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(MIS)CONCEPTIONS OF THE CORPORATION

Reza Dibadj*

ABSTRACT

Common conceptions of the corporation are wrong. Contrary to contemporary jurisprudence, a corporation—a piece of paper that is given legal legitimacy by a state—is not a person worthy of constitutional rights. A corporation, as a legislative creature, should only enjoy those rights bestowed upon it by its creator.

This Article is structured into three principal sections. Part I argues that the only appropriate theoretical construct with which to conceptualize a corporation is one that posits that the corporation is an artificial creation of the state. First, it outlines three competing theories—artificial, associational, and real entity—as well as the apparently increasingly popular notion that theory simply does not matter. It argues that as Supreme Court precedent evolved, it became sadly muddled and that today the Court has essentially given up on theorizing the corporation. Second, it argues for the artificial entity theory on the bases of common sense, constitutional history, and the continuing role of the state in chartering corporations.

Why has the artificial entity theory fallen deeply out of favor? Part II, which explores the political economy of corporate theory, argues that instrumental reasons explain the decline of artificial entity theory: anti-regulatory fervor and a desire to privilege a managerial class. Next, it addresses some concerns that might emerge to my conceptualization; notably, that not offering constitutional rights to corporations is too stark and reductionist an approach, as well as the notion that such a restrictive conception of corporate personhood might jeopardize attempts to find corporations liable under criminal or international law.

Finally, Part III discusses whether the law has been headed in precisely the wrong direction: rather than asking whether

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corporations deserve constitutional rights, should the real question be whether constitutional rights should be asserted *against* corporations?

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> The emperor marched in the procession under the beautiful canopy, and all who saw him in the street and out of the windows exclaimed: "Indeed, the emperor's new suit is incomparable! What a long train he has! How well it fits him!" Nobody wished to let others know he saw nothing, for then he would have been unfit for his office or too stupid. Never emperor's clothes were more admired. "But he has nothing on at all," said a little child at last.[1]

INTRODUCTION

Common conceptions of the corporation are wrong. Contrary to contemporary jurisprudence, a corporation—a piece of paper that is given legal legitimacy by a state—is not a person worthy of constitutional rights. On the one hand, this argument may appear so banal that it seems absurd to devote an entire law review article to it; on the other, no matter how simple and intuitive this point of view might be, I am fighting a discouraging uphill battle. The opposing point of view—namely, that corporations are worthy of constitutional protection—is so entrenched that all I can do is expose its fallacies and offer a small hope for future reform.

In an area of law that has become unnecessarily muddled, I argue for simplicity and intellectual consistency.[2] My thesis is simple: a corporation, as a legislative creature, should only enjoy those rights bestowed upon it by its creator.

The argument is structured into three principal sections. Part I argues that the only appropriate theoretical construct for conceptualizing a corporation is one that posits that the corporation is an artificial creation of the state.[3] First, it outlines three competing theories—artificial, associational, and real entity—as well as the

1. Hans Christian Andersen, *The Emperor's New Suit*, HCA.GILEAD.ORG.IL (Dec. 13, 2007, 8:45 PM), http://hca.gilead.org.il/emperor.html.

2. *Cf.* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1747 (2001) [hereinafter *Legal Fiction*] (lamenting "the theoretical unmooring and doctrinal disarray of the American law of persons").

3. *See* discussion *infra* Part I.

apparently increasingly popular notion that theory simply does not matter.[4] It argues that as Supreme Court precedent evolved, it became sadly muddled and that today the Court has essentially given up on theorizing the corporation.[5] Second, it argues for the artificial entity theory on the bases of common sense, constitutional history, and the continuing role of the state in chartering corporations.[6]

Part II delves into the political economy of corporate theory. If, as Part I argues, the artificial theory makes so much sense, then why has it fallen deeply out of favor? Part II argues that instrumental reasons explain the decline of artificial entity theory: anti-regulatory fervor and a desire to privilege a managerial class. Next, I address some concerns that might emerge from my conceptualization: notably, that not offering constitutional rights to corporations is too stark and reductionist an approach as well as the notion that such a restrictive conception of corporate personhood might jeopardize attempts to find corporations liable under criminal or international law.[7] Finally, Part III addresses whether the law has been headed in precisely the wrong direction: rather than asking whether corporations deserve constitutional rights, should the real question be whether constitutional rights should be asserted *against* corporations?[8]

One point cannot be overemphasized before beginning: my argument is not that either corporations or corporate insiders are somehow inherently bad; it is merely that recent constitutional jurisprudence has given too much power to corporations and those who run them in a way that might be detrimental to the broader interests of society.[9]

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4. *See* discussion *infra* Part I.
5. *See* discussion *infra* Part I.
6. *See* discussion *infra* Part I.
7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part III.
9. *Cf.* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 129 (Edwin Cannan ed., Random House, Inc. 1937) (1776) ("The pretence that corporations are necessary for the better government of the trade, is without any foundation.").

I. TOWARD A THEORY OF THE CORPORATION

CORPORATE ENTITY
The Oklahoma Ligno and Lithograph Co
Of Maine doing business in Delaware Tennessee
Missouri Montana Ohio and Idaho
With a corporate existence distinct from that of the
Secretary Treasurer President Directors or
Majority stockholder being empowered to acquire
As principal agent trustee licensee licensor
Any or all in part or in parts or entire
Etchings impressions engravings engravures prints
Paintings oil-paintings canvases portraits vignettes
Tableaux ceramics relievos insculptures tints
Art-treasures or masterpieces complete or in sets
The Oklahoma Ligno and Lithograph Co
Weeps at a nude by Michael Angelo.
— Archibald MacLeish[10]

There are three competing conceptions of the corporation: the artificial entity theory, the associational theory, and the real entity theory. Additionally, there is the view that theory does not matter. First, I outline each of these four perspectives and highlight examples from Supreme Court jurisprudence. Next, I argue—contrary to current conventional wisdom—that the only coherent conceptualization of the corporation is the artificial entity theory.

A. Competing Conceptions

The original theory of the corporation was the artificial entity theory where the corporation is "regarded as an 'artificial being' created by the state with powers strictly limited by its charter of incorporation."[11] Most importantly for our purposes, "[u]nder this

10. Archibald MacLeish, *Apologia*, 85 HARV. L. REV. 1505, 1507 (1972).
11. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985); *see also id.* at 184 ("The traditional conception, derived from the ante-bellum

view, corporations cannot assert constitutional rights against the state, their creator."[12] Courts have occasionally used this theory[13] in older cases, but it is currently out of vogue.[14] For instance, in *Bank of Augusta*, the Supreme Court relied on the theory to deny corporations citizenship under the Article IV Privileges and Immunities Clause.[15]

The second theory sees the corporation as an aggregate or association of the shareholders comprising it.[16] Through this metaphor, rights that individuals qua individuals might have are magically transferred to the corporation:[17] to the extent the aggregate theory emphasizes shareholders and not the state it provides a conceptual framework with which to oppose governmental regulation.[18]

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grant theory, as well as older English corporation law, characterized the corporation as 'an artificial entity created by positive law.'").

12. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580 (1990); *see also* Daniel Lipton, Note, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1915 (2010) ("Artificial entity theory viewed the corporation as nothing more than a creature of the law, whose rights consisted only of those conferred by the state."); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1455 (1992) ("The artificial entity theory holds that the corporation is a creature of state law, and that the state may deny liberty rights to its legal creation.").

13. *See Legal Fiction*, *supra* note 2, at 1752 ("In some cases, courts have emphasized the artificiality of corporations, holding that rights that inhere in humans as humans may not be extended to nonhuman entities; the assumption that legal personhood derives primarily from humanness has clearly animated this approach.").

14. The classic and oft-quoted articulation of artificial entity theory derives from Justice Marshall's famous opinion in *Dartmouth College* where he stated that a corporation "is an artificial being, invisible, intangible, . . . possess[ing] only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

15. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 586–88 (1839).

16. *See, e.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1641 (2011) ("[T]he 'aggregate' theory, looked through the corporate form to the individuals behind it. This view regarded the corporation as a collection of its individual members, the shareholders."); Reuven S. Avi-Yonah, *To Be or Not to Be?* Citizens United *and the Corporate Form* 1 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 184, 2010), *available at* http://ssrn.com/abstract=1546087 (commenting on "the aggregate theory, which views the corporation as an aggregate of its members or shareholders").

17. *See Legal Fiction*, *supra* note 2, at 1753 ("Alternatively, courts have emphasized the human individuals that constitute the corporation, deploying the corporate personhood metaphor as a means of protecting those individuals' rights."); Rivard, *supra* note 12, at 1455–56 ("The aggregate entity theory holds that natural persons within the corporation justify granting liberty rights to a corporation, to protect the rights of natural persons within it.").

18. *See* David Millon, *The Ambiguous Significance of Corporate Personhood* 4 (Washington & Lee Pub. Law & Legal Theory Research Paper Series, Working Paper No. 01-6, 2001), *available at*

Two interesting points are worth noting with regard to the aggregate theory. First, the corporate lawyers espousing this theory did so by claiming an analogy to partnership and contract.[19] As Morton Horwitz notes, "[i]n reaction to the grant [artificial entity] theory, some legal writers during the 1880s began to put forth a polar opposite conception of the corporation as a creature of free contract among individual shareholders, no different, in effect, from a partnership."[20] While early theorists emphasized the partnership analogy, the more recent focus—as epitomized by modern contractualists—is to argue that corporations are merely "a set of contracts created through private ordering that should be protected from government interference."[21] As leading contractual theorist Larry Ribstein puts it, "[t]he corporate contract theory . . . characterizes corporations like any other contracts. Under this theory, any government regulation that constrains the exercise of constitutional rights would have to be justified to the same extent as it would with respect to other types of contracts."[22]

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http://ssrn.com/abstract=264141 ("Opponents of governmental regulation of the corporation relied on the aggregate characterization. . . . The aggregate theory challenged the older notion that the corporation was an entity or person created by the state.").

19. In the words of one commentator:

> Faced with public hostility towards large business and a crippled legal conception of the corporate form, some members of the corporate bar put forward a modification of the fictive person formula of the corporation during the 1880s. These attorneys hoped to expand the rights of corporations while preserving their structural organization by suggesting that the proper way to think of corporations was that they were similar to partnerships.

Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1457 (1987).

20. Horwitz, *supra* note 11, at 184; *see also* Pollman, *supra* note 16, at 1641 ("The [aggregate] theory had roots in a view of the corporation as a partnership or contract among the shareholders.").

21. Pollman, *supra* note 16, at 1666; *see also id.* at 1667 ("[T]he contract view has been characterized as simply a reinvention of the aggregate theory representing the opposite pole in a debate with the classic concession theory."); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 83 (2005) ("[I]ndividualists advocated a contractual theory, which built on and refined the aggregate entity theory.").

22. Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 109 (1995).

Second, the original emphasis of the associational theory was on protecting the property rights of shareholders.[23] As Herbert Hovenkamp observes in his analysis of *Santa Clara*:

> The constitutional doctrine of "personhood" was the Supreme Court's solution to two problems. The first problem was guaranteeing that the owners of property held in the name of a corporation would receive the same constitutional protections as the owners of property held in their own name. The second problem, which lies below the surface, was how to assign the power to assert constitutional rights in corporately held property.[24]

In sum, the idea is that since the property interests of the corporation can be traced back to the shareholders, the corporation should be able to assert those rights.[25] This traceability rationale has been extended and applied, most notably and controversially, to speech; in other words, the corporation's right to speak is justified based on the fact that the corporation represents an association of individuals.[26]

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23. *See, e.g.*, Mark, *supra* note 19, at 1458 ("Having grounded the protection of corporate property in the rights of the shareholders, the treatise writers also moved to establish the legitimacy of the corporate structure on non-legal foundations.").

24. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1641 (1988); *see also id.* at 1643 ("The best explanation of *Santa Clara* is that by 1886 both state and federal courts agreed that, in most cases, the corporation, rather than its shareholders, must be the named party to the corporation's litigation."). *Cf.* Millon, *supra* note 18, at 17 ("The property rights argument, which had its roots in old ideas about the ownership of business organizations, therefore supported the view that shareholders, among all the constituencies interested in a corporation's behavior, should hold a place of primacy.").

25. As Hovenkamp describes it:

> The Court might have chosen another route for giving what little fourteenth amendment protection existed to private property owned by corporations. It might have said that the corporation represents the constitutional property rights of its shareholders. But that would have left the Court in a quagmire concerning one person's right to assert the constitutional claims of another. Worse, it might have opened the door to shareholder participation in constitutional litigation involving the corporation, since the shareholders' rights were at stake.

Hovenkamp, *supra* note 24, at 1643.

26. *See, e.g.*, Randall P. Bezanson, *No Middle Ground? Reflections on the* Citizens United *Decision*, 96 IOWA L. REV. 649, 663 (2011) ("The central distinction is between collective speech that can be traced to individuals' intentions and that which cannot, between speech protected as function of the individual speaker's liberty and speech that cannot be justified in the name of liberty."); Charles R.

Most crucially, careful scholars suggest that the associational theory—undergirded by property rights—explains the stunningly sweeping grant of constitutional rights bestowed upon corporations in the headnote of the Supreme Court's 1886 *Santa Clara* opinion, which asserted that "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does."[27] To be sure, the headnote is deeply troubling in simply concluding, without any analysis whatever, that corporations should be granted protections under the Fourteenth Amendment.[28] Thus, *Santa Clara* has been quite powerfully and correctly criticized.[29] As Morton Horwitz's careful historical analysis suggests, however, the Court's conclusory statement was most likely predicated on the associational theory—more specifically, protecting the property rights of the corporation's constituent shareholders:

> In *Santa Clara* a "natural entity" theory was unnecessary for the immediate task of constitutionalizing corporate property rights. *An "aggregate" or "partnership" or "contractual" vision of the corporation . . . was sufficient to focus the*

O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1366 (1979) ("Under the associational rationale, however, when individuals with a desire to express their common views exercise their freedom of expression through the medium of a corporation and its agents, the corporation may assert that the expression is protected under the first amendment.").

27. Cnty. of Santa Clara v. S. Pac. R. Co., 118 U.S. 394, 396 (1886).

28. *See, e.g.*, Krannich, *supra* note 21, at 78 ("*Santa Clara* may be viewed as the watershed case for corporate constitutional rights, for by holding that a corporation is a constitutional 'person' under the Fourteenth Amendment, it provided the foundation for all corporate constitutional rights.").

29. As Charles Reich laments:

> In 1886, the U.S. Supreme Court made a major and radical change in the nation's charter. The Court held that corporations were "persons" entitled to certain of the rights and protections given to individuals by the Constitution and the Bill of Rights. This decision, which was reached by a Court that did not even hear argument on the issue and cited no basis for its "interpretation," was revolutionary . . . .

CHARLES A. REICH, OPPOSING THE SYSTEM 142 (1995) (citation omitted); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting) ("This Court decided at an early date, with neither argument nor discussion, that a business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment." (citing *Santa Clara*, 118 U.S. at 409)); Krannich, *supra* note 21, at 93 ("This lack of reasoning and analysis is troubling given that *Santa Clara* has proven to be a fountainhead for all other corporate constitutional rights. This suggests a foundational issue for later adjudications of corporate personhood.").

> *conceptual emphasis on the property rights of shareholders.* Either a partnership or natural entity view could equally successfully have subverted the dominant "artificial entity" view of the corporation as a creature of the state.[30]

Similarly, Herbert Hovenkamp suggests that "[a]t bottom, the corporate personhood doctrine of *Santa Clara* represented an efficient way for the corporation to assert the property rights of its shareholders."[31] Some observers suggest that the headnote was essentially taken from Justice Field's opinion in *The Railroad Tax Cases*, which espoused an associational theory of the corporation with an ostensible focus on property rights.[32] There, Justice Field asserted that corporations "have never been considered citizens for any other purpose than the protection of the property rights of the corporators."[33] By contrast, the "prohibition against the deprivation of life and liberty in the . . . [F]ifth [A]mendment does not apply to corporations, because . . . the lives and liberties of the individual corporators are not the life and liberty of the corporation."[34]

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30. Horwitz, *supra* note 11, at 223 (emphasis added); *see also* Lipton, *supra* note 12, at 1942 ("So, when Justice Morrison Waite declared in one short paragraph in *Santa Clara County* that the Justices would not entertain the question of whether the Fourteenth Amendment afforded protections to corporations as persons, he was relying upon the established proposition that corporate property was to be treated no differently than individual property.").

31. Hovenkamp, *supra* note 24, at 1649. *Cf.* Lipton, *supra* note 12, at 1935 ("The courts viewed corporate personhood as an extension of property interests."); Mark, *supra* note 19, at 1464 ("Because court reporters, even Supreme Court reporters, are not sources of doctrine, it is impossible to assume that the court meant to do anything more than accept the argument that corporate property was protected as property of the corporators, no matter what uses the Court's announcement was put to in later cases.").

32. *See* Cnty. of San Mateo v S. Pac. R. Co. (The Railroad Tax Cases), 13 F. 722, 744 (Field, Circuit Justice, C.C.D. Cal 1882) ("It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. . . . [W]henever a provision of the constitution, or of a law, guaranties to persons the enjoyment of property, or affords to them means for its protection . . . the benefits of the provision extend to corporations . . . ."). *Cf.* Mark, *supra* note 19, at 1463 ("The evidence suggests that Conkling [the lawyer representing the railroads] and Justice Field, the likeliest sources for a new vision of the corporation in *Santa Clara*, could not have had in mind anything but the partnership analogy that they had espoused in *The Railroad Tax Cases*.").

33. *The Railroad Tax Cases*, 13 F. at 747; *see also* O'Kelley, *supra* note 26, at 1362 ("If a constitutional right to protect property or business would be available to a natural person, then, under the Field rationale, the Court has consistently held that the right is equally available to a corporation for the protection of its property.").

34. *The Railroad Tax Cases*, 13 F. at 747.

Subsequent Supreme Court cases revealed ambivalence in vacillating between the associational and artificial entity theory. For instance, two years after *Santa Clara*, in *Pembina*, the Court relied on the artificial entity theory in refusing to recognize corporations as "citizens" under the Privileges and Immunities Clause[35]—yet it relied on the associational theory to grant corporations Equal Protection and Due Process rights.[36] Similarly, in the 1906 case of *Hale v. Henkel*, the Court used the artificial entity theory to hold that corporations do not enjoy rights against self-incrimination under the Fifth Amendment,[37] while using the associational theory to give corporations protections against unreasonable searches and seizures under the Fourth Amendment.[38] Though no longer prominent in constitutional discourse, the associational theory occasionally reappears in newer cases when granting corporations constitutional rights. Perhaps most notably, the majority in *Citizens United* conceptualizes corporations as "associations of citizens,"[39] as does Justice Scalia in his concurrence.[40]

The third theory, as audacious as it is oddly popular, is to treat the corporation as a real entity. As strange as it might appear, this theory "posited that the corporation was a naturally occurring being, independent of the law and separate from its individual shareholders. The corporation, according to this theory, possessed both free will

35. Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 187 (1888) ("Nor does the clause of the constitution declaring that the 'citizens of each state shall be entitled to all privileges and immunities of citizens in the several states' have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause.").

36. *Id.* at 189 ("Under the designation of 'person' there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution.").

37. Hale v. Henkel, 201 U.S. 43, 74 (1906) ("[T]he corporation is a creature of the state . . . presumed to be incorporated for the benefit of the public.").

38. *Id.* at 76 ("[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity").

39. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, ___, 130 S. Ct. 876, 904 (2010); *see also id.* at ___, 130 S. Ct. at 904 ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.").

40. *Id.* at ___, 130 S. Ct. at 928 (Scalia, J., concurring) ("All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*.").

and morality and could claim and assert rights, as would a natural person."[41] An anthropomorphized corporation, in turn, becomes an entity increasingly worthy of legal protection.[42]

The natural entity theory emerged in the late nineteenth and early twentieth centuries.[43] While some scholars suggest that the Supreme Court used the natural entity theory as early as 1886 in *Santa Clara*,[44] its first clear articulation was arguably in the 1910 case *Southern Railway v. Greene*.[45] At one level, one can correctly note that this historical period coincided with the advent of general incorporation statutes, which conveniently deemphasized the role of the state.[46] But the underlying story is driven by the separation of ownership and control. As David Millon suggests:

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41. Lipton, *supra* note 12, at 1915; *see also* Pollman, *supra* note 16, at 1641–42 ("Also known as the natural entity or person theory, this view regarded the corporation as a real entity with a separate existence from its shareholders and from the state."); Rivard, *supra* note 12, at 1461 ("[T]he real entity theory holds that the corporation is like a 'natural person.'").

42. *See, e.g.*, Mayer, *supra* note 12, at 581 ("The 'artificial entity' theory was invoked to deny corporations constitutional protection; the 'natural entity' theory was used to accord them safeguards."); *Legal Fiction*, *supra* note 2, at 1753–54 ("This [natural entity] theory provides the most robust version of corporate personhood, and courts invoke it when attempting to extend to corporations the full panoply of legal rights. Though it requires a rather extreme anthropomorphization of corporations, this approach has found increasing favor with courts.").

43. *See, e.g.*, Horwitz, *supra* note 11, at 185 ("A third theory which emerged during the 1890s also sought to represent the corporation as private, yet neither as 'artificial,' 'fictional,' nor as a creature of the state."). For an early defense of the natural entity theory, see Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253 (1911).

44. *See* Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1257 (1999) ("The Waite Court more or less formally adopted the natural entity view of the corporation in *Santa Clara County v. Southern Pacific Railroad* in 1886."). *But see* Horwitz, *supra* note 11, at 223 ("The *Santa Clara* case did not represent the triumph of a 'natural entity' theory of the corporation.").

45. 216 U.S. 400 (1910). As one commentator suggests:

> The Court quoted *Pembina* for the proposition that a corporation is a "person," but omitted the portion of the *Pembina* opinion stating that corporations were "merely associations of individuals." By doing so, the Court implicitly adopted the emerging theory of the corporate entity as a real person, entitled to the same rights as individuals.

Krannich, *supra* note 21, at 94.

46. *See, e.g.*, Avi-Yonah, *supra* note 16, at 10 (noting that with the move to general incorporation statutes, "the artificial entity theory, under which the corporation derives its powers from the state, lost most of its appeal, since the state was only vestigially involved in creating corporations. Instead, corporations were viewed as separate from both their shareholders and the state, and the real entity view reigned supreme"). With general incorporation statutes, incorporation no longer required a special act of the legislature. *See, e.g.*, Mark, *supra* note 19, at 1453 ("In a remarkable innovation in political economy, the Jacksonians sought to foster legislative purity as well as restore equality when they demanded and ultimately won universal access to the corporate form, with restrictions on the power of the legislature to grant special perquisites.").

> Growth in enterprise size required capital accumulation, which, in turn, meant increasingly wide dispersal of share ownership and relatively small individual holdings. This development also called for new managerial expertise and a professional class of corporate managers emerged to meet that need. In this process, shareholders saw their status transformed from active entrepreneurs to passive investors whose fortunes depended on the efforts of others.[47]

Crucially, as Millon points out, "if . . . the corporation was a separate entity in its own right, rather than merely an aggregation of people, a new governance structure and limited liability for the owners could replace old doctrines of partnership law that stood in the way of capital formation and professional management."[48] Unlike the aggregate theory, which revolves around shareholders, the real entity theory effectively deemphasizes these principals to the benefit of management.[49]

While the real entity theory may legitimate managerial capitalism, it also represents a historical change[50] that is theoretically troublesome.[51] It even treats us to oxymoronic rhetoric that appears absurd: as if by magic, an artificial entity becomes "real."[52] Corporations even have human feelings. For example, in granting

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47. Millon, *supra* note 18, at 8.

48. *Id.* at 6. *Cf.* Horwitz, *supra* note 11, at 185 ("The 'aggregate' or contractual view of the corporation seemed capable of restricting corporate privileges and, in particular, the rule of limited liability.").

49. *See, e.g.*, Mark, *supra* note 19, at 1472 ("The reality of the corporation apart from its members was becoming clearer as the relationship of the shareholders to the operations of the business became increasingly distant."); Rivard, *supra* note 12, at 1460 ("In addition to separation from the state, a corporation under the real entity theory is an entity separate from the shareholders composing it."); Avi-Yonah, *supra* note 16, at 16 (noting the "real entity view, which equates the corporation with its management . . . rejected the aggregate view of the corporation as an aggregate of its shareholders").

50. *See, e.g.*, Millon, *supra* note 18, at 3 ("Although the concept is generally accepted today, 150 years ago it was by no means clear that the corporation should be thought of as a distinct legal person.").

51. *See, e.g.*, Mark, *supra* note 19, at 1443 ("The concept of the personified corporation resulted from a crisis of legal imagination that accompanied the maturation of America's economy at the end of the nineteenth century and largely preceded the country's entry into what economic historians call the second industrial revolution.").

52. *See id.* at 1471 ("Even the clarifying adjective 'real' helped but little, for something artificial could be real.").

double jeopardy protection to corporations, the Supreme Court was worried about "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty."[53] Or, in extending Fourth Amendment protections, the Court tells us that a corporation "plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe."[54] In a remarkable metaphysical feat, a piece of paper labeled a corporation can, *inter alia*, be anxious and insecure while expecting privacy.[55]

As one commentator sums up:

> Personification with its roots in historic theological disputes and modern business necessity, had proved to be a potent symbol to legitimate the autonomous business corporation and its management. Private property rights had been transferred to associations, associations had themselves become politically legitimate, and the combination had helped foster modern political economy. The corporation, once the derivative tool of the state, had become its rival, and the successes of autonomous corporate management turned the basis for belief in an individualist conception of property on its head. The protests of modern legists notwithstanding, the business corporation had become the quintessential economic man.[56]

Ascribing personhood to a corporation is easy; the problem, as I will argue below, is that none of the theories used to justify this heroic grant make sense.

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53. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

54. Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986).

55. *Cf.* Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1599 (2006) ("Because corporations are artificial entities, it is difficult to identify a source of their moral obligations.").

56. Mark, *supra* note 19, at 1482–83.

The last theory—or, perhaps more aptly, "non-theory"—is that a corporation theory does not matter. Perhaps the canonical text in this tradition is John Dewey's famous article, written in 1926, where he argued that:

> As far as the historical survey implies a plea for anything, it is a plea for disengaging specific issues and disputes which arise from entanglement with *any* concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations.[57]

As one commentator observes, after "Dewey's stunning eulogy"[58] and by the 1940s:

> the place of the corporation in law had ceased to be controversial, and both theoreticians and practitioners concerned themselves instead with organizational theory and economic analysis of corporate behavior. The corporation as a legal institution ceased to be of interest. The historical and jurisprudential debates which had consumed the energies of some of the leading legal scholars were relegated to the introductory pages of corporation law textbooks, if they were discussed at all. As a result, *a modern lawyer knows only that a corporation is considered a legal person but finds that terminology devoid of content*.[59]

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57. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669; *see also id.* at 673 (claiming that one must "enforce the value of eliminating the *idea* of personality until the concrete facts and relations involved have been faced and stated on their own account").

58. Mark, *supra* note 19, at 1480.

59. *Id.* at 1441 (emphasis added); *see also* Horwitz, *supra* note 11, at 175 ("There are very few discussions of corporate personality after Dewey. The Legal Realists in general had succeeded in persuading legal thinkers that highly abstract and general legal conceptions were simply part of what Felix Cohen, quoting von Jhering, derisively called 'the heaven of legal concepts.'"); Pollman, *supra* note 16, at 1652 ("After this debate quieted, most corporate law scholars simply accepted corporate personhood as a given, without pushing for a particular philosophical conception of the corporation to

Most crucially for our purposes, it seems that the Supreme Court—whether intentionally or not—has bought into Dewey's claim and, to a large extent, stopped trying to offer a coherent theory of the corporation.[60]

Nowhere is this sad reality more present than in the context of the First Amendment. Stated plainly, perhaps the most powerful rhetorical move the Court has made in justifying ever-increasing free speech rights for corporations has been to deflect attention away from the source of the speech and instead speak of speech in abstract generalities. For instance, the majority in *Bellotti* claims that "[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual."[61] Similarly, the *Citizens United* opinion asserts that "[t]he Court has thus 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.'"[62]

As an instrumental move to grant corporations greater rights, deflecting attention away from any conceptualization of the speaker is brilliant. As Adam Winkler notes, for example, with respect to Justice Powell's majority opinion in *Bellotti*: "[b]y . . . ignoring the corporate identity of the speaker, Powell rendered the corporate entity invisible while at the same time formalizing its equal rights."[63]

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ground this concept.").

60. *See* Pollman, *supra* note 16, at 1647 ("Despite robust debate of corporate personality from the turn of the century to the 1930s, as well as dissenting calls for reexamination of the doctrine, the Court has not grounded the expansions of corporate rights in a coherent concept of corporate personhood nor used a consistent approach in determining the scope of corporate rights.").

61. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978); *see also id.* at 784 ("We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.").

62. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 900.

63. Winkler, *supra* note 44, at 1259; *see also* Adam Winkler, *Beyond* Bellotti, 32 LOY. L.A. L. REV. 133, 196 (1998) ("The Court's finding that unlimited *corporate* initiative speech served hearers' rights rested on no articulated understanding of corporations as institutions."). *Cf.* Mayer, *supra* note 12, at 633 ("In both the political speech and the commercial speech context the question became not whether the party asserting the right (a corporation) was entitled to free speech protections, but whether assertion of the right furthered free and open debate."); Saul Zipkin, *The Election Period and Regulation of the*

But it defies logic and constitutional history. It might be banal to note that "[a]rtificial legal entities do not assemble to protest, to hold signs, to sing songs, etc., though the few who rule them may hire people to do these things. They don't speak or write either, though they may hire people to do these things for them."[64] There is also a line-drawing problem: if speech is speech regardless of source, and voting is a form of speech, then why should corporations not be given a right to vote?[65]

More generally, as Randall Bezanson notes, "[w]ithout a speaker an anchor of the First Amendment is missing."[66] He continues:

> In the late eighteenth century the idea of speech without a speaker was unthinkable. The question, "Who is the speaker?" was redundant. Speech and speaking, as I have used the terms, were largely, if not exclusively, synonymous. Except for government, there were few large institutions divorced from the personality and will of a single individual. The only exception was the press.[67]

He further argues:

> It is therefore clear that those who drafted the First Amendment could have had nothing remotely approximating the institutional and representational speaker of today in mind. But I draw from this conclusion the conviction that what the Framers

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Democratic Process, 18 WM. & MARY BILL RTS. J. 533, 581 (2010) ("This 'the speech not the speaker' approach frames two important moves: first, it concentrates the inquiry on the speech itself, asking if it is the kind of expression protected by the First Amendment; and second, it reflects constitutional protection of the deliberative environment rather than the speaker personally.").

64. Michael Kent Curtis, Citizens United *and* Davis v. FEC*:* Lochner *on Steroids and Democracy on Life Support* 17 (Wake Forest Univ. Legal Studies, Paper No. 1685459, 2010), *available at* http://ssrn.com/abstract=1685459.

65. *See Citizens United*, 558 U.S. at ___, 130 S. Ct. at 948 (Stevens, J., dissenting) ("Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech."). *Cf.* Lloyd Hitoshi Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, 4 CHARLESTON L. REV. 91, 126 (2009) ("[U]nlike individuals, corporations are not voters and so have no inherent right to influence elections.").

66. Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 737 (1995).

67. *Id.* at 809.

> therefore did have in mind was individual speech, and individual speech alone.[68]

As Justice Stevens reminds us in his *Citizens United* dissent, the overall point is simple: "The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it."[69]

Contemporaneously with this anti-theoretical fashion, rights for corporations have expanded dramatically over the past fifty years.[70] As one observer carefully notes:

> Despite earlier assertions of corporate personhood in the [F]ourteenth [A]mendment context, corporations did not come to rely on Bill of Rights protections until quite recently. As late as 1960 the corporation arguably enjoyed only the protection of the [F]ifth [A]mendment's due process clause. Today, the corporation boasts a panoply of Bill of Rights protections: [F]irst [A]mendment guarantees of political speech, commercial speech, and negative free speech rights; [F]ourth [A]mendment safeguards against unreasonable regulatory searches; [F]ifth [A]mendment double jeopardy and liberty rights; and [S]ixth and [S]eventh [A]mendment entitlements to trial by jury.[71]

As it stands today, "the right against self-incrimination has been virtually the only part of the Bill of Rights that courts have not extended to corporations."[72]

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68. *Id.*

69. *Citizens United*, 558 U.S. at ___, 130 S. Ct. at 971 (Stevens, J., dissenting).

70. *Cf. Legal Fiction*, *supra* note 2, at 1764–65 ("Though there is no social consensus regarding the effects of increasingly monolithic business entities on American society, there appears to be no abatement to the expansion of freedoms granted corporate actors, a situation that has raised much concern.").

71. Mayer, *supra* note 12, at 582.

72. *Legal Fiction*, *supra* note 2, at 1752. Corporations also cannot assert the privileges and immunities clause of the Fourteenth Amendment. *See* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1644 (1982) ("The corporation may be deprived of privileges and immunities states normally accord their own citizens . . . ."). This right, however, is essentially dormant under current jurisprudence.

Through this expansion of constitutional rights for corporations, however, corporate theory has—even upon cursory glance—been shockingly absent. As commentators have variously lamented, "the Court has adopted an ad hoc, result-oriented approach to corporate rights, which is difficult to reconcile with traditional modes of constitutional interpretation";[73] "[m]issing from the Court's various decisions involving corporations is any expressly enunciated common rationale";[74] and "[t]here is no way to bring unity to these many decisions, for they rest on radically different conceptions of the person whose rights and duties receive judicial definition."[75]

Yet it is likely no coincidence that the death of corporate theory has coincided with ever-expansive constitutional rights for corporations. As one commentator correctly observes, "the Court's modern, pragmatic, antitheoretical approach is the prosaic legitimation of the corporation's constitutional status. This pragmatic approach is a less controversial guarantor of corporate rights than a theoretical methodology that raises fundamental questions about the nature of a corporation and its role in society."[76] Notwithstanding its convenience, however, such an antitheoretical approach ducks the basic question of whether an artificial entity, such as a corporation, should be entitled to constitutional protection.[77] Not having a theory

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73. Krannich, *supra* note 21, at 64.

74. O'Kelley, *supra* note 26, at 1348.

75. *Constitutional Rights of the Corporate Person*, *supra* note 72, at 1644–45; *see also* Winkler, *supra* note 63, at 195 n.269 ("[A]pplication of individual rights to corporate entities has been inconsistent."). As one observer carefully summarizes:

> As the Bill of Rights became important to the corporation in the period of Modern Regulation and Modern Property, the Court jettisoned theories of corporate personhood. Frequently the Court looked to the history of the amendment in question to justify corporate rights, as in the case of the [F]ourth [A]mendment; occasionally the Court examined the underlying purposes of an amendment, as in its handling of the [F]irst [A]mendment; and sometimes the Court conferred Bill of Rights protections on corporations with no explanation, as with the [F]ifth, [S]ixth, and [S]eventh [A]mendments.

Mayer, *supra* note 12, at 629.

76. Mayer, *supra* note 12, at 621; *see also id.* at 643–44 ("As the metaphor of corporations as persons became increasingly strained, the Court abandoned corporate theory in favor of notions about commercial property, the free market of ideas, and the historical purposes of each amendment.").

77. *See* Krannich, *supra* note 21, at 62 ("The result is a foundational problem in corporate constitutional law, for the Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them under the Constitution.").

of constitutional personhood is unsettling and does not inspire confidence, to say the least.[78] What Justice Black once pointed out in the context of the Fourteenth Amendment applies more generally: "[i]t requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause."[79] Put bluntly, "[i]n the Court's corporate constitutional jurisprudence, the Court has never set forth a specific test to determine what a constitutional 'person' is."[80] In the following section, I venture to suggest a simple conceptualization.

B. Coherence Of Artificial Entity Theory

The artificial entity theory is the most compelling, with alternative theories remaining unsatisfactory. The most sophisticated competitor is likely the associational theory, which seems to analogize corporations to partnerships, beginning most dramatically with *Santa Clara*.[81] While it might be superficially attractive to conceptualize shareholders in corporations as partners in a partnership, "viewing the corporation as just an aggregate of its shareholders can be incongruent with modern times, particularly in the large public company context. Shareholders in publicly traded corporations are not a static set of identifiable human actors and they do not control

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78. *See, e.g.*, Pollman, *supra* note 16, at 1657 ("While the Court has significantly expanded corporate rights, it has not grounded these expansions in a coherent concept of corporate personhood."); *Legal Fiction*, *supra* note 2, at 1759 ("The doctrinal discord in the law of the person results largely from the lack of a coherent theory of the person. . . . The absence of any coherent theory raises an inference that courts' determinations of legal personality are strongly result driven, with judges selecting whatever theories of personhood suit the outcomes they desire."); Rivard, *supra* note 12, at 1445 ("[T]he Supreme Court has failed to develop a coherent theory of constitutional personhood. Rather, the Court uses theory merely as a post hoc rationalization to justify result-oriented decisions.").

79. Wheeling Steel Corp. v. Glander, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting); *see also* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 31 (2001) ("The Supreme Court treats corporations as the equivalent of human persons for some constitutional purposes."); Krannich, *supra* note 21, at 97 ("The Court has never explained why a corporation is a person for purposes of double jeopardy, but not for purposes of self-incrimination, despite the fact that the use of the term 'persons' in the clause is analytically indistinguishable."); Rivard, *supra* note 12, at 1462.

80. Krannich, *supra* note 21, at 90.

81. *See* Mark, *supra* note 19 at 1463 ("The evidence suggests that Conkling and Justice Field, the likeliest sources for a new vision of the corporation in *Santa Clara*, could not have had in mind anything but the partnership analogy that they had espoused in *The Railroad Tax Cases*.").

day-to-day corporate decision-making."[82] While sophisticated defenders of associational theories seem to admit this reality,[83] they assume that shareholders will be able to defend themselves against possible abuses by insiders.[84] Sadly, anyone with even a passing knowledge of corporate law and governance would recognize these assumptions as heroic.[85]

The supervening irony here is that rather than empowering shareholders, the associational theory disenfranchises them by giving the corporation—really, management—standing to assert constitutional claims. As Herbert Hovenkamp insightfully suggests:

> The doctrine that a corporation is a constitutional person meant that the corporation's directors or managers could assert its constitutional claims. The less-cited corollary was that shareholders lacked standing to assert the corporation's constitutional rights, just as they lacked standing to represent the corporation in most legal disputes. Had the doctrine of corporate constitutional personhood not been developed, corporate property still would have been protected by the [F]ourteenth [A]mendment. Shareholders, rather than the corporation, would have been allowed to assert claims for unconstitutional injuries.

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82. Pollman, *supra* note 16, at 1630.

83. *See, e.g.*, Ribstein, *supra* note 22, at 133 ("Under the contract theory of the corporation, the separate corporate entity disappears for constitutional purposes and the speech is attributed to those immediately responsible for it. Generally this will be the managers who speak or prepare the speech rather than the shareholders who may fund the speech with their investments."). *Cf.* O'Kelley, *supra* note 26, at 1363 ("If, for instance, Mobil Oil Corporation pays for an advertisement that expresses certain social views, the expression involved is not that of the myriad shareholders, but of the top management of Mobil.").

84. *See, e.g.*, Ribstein, *supra* note 22, at 135 ("[T]he contract theory assumes that the parties to the corporation, like parties to other types of contracts, can protect themselves by investing in corporate governance devices that minimize this divergence of interest, and that these contracts are subject to the same sort of market discipline that applies to other contracts.").

85. As Russell Stevenson laments:

> [A]s the principal institutional means of legitimating and controlling the power of corporate management, shareholder control is a miserable failure. Moreover, the perpetuation of the fiction that shareholders do exercise ultimate guiding authority has acted as a barrier to real institutional reform because the myth provides nominal legitimation of management power.

Russell B. Stevenson, Jr., *Corporations and Social Responsibility: In Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709, 731 (1974).

> Thus the Supreme Court's decisions that a corporation is a constitutional "person" were an important step in the separation of ownership from control that characterized the classical corporation.[86]

If one were to assume for a moment that these deep problems can be overcome, the associational theory still remains unsatisfactory; especially in its more modern nexus-of-contracts incarnation, where it criticizes the artificial entity theory for emphasizing the role of the state.[87] But if corporate law is merely contract law, then why incorporate? Presumably because incorporation saves on transaction costs and offers protections that private contract simply does not provide.[88]

Perhaps more importantly, the associational theory actually performs precious little work. After all, one must now delineate what rights are actually "personal" to shareholders but should now be asserted by the corporation as its proxy—in effect, all this does is shift the analysis to the slippery debate of what makes a right "personal."[89] For instance, *Bellotti* relegates this central question to a thoroughly unhelpful footnote[90] and the recent *FCC v. AT & T* decision resorts—somewhat stunningly—to using the dictionary definition of "personal" to argue that while a statute might define a corporation as a "person," the adjective "personal" cannot modify the right of a corporation.[91]

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86. Hovenkamp, *supra* note 24, at 1641.

87. *See, e.g.*, Ribstein, *supra* note 22, at 98 ("The description of the corporation as a 'mere creature of law' implies that government has created rights that cannot be created by private contract.").

88. *Cf.* Mayer, *supra* note 12, at 658–59 ("Besides perpetual life, corporations enjoy limited liability for industrial accidents such as nuclear power disasters, and the use of voluntary bankruptcy and other means to dodge financial obligations while remaining in business.").

89. Other related notions such as "traceability" present similar problems. *See, e.g.*, Bezanson, *supra* note 66, at 749 ("The requirement that speech be traceable to the intention and beliefs of individuals in order for the liberty of speaking to apply is an important factor in the institutional speech calculus . . . .").

90. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 779 n.14 (1978) ("Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."); *see also* Rivard, *supra* note 12, at 1464.

91. The Court stated that:

> "Personal" ordinarily refers to individuals. We do not usually speak of personal

Finally, even if we assume away the separation of ownership and control characteristic of the modern public corporation and somehow magically manage to define what is "personal" to its constitutive shareholders, at a very basic level the associational theory suffers from an unrealistic assumption and fallacy. It assumes that the group's positions are those of its individual members[92] and ignores the "fact that a right is enjoyed by a person in her individual capacity says nothing about whether that right should be enjoyed by the association that she forms along with other individuals."[93]

For its part, the natural entity theory is more obviously troubling. As Lucian Bebchuk and Robert Jackson succinctly observe, "a corporation is merely a product of legal rules that govern the relationships between shareholders, directors, and executives,"[94] unfortunately, "the rhetorical convention that a corporation is a legal person remains, though the convention utterly fails to capture the understanding of the corporation conveyed by any modern theory."[95] Sadly, anthropomorphizing a corporation "does not explain why corporations would receive constitutional protections as people."[96]

Finally, Dewey's denial of theory as being of little import is troublesome. As one commentator chronicles, theory can be outcome-determinative:

> Moreover, the Court's very use of corporate personhood theory

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> characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities. This is not to say that corporations do not have correspondence, influence, or tragedies of their own, only that we do not use the word "personal" to describe them.

FCC v. AT & T, Inc., 131 S. Ct. 1177, 1182 (2011).

92. *See, e.g.*, Bezanson, *supra* note 66, at 758 ("[T]here has been substantial reason to doubt that the speech of the group is a reflection of the views of the individual members.").

93. Amy J. Sepinwall, Citizens United *and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 584 (2012).

94. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 108 (2010).

95. Mark, *supra* note 19, at 1442.

96. Pollman, *supra* note 16, at 1630; *see also Constitutional Rights of the Corporate Person*, *supra* note 72, at 1651 ("The notion that soulless, inarticulate corporations could even hold a political view, let alone insist on the right to express it, would be incomprehensible to the scholastic philosophers and the classical economists who provided the conceptual ground for earlier explanations of corporate personality.").

> to decide Bill of Rights cases, as in *Hale* and *Morton Salt*, belies Dewey's claims: there is a perfect correlation between the invocation of the artificial entity theory and the denial of corporate rights. Similarly, there is a perfect correlation between the invocation of the natural entity theory, as in *Hale* and *Grosjean*, and the conferral of corporate rights. In the particular context of the corporation's Bill of Rights, the choice of a corporate theory had important consequences.[97]

By contrast, the artificial entity theory accords with common sense and constitutional history—not to mention it recognizes that corporations simply cannot exist without the approbation of the state. First and perhaps most fundamentally, it cannot be overemphasized that corporations—unlike natural persons—only exist at the will of the state.[98] Further, these artificial creations—again, unlike natural persons—are neither capable of emotion nor action.[99] As one scholar puts it, "[t]o believe that legal entities are capable of physical acts is a category-mistake and any superstructure erected on this category-mistake may be invalid."[100] Perhaps this disjunction is why lawyers need so many contortions to try to convince laypersons that corporations are people: "[e]ven in a legal world filled with fictions, the corporate claim to personal Bill of Rights guarantees must appear fantastic to the non-lawyer."[101] As Justice Rehnquist once aphoristically noted in dissent, "[t]he insistence on treating identically for constitutional purposes entities that are demonstrably

97. Mayer, *supra* note 12, at 640.

98. *See, e.g.*, Hovenkamp, *supra* note 24, at 1645 ("But there is one important difference between the natural person's right to contract and the corporation's right: the corporation has only those powers granted to it by the sovereign."); *Constitutional Rights of the Corporate Person*, *supra* note 72, at 1645 ("The corporation thus exists as a person only because it is recognized by the law, and it is granted standing in the court only because it has been brought into being by the state.").

99. *See, e.g.*, Stevenson, *supra* note 85, at 710 ("[C]orporate 'persons' are deficient in that concatenation of spiritual, social, and political characteristics which in human personalities we call the 'soul.'").

100. O'Kelley, *supra* note 26, at 1351. For example, in the context of the First Amendment, "[t]he basic intuition is that speech is fundamentally a human act, that for purposes of the First Amendment, protected speech is primarily a product of the human act of speaking." Bezanson, *supra* note 66, at 755.

101. Mayer, *supra* note 12, at 655; *see also* Krannich, *supra* note 21, at 61 ("[A] corporation is simply not a 'person' as most understand the term.").

different is as great a jurisprudential sin as treating differently those entities which are the same."[102]

In addition to common sense, artificial entity theory also has constitutional history on its side. While the word "corporation" does not exist in the Constitution,[103] the balance of historical analysis suggests that the Founding Fathers would not accord constitutional personhood to corporations and, in fact, might view the granting of such powers with disdain. As background, it is important to remember that the Constitution was written at a time when "[c]orporations were few and small and of little consequence . . . ."[104] Philosophically, however, their "major premise was the existence of a relatively atomistic society, one devoid of aggregations of political and economic power greater than those which might be amassed by a single individual or at most a family or small partnership."[105] In a detailed historical study, Jonathan Marcantel:

> [a]ttempts to discern whether evidence exists indicating that corporations are real constitutional entities by analyzing contemporary documents from the Constitutional Convention of 1787, the ratification debates, the ratification debates of the Bill of Rights, and the debates preceding ratification of the Fourteenth Amendment. Taken together, the documents indicate the drafters and ratifiers believed the Constitution and its amendments protected individual rights. Furthermore, they indicate the drafters and ratifiers embraced a concessionary doctrinal vision of the corporation that was inconsistent with

102. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 35 (1986) (Rehnquist, J., dissenting).

103. *See, e.g.*, Harold Anthony Lloyd, *A Right But Wrong Place: Righting and Rewriting* Citizens United, 56 S.D. L. REV. 219, 222 (2011) ("On its face, the Constitution provides no corporate Constitutional rights at all . . . ."); O'Kelley, *supra* note 26, at 1352 ("Nowhere in the Constitution does the word 'corporation' appear."); Pollman, *supra* note 16, at 1632 ("[T]he Constitution itself includes no specific reference to corporations.").

104. Arthur Selwyn Miller, *Toward the "Techno-Corporate" State?—An Essay in American Constitutionalism*, 14 VILL. L. REV. 1, 4 (1968); *see also* Pollman, *supra* note 16, at 1633 ("[S]cholars agree that before independence there were only a small handful of corporations.").

105. Stevenson, *supra* note 85, at 711. *Cf.* Miller, *supra* note 104, at 4 ("The 55 men who wrote the Constitution foresaw neither the rise of the supercorporation nor the Positive State.").

> their vision of constitutional rights.[106]

Some examples might reinforce Marcantel's point. For instance, as Randall Bezanson carefully notes:

> If the First Amendment were intended to protect all speech without regard to its identifiable human agency—all words and images, whatever their origin or intent or effect—there would have been no reason to single out the press for explicit constitutional protection. The drafters of the First Amendment knew that the press was a different kind of speaker than the individual.[107]

In the context of the Fourteenth Amendment, Justice Black once forcefully noted the perversion of intent:

> I do not believe the word "person" in the Fourteenth Amendment includes corporations . . . .
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> . . . .
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> . . . The history of the amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments . . . .
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> . . . .
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> . . . Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, *less than one-half of 1 per cent. invoked it in*

106. Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 232 (2011); *see also id.* at 237 ("First, to the extent the drafters discussed corporations in the context of constitutional protections, it was only in the sense of state or local authorities as sovereign corporations. Second, it is clear the drafters did not use the terms 'corporation' and 'people' coterminously.").

107. Bezanson, *supra* note 66, at 775; *see also* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863 (2007) ("When the Founders established the principle of free speech in both the Federal and state constitutions, corporate speech was far from their minds.").

> *protection of the negro race, and more than 50 per cent. asked that its benefits be extended to corporations*.[108]

As if common sense and constitutional history were not enough, the artificial entity theory also recognizes the state's inextricable role in the chartering of corporations. The conventional wisdom is that "[v]iewing the corporation as a concession from the state is a relic of a time before incorporating became a mere administrative formality"[109]—after all, the move from special incorporation statutes to general incorporation statutes seems to minimize the state's role.[110] But this argument is puzzling: while the steps needed to charter a corporation are different, the state still maintains a "traditional constitutive role."[111]

A more subtle argument is to note that the availability of different jurisdictions within which to incorporate also marginalizes the state's role.[112] But there are several problems with this portability argument. Most simply, companies tend to incorporate as local subsidiaries within countries in which they operate for tax and liability reasons; as such, the local subsidiary exists at the grace of the local sovereign.[113] To the extent that the contention revolves around American companies incorporating in management-friendly jurisdictions—

108. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85, 87, 90 (1938) (Black, J., dissenting) (emphasis added) (footnote omitted) (citations omitted); *see also* Krannich, *supra* note 21, at 95 ("[U]nder the Fourteenth Amendment the Court has created corporate constitutional rights not implied by the text of the Constitution or the intent of its framers."); Marcantel, *supra* note 106, at 265 ("In sharp distinction, however, the drafters of the Fourteenth Amendment did not envision corporations as possessing inalienable rights. Quite the contrary, the drafters repeatedly indicated their belief that corporations existed and were regulated at the leisure of the legislature.").

109. Pollman, *supra* note 16, at 1630.

110. *See, e.g.*, *id.* at 1640 ("The economic expansion of the time [late nineteenth century] and the transition from special chartering to general incorporation eroded the persuasiveness of the concession theory [of the corporation], as the connection between a corporate charter and a state act became less significant.").

111. Millon, *supra* note 18, at 7.

112. *See, e.g.*, Pollman, *supra* note 16, at 1661–62 ("Further, as corporations can change their place of incorporation, switching state or even country, the description of corporations as a concession from a particular state seems a poor fit in our modern, global environment."); Avi-Yonah, *supra* note 16, at 24 ("[T]he artificial entity theory becomes hard to maintain when management can pick weak countries like Bermuda as the country of incorporation for the parent of a multinational.").

113. *See, e.g.*, Pollman, *supra* note 16, at 1660–61.

notably Delaware—and doing business in other states,[114] the state's role cannot be so simply dispensed with. First, the company cannot exist without the approbation of the incorporating state; second, even today there is little to prohibit additional regulation by a sister state of the United States.[115]

In sum, "this marginalization of the State in discussions of theory of the corporation is incorrect both from a positive as well as normative perspective."[116] Put simply, "there is no corporation without the state."[117] Artificial entity theory is the only theory that recognizes this seemingly banal point.

II. POLITICAL ECONOMY OF CORPORATE THEORY

"Only people can have responsibilities. A corporation is an artificial person and in this sense may have artificial responsibilities, but

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114. *Id.* at 1640 (explaining that "[s]tates like New Jersey and Delaware began to compete for corporate taxes and fees by offering a liberal legal environment for incorporation").

115. Those versed in corporate law might argue that the internal affairs doctrine imposes a barrier to the regulation of out-of-state corporations. As the U.S. Supreme Court describes it:

> The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.

Edgar v. MITE Corp., 457 U.S. 624, 645 (1982) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. b (1971)). The internal affairs doctrine, however, does not rise to the level of constitutional imperative. As one commentator observes:

> Although the [U.S. Supreme] Court historically has deferred to the law of the state of incorporation on issues involving internal affairs, that does not mean that the Court has established a constitutional requirement under the commerce clause mandating that the law of the state of incorporation be applied on all corporate governance issues.

Arthur R. Pinto, *The Constitution and the Market for Corporate Control: State Takeover Statutes after* CTS Corp., 29 WM. & MARY L. REV. 699, 764–65 (1988) (footnote omitted). In addition, the guidance provided by the Restatement of Conflict of Laws provides space to regulate:

> The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302(2); *see generally* Richard M. Buxbaum, *The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law*, 75 CALIF. L. REV. 29 (1987).

116. Stefan J. Padfield, *Finding State Action When Corporations Govern*, 82 TEMP. L. REV. 703, 724 (2009).

117. *Id.* at 720.

'business' as a whole cannot be said to have responsibilities, even in this vague sense."
—Milton Friedman[118]

If, as I have argued in Part I, the artificial entity theory makes so much sense, then why is it so unpopular? The response lies in political economy. Instrumental reasons explain the decline of artificial entity theory: an anti-regulatory agenda and a concomitant wish to elevate the managerial class. To be sure, there are opposing concerns that might emerge to my proposal to restrict the personhood of corporations. Some might characterize it as too simplistic an approach; others might suggest it would hinder attempts to find corporations liable under criminal or international law. But upon closer examination, neither of these concerns is convincing.

A. Decline Of Artificial Entity Theory

Conceptualizing the corporation as an artificial entity necessarily allows the government to place limits on its behavior. After all, if the corporation is a creature of the state, then the state can regulate it if it wishes. Further, the more the state's role is emphasized, the less power accrues to corporate insiders. I argue that anti-regulatory fervor, coupled with a desire to elevate the managerial class in society, best explain why artificial entity theory has fallen out of favor. Instrumental reasons explain the rise of the associational and natural entity theories more than logic might.

Under the artificial entity theory, as David Millon has succinctly noted, "[b]ecause the corporate person was a creature of the state, it was assumed to be subject to whatever limitations or regulatory burdens might emerge from the political process."[119] In contrast, "[b]y appealing to the individual property rights of the shareholders, the aggregate idea offered a potentially useful theoretical justification

118. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at SM17.

119. Millon, *supra* note 18, at 5; s*ee also* Pollman, *supra* note 16, at 1635 ("Under this [artificial entity] view the corporation is a legal fiction and incorporation a special privilege or concession awarded by the state. Accordingly, this view supported the government-imposed limitations on corporations of the time because if incorporation is a state grant, it follows that it can be a limited one.").

for shielding big business from public supervision."[120] The natural entity theory places government at an even greater distance. As Morton Horwitz notes, "[t]he main effect of the natural entity theory of the business corporation was to legitimate large scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state."[121] The rhetoric of natural entity theory is especially powerful: by equating "corporation" to "person," one is then tempted to transpose the rights of the latter to the former.[122]

New corporate theories have thus brilliantly served an anti-regulatory agenda. As Walter Hamilton amusingly observes:

> The legal make-believe that the corporation is a person, the ingenuities by which it has been fitted out with a domicile, the elaborate web of "as-ifs" which the courts have woven,—have put corporate affairs pretty largely out of reach of the regulations we decree. . . . "The corporation" . . . has no anatomical parts to be kicked or consigned to calaboose; no conscience to keep it awake all night; no soul for whose salvation the parson may struggle; no body to be roasted in hell or purged for celestial enjoyment. . . . [We cannot lay] bodily hands upon General Motors or, Westinghouse . . . [or] incarcerate the Pennsylvania Railroad or Standard Oil (N.J.) complete with all its works.[123]

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120. Millon, *supra* note 18, at 5. The idea is essentially the same under the more modern association of contracts notion. *See id.* at 21 ("Efforts by government to impose obligations on the parties to these arrangements offend the freedom of contract, anti-redistributive ideology that lies at the heart of the nexus-of-contracts agenda.").

121. Horwitz, *supra* note 11, at 221; *see also* Rivard, *supra* note 12, at 1459 ("In contrast to the artificial entity theory, the natural entity—or real entity—theory of the corporation constrains the power of the state to control its creation.").

122. *See* Mark, *supra* note 19, at 1472 ("'Person' carried with it powerful connotations in Anglo-American jurisprudence. The irreducible unit of the common law was the individual person; if the corporation was a real person, not an artificial creation of the state, was it not entitled to the same respect as any flesh-and-blood person?").

123. RICHARD EELLS & CLARENCE WALTON, CONCEPTUAL FOUNDATIONS OF BUSINESS: AN OUTLINE OF THE MAJOR IDEAS SUSTAINING BUSINESS ENTERPRISE IN THE WESTERN WORLD 132, 133 (1961) (quoting Walter H. Hamilton, On the Composition of the Corporate Veil, Address Before the Brandeis Lawyers' Society (Mar. 21, 1946), *in* BRANDEIS LAWYERS' SOC'Y PUBL'NS, 1946, at 4).

The risk of all the deference given to corporations and their insiders is the drifting toward a new *Lochnerism*. In the words of one scholar:

> More than the problems of personhood metaphors, concerns about judicial legitimacy explain the demise of corporate theory. The bestowal of constitutional rights on corporations, via the natural entity theory, raises the specter of *Lochner*. . . .
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> . . . .
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> . . . In the modern political economy, the question, what is a corporation, is every bit as important as the questions about freedom of contract and common-law entitlements considered during the *Lochner* period. For the Court to appear to be imposing its view of the corporation—and therefore shaping a state and imposing an economic view—creates problems of legitimacy reminiscent of *Lochner*.[124]

As one commentator aptly observed, "[d]enied the protections of *Lochner* and substantive due process, corporate managers merely shifted the constitutional battle from the [F]ourteenth [A]mendment to the [F]irst, [F]ourth, and [F]ifth amendments."[125] As such, "[b]usinesses now wield the Bill of Rights in much the same way that the [F]ourteenth [A]mendment was used during the Progressive era when corporations impeded state governmental regulation with constitutional roadblocks."[126]

Beyond a desire to fight regulation, the move away from artificial entity theory and eventually toward natural entity theory effectively provides constitutional cover for the activities of corporate insiders. As Herbert Hovenkamp has chronicled, by the late nineteenth

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124. Mayer, *supra* note 12, at 645, 646.

125. *Id.* at 606.

126. *Id.* at 577; *see also* Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 295 (1981) ("Particularly with respect to corporate commercial speech, the First Amendment should not become the vehicle for restoring the lenses of the Lochner court to judicial scrutiny of economic regulation of either legislative or executive origin."). *Cf.* Miller, *supra* note 104, at 5 ("By the mid-1960's that 'social revolution' had become so solidified that corporations seem part of the 'natural' order of things, so much so that no serious intellectual opposition to them is evident.").

century, "the business corporation gradually evolved into a device for assembling large amounts of capital in a manner that could be controlled efficiently by a small number of managers."[127] The problem, of course, is that even the associational view ostensibly emphasizes the property rights of shareholder-principals, not manager-agents.[128] The rather hefty task, then, was somehow to craft theoretical support for management control over large corporations.[129]

At this challenge, the real entity theory proved brilliant. Arguably, two subtle analytical moves are at work: first, anthropomorphize the corporate entity to somehow detach it from its shareholder-principals;[130] second, effectively emphasize how the now anthropomorphized entity can be represented by its directors and officers.[131] It is also important to note that the real entity theory also emerged in a symbiotic relationship with a remarkable liberalization of corporate law during the late nineteenth century that only further legitimated the power of management over shareholders. As Adam Winkler chronicles in helpful detail:

> Traditional doctrines of ultra vires and quo warranto, which strictly limited corporate activities to those specified at inception or provided for in corporate charters, were watered down—another expansion of managerial autonomy. The discretion of managers over corporate affairs was also augmented by the

127. Hovenkamp, *supra* note 24, at 1595.

128. *See, e.g.*, O'Kelley, *supra* note 26, at 1373 ("In the case of a large corporation, however, the views of shareholders and management may diverge, making the associational rationale inapplicable."). As Morton Horwitz observes, "[s]ome of the contractualists seemed to have in the back of their minds an ideal of what in a later age would be called 'shareholder democracy.' But during the 1880s it was beginning to become clear that management, not shareholders, were the real decision-makers in large publicly owned enterprises." Horwitz, *supra* note 11, at 206.

129. *See* Mark, *supra* note 19, at 1475 ("The task before those theorists was to explain how management control was legitimate.").

130. *See* Marcantel, *supra* note 106, at 228 ("As the structure of corporations changed and became more management controlled, corporations began to be viewed as no longer representing the rights of the individuals who composed them, but rather, as separate bodies that possessed their own values and desires independent of their shareholders.").

131. *See, e.g.*, Mark, *supra* note 19, at 1477 ("The psychological assimilation of the corporation to the individual contained the connotative powers of personification while the representative analysis set out by Ernst Freund provided a justification for management's assumption of control of corporate affairs.").

> replacement of common law negligence rules governing corporate agency with the notoriously management-friendly business judgment rule. Stockholders witnessed the diminution of their right to oversee management through inspection of the corporate account books and ledgers, as state lawmakers restricted inspection rights (purportedly to guard against corporate espionage). Voting rules within the corporation were also transformed in ways that minimized stockholder authority: unanimity requirements for fundamental corporate changes became majority rules; preferred shares were sold without any right to vote attached; and proxy voting, as indicated by the example of insurance companies above, ensconced management control over firm assets.[132]

Helped along by corporate law and concomitant with the rise in industrial organization, by the 1920s the real entity theorists had essentially won: management was ascendant.[133] Sadly enough, the past century has seen an erosion of shareholder capitalism.[134] Reuven Avi-Yonah sums up our sorry state of affairs:

> Why does the real entity view prevail? In part, this is no doubt due to the fact that it represents the most congenial view to corporate management, because it shields them from undue interference from both shareholders and the state. Corporate

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132. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 907–09 (2004); *see also* Horwitz, *supra* note 11, at 183 ("The triumph of the entity theory parallels another development in late nineteenth century corporate law—the tendency to shift power away from shareholders, first in favor of directors and later to professional managers.").

133. *See, e.g.*, Marcantel, *supra* note 106, at 228 ("And, as those entities grew in size and became more controlled by management as opposed to shareholders, the real entity theory grew in prominence."); Mark, *supra* note 19, at 1474 ("The ascendance of management strengthened the analytic force of the real person/real entity theory and was in turn legitimated by it.").

134. As the mutual fund pioneer, John Bogle, laments:

> [C]apitalism has been moving in the wrong direction. We need to reverse its course so that the system is once again run in the interest of stockholder-owners rather than in the interest of managers . . . .
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> . . . .
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> Our society today, then, is no longer an "ownership society." It has become and "intermediation society," and it is not going back.

JOHN C. BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM xi (2005).

> management wields political power and it influences the outcome of the debate; judges again and again refer to the importance of corporations, by which they mean corporate management.[135]

Yet the world Avi-Yonah summarizes so well effectively privileges a small class of corporate insiders with access to corporate resources—in a way that is deeply problematic. Not only does it deemphasize the property rights of shareholder-principals,[136] it does so in a way that is antithetical to the principles embodied in our Constitution.[137] In the words of one scholar:

> *The philosophy of private property that informed our founding fathers falls apart in a system in which the owners of property no longer direct its use.* The corporate person is not, the protestations of corporate managers to the contrary notwithstanding, a member of society in the same sense as the individual person. There is no effective mechanism for socializing a corporation. It cannot be educated. It cannot be shamed. To an increasing extent society is not even capable of punishing it. The result is an institution truly responsible to no

135. Avi-Yonah, *supra* note 16, at 25; *see also* Horwitz, *supra* note 11, at 183 ("The collapse of the grant [artificial entity] theory eventually produced the best of all possible worlds for the expansion of corporate power."); *Legal Fiction*, *supra* note 2, at 1754 ("At least, it does not seem a coincidence that as the increasingly complex modern corporation has become increasingly dependent on Bill of Rights protections and the American economy has become increasingly dependent on corporations, courts have adjusted definitions of personhood to accommodate the modern corporation's need for these protections.").

136. *See, e.g.*, Stevenson, *supra* note 85, at 713 ("It has long since been recognized that corporations are no longer run for the benefit of shareholders by a management responsive to shareholders, but are by and large run by and for a management for whom shareholder benefit is a secondary concern.").

137. For instance, in the context of the First Amendment, "[*Bellotti*] does not in itself further the values protected by the First Amendment. Instead, it constitutionally legitimizes management's discretionary power to use corporate funds in expressing the political views of those who run the corporation." *Constitutional Rights of the Corporate Person*, *supra* note 72, at 1655; *see also* O'Kelley, *supra* note 26, at 1351 ("Expression is possible only by natural persons, not by corporations. Only a natural person may express himself through a political expenditure. Any expenditure of corporate assets for political purposes must be an expression of the natural persons who authorize and direct the expenditure.").

one.[138]

A fundamental question becomes whether a legal instrument such as the Bill of Rights, which was designed to protect minorities from the "tyranny of the majority" have led instead "to a tyranny of the minority in which the corporate form is manipulated to magnify managerial power."[139]

B. Some Misplaced Concerns

Some thoughtful readers might be concerned about my proposal to restrict the personhood of corporations. Some might characterize it as too simplistic and stark an approach; others might suggest that it would set back efforts to find corporations liable under criminal or international law. I argue, however, that while these concerns appear serious at first glance, upon closer scrutiny, neither is convincing.

A critique might begin by noting that not offering constitutional protections to corporations is too reductionist an approach. After all, are there not situations where the corporation might be exerting a right analogous to an individual's "personal" right?[140] As discussed in detail above,[141] however, this move merely shifts the analytical focus to determining what is "personal"—an unsatisfactory, and arguably fruitless, exercise. A more intellectually consistent approach centers on recognizing that corporations are creatures of statute; as such, they only deserve rights granted to them by statute. To belabor the obvious, individuals can choose not to form corporations, and

138. Stevenson, *supra* note 85, at 713 (emphasis added).

139. Mayer, *supra* note 12, at 657; *see also* Horwitz, *supra* note 11, at 183 ("[T]he [real] entity theory produced court decisions that promoted oligarchical tendencies within the business corporation."); Miller, *supra* note 104, at 40 ("'Managerial capitalism' in many respects differs little from 'managerial socialism'; the industrial enterprises of both systems are basically similar."). *Cf.* Stevenson, *supra* note 85, at 721 ("If forced to choose between the view that 'the business of business is business' and the view that corporations are perfectly free to wield their economic and political muscle to bring about whatever changes in society happen to be thought desirable by a self-perpetuating management oligarchy, I for one would ardently advocate the former.").

140. *See, e.g.*, Krannich, *supra* note 21, at 106 ("More explicitly, a corporation would only be entitled to a constitutional right if the values and policies underlying the right are such that the reasons a natural person is entitled to the right apply equally to a corporation.").

141. *See supra* Part I.B.

states could even choose not to charter them.[142] Human beings deserve constitutional protection against possible abuses wrought upon them by majoritarian politics; corporations do not.[143]

A related, though more nuanced, criticism is that diminishing the personhood of corporations might jeopardize the liability of corporations under criminal law—perhaps counterintuitively, early real entity theorists argued for corporate criminal liability and artificial entity theorists fought against it.[144] Yet again, however, this concern belies crucial differences. To begin with, corporate criminal liability has generally emerged through statutes—not common law.[145]

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142. *Cf. Constitutional Rights of the Corporate Person*, *supra* note 72, at 1643 ("If the public good is not served by unrestricted corporate involvement in the political process, legislatures are free to limit the body corporate to the activity for which it was called into being: business.").

143. Here, I permit myself to diverge from the views of very thoughtful commentators. For example, Victor Brudney argues that:

> Corporations are accorded "personality" in order to create a mechanism for saving transaction costs in business dealings, not to create autonomous beings. Accordingly, they may be deemed legal "persons" separate from their stockholders for many constitutional purposes, particularly when corporate dealings with third persons involve contract rights, ownership of property, or liability for injuries. Moreover, corporations that are in the business of communicating have special ground for claiming protection under the First Amendment.

Brudney, *supra* note 126, at 240 (footnote omitted). While I agree entirely with the first sentence, I am not sure why corporate "contract rights, ownership of property, or liability for injuries" cannot be dealt with by statute. "Corporations that are in the business of communicating" could similarly be protected by statute—not to mention that there is a specific Press Clause to protect institutional speech. This seems to be a point that Brudney appears to acknowledge as well. *See id.* at 290 ("But whatever may be the difficulties at the margin, in general the distinction between communications businesses, which are anchored in activities that First Amendment press and association rights protect, and other businesses can be articulated in regulatory legislation.").

144. *See* Lipton, *supra* note 12, at 1930 ("In the prevailing historical narrative, real entity theorists are the proponents of unrestricted corporate power, and artificial entity theorists are the guardians of the public interest. Yet, these roles were actually reversed in the context of corporate crime.").

145. As one observer summarizes:

> Under the common law, criminal acts were thought to be beyond the corporate purpose and therefore unattributable to the corporate group. In the late nineteenth and early twentieth centuries, however, Congress and state legislatures enacted statutes that made corporations criminally liable for violating certain statutory provisions, while at the same time courts became increasingly amenable to the idea of corporate criminal intent.

Id. at 1913. *Cf.* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L REV. 105, 123–24 (1888) ("It has often been questioned whether a corporation could commit a tort or crime. The better opinion in the Roman law seems to have been that the question should be answered in the negative, at least whenever *dolus* or *culpa* was necessary to make the act under consideration wrongful."). To be sure, courts have imported common law concepts to fulfill elements of criminal liability such as *mens rea* and *actus reus*, but the doctrine has evolved in the shadow of statutes and, as some have argued, with little justification. Pollman, *supra* note 16, at 1648 ("With little theoretical grounding, courts imported tort and agency principles to hold corporations vicariously liable for

As such, there is nothing in my approach that precludes legislatures from imposing criminal liability on corporations.

What about criminal procedure? One supervening irony is that criminal liability has actually spawned constitutional protections for corporations.[146] Further, the extension of corporate personality through cases such as *Citizens United* will only enhance the argument that corporations are deserving of even more procedural protections under the Constitution. For instance, as Christopher Slobogin insightfully asks with respect to the Fourth and Fifth Amendments:

> If corporations are entitled to freedom of speech, and protection from unregulated government intrusion is necessary to ensure that speech is freely exercised, the Fourth Amendment's application to corporations may need to be revisited. . . .
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> . . . .
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> The same goes for the privilege against self-incrimination, which up to now has not applied to corporations. . . .[I]f corporations can possess and exercise a right to speak (per *Citizens United*), they can possess and assert a right not to speak.[147]

Along the lines of Slobogin's concern, there is emerging literature on whether, as corporations are increasingly equated to people, mechanisms such as deferred prosecution and non-prosecution agreements will pass constitutional muster.[148] By contrast, under my

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criminal acts performed by corporate agents within the scope of employment.").

146. *See, e.g.*, Pollman, *supra* note 16, at 1648 ("This is striking because many of the constitutional rights that corporations enjoy are an outgrowth of the Court's recognition of the corporation as subject to criminal liability. For example, if corporations were not subject to criminal liability there would be no need to consider whether they should receive double jeopardy protection.").

147. Christopher Slobogin, Citizens United *& Corporate & Human Crime*, 14 GREEN BAG 2D 77, 83, 84 (2010).

148. For example:

> Viewed in light of the Court's traditional understanding that corporations are considered to be "persons" under the Constitution, the majority's suggestion in *Citizens United* that corporations are equal to human beings, at least under the First Amendment's Free Speech Clause, likely affects the way that corporations' alleged criminal conduct is investigated by the government and the manner in which the government addresses corporate misconduct. Specifically, a number of standard conditions currently included in

approach, corporations would be stripped of these constitutional rights: to the extent legislatures wish to impose criminal liability, they can also provide procedural safeguards by statute.

There is a deeper debate, however, that I hope will emerge: is the imposition of criminal liability on corporations even a good idea? After all, sanctions are limited to fines which too often have little deterrent effect, especially given that shareholders are left paying them in the end.[149] Sadly, corporate agents might view reprehensible conduct not in terms of its inherent immorality, but as an economic calculation. The concerns of one scholar, written over a century ago, are strikingly contemporary:

> Let me ask, if any board of directors, who ever started any corporation on a course of criminality, ever was visited with the contempt, commission of the same acts by them as individuals would have entailed? Do they, indeed, when they authorize corporate crime, feel the same contempt for themselves that they ought to feel? On the contrary, the commission of such offenses is more apt to be discussed around a council board of directors with respect solely to its financial risk. They become, or tend to become, the soulless intellectual agencies of a soulless non-intellectual machine. When that point is arrived at, law is to them nothing in its majesty, and merely a tyrannical barrier to greed.
>
> But, if a board of directors who authorize or permit a

> deferred prosecution agreements and non-prosecution agreements may have to be altered or eliminated altogether in response to the humanization of the corporate entity following *Citizens United*.

Elizabeth R. Sheyn, The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of *Citizens United* 51 (June 2010) (unpublished manuscript), *available at* http://works.bepress.com/elizabeth_sheyn/1.

149. As Russell Stevenson observes:

> An additional problem with regulatory legislation is that most laws intended to regulate corporate activity have relied, either explicitly in the design of the statute, or by virtue of the way it is applied in practice, on sanctions directed not at the real people who actually make corporate decisions, but at the fictional corporate persona. The corporation is, as should be known by now, uniquely insensitive to the moral suasion of statutory rules. And where, as is usually the case, fiscal penalties imposed are nominal relative to the size of the institution on which they are imposed, regulatory statutes influence corporate behavior far less than we would desire.

Stevenson, *supra* note 85, at 722.

> corporation to disobey statutes, are put in jail or are condemned to wear felons' stripes, will they, in any gamble upon violation gathering dividends for others, defy the law's commands?[150]

Perhaps most crucially, imposing criminal liability on the corporation, a piece of paper, conveniently deflects attention from the actual wrongdoers:

> [W]e will come greatly nearer to reducing corporate criminal violation when we get back to the common-law theory, and more convincing will be the thought that nobody can authorize anybody or anything to commit a crime. Then all agents of corporations will be like agents of individuals. *If they violate law, there will be no force or power to stand between them and its vindication*.[151]

Or put more starkly, in the words of Charles Reich, "[o]ne of the great modern 'inventions' is the avoidance of personal responsibility by use of the organizational form."[152]

In an analogous critique to that focused on domestic criminal law, one might oppose my proposal on the theory that it would hinder attempts to find corporations liable under customary international law. After all, it would be tempting to find corporations "liable for committing, or for their complicity in, human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labor, torture and crimes against humanity."[153] Indeed, a particularly relevant and controversial

150. N.C. Collier, *Impolicy of Modern Decision and Statute Making Corporations Indictable and the Confusion in Morals Thus Created*, 71 CENT. L.J. 421, 427 (1910).

151. *Id.* (emphasis added).

152. REICH, *supra* note 29, at 173.

153. Larry Catá Backer, The United Nations' "Protect-Respect-Remedy" Project: Operationalizing a Global Human Rights Based Framework for the Regulation of Transnational Corporations 19 (Mar. 12–13, 2010) (unpublished conference paper), *available at* http://law.scu.edu/corplaw/file/Santa-Clara-Symposium-Larry-Cata-Backer-Paper-Draft.pdf.

example would be the argument that corporations should be brought to justice under the Alien Tort Statute.[154]

While this argument is very seductive, here too there are several responses. First, and by analogy to domestic criminal law and its statutes, if the international community wishes to impose liability on corporations, it is free to do so through treaties. Second, more fundamentally and again drawing parallels to criminal law, one wonders whether imposing criminal liability on corporations again serves as a convenient deflection away from those with real responsibility. As Judge José Cabranes of the United States Court of Appeals for the Second Circuit recently noted in his majority opinion in *Kiobel*:

> From the beginning, however, the principle of individual liability for violations of international law has been limited to natural persons—not "juridical" persons such as corporations—*because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it.*[155]

As Judge Leval thoughtfully observed when he concurred in the majority's judgment:

> A corporation, having no body, no soul, and no conscience, is incapable of suffering, of remorse, or of pragmatic reassessment of its future behavior. Nor can it be incapacitated by imprisonment. The only form of punishment readily imposed on a corporation is a fine, and this form of punishment, because its burden falls on the corporation's owners or creditors (or even possibly its customers if it can succeed in passing on its costs in

154. The statute itself is notoriously ambiguous, stating merely that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006).

155. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 119 (2d Cir. 2010) (emphasis added), *cert denied*, 132 S. Ct. 248 (2011), *cert. granted*, 132 S. Ct. 472 (2011).

> increased prices), may well fail to hurt the persons who were responsible for the corporation's misdeeds. Furthermore, when the time comes to impose punishment for past misdeeds, the corporation's owners, directors, and employees may be completely different persons from those who held the positions at the time of the misconduct. What is more, criminal prosecution of the corporation can *undermine* the objectives of criminal law by misdirecting prosecution away from those deserving of punishment. . . . For these reasons, criminal prosecution of corporations is unknown in many nations of the world and is not practiced in international criminal tribunals.[156]

Third, and perhaps most subtly, while treating corporations as "subjects" of international law may appear seductive from a criminal liability standpoint, it could open up a panoply of rights that corporations might claim as "people." As José Alvarez has convincingly argued, "[c]ontrary to what many human rights advocates apparently believe, those who want to hold corporations accountable for international law violations should not be so quick to assume that they want corporations to be 'subjects' of international law."[157] At one level, his point seems straightforward: human rights lawyers should not get trapped in the contradiction of wanting corporations to be "subjects" of international law when trying to find corporations liable but denying this status when corporations wish to assert their rights.[158] But using the international investment regime—where, perhaps stunningly, corporations are treated as states in their ability to enforce treaty rights directly[159]—Alvarez also makes a very sophisticated point:

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156. *Id.* at 168 (Leval, J., concurring).

157. José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 3 (2011).

158. *See id.* at 23 ("Human rights advocates have paid little attention to the fundamental contradictions of insisting that corporations are 'international legal persons' or 'subjects' for purposes of imposing obligations on them (as in ATCA litigation) and resisting that outcome when it comes to finding international rights for corporations (as in the investment regime).").

159. As Alvarez notes, "[u]nder most contemporary investment treaties, foreign investors have the right to bring direct claims for violations of their treaty rights in various arbitral forums, including the World Bank's International Centre for the Settlement of Investment Disputes (ICSID)." *Id.* at 11. The

> One of the general rationales offered for establishing this innovative international [investment] regime is precisely that suggested by the majority in *Citizens United*: Corporations have a legitimate role to play in constructing the rule of law and democratic society and their rights as persons should be respected no less than others. The investment regime just takes this rationale one step further to argue that foreign businesses should be able to bring international claims against the home states in which they operate.[160]

To be sure, this analysis does elide the fact that the investment regime is treaty-based, whereas customary international law is not. But overall, Alvarez's point is a very powerful one that in many ways parallels those of Christopher Slobogin in the domestic criminal context: the more corporations are deemed "persons," the greater rights they will claim.[161] So simply treating a corporation as a "person" or "subject" resolves precious little. In the end, as Alvarez warns, "[i]nternational lawyers should spend their time addressing which international rules apply to corporations rather than whether corporations are or are not 'subjects' of international law."[162]

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features of this regime, however, are troubling:

> Under investor-state arbitration, therefore, states are mostly passive participants in a game controlled by corporate plaintiffs in which the latter play the jurisgenerative role that in the WTO and throughout much of international law is formally reserved to states. As students of the burgeoning investor-state arbitral case law attest, states have in effect delegated the making of international investment law to third party private attorneys general, namely the wealthy multinationals that can afford to bring the cases and generate the case law.

Id. at 11–12.

160. *Id.* at 14; *see also id.* at 23 ("The principal lesson to take from decisions like *Citizens United* is simple: Beware the consequences of equating corporations to persons.").

161. *See* Slobogin, *supra* note 147, at 83–84.

162. Alvarez, *supra* note 157, at 31; *see also id.* at 30 ("[T]he only viable approach is to delineate corporate rights and obligations inductively from the bottom up: to define the rights and obligations of corporations by what those entities are and what they are not.").

III. REFRAMING THE DEBATE: CONSTITUTIONAL RIGHTS *AGAINST* CORPORATIONS?

> History appears to exhibit a cycle in which social organization is sometimes dominated by organization and ascendant power, and at other times by highly individualized life with a high degree of individualized possessory property. The core of the feudal system rested not on property but on power. This was gradually dispersed: the collectivized power of the feudal dukes dissipated into the individual titles of tiny landholders in the nineteenth century. The industrial era appears to have compelled a large measure of recollectivization of property. . . . In great areas, we have moved away from the individual and possessory property stage into a stage of great organization. But organization, economic as well as political, turns on power, not on title. Protection of individual liberty might possibly be carried out by impeding or preventing recollectivization of economic function with its attendant increase of power in private or public hands or in both working together.
>
> —Adolf Berle[163]

Having spent the bulk of this Article arguing that corporations should not be given constitutional rights, it might be worthwhile to end by asking if the debate about whether corporations deserve constitutional protection is even the right one to have. Rather than asking whether corporations should benefit from constitutional rights, the appropriate inquiry may be whether human beings should be able to assert constitutional rights *against* corporations. Put starkly, current jurisprudential debates might be arguing the wrong question.[164]

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163. A. A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 660 (1952).

164. *Cf.* Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1699 (1989) ("There is, of course, something worse than asking unintelligible questions—and that is answering them.").

As Charles Reich has provocatively argued, perhaps we have deluded ourselves into a bifurcation between "public" and "private":

> By dividing America into these two sectors, we are given a view of reality where the private individual and the giant corporation are considered to be alike. *All distinctions between the personal zone of individuals and the organized zone of corporate power are wiped out*. . . . The existence of a deepening conflict between the interests of individuals and the interest of "private" corporations is rendered invisible.[165]

Crucially, "[t]he image of the 'private sector' as a zone of freedom is further supported by describing our economy as a 'free market' rather than a carefully managed system with restricted opportunity. The market image suggests free and equal individuals exchanging handmade shoes for homegrown geese in a village square."[166] Contrary to this idyllic idealization, Reich argues that "it is big business, not big government, that primarily regulates the lives of ordinary Americans"[167]—a pernicious phenomenon he labels "economic government."[168]

The great stumbling block to such a project, of course, is the state action doctrine: corporations are not public actors against whom individuals typically assert constitutional rights.[169] Yet this roadblock

165. REICH, *supra* note 29, at 159–60 (emphasis added).

166. *Id.* at 161.

167. *Id.* at 41; *see also id.* at 77 ("The world of 1776, when Adam Smith published his book describing the free market, has been replaced by a centralized and highly organized economy; it is absurd to assume that the Adam Smith economic model still operates in the same way."); *Id.* at 169 ("A managerial economy is morally different from a free market because the individual's economic fate is controlled by others who thereby incur responsibility for their exercise of power.").

168. *See, e.g.*, *id.* at 20 ("Economic government is the dominant partner, public government the subordinate, in the totality of government that affects our daily lives."); *Id.* at 21 ("Through its control of jobs and our livelihood, economic government is responsible for far more coercion in our daily lives than public government."). For a similar argument, see Stevenson, *supra* note 85, at 729. "There are those who predict that, as the city-state gave way to the nation-state, so the nation-state will eventually give way to the corporation as our principal socio-political institution." *Id.*

169. *See, e.g.*, Miller, *supra* note 104, at 65 ("[I]f due process of law is to become the way in which a measure of accountability is brought to the corporate enterprise, one major constitutional leap must be taken, namely, the concept of 'state action' will have to be dropped by the Supreme Court, at least in part.").

can be overcome by recognizing both the state's role in chartering corporations and the significant impact private corporations have on the welfare of individuals.

First, corporations would not exist without the state's approbation. There is little doubt that the drafters of our Constitution would not instantly recognize this fundamental reality. As Adolf Berle wryly observes:

> Had the question come up, let us say, in 1800, when there were only 300 recorded corporations in the United States, all of which derived their authority from the states or predecessor colonies, the lawyer arguing that they were purely private and, because private, not within the scope of constitutional limitations on governmental action would have had the difficult side of the argument.[170]

Even today, "[t]he fact that the state benefits from granting corporate charters, combined with the corporation's dependence on state-granted limited liability (and other unique benefits of corporate status), suggests a symbiotic relationship between the state and the private corporation that is relevant to state action doctrine analysis under current precedents."[171]

It is difficult to deny the basic premise that corporations "are created by the State as a means of furthering the public welfare."[172] As such, "[t]he private practice of a corporation (or apparently any aggregate body) taken under or in furtherance of a privilege granted

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170. Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 945 (1952).

171. Padfield, *supra* note 116, at 726. As Padfield elaborates:

> First, the corporation does not exist without the State and the State derives significant benefits in exchange for granting corporate status . . . . Second, the abuse of the corporate form for illegitimate governing is foreseeable and has been predicted since the 1800s, but state law nevertheless encourages this type of abuse by making shareholder wealth maximization the priority of corporate management and protecting those managers from personal liability via doctrines such as the business judgment rule . . . . Third, the democratic process has arguably failed to keep the accumulation of corporate power in check and therefore it falls to the judiciary to rein in the abuse of that power.

Id. at 703 (emphasis omitted).

172. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 818 (1978) (White, J., dissenting).

by the state falls within the area of constitutional control."[173] In sum, one response to the lack of state action critique is "that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself."[174]

Second, and beyond the debates about whether the outsourcing of government functions renders state action doctrine problematic,[175] large corporations control resources that often exceed those of the governments that created them.[176] Thus, they affect the welfare of individuals in a manner that rivals, and might even surpass, that of government. As Erwin Chemerinsky observes, "the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct."[177] As another scholar asks:

> If the sovereign state of Delaware is subject to the limitations of the [F]ourteenth [A]mendment, then why should not the "corporate state" of DuPont or General Motors? By applying the Constitution to such entities—by "constitutionalizing" the supercorporation—it may be possible to retain the benefits flowing from the private ownership of business while simultaneously attaining a higher degree of fairness in the social

173. Berle, *supra* note 170, at 951; *see also id.* at 952 ("Implicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself.").

174. *Id.* at 942. As Russell Stevenson observes:

> Although it is a point often lost sight of, corporations are the recipients of a grant of important privileges and rather substantial powers from the state, and it seems not at all unreasonable to suggest that those powers and privileges ought to be used in the public interest and, to that end, that their exercise might properly be subjected to certain conditions. Corporations were historically viewed as much as instrumentalities of the state as centers of independent private power.

Stevenson, *supra* note 85, at 728.

175. *See, e.g.*, Padfield, *supra* note 116, at 712 ("[O]utsourcing of inherently governmental functions via privatization is another way in which corporations can end up in governing roles.").

176. *See, e.g.*, Stevenson, *supra* note 85, at 728 (noting "a world in which large corporations control resources and wield powers which dwarf those of state governments, and indeed, in the case of the largest corporations, the governments of all but a handful of nations").

177. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510–11 (1985); *see also* Krannich, *supra* note 21, at 100 ("Modern business corporations have the capacity to aggregate enough power and influence to rival governmental institutions.").

order.[178]

After all, "[t]he power of many large corporations over the lives of their employees, the residents of the communities in which they operate, and even their customers, often surpasses in practical impact that of the state governments to whose laws corporations nominally owe their existence."[179] As Adolf Berle elegantly argued in the 1950s:

> The thrust of the doctrine here propounded is precisely that where the corporation by reason of size or of degree of concentration has acquired power giving it the capacity to impede personality or personal life it has become, [*tanto quanto*], an arm of the state both because it is a state chartered corporation and because it is relied on by the community as a necessary part of its economic function.[180]

In the tradition of Berle, Reich laments that while "[p]ublic government is limited in what it can do to individuals by the provisions of the Constitution; private government is subject to no such limitations."[181] But the situation is actually far worse than what Reich describes: not only are private corporations not subject to constitutional restraints, they are using the Constitution both as an

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178. Miller, *supra* note 104, at 65. Other scholars echo these concerns:

> Viewed in the large, the proposition that the government of the state of Arizona or the City Council of Keokuk, Iowa, are subject in all respects to the restraints of that formidable body of constitutional law known as "due process"—which comprehends among other things most of the guarantees of the Bill of Rights—but that the General Motors Corporation or American Telephone and Telegraph are not, appears on its face rather absurd. Surely the influence wielded by one of these corporate behemoths over the lives and fortunes of its employees is at least as great as the impact of most state and local governments on the daily affairs of their citizens.

Stevenson, *supra* note 85, at 732.

179. Stevenson, *supra* note 85, at 729. *Cf.* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting) ("It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process.").

180. Berle, *supra* note 163, at 658.

181. REICH, *supra* note 29, at 30.

offensive weapon against government regulation and in the service of managerial capitalism.[182]

By contrast, individuals might be better off with a jurisprudence that asks whether corporate actions pass constitutional muster. As Berle forcefully notes:

> It is here submitted that a corporation or concentrate of corporations, so situated that it has power seriously to affect the individual life of a patron or customer, has become an arm of the state so that its actions are reviewable to determine whether or not they accord with the constitutional limitations and requirements imposed on states.[183]

The great irony here is that constitutional law might do what business law has not done well: regulate corporations in a manner that enhances public welfare.[184] While there is at least some doctrinal support to rethink the state action doctrine,[185] such reform is admittedly a very long haul. The crucial insight is to recognize that corporations may more closely be analogized to governments than to persons; after all, "[h]ad jurists focused on economic power, the analogy of a corporation to a government might have forcefully suggested itself."[186]

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182. *See supra* Part II.A.

183. Berle, *supra* note 163, at 657. Reich makes a similar argument:

> The Constitution and the Bill of Rights should be made applicable to economic or private government and to the workplace. Corporations should lose their special status as "persons" and their ability to dominate the political process and the channels of communication . . . . These changes would recognize the need to bring private economic power under the Constitution and thus ultimately under the control of the American people.

REICH, *supra* note 29, at 195.

184. As Reich laments, "Every form of legal control over the corporation has failed. Control by the stockholders—the supposed owners of corporations—was lost to management. . . . A second kind of legal control—the antitrust laws—also failed." REICH, *supra* note 29, at 34–35.

185. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 509 (1946) ("[T]he circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties."). *Cf.* Garner v. Louisiana, 368 U.S. 157, 184 (1961) (Douglas, J., concurring) ("A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public.").

186. Mark, *supra* note 19, at 1446; *see also* Bezanson, *supra* note 26, at 656 ("Indeed, the size and

Specific reforms can follow. For instance, Erwin Chemerinsky has suggested that "states could be required in chartering corporations or granting licenses to insist that the private entity refrain from infringing constitutional liberties"[187] and Russell Stevenson envisions a "Corporate Bill of Responsibilities"[188] which would "at a minimum, comprehend some guarantee of free speech, a prohibition of invasions of individual privacy, and something akin to 'due process' rights for employees and perhaps others."[189]

Beyond suggestions for reform that should be debated, one should not lose sight of the big picture. When thinking about whether our jurisprudence has been evolving in precisely the wrong direction, it might be worth revisiting Victor Brudney's prescient warning thirty years ago:

> Regardless of whether increased corporate participation in the social and political life of the nation is desirable as a matter of policy, *serious doubts exist regarding the validity of the constitutional support thus given to that movement*. That support could significantly reduce the regulatory power of government over an institution whose existence is uniquely a function of government authorization, whose power and wealth often far exceed those of the government that created it, and that has long been a subject of pervasive government regulation.[190]

To the extent that the issues raised by thinkers as varied as Reich, Berle and Brudney are cause for concern, it might behoove us to

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power of corporations would more likely lead to the conclusion that corporations are a sector in need of popular *control* rather than in need of actively participating in political discourse.").

187. Chemerinsky, *supra* note 177, at 527.

188. Stevenson, *supra* note 85, at 732. Much like Reich, Stevenson recognizes:

> [T]he corporation as an institution possessing the power to intrude on important social values, inherent in such a document, would explode the myth with which we have so long been saddled that our society is sufficiently atomistic that the only concentration of political and social power against which we must be on our guard is that which resides in the state.

Id. at 733 (footnote omitted).

189. *Id.*

190. Brudney, *supra* note 126, at 236 (emphasis added).

begin asking not whether corporations should have constitutional rights, but whether to evolve a mechanism that protects individual rights in the face of corporate power.[191]

CONCLUSION

One might reasonably argue that conceptualizing corporations is not trivial. After all, "the large corporation [does] not fit well into a legal system designed to mediate conflicts between individuals and between individuals and government."[192] Notwithstanding this reality, offering constitutional protections to corporations is nothing short of breathtaking. As Carl Mayer observes:

> Behind doctrines of commercial property and the free market of ideas is hidden the tacit acceptance of the corporation as a person, entitled to all the rights of real humans. Under this methodology of constitutional operationalism, the rationale for equating corporations and persons is not stated specifically, however, so it cannot be rebutted. *There is no opportunity for denial; sub silentio the corporation is legitimated as a constitutional actor.*[193]

Especially troubling is the fact that legitimization has occurred without a consistent theory of the corporation.[194]

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191. *Cf.* REICH, *supra* note 29, at 196 ("We must revise the social contract to reflect the central role of organized economic power and to define the responsibilities that accompany such power.").

192. Mark, *supra* note 19, at 1445; *see also* Krannich, *supra* note 21, at 89–90 ("The history of corporate personality doctrine reflects a struggle to fit the corporate entity into traditional legal practices. This is no easy task, for corporations do not readily fit within the American legal tradition."); *Constitutional Rights of the Corporate Person*, *supra* note 72, at 1641 ("As common as its presence may be, the legal nature of the corporate person has defied simple analysis.").

193. Mayer, *supra* note 12, at 650 (emphasis added). *Cf.* Bezanson, *supra* note 66, at 739 ("Institutional speech, in contrast, is abstracted from the individual; it is an artifact. It has nothing to do with liberty and no necessary relationship to freedom, a term that is meaningless outside the context of individuals.").

194. *See* Mayer, *supra* note 12, at 650–51 ("But it is certain that the conferral of corporate Bill of Rights protections, without any theory, has served an important legitimizing function. Extending these rights has legitimized corporations as constitutional actors and placed them on a level with humans in terms of Bill of Rights safeguards.").

One also cannot help but wonder to what extent a zero-sum game is at work: greater constitutional protections for corporations come at the expense of individual rights. As one commentator observes, one must recognize "not only that legal personhood relates to actual social status, but also that status may operate as a zero-sum game; grants of legal personality to corporations may cheapen the social meaning of humans' legal personality"[195]—after all, "[c]alling corporations persons sends a message about the state's values: by implicitly extending human dignity to artificial business entities, the state cheapens the distinctiveness of legal personhood by overextending its application."[196] As just one example, one might ask whether over-expansive First Amendment rights for corporations might trammel the due process rights of voters under the Fifth and Fourteenth Amendments, or perhaps even the rights of shareholders to remain silent under the First Amendment.[197]

Sadly, "[t]he corporation's invocation of the first ten amendments symbolizes the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives."[198] By contrast, reviving the artificial entity theory might return us to what scholars such as Morton Horwitz have described as "'methodological individualism,' that is, the view that the only real starting point for

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195. *Legal Fiction*, *supra* note 2, at 1764.

196. *Id.* at 1765; *see also* Padfield, *supra* note 116, at 707 ("[T]here can be little doubt that the power of multinational corporations is growing. It seems reasonable to conclude that this gain in power must come at the expense of a loss of power on the part of other parties."); Rivard, *supra* note 12, at 1431 ("One problem noted by commentators is the increasing protection corporations enjoy under the Bill of Rights, which expands the power of corporations at the expense of individuals.").

197. *See also* Mayer, *supra* note 12, at 658 ("Fourth [A]mendment rights applied to the corporation diminish the individual's right to live in an unpolluted world or to enjoy privacy. The corporate exercise of first amendment rights frustrates the individual's right to participate equally in democratic elections, to pay reasonable utility rates, and to live in a toxin-free environment."). In the words of one scholar:

> When Mobil Oil Corporation purchases an advertisement that promotes a particular social view, the real speaker is again top management. Should not Congress have the power to deny top management access to the corporate treasury based on an equal-footing rationale? Management could spend its own personal funds or solicit, individually or collectively, contributions from others to further their expression. This congressional action would not prevent the actual expression, but would only place all individuals at the same starting point.

O'Kelley, *supra* note 26, at 1382.

198. Mayer, *supra* note 12, at 578. *Cf.* Alvarez, *supra* note 157, at 35 ("We should never confuse the economic rights of corporations (or of investors) for the rights of natural persons to live in dignity.").

political or legal theory is the individual."[199] Perhaps what is needed, as some have suggested, is a constitutional amendment that corporations, as creatures of the legislature, only enjoy rights conferred to them by their creator.[200] The broader point, however, is that "[t]he State need not permit its own creation to consume it."[201]

Amid all this pessimism, let me conclude on a hopeful note: institutions such as corporations can only survive and thrive if we as a polity validate them.[202] Let us not forget that while "[m]onarchies may legitimize themselves by reference to the divine right of kings . . . in a society founded on democratic values legitimacy ultimately depends on responsibility and accountability."[203] If more of us stop acquiescing and begin asking for "responsibility and accountability," then perhaps one day our constitutional jurisprudence will again be different.[204] We need more people like the brave child in Hans-Christian Andersen's strikingly contemporary tale about the naked emperor.

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199. Horwitz, *supra* note 11, at 181. *Cf.* REICH, *supra* note 29, at 199–200 ("We need to restore citizenship by returning to the ideal of democratic individualism . . . . In a society where organization possesses so much power to change individual behavior, individuals must be much more conscious of their species and evolutionary role, so that we can guide our own changes rather than submit to being changed by impersonal forces.").

200. *See, e.g.*, Mayer, *supra* note 12, at 660 ("What is required is a constitutional presumption favoring the individual over the corporation. To establish this presumption, a constitutional amendment is needed that declares corporations are not persons and that they are only entitled to statutory protection conferred by legislatures and referendums.").

201. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting); *see also* C.F. Adams, Jr., *A Chapter of Erie*, *in* CHAPTERS OF ERIE AND OTHER ESSAYS 1, 95–96 (1871) ("Modern society has created a class of artificial beings who bid fair soon to be the masters of their creator."); *Constitutional Rights of the Corporate Person*, *supra* note 72, at 1658 ("Loosen the fiction theory from its absolutist moorings and we find a bare, political message: society should not lose control over that which it creates.").

202. *See* Backer, *supra* note 153, at 45 ("A corporation cannot exist as a viable entity in the absence of either legal or social 'validation.'").

203. Stevenson, *supra* note 85, at 714.

204. *Cf.* Backer, *supra* note 153, at 1 ("It was once a comfortable tenet of law that economic enterprises organized in[ ]corporate form were the creatures of the states that recognized and regulated their existence.").