medieval conceptions of masters and servants, kings and their subjects? There are rational explanations for our tolerance of nepotism and insider dealing in the corporate sector that we would call corruption in government – but are the explanations good enough to justify the full difference?

Similarly, we will need to begin the process of defining the fundamental rights every citizen should be able to assert against potentially overbearing corporate power. Those rights will look remarkably like the classic Eighteenth Century rights against absolute government: rights to a private space exempt from the demands of the

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<sup>4</sup> Cf. Montesquieu (outlining importance of separation of powers); Federalist Papers X (similar).

public sphere, rights to speak, dissent, and follow our consciences in matters of religion, politics and aesthetics; and, above all, the right to be included within the corporate conception of the common good. They will also draw from long-standing understandings of the minimum requirements of good government: a degree of openness, competing or divided powers, the predictable and neutral decision-making we call the rule of law, and, most radically, some right to be represented among the decision-making bodies.<sup>5</sup>

## II. FOURTEENTH AMENDMENT: TEXT, HISTORY, STRUCTURE

Much discussion of corporate rights under the Constitution centers on the old question: Are business corporations “persons” entitled to due process and equal protection under the Fourteenth Amendment? Precedent says yes. Logic, text, history and purpose say no.

Since the end of the *Lochner* era, the Bill of Rights, directly and as incorporated into the Fourteenth Amendment, has become an increasingly powerful source of business and corporate rights.<sup>6</sup> Sometimes, as in some of the seminal decisions overturning legislative regulation of corporate advertising and electioneering under the First Amendment, the opinions have sidestepped the “personhood” issue. Thus, both the early corporate electioneering cases<sup>7</sup> and the commercial speech cases<sup>8</sup> relied on the rights of listeners rather than

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<sup>5</sup> Charles Reich famously suggested that property rights could be expanded to create new zones of freedom. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). This article suggests the opposite: that we need to replace existing claims of corporate officials and investors to property rights in their offices and the associated perquisites with republican and democratic concepts, much as we did in the government sector at the beginning of the modern era. Reich urged transforming the propertyless employee into owners; I urge, in contrast, transforming the “servants” of agency law into something closer to citizens.

<sup>6</sup> *United States v. Carolene Products Company*, 304 U.S. 144 (1938) at Fn 4.

<sup>7</sup> Beginning with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (creating a constitutional right for corporate managers to spend corporate funds on electioneering). In that case, the Court contended that it was protecting “speech,” making the identity of the speaker irrelevant. But freedom doesn’t float in the air; the passive voice works no better in politics than in grammar. The issue is who has the right to spend corporate money and to what end – the fiduciary’s supposed freedom is remarkably similar to the claims of sovereign dictators that national freedom frees the people and not merely their oppressor.

<sup>8</sup> E.g., *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (overturning ban on price advertising designed to limit price competition between pharmacists); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (overturning restrictions on advertising “compounded” drugs intended to allow them to be sold but not promoted). But see, *Meese v. Keene*, 481 U.S. 465 (1987) (upholding requirement that certain

speakers. Similarly, when the Court has granted business corporations rights in their own name, it has not always used “personhood” theory: the earliest cases creating constitutional rights for corporations and the most recent ones have not used the word “person” or relied on strained exegesis of the Fourteenth Amendment’s vocabulary.<sup>9</sup>

Nonetheless, the same principles apply: the text does not mention corporations, and the history and underlying purpose of the Constitution and the fundamental rights it protects make clear that business corporations are usually the wrong sort of entity to press them.

#### A. Text

Over a century ago, the Supreme Court held that business corporations may assert the protections of the Fourteenth Amendment against legislatures seeking to regulate them.<sup>10</sup> It has never questioned that result. On the contrary. It has repeatedly reaffirmed and extended the holding. Today, most constitutional claims available to individuals are also available to business corporations.<sup>11</sup>

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Canadian films be labeled “political propaganda” because label imposed no burden on film distributors’ speech).

<sup>9</sup> In some cases, the Court seems to rely on strained exegesis of different clauses. In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), for example, one of several arguments the Court offers is that corporations are protected by the Petition for Redress of Grievances clause of the First Amendment (as incorporated into the Fourteenth Amendment). That clause is limited by its terms to “the People”; even if corporations could be squeezed into the language of the Fourteenth Amendment, they cannot possibly be included in the People. Ours is a republic of men, not organizations. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (contending that Fourteenth Amendment does not protect races but only individuals). But see, David Westbrook, *If Not a Commercial Republic*, 50 U. LOUISVILLE L. REV. 35, 36 (2011) (contending that in a commercial republic, political processes, legal processes and economic processes should be in tripartite equipoise).

<sup>10</sup> *Santa Clara Cty v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886). It did not extend this treatment to municipal corporations. See, e.g., *City of Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394 (1919), *City of Trenton v. New Jersey*, 262 U.S. 182 (1923), *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933).

<sup>11</sup> See, generally, Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987). For a list, now somewhat out of date, of corporate constitutional rights see, Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. (1990) at appendix.

The most important constitutional right that corporations have not been granted is the privilege against self-incrimination. *Wilson v. United States*, 221 U.S. 361, 382-386 (1911). Corporate privacy rights may be more limited than individual rights. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n. 14 (1978).

The two most important cases since Mayer wrote are *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (overturning century-old Federal restrictions on corporate

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electioneering) and American Tradition Partnership, Inc., v. Bullock – US – (2012) (extending Citizens United to state laws).

It remains to be seen whether the Court will extend corporations rights under the Free Exercise Clause or the new personal right to bear arms. The managers of a corporation with no internal rights of dissent, but with the right to hire mercenaries, to impose religious practices on its employees, to hold property in perpetuity notwithstanding the ban on entail, and a constitutionally protected right to charge its customers to subsidize its marketing, lobbying and electioneering activities would have more authority than the leaders of any American polity – indeed, little more than *droit de seigneur* would differentiate them from feudal lords.

The United States has a long history of corporate violence, including, perhaps most famously, the Homestead Strike. Corporate use of Pinkertons and similar mercenaries to suppress strikes lead to constitutional amendments in several states barring, with varying degrees of effectiveness, private armies. I am not aware of any litigation challenging such provisions or other restrictions on armed corporations since the rebirth of the Second Amendment.

Corporate religious rights, in contrast, are currently being litigated, particularly in the context of corporations seeking exemptions from the requirement that employer-provided and tax subsidized medical insurance include coverage for contraception. Compare, *Conestoga Wood Specialties Corp. v. Secretary of HHS*, -- F.3d – (3d Cir. 2013) (holding that corporations do not have free exercise rights, since a corporation, as a legal entity, has no capacity for religion, and rejecting the “pass through” theory as incompatible with basic corporate law principles) with *Hobby Lobby Stores Inc. v. Sebellius*, -- F. 3d – (10<sup>th</sup> Cir. 2013) (holding that individual shareholder does not lose free exercise rights by incorporating and therefore corporation – as opposed to individual shareholder -- may have some likelihood of success on a claim that contraception rule interferes with corporation’s free exercise rights). Cf. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 Green Bag – (2013).

Presumably, if such a right begins to develop, corporations will also seek the right to require employees to conform to other religious requirements to which their shareholders or executives subscribe. It is hard to see how one could distinguish between allowing Amish shareholders to prevent a corporation from paying for insurance that includes coverage for contraceptives, as in *Conestoga*, and allowing a corporation with Christian Scientist shareholders to refuse to pay for insurance that covers visits to medical doctors. And given that corporate law universally places governance of the corporation in the board and its executive delegates, not the shareholders, it is also hard to why this new shareholder power should not be extended to boards, so that the board of a publicly traded company could impose whatever religious views a majority happens to hold on the entire firm and all its employees.

On the other hand, if corporations are denied religious exercise rights, it is hard to see what human being or human right will suffer. The corporation’s managers, employees, investors and customers will, of course, all retain their own religious rights. No one will be compelled to use contraception if it violates his or her religious views, nor will any actual believer lose standing to challenge a law that actually interferes with his or her own practices. To be sure, Hobby Lobby shareholders might not have standing to challenge a rule that mandates that insurance companies selling health insurance to Hobby Lobby include contraceptive coverage in the policy – but that is because they are not injured, since they are neither writing nor paying for this insurance nor are they compelled to avail themselves of its contraceptive coverage. Our regime of individual religious freedom would remain entirely intact.

In this way, the purported “free exercise” rights of corporations are quite similar to the “free speech” rights purportedly vindicated in *Citizens United*. If all corporate electioneering were completely banned, every human being affiliated with the corporation would remain entirely free to speak and to spend money, individually and in association with the other corporate affiliates via a PAC or other actual association. The only “harm” would be that managers would not be permitted, or compelled, to spend money that is not their own to advocate positions that may or may not be their own, and tax avoiders might have a harder time characterizing non-deductible political contributions as deductible business expenses. To use corporate money for

In some cases, corporations have constitutional rights that go well beyond those extended to individuals:<sup>12</sup> they may assert diversity jurisdiction based on purely fictional “citizenship,” and the Court has implied that the Constitution may protect their right to choose their internal law, which has no parallel in personal law.<sup>13</sup> And the most efflorescent area of modern constitutional corporate privilege gives businesses (which are mainly incorporated) rights that go well beyond those of individuals – the commercial speech rights that limit government ability to regulate advertising have no non-business parallel.<sup>14</sup>

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electioneering, they’d have to pay it to employees or investors and then, once the money had a clear owner, allow the owner to decide how to use it. While it is easy to see reasons that corporate directors might prefer to spend money that isn’t their own, or shareholders might prefer to avoid paying their taxes, those motives raise no “free speech” concerns.

<sup>12</sup> The Tenth Circuit’s ruling in *Hobby Lobby* may depend on a corporate right that goes beyond the rights of citizens. American citizens have no constitutionally protected right to coerce others to conform to their religious beliefs or to seek exemptions from ordinarily applicable law on the ground of their personal beliefs. See *Employment Division v. Smith*, 494 U.S. 872 (1990). Citizens do have some right to assert Free Exercise rights with respect to their unincorporated businesses, as the *Hobby Lobby* court notes, but the cases it cites do not suggest that the owners of unincorporated businesses are permitted to impose their beliefs on their employees. See, *United States v. Lee*, 455 U.S. 252 (1982) (requiring employer to pay social security taxes on behalf of employees even though payment violated his religious principles); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (requiring Sabbath-observing business to observe Sunday Blue Laws despite significant economic impact of closing on two days when competitors close only on one). The 1964 Civil Rights Act suggests the opposite.

<sup>13</sup> See, *Edgar v. MITE Corporation*, 457 U.S. 624 (1981) (stating that a state has “no” interest in regulating the internal affairs of a “foreign” corporation, apparently even if the corporation is engaging in business within the state’s borders). In ordinary corporate law usage, a “foreign” corporation is one organized under another state’s laws, regardless of where it actually operates or does business. Corporate law has no requirement that a corporation be incorporated where it does business or that it have anything more than a purely formal presence in its state of incorporation. If the MITE Court’s statement is to be taken seriously out of its immediate context, corporations have a right to choose their constitutive law – including the rules determining the selection, powers and responsibilities of its decision-makers and whether its investors are liable for its obligations – by the simple expedient of incorporating in their preferred state, regardless of where they operate or do business. Human beings, in contrast, may not elect to have their marital status or estate governed by foreign law. Nor may they choose to have a foreign state determine which of their assets are exempt from seizure by creditors.

<sup>14</sup> Commercial speech claimants are allowed to overturn government regulations by asserting the rights of listeners, even when the corporation was seeking to promote anti-social behavior. E.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission of NY*, 447 U.S. 557 (1980) (overturning bar on corporate advertising designed to increase electricity consumption). Commercial speech doctrines protect businesses (or, allegedly, their customers) rather than corporation. Sometimes, this “listener’s rights” regime seems patently fictitious. For example, the Court’s resolute protection of the rights of consumers to receive advertisements encouraging anti-social behavior is not matched by any corresponding right to receive information discouraging it. The rights of listeners disappear when the government seeks to encourage information rather than discourage advertising. See, e.g., (cig ads, liquor ads), *Pacific Gas & Elec. Co. v. Public Utilities*

Text, history, and context of the Amendment say the Court is wrong. As we shall see later, fundamental principles of corporate law demand the same conclusion.

The plain meaning of the Fourteenth Amendment excludes corporations: it grants its protections to “citizens” (in the privileges and immunities clause) and “persons” (in the due process and equal protection clauses), and both terms are limited to individual human beings. Not because corporations are not “persons” – lawyers have referred to corporations as legal persons from the dawn of time. Indeed, legal personality – the right to sue and be sued – is perhaps the most fundamental right of a corporation, the very thing that makes it “corporate” – one body instead of many.<sup>15</sup>

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Comm’n, 475 U.S. 1 (1986). Those cases, instead, rest frankly on the corporation’s own right to encourage use of its product regardless of social consequences.

More generally, the “listener’s rights” cases give business speakers (or listeners) rights not available in other contexts. Thus, for example, no First Amendment issue is raised when copyright rules make “orphan” works unavailable because it is impossible to locate the rights holder. The First Amendment places no restrictions at all on governmental protection of trade secrets, or on government restrictions to its vast stores of classified materials – or even to entirely non-classified materials that are not covered by a state or Federal freedom of information act. Similarly, listeners have only limited right to hear foreigners, whether they be foreign communists to whom the US State Department declines to give a visa or Canadian movies that US law classifies as foreign propaganda (*Meese v. Keene*). *But see*, *Lamont v. Postmaster General*, 381 U. S. 301 (1965) (invalidating law requiring postal customer to file form indicating willingness to receive “communist political propaganda.”) Indeed, even the clients of government employed professionals appear to have no right to receive good faith professional advice if US or state law requires the professional to lie or remain silent, e.g., about abortion options. In each of these areas, the legislatures’ judgment is final.

Similarly, the right of corporate advertisers to invoke their listener’s purported desire to receive their advertising is not matched by any right of actual listeners to avoid corporate propaganda designed to distort their behavior. It has created no corresponding right for listeners to avoid corporate propaganda designed to distort their behavior.

Finally, while corporations have invoked the First Amendment to insist that consumers receive information they wish to distribute, regardless of the impact on markets, the Court has held that the First Amendment restricts the government’s ability to force corporations to include its advertisements with theirs, see, e.g., (cig ads, liquor ads, *Pacific Gas & Elec. Co. v. Public Utilities Comm’n*, 475 U.S. 1 (1986)). It appears, then, that corporate advertisers have the right to change market results by advertising, but the people do not.

<sup>15</sup> In the older cases and charters, corporations were not referred to as “persons” but as “bodies politic,” understood to mean “an artificial being, invisible, intangible, and existing only in contemplation of law” endowed by law and its charter with “immortality” and “individuality.” See, e.g., *Dartmouth College v. Woodward*, 17 U.S. 518, 525, 527, 636 (1819) (quoting charter creating Dartmouth as a “body corporate and politic” and granting it right to sue and be sued and generally to hold and transfer property “in as full and ample a manner ... as a natural person”). The concept, however, is identical to legal personhood: the corporate body, separate from the individuals who make it up, is deemed a legal actor.

Instead, it is because the Fourteenth Amendment three times uses the word in contexts that can only refer to natural persons.

The first sentence of Section One refers to “persons born and naturalized,” but corporations are neither born nor naturalized. At the time of the original constitution, and to a large extent still at the time of the Civil War, corporations were created only by an act of the sovereign specifically authorizing a group of people to form a “body politic.”<sup>16</sup> Today, corporations are created by a lawyer filing Articles of Incorporation with the Secretary of State, satisfying simple requirements, and paying a fee.

Indeed, legal personality is never a simple result of natural birth: it is a creation of mankind, not nature or nature’s God. To be a legal person in an area of law is to have legal capacity to create or assume rights and obligations under that law. Many human beings are not legal persons in particular contexts. In contract law, to this day, minors are generally not legal persons – they cannot make or be sued on binding contracts. At the time of the Amendment’s passage, the same was true of married women; in contract law, a married woman’s personality was subsumed in her husband, who controlled her property and had sole contract-making authority. Slaves were always legal persons in criminal law, but rarely in property law – they were property but often had no recognized right to own it. Conversely, legal persons frequently are not human. In classical international law, only sovereign states have legal personality; in Admiralty law, a boat may be a legal person; in the law of civil forfeiture, cars can be sued.<sup>17</sup> Birth is biological. Corporations are created by a different process altogether.

Even more clearly, Section Two requires that apportionment in the House of Representatives be according to the “whole number of

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<sup>16</sup> See, e.g., *Dartmouth College v. Woodward*, 17 U.S. 518, 525, 527 (1819) (describing English King’s grant of a charter creating Dartmouth as a “body corporate and politic”). Some of the oldest English corporations – the City of London and Oxford and Cambridge Universities – won their corporate status deep in the dark ages and have no charter. Later common lawyers created a fiction that these corporations were created by sovereign grant with “lost” charters, but the obvious reality is that, like that other medieval corporation, the aristocracy, their rights actually precede centralization of sovereignty in the king. In the US, however, every corporation traces its rights to a legislative statute or charter granted by a legislature (a few existing corporations originally had charters granted by the British King, including Princeton, Columbia, and William and Mary, but so far as I can determine, none is operating under the original charter. Harvard and Yale were originally chartered by colonial legislatures, not the King; neither operates under the original charter.)

<sup>17</sup> On civil forfeiture, see [http://www.newyorker.com/reporting/2013/08/12/130812fa\\_fact\\_stillman](http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman).

persons in each State, excluding Indians not taxed.” No one would seriously contend that Delaware is entitled to more representation in the House because of its population of corporations. Even leaving aside the implications for democracy, the republic could not stand if the wealthy could multiply their votes by the simple expedient of forming multiple corporations: whoever controlled the corporate registry would control the country. Section Three again uses “person” to mean natural persons – corporations cannot serve as Senators or Representatives.<sup>18</sup>

Accordingly, for the Amendment to create rights for corporations, the meaning of the word “person” has to have a different meaning in its second and third appearance than in its first, fourth and fifth ones. That is not the American tradition of legal drafting.<sup>19</sup> Our presumption is that if drafters use the same word multiple times in close proximity, they mean for it to have the same meaning. This especially true when standard vocabulary easily allows distinguishing different meanings – it would have been easy enough to draft the Amendment to distinguish between natural and legal persons.

Finally, the word “person” was obviously lifted from the due process clause of the Fifth Amendment, which the Fourteenth Amendment closely tracked, and the 3/5 and Fugitive Slave Clauses,<sup>20</sup> which it replaced. The latter two clauses obviously refer only to natural persons: no one expected corporations to be fugitive slaves or intended to include them in apportionment even as 3/5<sup>th</sup> of a person. Indeed, it is unlikely that anyone thought about them at all: there were only about a dozen business corporations in the country when the Constitution was enacted.<sup>21</sup>

<sup>18</sup> But see, <http://murrayhillinforcongress.com/>.

<sup>19</sup> In other traditions, this point might be less clear. For example, the Mishnah, which was originally meant to be memorized, often groups rules together by sound – so consecutive clauses may use the same word in radically different senses with unrelated contexts. American drafters, however, use different words when they intend different meanings.

<sup>20</sup> Art 1, sec 2 and Art IV sec 2, respectively.

<sup>21</sup> Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 *Seattle L. Rev.* 863, 863 n.1 (2004) estimates six, citing Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 *Am. Hist. Rev.* 449, 450 (1903). This number presumably excludes universities, chartered cities and non-profits, the usual uses of corporate form before the railroads. In any event the number of business corporations was rapidly growing, even if still relatively unimportant. Winkler reports that “approximately 350 business corporations [were] formed between 1783 and 1801. See, Oscar Handlin & Mary F. Handlin, *Origin of the American Business Corporation*, 5 *J. Econ. Hist.* 1, 4 (1945).” (Id.). {{check also: Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *Geo. L.J.* 1593, 1616–17 (1988); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 9 (1970).}}

### B. History

The history and context of the Amendment is, if anything, even clearer. We fought a Civil War to end slavery and preserve the Union, not to set business corporations above ordinary law and politics.<sup>22</sup> The Amendment was enacted to set out the terms of the end of that war, not to reduce the power of legislatures to control their corporate creations.<sup>23</sup>

<sup>22</sup> Slaughterhouse Cases, 83 U.S. 36 (1873) (recognizing that Fourteenth Amendment was intended to provide “constitutional protection to the unfortunate race who had suffered so much”).

However, while the Court was quick to declare that the Fourteenth Amendment protects corporations, see *Santa Clara*, and has never wavered from that view, it had less alacrity in determining whether and to what extent the Fourteenth Amendment’s guarantees of the privileges and immunities of citizenship, equal protection, and due process protected African Americans.

As Reconstruction ended, the Court invented a distinction between state and private action to exclude most publicly sanctioned and enforced discrimination from the purview of the Amendment. Civil Rights Cases, 109 U.S. 3 (1883) (holding Civil Rights Act of 1875 unconstitutional on ground that Congress lacks power, despite Fourteenth Amendment, to bar “private” discrimination including discrimination on traditional common carriers or by state chartered corporations), *reaffirmed* in *United States v. Morrison*, 529 U.S. 598 (2000) (overturning VAWA).

Moreover, it held that whatever the privileges and immunities of citizenship are and whatever equal protection of the law requires, they were not offended by even state imposed Jim Crow segregation. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state mandated segregation), *reversed* by *Brown v. Board of Education*, 347 U.S. 483 (1954) (noting that segregated educational institutions were exclusionary and unequal). Similarly, it took nearly a century to overturn sharecropping and Black Codes that enforced slavery-like peonage, see *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (holding vagrancy acts, a key part of Black codes, unconstitutional). (Forced labor continues to this day under guise of the criminal laws, see, *The Farm: Angola, USA* (1998) (documentary).) On exclusion from voting, see, e.g., *Grovey v. Townsend*, 295 U.S. 45 (1935) (upholding White primary), *reversed* by *Smith v. Allwright*, 321 U.S. 649 (1944); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (upholding poll taxes), *reversed* by *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) and U.S. Constitution 24<sup>th</sup> Amendment (1964); *Shelby County v. Holder*, -- U.S. -- (2014) (overturning preclearance provisions of Voting Rights Act). On jury service, *compare*, *Strauder v. West Virginia*, 100 U.S. 303 (1880) (holding that excluding African-Americans from jury is a denial of equal protection) *with* *Virginia v. Rives*, 100 U.S. 313 (1879) (upholding all-White jury) *and* *Batson v. Kentucky*, 476 U.S. 79 (1986) (first bar on discriminatory use of peremptory challenges). Limiting other forms of blatant discrimination took even longer, see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (first case overturning anti-miscegenation laws).

<sup>23</sup> I take it that no citation is necessary. Not even those who call the Civil War the War of Northern Aggression and characterize it as primarily about “states rights” rather than slavery claim that the war or the Amendments that the North imposed on the South were driven by struggles over the rights of national railroad corporations or the merits of a laissez-faire economic theory forced into a legal theory of substantive due process. While railroads and corporate law alike were in a period of rapid change before and after the War, the War was not fought to fossilize a particular view that had not yet been fully articulated. See, *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics”).

To be sure, Roscoe Conkling, counsel for the railroad in one of the earliest cases asserting corporate rights under the Fourteenth Amendment, suggested that a secret cabal of drafters used the word “person” rather than “citizen” specifically in order to create corporate rights.<sup>24</sup> But his argument is implausible on its face for the reasons stated above.<sup>25</sup> In any event, not even Conkling claims that this alleged intention to include corporations in Section 1 (but not Section 2 or 3) was ever part of the public debate.<sup>26</sup> Secret intentions of drafters hidden in language that naturally reads otherwise should have no weight in a democratic system. It is puzzling enough why we allow current representative bodies to be overridden by judges interpreting the words of long-dead legislatures; to extend this rule-of-the-dead to include the secret intentions of a handful of committee members would make a mockery of self-rule. This is especially true when, on the one hand, we have perfectly reasonable explanations of the words chosen that do not require strained readings, and on the other, it would have been easy enough to express the alleged secret intentions plainly.<sup>27</sup>

### C. Structure

First principles and the structure of our democratic republic confirm what the text says. Our Declaration of Independence proclaims that men are “endowed by their Creator with certain unalienable rights.” Corporations, however, are created by people under authority of state legislatures; they have only the rights that statutes give them. Like any other governance structure, they are “instituted among men” to “secure” our rights, and, like other governments, when a corporation or corporate law “becomes destructive of these ends, it is the Right of the People to alter or to abolish it.” To set our creations above us – to proclaim that our creatures are comparable to God’s – is a form of

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<sup>24</sup> In *San Mateo County v. Southern R.R.*, 116 U.S. 138 (1882), Roscoe Conkling, counsel for the railroad, suggested that he and a secret cabal drafted the Fourteenth Amendment with corporate rights in mind. See, Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 *YALE L. J.* 371, 371 (1938).

<sup>25</sup> See generally Graham (rejecting Conkling’s argument as misleading and proposing, instead, that the word “persons” was preferred over “citizens” because of fears that the freedman might not be considered citizens); but see, CHARLES AND MARY BEARD, II *THE RISE OF AMERICAN CIVILIZATION* 111-12 (accepting Conkling’s account).

<sup>26</sup> Graham, *supra*, at n. 50.

<sup>27</sup> Graham points out that Bingham, the alleged point-man for the conspiracy and an early exponent of a natural rights view of due process, explained his preference for the word “person” over “citizen” by citing Biblical provisions for protecting aliens and the equality of all men – never mentioning corporations. *Id.* at n. 66, 397.

political idolatry: business corporations are no more instances of divine right than kings.

More prosaically, legislatures create corporate law. Indeed, they have recreated it several times since the Constitution, and the Fourteenth Amendment, was written.

The body of the Constitution, including the Fifth Amendment's due process clause, was written before industrialization and before the invention of the private business corporation. At the time, corporations could be created only by charter. States granted charters for public works of infrastructure, such as bridges, turnpikes, colleges and banks that were thought to be beyond the capacities of private enterprise.<sup>28</sup> Every charter had a quasi-governmental aspect, creating a "body politic" to pursue a public task, often with special privileges stemming from its quasi-sovereign form.<sup>29</sup>

Moreover, the structure of these "bodies politic" was radically different from that prescribed by modern corporate law. The firm was generally composed of a limited number of "members" who controlled its decisions directly and were understood to be "legislating" for themselves.<sup>30</sup> In the earliest charters, these members often voted democratically (one person one vote) or, if votes were proportional to investment, with limits on the maximum votes an individual member could exercise. To protect the public and defend the state from encroachments on its domination of collective decision-making,<sup>31</sup> incorporated businesses were highly restricted and the legislatures normally specified narrow limits on the corporation's scope of activity. Often (especially for business corporations) the charter was only for a limited time. To protect the public corporate charters often specified a maximum capitalization, and to protect corporate creditors,

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<sup>28</sup> E.g., Daniel Webster (1847), in FRANK O. GATELL & JOHN M. McFAUL (eds.), *JACKSONIAN AMERICA 1815-1840: NEW SOCIETY, CHANGING POLITICS* (1970) at 13.

<sup>29</sup> See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) (describing (and limiting) privileges of the Charles River Bridge company); Message of President Jackson vetoing the Charter Renewal of the Bank of the United States, July 10, 1832 (partially reprinted in *JACKSONIAN AMERICA*, *supra*, at 141).

<sup>30</sup> Early charters, such as the charter for Dartmouth College quoted in the *Dartmouth* case, routinely refer to the corporation's power to make "laws" binding on the organization. Modern statutes would call these internal regulations "by-laws," reflecting our lessened sense of the derogation of sovereignty involved in corporate law.

<sup>31</sup> See, e.g., Jackson's Veto Message, *supra*, at 145 ("when the laws undertake to ... make the rich richer and the potent more powerful, the humble members of society – the farmers, mechanics and laborers – who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government.")

corporations were usually required to have relatively significant minimum capitalization before commencing operations. Charters were expected to operate only within the boundaries of the chartering state; in the early days of interstate transportation, turnpike and railroad corporations sought a separate charter from each state the line would pass through. Members were often at least partly liable for corporate obligations if the firm failed to meet them; bank shareholders, for example, were frequently liable to depositors for specified additional amounts should the bank fail. None of these rules have survived.

By the time of the Fourteenth Amendment, corporate law was in the midst of a major change. By mid-century, reformers using the Jacksonian rhetoric of opposition to monopoly and special privilege eliminated the problem of bribery by routinizing corporate status. The Jacksonian battle against monopoly culminated, in corporate law, in general incorporation laws.<sup>32</sup> These allowed promoters to form corporations without special legislation and without claiming public purpose. By 1860, 2300 charters had been issued.<sup>33</sup> Still, corporate form was used mainly for the largest enterprises – especially railroads – until later in the century. And even after the rise of the general incorporation laws, corporate law continued to bar many of the most important and commonplace aspects of the modern corporate economy.<sup>34</sup>

Only at the turn of the twentieth century did corporate law proper begin to assume its modern shape, and only with the New Deal's introduction of the Securities Act and the Securities Exchange Act did the modern, publicly traded, centrally directed, multinational corporation assume something of its contemporary form.<sup>35</sup>

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<sup>32</sup> FRANK O. GATELL & JOHN M. McFAUL (eds.), *JACKSONIAN AMERICA 1815-1840: NEW SOCIETY, CHANGING POLITICS* (1970) 43; HORWITZ

<sup>33</sup> HOWARD ZINN, *PEOPLE'S HISTORY OF THE UNITED STATES* 220.

<sup>34</sup> For example, corporations were not permitted to hold stock of another corporation or, generally, to operate outside of the borders of the chartering state, until the last decade of the nineteenth century. Nineteenth century charters and codes often included minimum and maximum capitalization requirements, requirements that firms limit their activities to specified fields, provisions requiring shareholders to contribute towards corporate obligations, and shareholder governance rights -- all of which are utterly foreign to modern corporate law. Indeed, even the notion -- basic to our corporate law -- that the general public might invest in firms via stock ownership is largely a twentieth century innovation. Before the last decades of the nineteenth century, public investment would have been virtually exclusively through bonds.

<sup>35</sup> On the rise of the modern bureaucratic firm, see generally ALFRED CHANDLER, *VISIBLE HAND* (1977); CHARLES PERROW, *ORGANIZING AMERICA: WEALTH POWER AND THE ORIGINS OF CORPORATE CAPITALISM*

Even in the post-war period we have seen major changes – first, the rise and demise of the industrial unions as basic parts of corporate governance, and second, the rise and fall of the hostile takeover and the waxing and waning of the market for corporate control. For smaller companies, the creation and eventual collapse of the corporate income tax over the course of the twentieth century has driven equally profound changes.

The net effect of all these changes is that the very concept of a “corporation” has had no fixed meaning. Even if the Constitution protected corporations at the founding, those corporations have as little to do with modern ones as the militia of the Revolutionary era has to do with the modern standing army.<sup>36</sup> Startlingly, however, changes in corporations and corporate law generated virtually no discussion in the U.S. Reports:<sup>37</sup> the Court has never suggested that changes in corporate law might require rethinking the status of these institutions under our Constitution.<sup>38</sup>

The basic idea of republican self-rule means that having created the corporate law that defines corporate powers and the powers of corporate officeholders, we can recreate it as well. Having set corporations loose in the world, we must retain the right, common to all

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(2002) 113-117, 212-28. On the history of the machinations that led to the transcontinental railroads, see, e.g., RICHARD WHITE, *RAILROADED* (2011).

<sup>36</sup> The Supreme Court has a variety of inconsistent approaches to obsolete provisions of the Constitution. It attempts to apply the right to a jury trial as if we still maintained, counterfactually, an Eighteenth century conception of the distinction between law and equity. In contrast, no case, so far as I am aware, has suggested that the combination of the Militia clause and the bar on Standing Armies mean either that our standing army is constitutionally questionable or that it must be raised by a universal draft as the militia was. And the Court’s recent Second Amendment jurisprudence would be far less radical if it restricted “arms,” like “jury,” to its original meaning and protected only muzzle-loaded blunderbusses.

<sup>37</sup> See generally HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW* (1991).

<sup>38</sup> The rise, fall and rise again of laissez-faire ideology on the Court, of course, sparked enormous changes in the substantive constitutional law, compare *Lochner with Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (limiting constitutional intervention in economic matters) with *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (using First Amendment to overturn economic regulation). But through all these changes, the Court continued to use the same tired metaphors of a corporation as a single, citizen-like, individual, or a transparent representative of unanimous “members,” while granting it deference ordinarily reserved for coordinate branches of government under comity doctrines. Neither substantive law nor modern political theory and sociology, see, e.g., ROBERT MICHELS *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* (1915) (setting out the “iron law of oligarchy”) had any more impact on its analysis than Madisonian understandings of faction, *FEDERALIST PAPERS X*.

self-governing peoples, to reform them or redirect them if they cease to work in our interests.<sup>39</sup>

If the Constitution removes this basic right of self-rule and self-preservation from the American people, it ought to do so in plain English. It does not. The word “corporation” does not appear in the Constitution at all.

### III. PRECEDENT TO THE CONTRARY

The basic history of the Fourteenth Amendment’s transformation into a font of laissez-faire protection of corporate privilege is well known. In the seminal Fourteenth Amendment case, *Santa Clara*, the Supreme Court proclaimed that the Fourteenth Amendment’s reference to “persons” includes corporations – rather than only natural persons – within the scope of its equal protection clause. The opinion offered no attempt at legal reasoning. Instead, the reporter’s syllabus states that:

“Before argument, Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”

From this modest seed, the great structure of *Lochnerian* due process jurisprudence grew.<sup>40</sup>

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<sup>39</sup> In one of its earliest corporate law cases, the US Supreme Court asserted that a corporate charter, once granted, was irrevocable. *Dartmouth College*, *supra* (basing this holding on the Constitution’s Contract Clause). The Court was almost certainly wrong on the merits: a corporate charter is not a contract. Indeed, I suspect the Court’s decision was based less on this linguistic distortion than on the lingering remnants of a medieval conception of corporate rights as a derogation of sovereignty – like a lord’s manse, irrevocable once granted. In any event, the legislatures unanimously rejected the Court’s decision: every charter, and every corporate law statute, since then has included a provision reserving the state’s right to change or rescind the privileges granted.

<sup>40</sup> See, e.g., *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888) (extending equal protection rights to corporations under the Fourteenth Amendment on the ground that a “corporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution. As said by Chief Justice Marshall: ‘The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.’”).

The Court offered no explanation of why a corporation should be seen as an association of individuals (or which of the many individuals affiliated with a corporation should be seen as members of this association), or why rights intended for individuals should also be extended to associations. In the modern era, this problem is more problematic still, since modern corporate law places corporate governance under ultimate control of the stock market, see e.g., *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1989), (stating that control was “in a

What is less well known is that *Santa Clara* was hardly the beginning of the Supreme Court's discovery of corporate rights in the Constitution. The older cases – some of which continue to define the legal landscape -- had nothing to do with the word 'person' or the ancient legal tradition, which long predates our Constitution, of referring to corporations as legal persons.

Instead, the long history of Supreme Court decisions regarding corporations and the constitution makes clear that the specific wording of the Fourteenth Amendment was not the crux of the issue. Corporations don't have rights under the Equal Protection clause because the drafters of the Amendment used the word "persons." Rather, the Supreme Court has imposed its vision of corporate law on the Constitution without regard to text, history or structure from the very beginning. It follows, I believe, that reformers who seek to deny corporations "legal personhood" are fundamentally misguided, even leaving aside the problems such a doctrine would cause in ordinary corporate law.

The Court's mistake is not based in text or vocabulary at all. Instead, the *Santa Clara* result – and the many similar cases before and after it – are driven by a strange combination of cheap metaphor and deep theory. If we want to understand why the Court has granted corporations constitutional rights, and even more if we want to bring the eighteenth century project of limiting illegitimate power to fruition by limiting those rights, we must understand both theory and metaphor – not the magic word of "personhood."

The cases before and after *Santa Clara* confirm what a careful examination of that case suggests. The Court has never based its findings of corporate rights under the Constitution on the text, the original intent, specific history or any identifiable context of the

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fluid aggregation of unaffiliated shareholders representing a voting majority—in other words, in the market"). The stock market is not an individual, nor has it associated to form the corporation in any normal sense of the word. Similarly, shareholders are typically not individuals: most shares are held by institutions in diversified portfolios that commonly trade extensively and, in any event have only minimal "affiliation" with particular companies. More importantly, shareholders, whether human or not, do not associate or unite to form a corporation. The individuals who could be said to do that in some loose sense are employees, but they ordinarily have no legal right to determine the corporation's decisions. In any event, even if modern business corporations had members, which they do not, it is no more obvious that giving rights to the legal entity protects those who have "united" to form it than it is that giving rights to Saddam Hussein's Iraq would have protected Iraqis.

provisions on which it relies. Moreover, it has routinely ignored fundamental principles of corporate law – especially the most fundamental principle of all, the separation between the corporation and the people who compose it at any given time.

Instead, the Court has discovered corporate rights from other sources. Perhaps the Beards' crude class warfare is part. But more visible is a combination of poorly understood metaphors and unarticulated, ideologically driven political theories that sharply distinguish between governmental and non-governmental power.

The first decisions seem to borrow from medieval conceptions of corporations as quasi-sovereigns, states within the state, with rights like those of the aristocracy and Church.<sup>41</sup> Paradoxically, they combine this atavism with a simple liberal dichotomy between citizen and state. The former theory presents the corporation as state-like; the latter as citizen-like. Yet instead of this tension leading to questioning or insight, the two incompatible notions lead to the same result – on both theories, the Court finds that the Constitution demands deference to corporate decision-makers.

The Court is quick to see the possibilities of governmental overreach, but much less willing to see the problems of private power.<sup>42</sup> Rather than defending constitutional order or freedom itself, it has redefined its role as protecting the existing power structure from popular attempts to use law to defend liberty.

[[Corporate rights, that is, parallel and stem from the same fundamental error as the Court's long defense of Jim Crow. The Court long held, and except for cases from a brief period during the Civil Rights Movement, continues to hold, that the Constitution's guarantees of equal protection protect African Americans only against state action – and often not even then.<sup>43</sup> Yet racial discrimination and the unjust

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<sup>41</sup> See, Daniel JH Greenwood, *The Semi-Sovereign Corporation*, in JAMES C. SMITH, ED., PROPERTY AND SOVEREIGNTY (2014).

<sup>42</sup> The social contract tradition of government for the limited purpose of keeping the peace begins, in the modern West, with Hobbes, who was so concerned with the problem of illegitimate private power that he condemned all restraints on the state that was necessary to restrain it. As the Talmud put it, a millennia earlier, we must pray for the health of the rashut – the authorities, even the occupying Roman empire – for without it men would eat each other alive. The Court, in contrast, seems to see its role as defending private power against the state, but even more importantly against limits on the states' ability to assist private power, let alone organized attempts by the people to use state power to restrain private overreaching.

<sup>43</sup> Thus, the Court recently overturned Section 2 of the Civil Rights Act, which protected against state attempts to disenfranchise minority voters. More generally, however, the Court's affirmative action jurisprudence has led to the bizarre result that the Fourteenth Amendment, in

power relations that defined slavery, Jim Crow and modern inequality are often the result of “private” power ratified and enforced by the state. By considering property, contract and corporate law “private”, the Court ignores both the importance of private power and the state’s role in promoting, condoning and enforcing it. ]]

*A. Before the Fourteenth Amendment*

The tradition of ignoring constitutional text goes back to the first cases involving corporate law the Court decided: *Deveaux*<sup>44</sup> and *Dartmouth College*.<sup>45</sup>

In *Deveaux*, a corporation – the Bank of the United States – sought to sue in Federal court invoking diversity jurisdiction. Deveaux was a Georgia tax collector; seeking to enforce a Georgia tax that the Bank refused to pay, he seized bank property. The Bank sued to recover the seized property. Given the extreme controversy around the Bank of the United States for most of its history, we may surmise that it feared a local jury in a Savannah court might have been more sympathetic to the Georgia legislature’s attempt to tax it. Unfortunately, the Constitution extends diversity jurisdiction only to a limited class of plaintiffs, including citizens of different states but not mentioning corporations. The Supreme Court reasoned that “[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen,” but then concluded that the Bank could be “considered [not] as a mere faculty, [but] as a company of individuals who, in transacting their joint concerns, may use a legal name.” Therefore, it said, the corporation would be allowed to assert diversity jurisdiction if all its “members” were diverse to the defendant. In effect, it ignored the corporate entity, treating it as if it were its “members.”

Perhaps this decision reflected the “substance” of contemporary corporate law. Neither limited liability nor the principle of centralized management by a board of directors nor the one-share, one-vote system was fully established; before the general incorporation laws and freely traded stock perhaps it made sense to think of shareholders or directors as “members,” as if the Bank were a partnership rather than a corporation.

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the Court’s view, allows legislatures to favor any group they choose – from opticians to veterans to people whose parents or grandparents attended college – except for the very African American citizens whom the Fourteenth Amendment was intended to protect.

<sup>44</sup> *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809)

<sup>45</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819)

As a matter of modern business corporation law, however, the *Deveaux* reasoning is indefensible. Most broadly, corporations are not invisible, intangible or existing only in contemplation of law, except perhaps in the entirely trivial sense in which any bureaucracy is invisible. They are, instead, the most important organizations structuring our economy. Most of us receive our paychecks from corporations; all of us depend on corporations for necessities. Anyone who cannot see Amazon or Exxon is quite blind.

Similarly, the notion that a corporation “is” its members is just wrong. The most basic principle of corporate law – then and now – is that a corporation exists independently of and separately from the people who work for it, manage it, and invest in it. That is the entire point of corporate law: the entity owns its property, enters into contracts, assumes and satisfies obligations in its own name, separate from the property, debts, and obligations of any of the people who make it up. To ignore this is to ignore what makes a corporation a corporation.

More technically, modern business corporations do not have “members.” Directors, officers and employees are fiduciaries, explicitly barred from thinking of themselves as the firm even though the Board is the only body permitted to act directly in the corporate name, and the employees are the people who normally act on the corporation’s behalf and do the work that is the corporation’s.<sup>46</sup> Shareholders have no right to operate the firm or to direct its actions. They are not responsible for its actions. They do not have any right to possess or control corporate property. And unlike members, neither law nor custom imposes any obligation on shareholders to act in the interest of the collective whole, or even any expectation that they will do so. While they vote for the board, they do not do so as individuals: voting is per share not per person, implying that if – counterfactually -- this organization had members, they’d be shares – capital itself – rather than shareholders. Moreover, once elected, directors are barred by law from acting according to the will of the shareholders that elected them – they must,

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<sup>46</sup> See, e.g., Del. G. Corp. Code 141(a). Employees routinely act for the corporation, but they do so as corporate agents, according to the principles of agency law, and not as the corporation. Shareholders, even sole shareholders, never have the power to act for the corporation – they are neither its agents nor its principals. When shareholders ignore this basic principle, corporate law declares that the corporation is a sham and courts “pierce the veil” – that is, refuse to grant the (non-)entity the fundamental privileges of corporate law. See, e.g., *Walkovsky v. Carlton*; *Berkey v. Third Ave Rwy*, 244 N.Y. 602 (1927).

instead, exercise their own independent business judgment in the interests of the corporation.<sup>47</sup> In short, modern business corporation law carefully excludes all corporate participants from the rights of membership; investors or workers who wish to be members of a firm must choose a different organizational form.

Business corporations, unlike partnerships and other types of corporations such as churches or non-profit membership associations, simply are not associations of people joined together for a common purpose. Under our law, they are, instead, organizations that are regularly mandated by law to behave in ways that may be quite contrary to the values of any or all of their human participants. No citizen, I think it is safe to say, places the “interest of the corporation” as his or her highest value – surely every one of us has some value that is more important. Yet corporate law requires that corporate decisionmakers set aside those more important values while acting on behalf of the corporation. We remain a free country: no one is required to assume this role, and whether or not they do so, they remain free to act as they will individually or in association with others. But under our corporate law, a business corporation is not an association of citizens. If it is an association at all, it is one of capital.

The *Deveaux* court “look[s] to the character of the individuals who compose the corporation.”<sup>48</sup> In most cases, modern shareholders are not individuals – they are, by and large, institutional investment portfolios – and they do not “compose” the corporation in any realistic sense. They are, instead, successors in interest to purely fungible past providers of a purely fungible commodity (money). That is why modern corporations can function perfectly well without even knowing who, or what, owns their shares – and knowing that at any given time many of their shareholders are computerized traders that intend to sell within milliseconds.

But even in the case of closely held corporations, with one or a few shareholders who may be human beings with a long standing connection to the corporation, the *Deveaux* “looking through” reasoning conflicts with the basic point of corporate law. Corporations

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<sup>47</sup> See, e.g., *Smith v. Van Gorkum* (imposing personal liability on directors for delegating to shareholders precisely the decision shareholders are most competent to make: valuing their shares). Compare, [page v page (voiding shareholder agreement that purported to bind directors); SEC regulation ... (permitting only precatory resolutions).

<sup>48</sup> *Deveaux* at 92.

are separate from the people who run them or own their shares. Any individual entrepreneur who wants to own his own business or take responsibility for its actions is free to do so; no one is ever obligated to organize a business as a corporation.

When people elect to use corporate form, it is because they do not want to own the corporation's assets or be liable for its obligations. They seek, instead, to separate the business from themselves, so that their personal assets will not be available to corporate creditors. Incorporating means that the business's contracts, torts and taxes are the corporation's, not the individual's. They seek to separate the corporation from themselves, so that, for example, if the individual shareholder sells his or her shares, divorces, dies or files for bankruptcy, the corporation continues on unchanged, without defaulting on its loans, transferring property, realizing capital gains or paying estate tax.

More important, disregarding the corporate form to is something courts do only when they conclude that, equitably, the corporation does not exist.<sup>49</sup> If diversity jurisdiction were based on piercing the corporate veil, it would seem that any corporation that asserted diversity would be conceding that its shareholders are personally liable for its obligations.<sup>50</sup>

Leaving aside the details of corporate law, however, one thing is clear: the Court was not relying on the language of the Constitution, which, it says, is written in "broad and general terms" and shouldn't be taken seriously in deciding particular cases. Indeed, the primary precedent it cites is a line of English tax cases holding that a tax

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<sup>49</sup> See, e.g., *Berkey v. Third Ave Rwy*, 244 N.Y. 602 (1927) (Cardozo, J) (disregarding corporate form when shareholders use the corporation as their agent); *Walkovsky v. Carlton* (refusing to accept corporations' legal status as separate when shareholder treated multiple corporations as one).

<sup>50</sup> The same reasoning applies to contemporary cases in which corporations claim Free Exercise rights. A corporation, of course, has no soul. Accordingly, at least according to the theologies with which I am familiar, it cannot sin. In several recent cases, controlling or sole shareholders have insisted that the corporation be granted Free Exercise rights on a pass through theory much like *Deveau*: the corporation ought to be deemed to be exercising the shareholder's religious rights, and the corporation's expenditures should be treated as if they were the shareholder's. But this argument only works if the corporation is not, in fact, an independent legal entity separate from its shareholders. If that is true, it is not a corporation, and should not be separate for liability, contract, property or taxation purposes either. See, *Conestoga Wood Specialties Corp. v. Secretary of HHS*, -- F.3d -- (3d Cir. 2013) ("A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners."). The Constitution protects citizens' right to freely practice their religion. But it is hard to see why that should extend to creating a religious citizen's "right" to impose his or her views on a corporation, its fiduciaries or its employees.

assessed on “inhabitants,” understood to mean landowners, includes corporate landowners, even though they do not have habitations. These cases, it contends, show that courts will ignore the ordinary meaning of words and instead look to the “substance” of a corporation rather than “technical” definitions or “a course of acute, metaphysical, and abstruse reasoning.”<sup>51</sup>

The specific *Deveaux* reasoning did not last (although it may be making a comeback today in the First Amendment context<sup>52</sup>). By midcentury, it was overruled.<sup>53</sup> But both the result and the method proved longer lasting. In overruling *Deveaux*, the *Letson* Court made diversity jurisdiction more available to corporations, not less, while paying even less attention to the actual language of the Constitution or the substance of corporate law. The new rule was (and still is) that a corporation may assert diversity jurisdiction as though it were a citizen of the state that incorporates it, even though it obviously is not a citizen, may have little or no connection to its state of incorporation, and regardless of whether human beings associated with it would be allowed to pursue diversity actions themselves. Thus, a corporation with extensive operations in a large state could avoid that state’s courts by the simple expedient of incorporating in some small state where it is unlikely to be engaged in state law disputes.<sup>54</sup>

This is a right well beyond the language of the Constitution, which has no hint of Federal jurisdiction in such cases. And it is a right never given to actual citizens – they may change their state citizenship only by changing their actual domicile, not by establishing a mail drop, paying a modest fee and filing a piece of paper. The Court’s justification is not that the Constitution’s language requires, or even permits, the result. It is, instead, that business corporations operating across state lines might be at a disadvantage if they were subject to local law applied by local courts: state sovereign “police power” – the right to control the state’s

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<sup>51</sup> *Id.* at 90, 88

<sup>52</sup> See fn. .. *supra* (discussing *Hobby Lobby*); fn. – (discussing alternative justifications for *Bellotti* and its progeny).

<sup>53</sup> *Louisville Railroad Co. v. Letson* (1844)

<sup>54</sup> Eventually, the Congress restricted this decision by determining that for diversity purposes a corporation should also be treated as if it were a citizen of the state where it is headquartered as well as the state in which it is incorporated. 28 U.S.C. § 1332 (c) (1). Since it is harder to place principal places of business in obscure places than to incorporate in small states, this reform limited *Letson*’s broad grant to corporations of access to the Federal courts that no citizen enjoys. However, in the modern era, when headquarters often are located far from the core of the company, this limitation is itself limited.

own economic policy, working conditions, contract and property rights and tort law – was, in the Court’s view, less important than the national need to protect corporate activities. So much less important than the language of the Constitution was irrelevant.<sup>55</sup>

*Dartmouth* similarly illustrates the Court’s use of metaphor and theory to trump the words of the Constitution. The issue was whether the State of New Hampshire could modify the corporate charter of Dartmouth College – issued by the King prior to independence – in order to reform the institution to better fit the desires of the current legislature. The background was some combination of Federalist and Republican partisan conflict, a college President who had inherited (!) his position and viewed the College – and the village church – as his private property, financial difficulties, and a corporate charter that no longer made much sense: it provided for an English board of overseers to inspect (“visit” in the terminology of the day) to ensure that the College was fulfilling its mission. (Which it was not: the original charter was granted “education and instruction of youth of the Indian tribes in this land in reading, writing, and all parts of learning which shall appear necessary and expedient for civilizing and Christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and others” but only 19 Indian students graduated from 1769 to 1970.)<sup>56</sup>

The Supreme Court held that New Hampshire had no power to modify Dartmouth College’s royal charter, based on the Constitution’s Contract Clause, which bars state legislatures from “impairing the obligation of contract.”

As in *Deveaux*, the Constitution’s language seems almost entirely irrelevant to the decision. Of course, there was no allegation that New Hampshire was declaring a debt jubilee<sup>57</sup> or sought to “impair” the

<sup>55</sup> Compare, *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013), holding, based on unwritten principle of states’ rights, that Fifteenth Amendment explicit grant of power to Congress to enforce right to vote does not allow Congress to require certain states to undergo “preclearance” before changing voting rights.

<sup>56</sup> [http://www.dartmouth.edu/~nap/about/www.dartmouth.edu/~library/rauner/docs/pdf/FAQ\\_DC\\_History.pdf](http://www.dartmouth.edu/~nap/about/www.dartmouth.edu/~library/rauner/docs/pdf/FAQ_DC_History.pdf); COLIN GORDON CALLOWAY, *THE INDIAN HISTORY OF AN AMERICAN INSTITUTION: NATIVE AMERICANS AND DARTMOUTH* 49 (2010) (first Indian graduate was in 1777, although a significant number of younger Indians attended the affiliated Moor’s Charity School).

<sup>57</sup> Leviticus 25:8-13. In the ideal law of Leviticus, in the Jubilee year all debts were cancelled, slaves freed and land contracts rescinded. Once a generation, that is, the entire nation would return to an initial position of equality. During the immediate post-Revolutionary period, a number of states had enacted or contemplated substantial debt relief, although nothing approaching the

obligation of contracts in any normal sense of the word. Moreover, a corporate charter is not a “contract” in any ordinary sense of the word, and was even less one in those days, when corporations were more clearly understood as quasi-governmental “bodies politic.”

Instead, the Court seems to have been inspired by the medieval notion that a charter – even one granted by the king prior to the revolution – is an irrevocable feudal grant. In the medieval world, government and government office were perceived as a form of property. Once the king had given autonomy to a new entity or power, he no longer “owned” the right and could not reclaim it. This understanding, of course, makes no sense in the new American republic, in which the People were (and are) understood to have retained an undivided sovereignty, and governmental structures and officers remain subject to their ultimate will. A corporate charter, in this old view, was the equivalent of a feudal grant to a lord, or a city, creating a new quasi-independent self-governing entity within the state. *Dartmouth’s* vision of corporations seems to be that they are indeed, as Hobbes put it, “worms in the entrails of the state” – independent beings, dependent on but not part of, the, and thus, as Hobbes complains, threats to the authority of the central government.

To be sure, this is almost the opposite of what Justice Marshall says. The bulk of his opinion is devoted to proving that corporations are *private* even though “[t]he objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.”<sup>58</sup> Rather than being part of the government, he says, the corporation is a sort of a trust created to preserve the donors’ intentions forever. But that is exactly the medieval point: corporate law is a derogation of the king’s authority, leaving the sovereign diminished and setting up a “private” (or, rather, non-state) governing authority in its place.

If the *Deveaux* case created corporate rights by ignoring the existence of the corporation altogether, and *Letson* used the opposite reasoning to reach the same result, treating corporations as if they were

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Biblical precedent; it seems clear that the fear these movements generated among the creditor classes inspired the Contracts clause. Justice Marshall acknowledges that fear of debt relief was the primary motivation of the Contracts clause, but rejects limiting the clause to that circumstance. *Dartmouth* at 628-9.

<sup>58</sup> *Dartmouth* at 637.

individual citizens, *Dartmouth* takes corporate law more seriously – far too seriously. The middle ages are over. Corporations may still have been referred to as “bodies politic” in the early nineteenth century, but it was too late for Dartmouth College to claim, as the University of Bologna had several centuries earlier, the right to exempt its students and faculty from the ordinary courts and law of the state.

Or so the state legislatures seem to have concluded. Every state promptly overruled *Dartmouth*, in effect if not in strict law: they included in every subsequent charter, and then in the general incorporation acts, an explicit provision reserving the right to unilaterally modify corporate charters and retroactively change the governing law that *Dartmouth* said they did not have.<sup>59</sup> Corporations would remain “private” in the sense that the legislatures delegated their governance to officers they did not appoint, and in the sense that the Court would continue to invent constitutional rights for them against the states, but the key point was made that they are “public” in that they derive their authority, existence and power only from the statutes that define who can act as the corporation and how.

In short, by the time *Santa Clara* misread the Fourteenth Amendment to create corporate rights that are not to be found in its text, the tradition was well established. The Court had long viewed narrow interpretation – text, history and context – as irrelevant in determining corporate rights.

The decisions, instead, depend on grand theory and low metaphor. All the early decisions result in granting corporations constitutional rights – rights far greater than those enjoyed by many Americans at the time. On the one hand, the Court saw corporate access to the Federal courts as so obviously part of the scheme of things that the principal overrode constitutional language. On the other, it thought it equally obvious that free American blacks could not be citizens<sup>60</sup> and that married women were not entitled to access the state courts, let alone Federal courts, to enforce contracts or control their property. On the one hand, it viewed corporate charters as sacred treaties not to be modified; on the other, it took a somewhat more flexible view of real treaties with American Indian tribes.

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<sup>59</sup> See, e.g., RMBCA § 1.02; Del G. Corp. L. § 394 (reserving state’s right to modify corporate law and apply modifications to pre-existing corporations).

<sup>60</sup> *Dred Scott v. Sanford*.

The theories and metaphors are more disparate. *Deveaux* rests on a metaphor of the corporation as private, reducible to citizens – but takes the metaphor sufficiently seriously that it was abandoned when it failed to provide strong corporate rights.

*Letson* and *Dartmouth*, on the other hand, start with rhetoric insisting that corporations are on the private, non-state side of the great liberal divide between state and civil society. The former describes corporations as citizens. The latter emphasizes that the mere fact of public function, special charter and special privileges – including the privilege of being a “body politic” with the right to make law binding on the students and faculty – was not enough to make a “private eleemosynary institution” into a “a grant of political power ... a civil institution, to be employed in the administration of the government.”<sup>61</sup> It remained, in the Court’s image, a private body – essentially, the private property of the original donors and its founder, Wheelock, despite the terms of the charter itself. In this sense, *Dartmouth* follows *Deveaux* in looking through the corporation to the people behind it – here, not the “members” (and certainly not the AmerIndian supposed beneficiaries) but the original (and now deceased) donors and founders, who are given rights from beyond the grave in a revival of medieval entail and mortmain.<sup>62</sup>

At the same time, however, both lines of doctrine end up granting the corporation itself status as a rights-bearing entity, entitled to a sort of comity, as if it were a foreign sovereign or a coordinate branch in our system of polycentric governments. This reflected traditional views of corporate law – a corporation was “the “uniting of a Societie . . . into one bodie by the Prince or Soueraigne, having auctoritie to make lawes and ordinances”<sup>63</sup> – that lasted, at least in the Treatises, until the last quarter of the nineteenth century.<sup>64</sup>

<sup>61</sup> *Dartmouth* at 623-30.

<sup>62</sup> *Dartmouth* at 642-3.

<sup>63</sup> See, Mary Sarah Bilder *The Corporate Origins of Judicial Review*, YALE L. REV. (2006) (“Within English law, under Edward I, such [corporate] jurisdictions were conceptualized as instances in which the king had delegated liberties... Corporations were a particular type of delegated jurisdiction within the “King’s exclusive prerogative.” Most corporations arose when the Crown granted franchises, liberties, rights, powers, privileges, immunities, or property to a group by letters patent. A corporation thus held delegated authority as a body politic.”)

<sup>64</sup> See, e.g., *Ngiraingas v. Sanchez*, 495 U.S. 182, n8 (1990) (“.. The sovereign was considered a corporation. See [3 H. Stephen, Commentaries on the Laws of England 166, 170 (1st Am.ed.1845)]; see also 1 W. Blackstone, Commentaries. ... See W. Anderson, A Dictionary of Law 261 (1893) (“All corporations were originally modeled upon a state or nation”); 1 J. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America 318–319 (11th ed. 1866) (“In

In *Letson*, this is obvious: while the decision uses the language of citizenship, the actual holding assimilates corporations to foreign sovereigns. *Letson* grants corporations diversity status even when the Constitution would deny it to the citizens who work for or invest in them, much as comity grants rights to the sovereign itself rather than its subjects or citizens. Similarly, when the *Dartmouth* court declared that Dartmouth College was not a “civil institution” – not an instrument of New Hampshire – it did not remove from it the dignity of the state but instead elevated to a co-equal, “perpetual[ly]” beyond the control of the people and their elected representatives.<sup>65</sup> In effect, it treated Dartmouth College as if it were a sovereign and its charter a treaty, rather than ordinary legislation.<sup>66</sup>

#### B. *Since Santa Clara*

This pattern of ignoring the constitutional text continued after *Santa Clara* and the early cases beginning to incorporate the Bill of Rights into the Due Process Clause, through the Switch in Time and to the modern revival of laissez-faire in recent cases. The Court has used manifold rhetorical strategies to justify its conclusions – more than can possibly be surveyed here. But one constant has been this: few decisions rely on close readings of the actual text of the Constitution, and, *Santa Clara* notwithstanding, none depend on the word “persons” in the Fourteenth Amendment.

The plethora of doctrinal defenses of corporate constitutional rights make clear that the issue here is not details of constitutional language. Instead, these decisions are driven by an understanding of the role of corporations in our constitutional space that precedes and guides the Court’s reading of the Constitution’s words. When the Court finds language that it can use, it does so. When the language isn’t there, it reaches its conclusions nonetheless.

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this extensive sense the United States may be termed a corporation”); *Van Brocklin v. Tennessee*, 117 U.S. 151, 154, 6 S.Ct. 670, 672, 29 L.Ed. 845 (1886) (“The United States is a ... great corporation ... ordained and established by the American people’ ”) (quoting *United States v. Maurice*, 26 F.Cas. 1211, 1216 (No. 15,747) (CC Va.1823) (Marshall, C.J.)); *Cotton v. United States*, 11 How. 229, 231, 13 L.Ed. 675 (1851) (United States is “a corporation”).)

<sup>65</sup> *Dartmouth* at 641.

<sup>66</sup> This is more than the Court granted to actual sovereign nations in the United States. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 19 (1831) (holding that Cherokee Nation, while a “State,” was a “domestic dependant nation” not entitled to invoke the Constitution’s grant of diversity jurisdiction for suits involving “foreign states” and, separately, refusing to enforce the treaty).

Just as the Court felt free to ignore the most obvious reading of the diversity clause (corporations are not citizens), and the word “persons” in the Fourteenth Amendment (corporations are neither born nor naturalized, nor mean to be included in apportionment), so too in many other areas.

While a full discussion of the extraordinary breadth of corporate rights the Court has created under the Constitution is well beyond the scope of this article, it may be useful to catalogue some of the common methods the Court has used to find rights where the text grants none.

#### IV. IF NOT TEXT, WHAT?

The Court’s corporate rights are rarely based on textual interpretation in any narrow sense. Instead, they rely on several closely related metaphorical or rhetorical moves to find a place for corporations in our largely individualistic legal system. None is fully argued, and none is satisfactory.

Most often, the Court simply elides the question, assuming without inquiry that corporations have rights just because the rights are important. Privacy, property, and freedom of speech are core values; thus, corporations must be allowed to assert them. We might call this the *Lochner* or *Bellotti* move. It should not have survived legal realism: rights are relations between human beings.

Property rights are important because they define privacy -- the space in which individuals can act without (much) concern for others. A man’s home is his castle means, first and foremost, that tort concepts of reasonable behavior or patriotic concepts of other-directedness give way to less fettered will and caprice. They are important because stability and predictability underpin much economic activity.

And property rights must be limited because property is power over other people, and excessive power threatens republican self-rule, democratic decisionmaking, and capitalist markets alike. Property rights define freedom, but property over people is slavery. Too much property rights over things amounts to the same thing. Long before Hobbes argued that property rights create a zero-sum game in which any increase in my freedom or security decreases yours, an ancient story seeking to answer the question of why Cain and Abel disagreed so bitterly as to lead to murder made the point clearly:

"About what did they quarrel? 'Come,' they said, 'let us divide the world.' One took the land and the other the movables. The former said, 'The land you stand on is mine,' while the latter retorted, 'What you are wearing is mine.' One said: 'Strip'; the other retorted: ' Fly [off the ground].'"<sup>67</sup>

Property rights protect freedom of action, but taken too far they make society and even co-existence impossible. Any state based on freedom and limited government must limit property rights. So, a man's house may be his castle, but to protect the competing freedom of others, criminal law, divorce law, family law, environmental law, zoning and parts of tort law all limit his authority over. Because property rights are so fundamental to our relations to each other, they are inherently controversial.

Speech rights, perhaps surprisingly, have much in common with property rights even without *Buckley's* egregious claim that money is speech. Freedom of speech and freedom of exercise, like private property, create a space in which the individual can think and act independent of ordinary pressures to conform. We, as a free society, have collectively decided not to make a collective decision about our religion or our taste in movies, just as we have decided not to make a collective decision about (some) of what goes on inside our house/castles. And, of course, more cannot be better in the realm of speech any more than in the realm of property: complete freedom of Cain's speech would leave no room for Abel to talk, just as Cain's complete property right leaves no room for Abel to walk.

Neither property nor speech, similarly, has any abstract meaning independent of who holds the right. Most importantly in a modern republic, we had to limit these rights to create freedom out of feudalism. To make an aristocracy into a republic, we had to eliminate officials' claims to property rights in their offices. To end established religion, we had to abolish the freedom of the state to assert its own religion. To create a vibrant civil society and freedom of debate, we must restrain the government's freedom of speech.

The issue for corporate rights is whether granting a corporation some specific rights is similar to granting that right to an individual

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<sup>67</sup> BREISHIT RABBAH 22:7. The point is similar to Hobbes's contention that freedom is inherently competitive. HOBBS, *LEVIATHAN* --. See also, THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* (1899)(arguing that most property is used to demonstrate status, an inherently competitive zero-sum game).

against the state, or to the state against individuals, or a new thing altogether. We struggled for centuries to abolish property and speech and religion rights in government and establish them for individuals (with the limitations necessary to avoid a Hobbesian war of all against all, or Cain against Abel). Is granting these rights to corporations a step forward or backward? To answer this, we need more than simplistic claims that the rights are important (*Lochner*, *Bellotti*, *Virginia Pharmacy*, [Takings cases]) or “purely personal” and therefore not suitable for corporations (*self-incrimination*), that corporations are just the (unidentified) people who make them up (*Deveaux*, *Citizens United*, *Hobby Lobby*) or that they are entitled to freedom in their own right (*Letson*, *Bell*, *Citizens United*, [subpoena, jury trial]). Governments are also made up of people, yet freeing government often restricts human freedom.

#### 1. *Lochner*: Rights Reification or Focus On The Victim

Sometimes the Court grants corporation’s constitutional rights by focusing on the other side of the transaction – the human being contracting or otherwise interacting with the corporation as opposed to the corporation itself. Thus, in the most famous of all corporate rights cases, *Lochner* itself, the Court overturned a state statute creating minimum employment safety standards for bakers by explicating the rights of the bankers, not their employers. In its view, the victims had a constitutionally protected right to bid their working conditions down to subhuman levels; the rights of the employer -- corporate or otherwise – to endanger or underpay them never even enter into the discussion.

After the “Switch in Time,” *Lochner* fell out of favor,<sup>68</sup> and the Court has been less willing to rely on the Due Process to protect the economic interests of corporations or other economic elites. Today, a challenge to a local tax of a national corporation, like the *Santa Clara* case, would be far more likely to be litigated as a “dormant commerce clause” case, as was the MITE case, challenging state regulation of hostile takeovers.

*Lochner*’s “laissez-faire” economic ideology, however, lives on. Ironically, given Justice Holmes’s famous *Lochner* dissent,<sup>69</sup> the main source of laissez-faire in modern constitutional law is Holmes’ metaphor

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<sup>68</sup> *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Carolene Products*.

<sup>69</sup> “This case is decided upon an economic theory which a large part of the country does not entertain.... The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”

of the First Amendment as creating a marketplace of ideas. In current doctrine, that “marketplace” turns out to have little to do with any real successful market. Our most competitive market – the stock market – is, not coincidentally, the most regulated one: markets work best when advertising is carefully monitored, accurate disclosures (well beyond ingredient lists) are mandated, quality is transparent, and bidding rules are carefully set. But that’s not the market that the Supreme Court thinks of in its “marketplace of ideas” metaphor. Instead, it has returned to Mr. Herbert Spencer’s Social Statics. In the Court’s market, the primary rule is that no limits be placed on incumbent wealth. The Court demands that wealth from past economic success, however derived, be given free rein to reign -- the legislatures must allow the wealthy to use their wealth to distort discussion and debate.<sup>70</sup>

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<sup>70</sup> Nothing in Holmes’ image of a marketplace, of course, requires that the marketplace be without rules (no market is), that truth be for sale to the highest bidder, or that the rules of the marketplace follow Spencer’s ideological claim that law ought to enhance the power of the powerful. Cf. Owen Fiss. Even accepting that the best route to truth is a competition between ideas, see J.S. Mill, *On Liberty*, the competition ought to operate by different rules than competition between products (and in the latter case, we often extensively regulate advertising, see, e.g., the Securities Act of 1933 and the Exchange Act of 1934 as amended). When truth is the actual goal, we never use markets, let alone unregulated debate, as a tool for discovering it; scientific method has little in common with the unlimited advertising regime the Supreme Court has enforced on us.

More importantly, however, political strife often is about values, morals, decency, allegiances, loyalties and styles – matters that, important as they are, have little to do with truth in the scientific sense. Popper; Hume. Robust debate is essential to challenge the immoral orthodoxies of an age, particularly when they benefit an entrenched elite, such as those who profited from slavery or existing status relations, or license to exploit natural resources regardless of larger consequences.

But in a liberal society that is committed to the notion that people of differing views even on matters of such importance as human freedom or entrance into the Kingdom of Heaven, often political debate is not meant to achieve truth at all. It is, instead, meant to find a compromise that can avert Civil War. We agree on little, but (with a few notable exceptions) we have agreed that we are one nation committed to living together. The effort to maintain unity in the face of disagreement over our most basic moral commitments can only succeed with constant compromise – a willingness to accept less than the truth. There was no other way to maintain a nation half slave and half free before our Civil War or during the long Jim Crow period, just as there will be no way to maintain a nation half committed to basic equality and half to punishing the poor today.

When the issue is not truth but finding a *modus vivendi*, citizens of good faith must be able to distinguish between truly fundamental beliefs and strategic posturing: it matters whether our fellow Americans genuinely believe that extending health insurance to an additional 10% of the population is an existential threat to their fundamental values, or, in contrast, it is just blather to cover up a self-interested grab from more resources or more prestige, “to get something out of this and ... don’t know what.”

Advertising is designed to distort that search for common ground, by making support for a particular position look broader or deeper than it actually is. Corporate advertising, paid for by funds with no human owner without regard to the actual views of any citizens (as opposed to

Capitalist markets, are, of course, notoriously disrespectful of the privileges of the past. Innovation disrupts. On that Marx,<sup>71</sup> Burke,<sup>72</sup> and Schumpeter<sup>73</sup> agree.

Yet it is also true that in any negotiation, a party that can walk away who will be able to take the surplus created by trade, and the diminishing marginal utility of money always means that it takes more to persuade the wealth than the poor. As a result, freedom of contract necessarily redistributes wealth upwards.<sup>74</sup> Left to its own, such a system will eventually self-destruct, as we have known at least as long as we've told the story of Joseph using free trade – voluntary sales of food in a famine – to enslave the Egyptian masses.<sup>75</sup>

Moreover, it is easy to use law to lessen the destruction and disrespect for accumulated privilege the market might otherwise display: copyrights can be extended; organized labor can be classified as “conspiracy in restraint of trade” while organized capital is called “corporate individuals;” macro-economic policies can keep unemployment above the “natural” rate at which employees can demand pay increases; tort and related law can permit “producers” to force others to pay their costs of doing business or allow them to expropriate the health and wealth of their neighbors; finance can be based on shifting risk to the unwary instead of eliminating it or selling

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fiduciary setting aside his or her own views), is worse still: while the national project means that we must accord our fellow citizens' views respect even when they are wrong and wrongheaded, there is no reason why we ought to accommodate institutional views rather than reforming the institution.

Reeducation camps for humans are a terrible thing. Redirecting a bureaucracy to better reflect the needs of society, or even the temporary victors of its political conflicts, is just routine governance.

<sup>71</sup> Communist Manifesto, (“Constant revolutionising of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify.”)

<sup>72</sup> Reflections on Revolution in France (“But now all is to be changed. All the pleasing illusions which made power gentle and obedience liberal, which harmonized the different shades of life, and which, by a bland assimilation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason.”)

<sup>73</sup> Capitalism, Socialism and Democracy (1942).

<sup>74</sup> Compare, Victor Hugo, *Les Misérables*.

<sup>75</sup> Of course, Joseph was only selling to the peasants the food they themselves grew. But that is not unusual: sellers are rarely producers in anything but a mythical sense. In any event, he could easily have achieved the same result by the miracle of compound interest, as the masters of American sharecroppers did, and modern lenders seem to be attempting. This too is not news. We used to have effective bankruptcy for the same reason that Leviticus demands a jubilee year: the alternative is slavery.

indulgences from taxation or precautionary regulation to the wealth and knowing. With enough political power, economic incumbents may find it in their interest to convert entire segments of the economy to simple rent extraction<sup>76</sup> – taking from the weaker, as Spencer prescribed, but with the predictable result of economic failure rather than racial victory.

Long before then, vested interests – Teddy Roosevelt’s malefactors of great wealth – may learn to exploit our political system’s multiple choke points to prevent any reform that does not preserve and enhance the power of economic incumbents. The past profits of pharmaceutical companies, the medical industry or finance, and the deep reserves of sunk costs in auto mobile manufacturing and the manifold associated industries, can be marshaled to convince politicians to ensure that all legal innovation protects the status quo. Lenders can “reform” bankruptcy law to make it more available to break collective bargaining agreements but less available to escape compound interest on credit card or student loan debt. Cigarette companies and hot-house gas polluters can finance pseudo-science to confuse and distract from the real thing. The wealthy can hire opinion makers or buy entire media industries to shift the Overton Window of plausible political projects far from the desires of ordinary citizens. Lobbyists can affect regulatory debate long after ordinary people must move on.<sup>77</sup>

Money, in short, can buy the law and political influence that can make the marketplace more pleasant for old wealth. Today, the Court regularly uses the First Amendment on behalf of this anti-market economic incumbent protection project.

Often it does so using, appropriately enough, the *Lochner* “rights of the victim” mode of analysis. Thus, in the line of Commercial speech cases beginning with *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, the Court relied on the purported First Amendment rights of consumers to receive “information” to overturn various restrictions on advertising.

The Free Speech clause has also been the vehicle by which the Court has expanded the power of money in elections. Electioneering is one of the few areas where long established American law sharply restricts the rights of corporations relative to human beings. Almost since the beginning of the era of large business corporations, Federal

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<sup>76</sup> See, e.g., Daron Acemoglu & James A. Robinson, *Why Nations Fail*.

<sup>77</sup> Mancur Olson, *The Logic of Collective Action*.

law has barred corporations from using corporate funds for electioneering.<sup>78</sup>

Sometimes, as in *Bellotti*, the Court relied on the rights of listeners to assert that the identity of the speaker is irrelevant, but more often it simply elided the issue entirely.<sup>79</sup> On one view, almost identical reasoning underpins *Bellotti*, the first of the corporate electioneering cases. There, corporate managers sought to use corporate funds to advertise in opposition to a referendum that might have increased executive income tax obligations.

The majority opinion contends that whether a corporation has Free Speech rights is irrelevant to its analysis. Instead, it interprets “speech” to include “spending corporate money” and then insists that restrictions on corporate (i.e., corporate elite’s) spending would impermissibly interfere with the right of voters to have advertising directed at them. The actual speaker – as well as any question of how the corporate elite

<sup>78</sup> Tillman Act, 1907, codified at 2 U.S.C. § 441b (banning direct contributions to candidates from corporate funds). See generally, Adam Winkler, *Other People’s Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 GEORGETOWN L.J. 871 (2004). The people – citizens and otherwise – associated with a corporation are, of course, completely free to contribute in their personal capacities, and the law even permits a corporation to form and staff an organization (known as a PAC) to facilitate its employees and shareholders making such contributions from personal funds. 2 U.S.C. § 441b; cf. *Citizens United* at 321, 337-8 (contending that PAC is a burden on corporate speech, without discussing what it means for a corporation to speak, why corporate executives should be allowed to use money that is not their own for purposes not contemplated by corporate law, or whether it would be a useful addition to our largest economic enterprises to have officials appointed based on party affiliation, as surely must happen if business corporations become significant players in partisan politics). It may not be surprising that shareholders rarely contribute to such corporate PACs.

<sup>79</sup> I find it difficult to take seriously the *Bellotti* argument that the First Amendment is meant to protect “speech” rather than freedom, so that we need not consider whether a business corporation – which is, after all, a tool created by people to serve human ends – should be granted freedom. Perhaps I am too fond of quiet to be able to accept the notion that “more speech is better” and so much better that a babble of meaningless distraction is a fundamental part of civilization, enshrined in the Due Process clause. However, others disagree with me. The dissent in *Conestoga*, *supra*, makes a parallel argument for the Free Exercise clause: in its view, religious exercise is a value in itself, independent of the views of any religious believer, so the First Amendment ought to be interpreted to protect the religious practices of a corporation, even if that corporation has no beliefs of its own and those practices interfere with the legal and moral rights of human beings. This is just peculiar. No business corporation law provides for a mechanism by which a business corporation could come to have religious beliefs or loyalties.

Moreover, we would all be worse off if our business corporation laws were amended to allow directors, or shareholders, to impose their religious views on other corporate participants. (The issue will never arise unless some corporate decision-maker is seeking to impose a sectarian view on others – if all participants agree, no one will have standing to complain). Economies work most efficiently when markets, including labor markets, are open to all qualified participants, with allocation based on economic terms – price and quality – rather than tribal ones. See, e.g., 1964 Civil Rights Act; Epstein on why discrimination is inefficient.

determines the corporate position, or whether corporate decision-makers should be permitted, as a matter of corporate law, to use corporate resources in this way – drops out of the analysis.<sup>80</sup>

## 2. *Deveaux*: Piercing the corporate veil

While *Deveaux* is no longer good law under the Diversity Clause, its technique continues to be important. In several cases, the Court or individual justices have simply pretended that a corporation is an association of citizens, and then imputed the rights of the individual citizens to the corporation without any discussion of whether this comports with corporate law or reality.

One classic example of this technique is Justice Black's opinion in *Bell v. Maryland*, in which he invokes the rights to privacy of an individual to sustain a corporation's manager's decision to maintain segregated lunch counters and have sit-down demonstrators arrested for trespass. Throughout the opinion, Justice Black refers to the corporation by the name and gender of its manager, Mr. Hooper (it is implied, but we are not told, that he is also its sole shareholder): the argument is that just as Mr. Hooper would have the unquestioned right to segregate in his living room, so too he must have the right to cause the corporation he controls to segregate at *its* restaurant.

The same reasoning appears in Justice White's *Bellotti* dissent, where he would have upheld the state restrictions on corporate electioneering due to the specter of shareholders being forced to subsidize political positions not their own – even though the money in question belonged to the corporation and was, presumably, generated by the corporation in the ordinary course of its business by paying employees less than the sales price of their product.

Most dramatically in recent years, this is one key argument of *Citizens United*. The majority opinion in that case never invokes Santa Clara's notion that a corporation is a Fourteenth Amendment person; if anything it is closer to the *Letson* notion that a business corporation is a citizen – the holding, if not the reasoning, appears to be that business corporations are now legitimate participants in our political debate, just as entitled to press for "their" goals as voters are.<sup>81</sup> The justification for

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<sup>81</sup> The political theory here appears to echo some version of a 1950's interest group pragmatism. Compare, ROBERT DAHL, WHO RULES (discussing, apparently approvingly, a balance of power between unorganized voters and highly organized monied interests, such as local business corporations).

this result, however, seems to be the *Deveaux* argument: the citizens who make up a corporation should not lose their rights to electioneer just because they incorporate.

### 3. *Dartmouth*: Comity, or the Medieval Corporation Revived

If the first two methods of granting corporations rights depend on ignoring the core concept that corporations are separate from the people who make them up, *Dartmouth*, *Letson*, *Santa Clara* and their successors treat the corporation itself as a rights-bearing citizen. This is the main argument in *Citizens United*.

At its core, the argument is not linguistic: it is not that the Constitution's words – "person" or "freedom of speech" or "citizen" – compel the Court's result. Nor is it "originalist": There is no evidence that these results were in the minds of any of the various people who could be considered authors of the written Constitution in 1788 or 1868 or at any of its various lurches towards democracy since then.

Instead, the argument rests on a simple metaphor: the corporation as legal person. Judges and lawyers treat corporations as individuals for many other purposes. A corporation is not a conspiracy in restraint of trade, because a person cannot conspire with itself. A contract with a corporation is not binding on the people who sign it or the people who profit from it directly or indirectly, because the corporation itself is the obligor.

But the metaphor of personhood alone is not enough. After all, the *Deveaux* claim that corporations have no independent existence continues to win both in constitutional litigation and elsewhere. The new claims that corporations should be allowed an exemption from the ACA's requirement that health insurance include contraceptives, based on shareholder religious views, depend on a *Deveaux*-style rejection of corporate personhood.<sup>82</sup> Our business press and "shareholder activists" routinely argue that the statutory requirement that boards act in the interest of the corporation means, instead, that they should maximize returns to shareholders, as if shareholders were the corporation. Similarly, anti-tax ideologues and respectable economists routinely argue that taxing corporate income is "double taxation" because, they imagine, the corporation will eventually pay the income to shareholders

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<sup>82</sup> See *Hobby Lobby*, *supra*.

who will be taxed on it as well. Of course, the usual rule of an income tax regime is that all recipients of income are taxed; if I receive income and use some of it to purchase your services, we are both taxed and no one calls that double taxation. So the argument, which is powerful enough to have led to a radical reduction in corporate taxes paid over the last generation, must depend on rejecting the notion that a corporation is separate from its shareholders.

The missing link is comity. Corporate law has an equally long tradition – also dating back to the misty middle ages – of treating corporations as something like coordinate branches of government. Before the rise of the unified state, corporations had self-governance rights: the aristocracy, the church, the universities, the cities, and even the Jews were called corporate precisely because they had the right to make laws binding on themselves with relatively little interference from the King.

In the modern era, this deference to internal corporate decision-making remains central to corporate law (with no acknowledgment of the historical origins). The Business Judgment Rule is usually explained as a presumption that boards have exercised good faith and not breached their fiduciary duties in making decisions; it serves to prevent judicial review of board decisions in most circumstances.

Taken purely as a matter of fiduciary law, the Business Judgment Rule is extraordinary. All other professionals and all other fiduciaries are held to a far higher standard. Indeed, even non-fiduciaries can be sued for breach of the universal duty of ordinary care. There is no obvious reason why doctors should be required to meet minimum standards of professional competence, but directors not.

However, as an historical remnant of an older view of corporations as quasi-sovereign, the doctrine makes perfect sense. It is simply the corporate law equivalent to Chevron Deference or international comity. Courts defer to coordinate branches of government and other sovereigns; they are reluctant to review official acts of sovereign officials with the same vigor they reserve for ordinary citizens and their acts.

Similarly, corporate law employs a choice of law rule that is best understood as expressing the same deference to a quasi-sovereign. The Internal Affairs Doctrine, accepted by all American states (although they do not entirely agree on its exact contours) holds that state courts should ignore ordinary choice of law doctrine when the issue is an

“internal affair” of a corporation – including issues of which assets are available to satisfy corporate obligations and who is permitted to act as or on behalf of the corporation. Instead, the state should respect the corporation’s own election: the applicable law is the law of the state of incorporation.

The Internal Affairs Doctrine means that a corporation that, for example, does business in New York, maintains its headquarters in New York and makes all important decisions there, has New Yorkers as employees, creditors, bondholders and shareholders, commits torts in New York with New Yorkers as victims or contracts in New York – may elect to incorporate in some state to which it has no other connection, such as Delaware. And if it does, New York courts will cede the governance of this New York institution, regardless of how important it is to New York’s economy, to Delaware law. Indeed, New York will use allow Delaware law to determine whether the New York citizens who operate or benefit from the corporation will be answerable for the corporation’s violation of New York contract, tort or environmental law – so if Delaware permits corporations to function with no minimum capital, New York has allowed the corporation’s decision-makers, by electing to incorporate in Delaware, to in effect repeal the monetary sanctions in New York’s tort, contract, environmental, regulatory and criminal law.

Once again, this is an extraordinary deference to internal corporate decision-making. It is quite hard to justify within the terms of modern democratic law or the ordinary principles of geographic sovereignty. We fought a revolution for the principle of “no taxation without representation” and self-rule. Yet we have outsourced the legal regulation of our most important economic enterprises to Delaware, which gives most of us no vote at all. (It does charge these corporations – and thus, ultimately, their customers, employees and investors, few of whom are in Delaware—enough taxes to account for a large portion of the state budget.) And Delaware, in turn, has declared that the corporation’s own internal decision-makers, wherever they may be located, have virtually complete autonomy to structure internal processes as they please. This seems to conflict with the basic requirements of republican self-government: we the people are not represented in this process.

On the other hand, it is quite easily understood historically. In the corporate law we inherited from England and until the great reforms of

the end of the nineteenth century, a corporation took on some of the power of the sovereign that created it. Typically, the sovereign retained the power of “visitation” – judicial supervision. Equally importantly, states ordinarily did not allow foreign corporations to do business in the state – interstate railroads, for example, were required to obtain a separate charter for each state they passed through. For a court to inspect or supervise a foreign supervision would have been a clear interference with the sovereign’s own powers within its jurisdiction; the internal affairs doctrine was, in that very different world, a direct consequence of ordinary comity.

Judicial deference to the internal officeholders of business corporations makes relatively little sense as a matter of corporate law. But corporate law is a product of our legislatures. Presumably, the legislature of New York could assert its sovereignty by repealing the Internal Affairs Doctrine<sup>83</sup> and eliminating the deference of the Business Judgment Rule, and we should take its failure to do so as at least some indication that it is satisfied with the consequences of outsourcing this basic republican function.

Supreme Court deference to corporate autonomy that places corporate officeholders’ decisions beyond ordinary politics or legislative control, however, is a different matter. Our Constitution is extremely difficult to amend. The Court should require more than half-unconscious memories of legal metaphor before creating new

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<sup>83</sup> *But see*, *McDermott, Inc. v. Lewis*, 531 A.2d 206 (Del. 1987); *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 n.14 (Del. 2005). In those cases, Delaware declared that the Internal Affairs Doctrine is required by the United States Constitution. Since this doctrine would sanctify Delaware’s position as the legislature for the nation and permanently protect its taxation of non-Delaware citizens, the court’s reasoning should be taken with a grain of salt. More disturbingly, however, the US Supreme Court accepted the argument that only the incorporating state as an interest in a corporation’s internal affairs – a radical departure from ordinary principles of geographic sovereignty, implying that the common law doctrine somehow limits state sovereignty. *Edgar v. MITE Corp.*, 457 U.S. 624, 643, 646 (1982) (Illinois law regulating national tender offer is an undue burden on interstate commerce because “Illinois has no interest in regulating the internal affairs of foreign corporations”). It is unclear if this statement should be taken at face value. First, the Court explicitly acknowledges that the internal affairs doctrine is no more than a common law choice of law doctrine, implying that any state could reject it and assert its sovereignty over the economic actors within its jurisdiction. Second, the Court implies that headquarters in Illinois might suffice to give the state the requisite interest. If so, the state ought to have an even greater interest in the internal governance of a corporation with actual operations in the state – internal affairs include the structures that determine whether the corporation will comply with or seek to avoid Illinois’ contract, criminal, tort, environmental and regulatory law, whether the firm’s leaders are likely to try to cause it act in the interest of Illinois citizens or seek to externalize its costs onto them, and whether the firm will be sufficiently corporate (and solvent) to be answerable in Illinois courts for its delicts or those of its agents.

constitutional rights and granting them to our creatures as protection against us.

4. Some Notes: The Power of Corporate Rights {cases to be integrated elsewhere or omitted}

At the end of the nineteenth century and into the early years of the twentieth, as business corporations began to dominate our economy and business corporation law went through a radical rewriting, the Court was also beginning the process of incorporating the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. As it did so, it routinely granted these rights to corporations, sometimes with no explanation at all.

Corporations were granted rights to jury trials, although they cannot be (even if there were some reason why they should be) tried by a jury of “peers”. They were granted the same rights against double jeopardy as human beings, although a corporation, lacking a nervous system, is unlikely to suffer from the emotional stress that is the usual justification for this rule in human contexts.

As businesses grew to the point where ongoing regulation was vital, the Court intervened to protect mass-production business practices as if they were personal habits that define human personality, holding – with no noticeable reasoning – that business corporations could prevent on-going audits or random inspections by asserting rights under the Search and Seizure clause. In *Pierce v. Society of Sisters*, the Court created a liberty right to attend private school, accepted earlier cases determining that corporations have no liberty rights, but nonetheless allowed incorporated schools to assert the right in order to protect the corporations’ property interests under the Due Process Clause.

In some cases, however, the Court distinguished between corporations and human beings. Thus, for example, in *Berea College*,<sup>84</sup> the Court held that even if Kentucky could not prevent a citizen from operating a racially integrated school (an issue which it declined to reach), it could prohibit corporations created under its law and doing business in its state by its permission from doing so. A corporation, it held, had no “natural right” to teach (i.e., to teach without imposing Jim Crow); “The granting of such right or privilege [the right or privilege to

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<sup>84</sup> *Berea College v. Kentucky*, 211 U.S. 45 (1908).

be a corporation] rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy."<sup>85</sup> Similarly, it held that corporations could not invoke the right against self-incrimination, which it regarded as a "personal" liberty inapplicable to organizations.<sup>86</sup>

After the Switch in Time, the Court abandoned *Lochner* and its attempt to find laissez-faire principles in the Due Process clause. But *Lochner* did not stay dead. As the Court began to incorporate the Bill of Rights into the Due Process clause, it usually continued to assume that corporations were entitled to assert most of the rights of citizens under the Bill of Rights, and it continued to use the Due Process clause and the incorporated Bill of Rights, especially the First Amendment, to restrict the people from controlling corporations.

For example, in *State Farm*, the Supreme Court has declared that the Due Process clause somehow bars state legislatures and state courts from using traditional common law tort methods to regulate corporations. According to that case, the clause bars a punitive damage award against a corporation of more than 10 times the actual damages proven, even if a jury concludes that a corporation will not be deterred from intentional wrongdoing without a larger penalty.<sup>87</sup>

The Court showed marvelous solicitude for the property of a corporation, but saw little need to discuss the incentives or governance implications of its ruling.<sup>88</sup> Instead it analogized regulating a corporation to the "basic unfairness of depriving citizens of life, liberty, or property,"<sup>89</sup> even though the only citizens deprived of property here were State Farm's victims.<sup>90</sup> (The fine, of course, was imposed on State

<sup>85</sup> *Berea*, quoting *Home Ins. Co. v. New York*, 134 U. S. 594, 600.

<sup>86</sup> See *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906). [Check these]. Cf. *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906) (distinguishing between the liberty of natural and corporate persons).

<sup>87</sup> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>88</sup> The Utah Supreme Court below had concluded that the jury had ample reason to believe that a large punitive damages award was necessary to deter State Farm, in part because its systematic pattern of wrongdoing produced hidden gains that would only rarely generate lawsuits.

<sup>89</sup> *State Farm* at 417.

<sup>90</sup> State Farm itself, of course, is not a citizen. Some of its employees, customers, suppliers and investors no doubt are, and, of course, the illicit profits at issue here would eventually have gone to some or all of those corporate participants. However, it is fundamental to corporate law that none of the corporate participants – citizen or not – has any property interest in State Farm's assets unless and until its board of director determines to grant them one by contract or, in the case of shareholders, declaring a dividend.

Farm, which is not a citizen. Ordinary corporate law makes clear that no citizen has any claim to own State Farm's assets; they belong to the corporation and the corporation alone. To be sure, if State Farm must pay a fine, some State Farm constituency will have to pay more or receive less – but there is no *a priori* way to know whether that will be customers (through lower services or higher prices), executives or employees (lower pay or reduced employment), suppliers (lower payments), the general public (reduced investment) or investors.<sup>91</sup> Nor is there any reason to expect that all of those parties are citizens or even human beings – in particular, we know that most shares are held by diversified institutional investors that are definitely neither.<sup>92</sup>)

Similarly, it considered the “reprehensibility” of State Farm's conduct as if it were a moral actor with a conscience and a soul instead of a business corporation designed to pursue profit to the exclusion of other values. Thus, the Court thought that the only significance of the fact that the company's headquarters never learned of a prior \$100 million verdict was as evidence of “reprehensibility” if the two actions involved similar conduct. Apparently, the states are required to ignore any suggestion that this omission might indicate serious problems in State Farm's governance system or the market that structures its drive for profit. Similarly, by focusing on State Farm's soul instead of the rules by which it functions, the Court appears to require the state to ignore any interest it might have in reforming failing institutions that exert major influence on the state's economy.<sup>93</sup>

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<sup>91</sup> Generally, we'd assume that the burden will be borne by the weakest party in the least competitive market. Since the stock market is generally the most efficient market, it is facially unlikely that stock investors will bear the burden. Stock investors, after all, are perfectly fungible providers of a perfectly fungible commodity (money), so it is hard to see how, in a competitive market, they would ever receive more than the market price for money. On the other hand, shareholders are entirely a sunk cost – corporations have no obligation to pay dividends. In general, the marginal price for a sunk cost is zero. So using standard economic models, it is somewhat difficult to understand why shareholders expect any return in the first place, let alone to have their return affected by punitive damages.

<sup>92</sup> Indeed, often even if you look through the multiple layers of institutions you never reach an identifiable human being, let alone a citizen. Consider the Finnish National Fund, which invests on behalf of unborn Finns; or the Ford Foundation and Harvard University, which invest on behalf of a mission rather than any identifiable person; or any ERISA-regulated pension fund, which is barred by law from considering any aspect of the ultimate beneficiaries other than their interest in a larger pension – an interest hardly likely to be the only or primary value of any actual citizen.

<sup>93</sup> *State Farm* at 427. Cf. Ginsberg dissent at 431 (noting that State Farm management was driven by profit). Pursuing profit, of course, is far from “reprehensible” – it is a large part of what managers are *supposed* to do. The Court, however, does not seem to recognize that “profit” is a function of the rules that states set. If the Court allows them to change those rules only when corporations are “reprehensible,” it leaves us without remedy when it is, instead, the predictable

Recently, in *Citizens United*, the Court summarized its holdings as having “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.”<sup>94</sup> Indeed, it appears to regard as entirely immaterial any differences among individual citizens; American unions (with elected leadership and funds contributed solely by members), and multinational business corporations (which derive their funds from business activities and have leaders elected on a plutocratic basis by shareholders that may not be human, let alone citizens, with other corporate participants entirely disenfranchised).

In other areas of the law as well, the Court has similarly refused to take corporate form seriously, relying instead on simple and misleading analogies to citizens, or, as in *Citizens United*, “associations of citizens.”<sup>95</sup> Indeed, the Court has been willing to ignore the actual text of the Constitution even to the point of granting corporations rights under the Petition clause, which reads, “Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to

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results of reasonable people operating within a given set of rules in the market system that are reprehensible. A tort system – such as the one that the US Supreme Court finds in the Due Process clause – which encourages State Farm to waltz on its contracts by making it highly profitable to do so, clearly is reprehensible. It is less obvious that the same is true of managers acting in the interests of their employer as they understand them.

<sup>94</sup> *Citizens United* at 343.

<sup>95</sup> *Citizens United* at 354. Under American law, a business corporation is not an association of citizens. First, corporations lack members or associates. They have, instead, agents – who, unlike members, have a fiduciary obligation to set aside their own views, politics and interests and the interests of the nation in order to work for the legally defined interests of the corporation. And they have investors, in the form of bondholders and shareholders, that are in large part diversified investment pools bound by law to act in the interests of their own investors rather than any human or national interests. In no sense are either investors or associates “members”: most clearly, they entirely lack any right to determine the corporation’s stance on relevant political issues. That decision, instead, is ultimately made by directors, who are explicitly fiduciaries, not members, and, again, bound by law to ignore their own political views or the needs of the nation if they conflict with the interests of the corporation. Some of these institutional investors may ultimately act on behalf of human beings – but often the law requires investor fiduciaries to ignore the actual human beings. ERISA trustees, for example, are required to act in the interest of a purely imaginary pensioner who has no citizenship, no job, and no connection to the United States or Americans but, instead, cares only about the size of a future pension. In other cases, the institution may not represent even thin legal simulacra of individuals: who are the “citizens” behind Harvard’s endowment or Trinity Church’s? Second, every major corporation has employees and investors that are not American. So do all the significant institutional investors. So, even if business corporations had “members” and we looked through institutional investors to find human beings instead of legal fictions, many of the people involved would be Saudi princes or unborn generations of Finns.

petition the Government for a redress of grievances.”<sup>96</sup> While the word “person” sometimes includes legal persons, the word “people” never does, and even if it did, corporations are clearly not part of the People. At least in theory, our constitution creates a republic of citizens, not of corporations.

Thus, in *Adarand*, the Court allowed a corporation to sue to overturn an affirmative action program on the grounds of racial discrimination, without any discussion of whether corporations are often victims of racial animus or why a corporation’s claim of entitlement to government business should be constitutionally protected.<sup>97</sup>

## V. PRINCIPLES

Contrary to Supreme Court precedent beginning well before the Civil War, business corporations should have no constitutional rights whatsoever. We the people, acting through our legislatures, authorize corporations to exist. We should have the authority, and the courage, to use ordinary legislation to grant corporations appropriate rights – and to reform them when existing rules threaten to lead to results we do not like.

The problem is not that the Court has not read the Constitution closely enough or that it is ignoring the intent of some undefined group of authors or the meaning that a long-deceased generation would have placed on the words. The Court rarely reads the Constitution closely, despite the occasional claims of some supposed “plain meaning” advocates or “strict constructionists.” If it did, it would have some trouble justifying judicial review itself, and far more trouble explaining why the Defense Department is not a violation of the No Standing Army clause, or why the Second Amendment applies to weapons that would not have been included in a list of “arms” in 1788 because they had not

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<sup>96</sup> See, e.g., *Citizens United* at 355: “[T]he [First](#) Amendment protects the right of corporations to petition legislative and administrative bodies.” *Bellotti*, [435 U.S.](#), at 792, n. 31 (citing *California Motor Transport Co. v. Trucking Unlimited*, [404 U.S. 508, 510-511](#) (1972); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, [365 U.S. 127, 137-138](#) (1961)).”

<sup>97</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (allowing corporation to assert that it was the victim of racial discrimination by an affirmative action program seeking to increase the number of minority-owned firms). To the best of my knowledge, no corporate law gives corporations a race.

yet been invented, or why current copyright laws are “for limited times.” And it is hard to see why it should place special weight on the interpretations of the Constitution’s words that it imagines long dead people would have made. There is nothing magic about our Constitution; it is not sacred, even if it is authoritative, and it comes with no guarantee of correctness. It establishes, and we consider ourselves to be, a democratic republic, which means we rule ourselves, in some imperfect fashion. Originalism, in all its variants, is inconsistent with self-rule, replacing our decisions with, instead, rule by the dead, or more precisely by Supreme Court justice’s interpretations of imaginary interpretations the dead might have made of the Constitution had they considered problems that did not exist in their day.

The issue, instead, is that the Supreme Court has created constitutional rights for corporations that do not fit with our scheme of government, properly understood. Too often the Court has acted without considering, and sometimes without seeming even to understand, the actual workings of corporate law and the actual functions of corporations in our economy and polity. Metaphor or atavistic remnants of half-forgotten medieval doctrine are a poor substitute for actual legal analysis.

Corporations and corporate law change, quite rapidly, as they must in a dynamic economy. An eighteenth century lawyer would find little familiar in our modern corporate law, less in securities law, and nothing at all in the actual workings of a modern multinational corporation employing people on several continents, controlling assets larger in quantity than the entire wealth of the early United States, and raising money from international investors in publicly traded stock and bond markets. Indeed, even a lawyer from the end of the nineteenth century would find our system quite foreign, and one from 1950 would need serious remedial work to catch up.

This dynamism counsels against constitutionalizing corporate law. When most of the system is rapidly changing, it will rarely make sense to fossilize another part. Less abstractly: we are constantly creating and recreating these massive and powerful institutions. There is little reason to expect that eternal rules of governing them can be derived from our eighteenth century constitution, even with its later accretions, because there is little reason to believe that we – let alone our predecessors – have discovered such universal laws.

Second, details – the details that are missing in constitutional adjudication that begins with metaphors of individuality, privacy or comity – matter.

Whether corporations should have particular legal rights is nearly always a question of prudential politics, and never an issue of fundamental principle. There is no abstract or context-less rule that can tell us whether giving rights or powers to an institution – which usually means to the leaders of the institution – will enhance or detract from the freedom of the people affiliated with the institution.

Usually, institutional freedom is quite different from personal freedom. This is often obvious in politics: we've known since the Eighteenth Century that the only way to preserve individual religious freedom is to deny the state any religious freedom at all, either (as in the US) preventing the state from any religious practice, or (as in the UK requiring it to support religions not its own on a fair basis). Allowing the state "freedom of religion" is the same thing as allowing the current officeholders to establish a religion. The state's freedom means that the citizens are no longer free to practice their own religion as they see fit.

The same will be generally true for corporations. Like states, corporations don't pray or believe, but those who control them do (and those who depend on them often disagree with their leaders about how best to do it). Giving a corporation religious freedom means giving the corporation's top executives or board of directors the right to coerce corporate participants – employees, investors or consumers – into participating in the leaders' choice of religion. If they don't want to go along, they must sever their ties with the institution, eliminating what otherwise might be an attractive economic relationship. That is, increasing the institution's freedom decreases the liberty and options available for citizens.

Similarly, granting corporations privacy rights does not enhance personal freedom: corporations are not human beings who must have a space free of social restraints in order to self-actualize or follow their consciences. They are institutions. Giving the institution "privacy" means removing social sanctions on corporate leaders. That enhances the leaders' freedom to ignore social norms, the law and their followers, but often it will not improve the lives or liberties of anyone else associated with the corporation.

Employees, investors and consumers might often prefer to keep leaders answerable, using techniques similar to those we use in the public sector, such as compulsory audits by the GAO or similar ombudsmen, open meetings law, protections for dissenters, requirements of open debate and so on. These methods can enhance individual freedom precisely because they limit the freedom of powerful decision-makers.<sup>98</sup>

Speech works similarly: freedom for the institution is usually the same thing as coercion for its participants. Giving corporations the right to “speak” means, as a practical matter, giving corporate managers the rights to use corporate money to pay for advertising and to order corporate employees to advocate corporate positions. This is not free but expensive and coercive.

Obviously, this does not enhance the freedom of customers, employees or investors – they are forced to choose between taking their business elsewhere, with whatever costs that may impose, or submitting to a decision not their own to work for values not their own. Giving the corporation the “freedom” to speak means that consumers, investors and employees are forced to give up money that could have been their own in order to pay for advocacy they may not support.

But it doesn’t even enhance the freedom of the managers who make the decisions. Corporate managers have a legally imposed duty to act on behalf of the institution regardless of their own values (or the values and interests of the public, corporate employees, or even corporate shareholders), and they often function within tightly coercive markets. Giving them “freedom” to use corporate assets often will mean that they will be compelled to act against their own values. If a manager believes that a particular corporate act is irresponsible or immoral – say, paying extremely low wages, polluting or distributing an unhealthy addictive product – but also profitable if legal, the manager may feel compelled to use corporate resources to attempt to change or evade the law.<sup>99</sup>

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<sup>98</sup> Sometimes, of course, we may decide that operating in public is more trouble than it is worth. For example, open debate of salaries – even CEO salaries – often has bad side effects, creating increased envy and completion, lowering morale, and, at least in the case of CEOs, dramatically increasing costs. But this is not an argument for a constitutional provision protecting corporate privacy. The issue of when and whether personal privacy trumps the “sunlight” disinfectant is going to be context dependent and changeable. It belongs in the legislature or the regulatory agencies, not the Constitution.

<sup>99</sup> I don’t think this is a correct understanding of the law, and I think it is quite clear that the chances of a Delaware court holding that a board’s decision to place other values above short-term

Sometimes, to be sure, corporate freedom will enhance individual freedom, just as sometimes the rights international law grants to sovereigns serve to help the subject people rather than simply protect dictators. Some people may prefer to work in a homogeneous environment of people with similar religious or other views and tastes; they will find this easier (especially if many others share their tastes or views) if firms are permitted to discriminate and differentiate. Sometimes leaders require confidentiality to make sensible decisions – the full light of day, or full debate among the poorly-informed, don't always improve matters.

Similarly, political and artistic speech, in the modern era, are likely to be quite quiet and ineffectual if not backed by some form of institutional publisher or funder – and while some institutions may be organized (as universities usually are) to protect the individual autonomy of specific researchers, thinkers or polemicists, others may be more effective with defined points of view and internal constraints to ensure that artists or activists work towards a common goal. Disney makes great movies and the American Enterprise Institute advocates using different methods and different structures than Harvard uses to support great research. Google, Bell Labs and IBM all have, or had, strong records of innovation using quite different management models; Reed College and the New York Times build support for independent thought into their corporate structures in quite different ways.

The point is not that we ought to impose “Fairness Doctrine” or governmental-style abstention doctrines on our largest business corporations.<sup>100</sup> It is, instead, that we have no generally accepted one-size-fits-all model for the best design for freedom enhancing institutions.

Even if we did know a “best” way to promote freedom in our enterprises, it is hard to believe that it could be found in our eighteenth century Constitution, which predates the rise of business corporations as socially significant enterprises. It is even harder to believe that

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profit or share price is a violation of duty are close to nil, absent some evidence that the “value” in question was personal profit for insiders. See, e.g., *Paramount v. Time*. Nonetheless, it is undeniable that the spirit of *Dodge v. Ford* haunts the imagination of America's businessmen. Board members regularly state, and are equally regularly told by media and other experts, that their duty is to maximize profits.

<sup>100</sup> Clearly, sometimes freeing corporate employees to dissent would enhance both freedom and corporate effectiveness. See generally ALBERT HIRSCHMANN, *EXIT, VOICE AND LOYALTY*. The problem of “yes-men” and echo chambers plagues corporate bureaucracies as much as governmental ones. Compare, *THE BEST AND THE BRIGHTEST*, with *SMARTEST GUYS IN THE ROOM*.

judges, using the backward-looking techniques of legal interpretation, have the right skills to interpret these rules out of that text, guiding us towards effective institutional design by examining the past.

Our economy is dynamic and rapidly changing. Systems that worked a generation ago don't necessarily work now; ones that seem to work today won't continue indefinitely. Thus, for example, a generation ago, a handful of great newspapers had a functioning management model that produced both funding and creative, difficult, important reporting (as well as plenty of mediocrity); that model has virtually collapsed today. Google, now, protects the independence of its engineers in creative ways; it is too soon to know if its system is sustainable or reproducible in less profitable companies. Our great universities (and most of our less great ones as well) have, for at least a century, protected academic freedom and promoted wide ranging artistic, scientific and political inquiry in part by having the university itself largely abstain from collective positions (other than a generalized commitment to quality that, usually, is enforced only at deeply decentralized levels). But the current university economic model is largely a post-World War II creation, and as national and state governments step back from their financial support of higher education, it is increasingly clear that it is going to have to change.

When the world changes rapidly and eternal verities are scarce, entrenched rules are likely to be counterproductive. The liberal ideals of personal privacy; freedom of religion, conscience, taste, inquiry and dissent; political, scientific and artistic debate; and anti-authoritarianism are constants despite the changes in our economy and politics. But the methods of furthering those ideals must adapt to changes in economic relations and organizations. Corporate rights, to the extent that we conclude that they are congruent with or further personal freedom, should be set by the same statutory process we use to create corporations and determine who runs them.

In short, courts that see corporations as citizen-like have routinely ignored the actual language of the Constitution in order to create corporate rights with no textual basis. Were courts to accept that bureaucratic business corporations are more analogous to government agencies than human individuals, they would find the same language to clearly hold the opposite

Even more troublingly than in *Deveaux*, the *Citizens United* Court makes no attempt to examine the premises of the argument. Few corporations – and no business corporations -- are membership associations; standard corporate law does not provide for members, except in some types of non-profits. In the usual case, none of the participants has the sort of control that would be necessary to impute the organization's positions to its "members." In particular, shareholders, if the corporation has them (*Citizens United* presumably does not), do not own the corporate funds at issue, did not create or contribute the funds of any successful corporation, and, at least in the case of publicly traded corporations, are often institutions themselves, not citizens (and often not American in any sense).

Moreover, corporate law makes corporate decisionmakers into fiduciaries, not elected representatives or independent actors. The law binds them to set aside their own values and interests and, instead, to exercise their own business judgment and act in the interest of the corporation as they perceive it.

Interests, of course, are not the same as values. Indeed, the two are often quite opposed, especially if "interests" means "economic interests narrowly defined" as it typically does in corporate law. Almost every human being, possibly excepting some members of the University of Chicago Economics Department, has moral, political and esthetic values that may conflict with his or her narrow economic interest as understood by a fiduciary in control of their money. Some of us might be willing to fight for justice or our country; nearly all of us are willing to sacrifice our own interests in order to punish misbehavior by others;<sup>101</sup> all is, I assume, have things we wouldn't be willing to do for money – if not torturing puppies, than raising children for food.<sup>102</sup>

The important issues of politics involve structuring the limits of markets – when interests conflict with values. We live in a society that uses markets to make many decisions – but we use politics to determine when we use markets. It is politics, not markets, that determines that the draft will be replaced by a volunteer army, and that housing but not kidneys may be sold for whatever the market will bear. It is a political

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<sup>101</sup> See, e.g., Kahneman, D., Knetsch, J.L., and Thaler, R.H. (1986b). "Fairness as a Constraint on Profit-Seeking: Entitlements in the Market." *American Economic Review*. 76, 728–741; ^ Henrich, Joseph, Robert Boyd, Samuel Bowles, Colin Camerer, Ernst Fehr, and Herbert Gintis (2004) *Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-Scale Societies*. Oxford University Press.

<sup>102</sup> Jonathan Swift, *A Modest Proposal*.

decision that food is allocated by market, but with overrides to ensure that large farmers of corn and soy make more profits than they might otherwise, that the prices of water and fertilizer and fast food do not reflect their actual social costs, that Monsanto has a guaranteed monopoly on certain GMO seeds, and that some, but not all, of our poorest fellow citizens pay somewhat less in the supermarkets. It is politics, not markets, that mandates socialized parking and socialized highways but requires mass transit systems to pay their way from fares alone.

Corporate managers, however, have their positions on these issues mandated by law. They must, regardless of their personal views, act in the interests of the corporation.

This means, first, that they are barred by law from delegating corporate decisions to shareholders or from following their perceptions of shareholder desires or values (even assuming that institutional shareholders have values).<sup>103</sup> If they are acting in conformity with the corporate law, they are acting in the interests of the corporation, not according to shareholder values, or, indeed, any human beings values. This alone, in my view, ought to disqualify corporations as First Amendment speakers: corporate managers are barred by law from spending corporate money in pursuit of anyone's values or politics.

Second, it means that they have virtually unreviewable discretion to determine what the corporation's interests are. This creates a conflict. They are obliged to act in the company's interest – not in their own interest or according to their, or any one else's, politics, morality or values. On the one hand, if they use corporate assets in violation of their fiduciary duty, they are, basically, thieves – and no theory of speech or corporate law protects thief's use of his victim's property to promote the thief's political views.<sup>104</sup> On the other, if they convince

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<sup>103</sup> See, e.g., Van Gorkum

<sup>104</sup> Actually, this isn't quite true. A number of churches have insisted that they ought to be allowed to keep tithes received from the proceeds of fraud. Sometimes they win -- that is, a court or legislature concludes that the wrongdoer has the right to make gifts of his/her victim's money.

And, of course, we all believe that time converts theft into good title: there is serious movement to disinherit the modern heirs of fortunes based on medieval conquest, slavery, now-illegal forms of ecological destruction, or computer services for the Final Solution.

Nor is the passage of time required to purify the proceeds of bad acts. It is basic to corporate law that if a publicly traded company earns money by anti-social activity – for example, selling legal but addictive and cancer-causing substances, or causing great ecological damage, or selling “financial instruments of mass de6struction” – and pays the “profits” out as dividends, the dividend recipients are entitled to keep their ill-gotten gains even if later calculations determine that the “profits” never existed, or never would have existed under proper accounting, in the first

themselves, in good faith, that any given action is in the corporate interest, they are free to use corporate assets to promote their views.

And corporate law as we know it makes this decision virtually unreviewable. Neither customers nor suppliers nor employees nor clients have any right to know, let alone influence, the decision. Thus, when the trustees of Cooper Union, in violation of the terms of the corporation's charter, expanded the institution unsustainably and spent down its endowment to cover the resulting deficits, ultimately reaching the point where they were forced, or perceived themselves as forced, to abandon the institution's fundamental commitment to free tuition, no other corporate participant had any formal say in the decisions – faculty, students, alumni, donors and the communities that depended on them lacked even a formal right to hear or be heard.

In for-profit corporations, the rules are almost the same. As General Motors resisted the inevitable demands of the market for two generations, or as HP spun through one disastrous reorganization plan after another in recent years, the ultimate decisionmakers were the companies' boards, under the influence of its top managers. Neither investors, employees, customers or the City of Detroit had any formal part in the decisionmaking process; it is simply nonsense to impute managers' decisions to them. Customers can boycott the firm, if they are not businesses with fiduciary obligations to their own customers and if the market is competitive enough; employees can quit, which, if the employment market is tight, may have an impact on the firm. But neither has a right to know the facts or the right to any internal voice in the firm.

The one enforceable restraint on managers and directors, and the only restraint on directors is the extremely limited remedy of a shareholder derivative action for breach of fiduciary duty. These actions are only of limited impact – courts are highly reluctant to second-guess director decisions absent evidence of self-dealing (and even then).<sup>105</sup> But to the extent that they are effective they only reinforce the point that a business corporation bears no similarity to a membership organization.

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place. So, too, those who sell to the anti-social wealthy are never required to inquire as to the source of the funds. Even if they do learn of the sleaze behind the scratch, they are only rarely expected to refrain from profiting themselves from the second-hand wrongdoing. See, G.B. Shaw, *Mrs. Warren's Profession*; but see, for the exception, *boycott of Nike*.

<sup>105</sup> See, e.g., *Disney Shareholder Litigation* (upholding director decision to grant extraordinarily generous contract to CEO and to terminate him on even more generous terms).

The upshot is that the Court's *Citizens United* jurisprudence is a threat to our system. Our corporate law has a single important task: to allow entrepreneurs and managers to structure organizations in a way that will permit them to create good jobs, paying decent wages, making useful products and services, without damaging the environment or endangering people or the workings of our economy.

This task is difficult, and corporate law often is not up to it.

*Citizens United* and the cases on which it builds, however, threaten to make the task impossible. Business corporations are the wrong sort of institution to have major influence on our politics. They are designed to promote one value – profit above all. But politics is, in a capitalist society, always about the limits to profit.

We use democratic means to determine when profit must give way to other values – decency, care for our fellow Americans and other people, long-term self preservation, ecological sustainability and empathy for non-human creatures, peace, beauty, and morality. We use politics, as well, to structure markets so that they lead to results we find attractive – so that selling destructive addictive substances or defrauding customers or shifting risk to the unaware is less profitable than creating useful products in safe and well-paid workplaces, or, more realistically, so that corn producers don't have to worry about the costs their runoff imposes on people and other living things downstream.

When profit-seeking institutions as effective as our major corporations enter the political sphere, this system threatens to collapse. Adam Smith warned at the very beginning of the capitalist era that "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." How much more so if, corporations are invited to enter into politics.

Their boards and managers are likely to understand their fiduciary duty to act in the interest of the company as requiring them to use corporate money to influence the law. And, unfortunately, law that allows grift, cheating, monopoly, overreaching, deception, or suppressing competitors is likely to be, or appear, highly profitable.

Even beyond the dangers of allowing institutions designed to ignore all values but profit to write the rules that limit profit to its proper sphere, business is poor training for politics. In business, employment is a cost; generally a company is better off if it can eliminate employees. But for the country as a whole, the reverse is

true: our goal is to employ as many as possible, at least as long as employment remains almost the sole basis for a decent and respectable life. Cutting wages, for a company, may increase profits; for a country, employee wages are more or less the same thing as customer demand, so cutting wages is likely to destroy demand, profits, and production alike.

For these reasons, we should take the Constitution's silence regarding corporations seriously. We created government to protect us and our fellow citizens. Corporations are tools – extraordinarily powerful tools, but like most powerful tools, potentially quite dangerous. It makes no sense to entrench rules preventing us, via our legislatures, from controlling them should we need to.

This does not mean, of course, that we should suddenly decide to deny corporations their day in court or that we should authorize unlimited NSA monitoring of every corporate communication. These are useful institutions, and we ought to respect the rules that make them useful. I see no reason to fear that we cannot do so by ordinary legislation.

Indeed, given the extraordinary influence our corporations now have on our lives, the real fear should be the reverse. I see no basis for fearing that the people will rise up in some populist rebellion, encouraging legislatures to strip corporations of the legal rights that make them useful.

Rather, the real issue is that corporate power, like all power, tends to corrupt. We have not even begun the process of bringing corporate governance into the modern era.

It is time, that is, to begin to think about when and whether we should use the concepts of separation and balance of powers in corporate governance: Do we need a democratically elected board to balance the plutocratically elected one we have now? Would some companies behave in a more socially useful way if they had ombudsmen structures to serve some of the functions of a loyal opposition in parliament or a free press outside? Are there lessons of federalism for corporate law – should we have local governance over local parts of the company, perhaps in the form of elected councils like a faculty meeting or a German workers council, and if so, with what authority? The collapse of the US union movement in the public sector eliminated our primary countervailing power to the stock market's pressures of short-

term profit and executive self-dealing; do we need to revive it or find a replacement?

We should also be considering the basic lessons we've learned since Montesquieu. Most of us have no vote for our corporate governors, and even those that own shares, vote only as representatives of invested wealth, not as consumers, producers or citizens. Even without constitutionally protected lobbying and electioneering rights, or Second Amendment rights to create private armies, our major business corporations (and, in the aggregate, the minor ones too) will remain major influences on our politics. Acemoglu and Robinson have recently reminded us of the ancient truth that elites can often profit even as they destroy the economy and the lives of those beneath them. In politics, the only effective method we've discovered for avoiding this process is democracy. Would we be better off adding some democracy to our multinational corporations as well?

Employees, during the work day, often lack the most basic rights of American citizens: Freedom of speech, due process, basic fairness are not parts of many workplaces. No employee has any expectation of privacy in his or her computer, email or desk. In the public sector, we are certain that criticism is vital to keep officials from hubristic calamity; we have seen enough foolish decisions by top managers protected from criticism to raise the issue of whether this does not apply to major companies as much as to minor government agencies. Free speech, in turn, requires some kind of tenure or civil service-like job protection, a radical change from current law.

Private corporations are free to spy on our home computer use or to use information they have gathered to interfere with our ability to get credit, rent homes or find jobs, in ways that we would never allow a government agency to do – yet the government is ultimately answerable to elections of the people, while Doubleclick and Experian are answerable to no one.

The basic message of our political tradition is clear. Power corrupts. We need to be suspicious of accumulated power even when it is working for us. Americans, remembering our history of slavery, Jim Crow and sweatshops, should be especially conscious that illegitimate and oppressive power can come from the private sector as easily as the public – and both need the help of state violence to survive.<sup>106</sup>

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<sup>106</sup> See, *Civil Rights Cases* (using public private distinction in order to maintain Jim Crow); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (limiting doctrine); Robert Cover, *Violence and the Law*.

It would be traditional, I suppose, to end this article by calling for judges to reverse the current precedents. Courts should acknowledge that major corporations belong on the state side of the state action doctrine and on the public side of the public/private divide. That, in turn, should mean that GM or Google or Experian will be treated more like the Corporation of the City of New York, or its DMV, than a citizen. We might have constitutional protections against Time-Warner's overreaching, as we do against the Town of Hempstead's.

That, however, is not my view. I think it is clear that corporations are not the right sort of thing to have most constitutional rights, and most especially not speech rights: giving any official unlimited power to spend nearly unlimited quantities of other people's money to influence politicians is contrary to all norms of good government.

I would not go to the other extreme. Our system of entrenched rights, articulated and enforced mainly by judges using the methods of legal interpretation rather than elected politicians or technocratic bureaucrats, has a mixed record. For every *Brown*, there is a *Plessy* and a *Lochner* and a *Buckley v. Valeo*; for every *New York Times v. US* (Pentagon Papers) there is a *Schenck* and a ruling asserting that we may not require our utility companies to encourage conservation.<sup>107</sup>

Moreover, the rights in question are rarely timeless. While rights are often thought of as abstract principles applicable without regard to context, generally they are more properly specific examples of a general commitment to the notion that government is for all the people and the national good includes the good of all the people. In the corporate sphere, even more, the most important point is to change our understanding of corporations as essentially exploitative – to commit to the principle that the good of the corporation means the good of the people who participate in it or depend on it, just as the good of the state is the good of its citizens.

Thus, employees are not a cost but one of the points. But this does not mean that employees ought to have property rights in their jobs, as Charles Reich famously proposed,<sup>108</sup> or citizen-like rights to continued membership in the firm.<sup>109</sup> Far better would be a system that reduced

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<sup>107</sup> *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1 (1986).

<sup>108</sup> Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>109</sup> See, *Trop v. Dulles*, 356 U.S. 86 (1958) (holding loss of citizenship to be an unconstitutionally cruel punishment because it is the "total destruction of the individual's status in organized society").

the cost of losing a job by, for example, countercyclical measures designed to guarantee a full employment economy and separating employment from essential social services that are currently (in the US) tied to it, such as medical care, union membership and retirement pensions. Given those background rules, the inflexibility of property would be far less attractive than, for example, replacing the agency law presumption of employment-at-will with a rule requiring that termination be based on articulated grounds in good faith.

What we need, that is, is a genuine political debate – in the press and the blogs and the legislatures, not the courts – to apply the well-understood lessons of liberal republican government to the remaining frontier. To take back our largest companies from the officials who control them – both in the boardroom and on the trading floors – and to turn them to public service instead of the enrichment of an ever-shrinking few, will take new norms and new ideas and new laws. But that is our mission. The survival of the middle class may depend on it.

#### APPENDIX: THE BUSINESS CORPORATION'S CONSTITUTION

(cases are illustrative, not exhaustive; many of the Bill of Rights cases were formally decided under the XIV Amendment Due Process clauses, in some cases before that clause was held to have incorporated the relevant Bill of Rights doctrine)

Article 1, Sec 10: Contracts clause	Dartmouth College v. Woodward, 17 U.S. 518 (4 Wheat.) (1819) (corporate charter is a contract under the Clause)
Article 1, Sec 10: Ex poste facto clause	Waters-Pierce Co. v. Texas, 212 U.S. 86, 108 (1909) (assuming without discussion that a corporation may invoke protection of clause)
Diversity jurisdiction	Louisville, Cincinnati & Charleston R Co. v. Leston 43 U.S. (2 How.) 497 (1844) (corporation may assert diversity jurisdiction as if it were a citizen of state of incorporation)
Citizenship	Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (corporation is

	not a citizen for Article IV purposes, so states need not give effect to charter from another state); Paul v. Virginia, 75 U.S. (9 Wall) 168 (1868) (only natural persons are citizens)
Commerce Clause - Internal Affairs Doctrine	Edgar v. MITE Corp., 457 U.S. 624 (1982) at 643, 646 (Illinois law regulating national tender offer is an undue burden on interstate commerce because "Illinois has no interest in regulating the internal affairs of foreign corporations" [it is unclear if this statement should be taken at face value, since the Court implies that headquarters in Illinois might be sufficient, and does not address the issue of whether other economic contacts with Illinois would be sufficient]."
First Amendment - Political lobbying and electioneering	First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (constitutional right to spend corporate funds to influence referendum); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980) (constitutional right to spend ratepayer funds to influence customers on matters of major political concern); Citizens United (constitutional right to spend corporate funds in "independent" expenditures to influence election).
First Amendment – libel	New York Times Co. v. Sullivan (creating First Amendment defenses to libel claim against corporate newspaper publisher)
First Amendment – national	New York Times Co. v. United

security	States, 403 U.S. 713 (1971) (limiting prior restraint in connection with publication of Pentagon Papers); United States of America v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (limiting prior restraint in connection with publication of "atom bomb secret")
First Amendment - commercial speech (advertising/laissez-faire)	Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980); 44 Liquormart, Inc. v. Rhode Island (1996) (all creating First Amendment limitations on regulation of corporate advertising as a means to regulate market)
First Amendment – coerced speech/right of corporate publisher to refuse to publish	Pacific Gas & Electric v. Public Utilities Commission, 475 U.S. 1 (1986); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (creating corporate right to refuse to publish advertisements or opinions with which corporate management disagrees). <i>But see</i> , Securities Act of 1933 (implementing extensive program of required disclosures); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding Fairness Doctrine for broadcast media).
First Amendment – obscenity (corporate publisher representing authors or readers)	Bantam Books, Inc. v. Sullivan, 372 U. S. 58 (1963) (allowing publisher to sue to overturn book censorship); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (upholding film censorship against

	challenge by corporation)
First Amendment – Religion	Hobby Lobby Stores Inc. v. Sebelius, -- F. 3d – (10th Cir. 2013) (creating corporate right to exercise religion and holding it violated by provision requiring corporation to pay for medical insurance including coverage that offends corporate managers' religious sensibilities); Gilardi v. HHS (D.C. Cir. 2014)(holding that closely held corporation has no religious freedom rights, but that its shareholders' rights are invaded by requirement that it fund insurance; in the opinion of the deciding judge, the corporation's decision to elect pass through taxation is critical). <i>Contra</i> , see, Conestoga Wood Specialties Corp. v. Secretary of HHS, -- F.3d – (3d Cir. 2013) (rejecting notion that a business corporation has religion or that piercing corporate veil to reach shareholders is appropriate); Autocam v. Sebelius (6 <sup>th</sup> Cir. 2013) (holding that shareholder has no standing to assert corporate claims and that corporation cannot exercise religion under RFRA rather than First Amendment); Eden Foods v. Sebelius (6th Cir. 2013) (following Autocam)
First Amendment – Right to petition	California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)
Second Amendment – Arms	Not decided; many states still have anti-Pinkerton provisions

Third Amendment -	Not decided
Fourth Amendment	Gulf, Colo. & S.F. Ry. v. Ellis, 165 U.S. 150, 154 (1897) (4th Amendment searches and seizures -- individuals are the equitable owners of corp. ppty; therefore corporation has individual rights); FTC v. American Tobacco Co., 264 U.S. 298 (1924) (papers; fewer rights than individuals); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (limiting 4th Amendment: subpoena for corporate documents); U.S. v. Morton Salt Co., 338 U.S. 632, 652 (1950) (limiting 4th Amendment rights - overturning <i>American Tobacco &amp; Hale</i> , on ground that corporations don't have same privacy rights as individuals); Colonnade Catering Corp v. U.S., 397 U.S. 72 (1969) (liquor industry not subject to limits on regulatory searches); G.M. Leasing Corp. v. U.S., 429 U.S. 338 (1976) (4th Amendment warrant required to "invade" corporate offices)
Fifth Amendment – due process	Noble v. Union River Logging RR, 147 U.S. 165 (1893) (First Supreme Court decision granting Corporation protection under Bill of Rights)
Fifth Amendment – self-incrimination is personal right not applicable to corporations	Hale v. Henkel, 201 U.S. 43 (1906) (no privilege against self incrimination); Wilson v. United States, 221 U.S. 361, 382-4 (1911) (corporation's books not protected by 5A self incrimination)
Fifth Amendment – takings clause	Pennsylvania Coal Co. v. Mahon,

	260 U.S. 393 (1922). In the modern era, "takings" has become a key doctrinal vehicle for laissez-faire/Lochnerism.
Fifth Amendment – double jeopardy	Fong Foo v. U.S., 369 U.S. 141 (1962) (origin of the corporation's rights under double jeopardy clause - no reasoning); U.S. v. Martin Linen Supply Co., 430 U.S. 564 (1977) (applying rationale based on natural persons to give corporation 5th Amendment double jeopardy rights; total reification of corporation, referred to as "him": purpose of 5 A. is to protect from "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"). No explanation of why this is different from self incrimination rights denied to corporations under US v. White.
Sixth Amendment – right to jury in criminal trial	Armour Packing Co. v. U.S., 206 U.S. 56 (1908)
Seventh Amendment – civil jury	Ross v. Bernhard, 396 U.S. 531 (1960) (dicta)
Eighth Amendment – excessive fines	Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111-112 (1909) (upholding fine as not so excessive as to amount to a deprivation of property without due process of law under XIV Amendment); cf. State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003) (holding large punitive damages award a violation of due process)
Fourteenth Amendment -	Pembina Consolidated Silver

Privileges and Immunities not applicable to corporations	Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888) (unprotected)
Fourteenth Amendment – Liberty	Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906) (No 14th Amendment liberty); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (no liberty interests, but property interests are protected); Grosjean v. American Press Co., 297 U.S. 233 (1936) (first case granting a corporation liberty – speech – rights rather than simply property rights); Shelly v. Kramer, 334 U.S. 1, 22 (1948) ("the rights created by the first section of the 14 A are ... personal rights)
Fourteenth Amendment – Equal protection	Santa Clara County v. Southern Pacific RR, 118 U.S. 394 (1886); The Railroad Tax Cases, 13 F. 722 (C.C.D. Cal. 1882), appeal dismissed as moot, San Mateo County v. Southern Pac. R.R., 116 U.S. 138 (1885) (reasoning in support of equal protection: if people have this protection why do they lose it the "moment the person becomes a member of a corporation"--looking through the corporation)
Fourteenth Amendment – Due process – freedom of contract	Allgeyer v Louisiana, 165 U.S. 578 (1897)("the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or

	avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”)
Fourteenth Amendment – Punitive damages	State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003)
Fourteenth Amendment – privacy	California Banker v. Schultz, 416 U.S. 21 (1974) (limiting Corp right of privacy); Dow Chemical Corp. v. U.S., 476 U.S. 277 (1986) (A reification case. Challenge to airplane surveillance -- right to privacy found under 4th A. search and seizure because "Dow plainly has a reasonable, legitimate and objective expectation of privacy"); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-466 (1958) (issue advocacy organization may assert rights of members to have their identities remain secret).
Fourteenth Amendment – “privacy” (of marital and personal relationships)	Roberts v. US Jaycees, 468 U.S. 609, 632 (1984) (personal rights of privacy and relationships do not encompass large unincorporated organization)
Fourteenth Amendment – State action (corporations not state)	Dartmouth v. Woodward, supra; Civil Rights Cases, 109 U.S. 3 (1883) (invalidating Civil Rights Act of 1875); Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 376-77 (1995) (Court, not Congress, decides if governmental corporation is state for purposes of state action

	doctrine – holding that Amtrak is state)
Fourteenth Amendment – Freedom of associate (including to freedom of leaders to discriminate)	<p>Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston (1995); Boy Scouts of America v. Dale (2000); Roberts v. US Jaycees, 468 U.S. 609, 620 (1984) (“the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees. Compare Loving v. Virginia, 388 U.S. 1, 12 (1967), with Railway Mail Assn. v. Corsi, 326 U.S. 88, 93 -94 (1945).”) (unincorporated associations, not-for-profits).</p> <p>Bell v. Maryland, 378 U.S. 226, 331 (1964) (Douglas, concurring: corporation lacks human being's right of freedom of association), (Black, dissenting: use of trespass laws to enforce Jim Crow in corporate-owned restaurant is not state action because “Hooper's [sic –Hooper is the CEO of the corporate restaurant owner] federal right must be cut down and he [sic!] must be compelled - though no statute said he must - to allow people to force their way into his [sic!] restaurant and remain there over his protest”; XIV Amendment “does not compel either a black man or a white man (sic!) running his own private business to trade with anyone else</p>

	against his will.”
Federalism (out of state contracts)	Allgeyer, <i>supra</i> .
Corporate rights more limited than personal	<i>Berea College v. Kentucky</i> , 211 U.S. 45 (1908) (corporation may be forced to segregate)
Asserting rights of (actual) members (incorporated non-profit associations with an ideological focus)	<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415, 431 (1963); <i>N.A.A.C.P. v. Alabama</i> , 357 U.S. 449, 357 U.S. 462 (1958) (membership lists); <i>Sierra Club</i> . Cf. cases involving religious rights of religious corporations, e.g., <i>Amos v. LDS Church</i> .
Asserting rights of fictional shareholders	<i>Bank of the United States v. Deveaux</i> , 9 U.S. 61 (1809); <i>First National Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978);
Fourteenth Amendment use of “person”	<i>Santa Clara</i> ; Allgeyer (liberty right to enter into contracts)
Rights-bearing individual without regard to internal politics / reification	<i>U.S. v. Martin Linen Supply Co.</i> , 430 U.S. 564 (1977) (applying rationale based on natural persons to give corporation 5th Amendment double jeopardy rights; purpose of 5 A. is to protect “him” from “embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity”); <i>Bell v. Maryland</i> , 378 U.S. 226 (1964) at 331, 343 (Black, dissenting)(repeatedly referring to corporation by name of its CEO and conflating personal prejudices with corporation)
Taking corporate form seriously; questioning <i>Santa Clara</i>	<i>Connecticut Gen. Life Ins. Co. v. Johnson</i> , 303 U.S. 77, 83-90 (1938) (Black, J., dissenting) ( <i>Santa Clara</i> wrong; corporations not persons); <i>Wheeling Steel Corp. v. Glander</i> ,

	<p>337 U.S. 562, 576-81, 579 (1949) (Douglas, J., dissenting) (Santa Clara wrong; corporations have no rights); Bell v. Maryland, 378 U.S. 226, 264 (1964) (Douglas, concurring: "Affirmance would make corporate management the arbiter of one of the deepest conflicts in our society: corporate management could then enlist the aid of state police, state prosecutors, and state courts to force apartheid on the community they served, if apartheid best suited the corporate need; or, if its profits would be better served by lowering the barriers of segregation, it could do so.")</p>
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