San Diego Law Review

Volume 50
Issue 1 *2013*

Article 5

3-1-2013

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I. INTRODUCTION

Corporate personhood defines corporations as something they cannot be.[1] It characterizes corporations as persons even though they have no bodies, souls, or hearts.[2] The legal fiction of corporate personhood, though useful, foments conceptual confusion and normative quagmires. As "artificial" persons, corporations can claim the constitutional rights of natural persons.[3] But then they can turn around and evade the obligations

1. *See, e.g.*, 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."). This statute is often referred to as the Dictionary Act or Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. Many state statutes provide for similar definitions. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11022 (West 2007) ("'Person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, or association, or any other legal entity.").

2. These inherent differences acquire relevance in many contexts. For example, without a body, corporations cannot be incarcerated for wrongdoing. Similarly, without a body there can be no "tag" jurisdiction over corporations. Actual persons have no subsidiaries, corporations have no "home," individuals cannot be and act in multiple places at the same time, and it makes little sense to test where the "nerve center" of a natural person lies. *Cf.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (holding that the test for general jurisdiction probes whether the contacts of the corporation with the forum state are enough so that the defendant corporation is "essentially at home" in the forum); Hertz Corp. v. Friend, 130 S. Ct. 1181, 1186 (2010) (noting that a corporation's "nerve center" for diversity jurisdiction purposes will typically, though not always, be found at its corporate headquarters); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 1–2 (1986) (explaining how the United States could have jurisdiction over a foreign subsidiary if that subsidiary's parent is incorporated in the United States).

3. This includes political speech rights, commercial speech rights, negative speech rights, protection against unreasonable searches, the right to invoke the Due Process Clause, the protections afforded by the Takings Clause and the Double Jeopardy Clause, and protection of corporate racial and tribal identities. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (holding that bans on political speech based on the speaker's corporate identity are prima facie violations of the First Amendment); Am. Tradition P'ship v. Bullock,132 S. Ct. 2490, 2491 (2012) (reaching a per curiam decision that *Citizens United* applies to state campaign finance laws and allows corporations to

that come with personhood.[4] This Article argues that this discrepancy constitutes a fundamental and dangerous mismatch. Rights must track obligations.

The most central political obligation a person—artificial or natural—can have is the duty to submit to the jurisdiction of the courts. Without jurisdiction, a forum cannot enforce any substantive obligations. Jurisdiction is the lynchpin for enforcing obligations, for adjudicating and deterring corporate wrongdoing, and for the vibrancy of any regulatory regime. It is thus unacceptable that corporations increasingly have the rights and means to exert political influence in a forum but simultaneously retain the conceptual tools to evade the reach of the forum's courts. Corporate personhood is a place where courts have split rights and obligations asunder to dangerous effect.

Nowhere is this divorce more visible, consequential, and its effect more painful than in the personal jurisdiction doctrine.[5] Courts and scholars have overlooked that the expansion of corporate rights entails the expansion of corporate obligations, including the obligation to submit to the jurisdiction of the right-granting forum.[6] Lacking the conceptual

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spend freely to advocate for or against candidates for local and state offices); *see also infra* notes 67–108 and accompanying text.

4. Most central is the obligation to submit to the jurisdiction of the courts. *See, e.g.*, Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1705 (2012) ("[T]he term 'individual' as used in the [Torture Victim Protection] Act encompasses only natural persons."); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (demonstrating the use of binding arbitration to avoid jurisdiction); Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2888 (2010) (limiting the extraterritorial application of U.S. laws); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537–38, 554 (S.D.N.Y. 2001) (granting corporate defendant dismissal based on forum non conveniens grounds in a boomerang litigation), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

5. As the names of the most famous personal jurisdiction cases make clear, personal jurisdiction doctrine now develops mostly with reference to corporations. Consider the names of the landmark post-*Pennoyer* cases: *International Shoe*, *Asahi Metal Industry*, *World-Wide Volkswagen*, *Helicopteros Nacionales*, *Burger King*, *Carnival Cruise Lines*, et cetera. More recently, the Supreme Court developed the personal jurisdiction doctrine in *J. McIntyre Machinery* and *Goodyear Dunlop Tires Operations*.

6. Predictably, personal jurisdiction doctrine is in disarray, with courts and scholars struggling to articulate a coherent framework for answering when defendants are obligated to submit to the jurisdiction of a state. *See, e.g.*, Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1246 (2011) [hereinafter Borchers, *Incoherence*] ("[T]he Court lacks any clear constitutional rationale for limiting state-court assertions of jurisdiction."); Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995) ("[J]urisdiction in the United States is a mess."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589,

vocabulary of obligations, courts and scholars have focused on justice instead.[7] They ask whether imposition of jurisdiction would be just or

1589 (1992) (noting that the Supreme Court has "not given us a coherent philosophical foundation for the constitutional restrictions they recognize"); Jay Conison, *What Does Due Process Have To Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) ("[Personal jurisdiction jurisprudence] is a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined."); Kevin C. McMunigal, Essay, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) ("Ambiguity and incoherence have plagued the minimum contacts test . . . ."); Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 101–02 (2010) ("In all the years since 1990, the Supreme Court has not returned to the subject of personal jurisdiction and has left the lower courts on their own to try to make sense of a doctrine without any clear foundation."); Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 572 n.17 (1991) (describing the personal jurisdiction doctrine as marked by "uncertainty and confusion"); Allan R. Stein, Burnham *and the Death of Theory in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 597, 598 (1991) (opining that a state's ability to assert jurisdiction over a defendant merely because he was served with process in that state "render[s] an already muddled area of the law totally incoherent"); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 850 (1989) ("The Supreme Court has . . . failed to expound a coherent theory of the limits of state sovereignty over noncitizens or aliens."); Mary Twitchell, Burnham *and Constitutionally Permissible Levels of Harm*, 22 RUTGERS L.J. 659, 666 (1991) (stating that the approach taken in *Burnham* creates "jurisdictional stew"); Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 102 (1988) (noting that personal jurisdiction doctrine is a "body of rules without reasons"); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171 (2004) ("Although the extensive body of commentary on federally imposed limitations of state court jurisdiction agrees on very little, the one point of consensus is that Supreme Court personal jurisdiction doctrine is deeply confused."); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 625 (1991) ("Jurisdictional doctrine is in chaos."). *But cf.* Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 856 (1987) ("The doctrine of personal jurisdiction . . . is consistent and coherent.").

7. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasizing the importance of "traditional notions of fair play and substantial *justice*" for the personal jurisdiction analysis (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted)); St. Clair v. Cox, 106 U.S. 350, 356 (1882) (arguing that consent made the exercise of personal jurisdiction over the corporation "eminently fit and *just*" (emphasis added)); Galpin v. Page, 85 U.S. (18 Wall.) 350, 368–69 (1873) (emphasizing the importance of personal jurisdiction because judgment without proper notice and opportunity to be heard amounts to "judicial usurpation and oppression, and never can be upheld where *justice* is justly administered" (emphasis added)); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) ("[P]rinciple of natural *justice* . . . forbids condemnation without opportunity for defence." (emphasis added)); Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) ("To bind a defendant personally by a judgment when he was never personally summoned, or had notice of the proceeding, would be contrary to the first principles of *justice*." (emphasis added)). In modern times, notions of justice are subsumed under a due process analysis. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 464 (1985).

convenient to the corporate defendant instead of asking whether the corporation has an obligation to submit to the jurisdiction of the forum.[8]

This Article aims to reconnect corporate rights and obligations. It argues that courts must consider the availability and exercise of corporate rights when determining whether the corporation is amenable to suit in the forum.

To make this novel argument, this Article begins by documenting the rise of corporate personhood, recently culminating in *Citizens United v. FEC*.[9] Part II shows how the evolution of corporations now allows for the treatment of corporations as entities that can have political rights and political obligations.

Part III argues that personal jurisdiction doctrine and scholarship has not acknowledged the rise of corporate personhood. Consequently, it has unduly focused on aspects of justice and convenience while neglecting notions of political obligations. This Part asks courts and scholars to reconsider the impulses behind the personal jurisdiction's minimum contacts factors currently in use. It suggests that the Supreme Court's jurisprudence will be improved through the incorporation of factors into the minimum contacts analysis that probe for the political obligations of the corporate defendant.[10]

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8. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) ("A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief."); Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State . . . ."); *Int'l Shoe*, 326 U.S. at 317 (examining an "estimate of the inconveniences" to the defendant from trial in the forum (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)) (internal quotation marks omitted)); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (determining that considering the "interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies" helps protect against inconvenient litigation for the defendant (citation omitted)); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 648–49 (1950) (noting that the forum's interest in regulating the defendant's conduct and the location of witnesses are factors in determining whether a state has jurisdiction over the defendant).

9. 130 S. Ct. 876 (2010).

10. Recently, the Supreme Court revisited the minimum contacts test for the first time in two decades in two cases but was unable to produce clear majorities. Instead, the Court's opinions are likely to add to the confusion and uncertainty. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856–57 (2011) (holding that a North Carolina court cannot exercise general jurisdiction over a non-U.S. subsidiary solely because the subsidiary's products were sold in the state); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (holding by a 4-to-2-to-3 split that a non-U.S. company is

Part IV builds upon this diagnosis by asking what it would mean to take seriously the notion that corporations are persons. This Part explains the main theoretical contributions of this Article. It develops the normative foundations of the personal jurisdiction analysis so that it can be applied to corporations while acknowledging the many practical and normative differences between natural and artificial persons. Part IV utilizes conceptual frameworks from political philosophy to argue that rights and obligations are intertwined.[11] As applied to corporations, any viable theory of political obligation must consider the rights and freedoms a state grants to corporations before determining whether the corporation is obligated to submit to the adjudicatory power of the state. The rights and protections afforded by a state must match the jurisdiction of that state over artificial or real entities with those rights and protections. Political rights imply political obligations, including submission to the jurisdiction of the right-granting state.

Part V reconstructs personal jurisdiction doctrine along these lines. It uses the insights of the political obligation framework developed in Part IV to put personal jurisdiction on secure normative foundations that are attentive to the practical and legal differences between natural and artificial persons. This Part argues that a more robust understanding of corporate citizenship and corporate rights correlates with a more robust ability of the state to exercise jurisdiction over corporations.[12] A corporation's general enjoyment and use of political rights must make a finding of

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not subject to jurisdiction in New Jersey on any stream-of-commerce theory where it sold its products to a distributor in Ohio and never entered, advertised, or sold its products in New Jersey itself); *id.* at 2791 (Breyer, J., concurring) ("[I]t is unwise to announce a rule of broad applicability without full consideration of the modern-day consequences."). *See generally* Borchers, *Incoherence*, *supra* note 6, at 1245–46 (arguing that the Supreme Court's opinion in *J. McIntyre* "is a disaster" and judging the decision in *Goodyear* "not nearly as bad" but "far from good"); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 868 (2012) ("[T]he Court [in *J. McIntyre*] produced a fractured 4–2–3 opinion that resolved little beyond holding that the New Jersey courts could not exercise personal jurisdiction over the defendant in the instant case.").

11. In political philosophy, the legitimacy of the state's exercise of coercive power has been a key issue for a long time. *See infra* note 191 and accompanying text. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) (asserting that a modern democratic state's authority derives from its citizens' acceptance of shared philosophical doctrines of justice); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986) (arguing that legitimate political authority entails the right to rule and creates political obligations); A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS (2001) (arguing that political authority may be morally justified without being legitimate, but that only legitimate authority generates political obligations).

12. This argument could, in theory, go either way. Just as a court may consider corporate rights in the jurisdictional context, so could a court consider jurisdictional reach in the corporate rights context.

general jurisdiction more likely.[13] Similarly, courts can use evidence of political activities that are directly and closely related to the suit at hand to justify imposition of specific jurisdiction.[14]

If we take seriously the law's trend to treat corporations increasingly as persons, then this is one procedural implication of this development. For the purposes of this Article, I remain agnostic whether a full-fledged or reduced notion of corporate personhood is more desirable. That is an important question; one, however, that cannot be answered without understanding the procedural ramifications of treating corporations as persons.

II. THE RISE OF CORPORATIONS AS PERSONS THAT CAN BEAR RIGHTS AND RESPONSIBILITIES

Corporations are treated under the law as persons unless the context indicates otherwise.[15] As artificial persons, they are treated presumptively like actual persons. Corporate personhood is, of course, a legal fiction.[16] But this legal fiction, like many other legal fictions, has important consequences. By designating a corporation as a kind of person, the law grants corporations the capacity for legal action and relations. As persons, corporations have legal standing to hold property, to enter into contracts, to conduct business, and ultimately, to sue and be sued.

This Part chronicles the expansion of corporate political rights. It details how corporations were periodically reconceptualized over the last 200 years. Case law moved from broad skepticism of corporations, to conceiving them as artificial creations of state law with no political rights and tightly circumscribed and controlled economic rights, to natural entities

13. *See infra* Part V.A.

14. *See infra* Part V.B.

15. 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."). Many state statutes provide for similar definitions. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11022 (West 2007) ("'Person' means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, or association, or any other legal entity.").

16. Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1987) ("The edification of the corporation to the status of person is one of the most enduring institutions of the law and one of the most widely accepted legal fictions."). *See generally* THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY (Michael Carrithers et al. eds., 1985) (discussing various conceptions of the person).

of private contract with broad economic rights but not political rights, to corporate persons with a claim to moral standing, and now to an approximation of corporate citizens increasingly difficult to distinguish from actual citizens.[17]

Each reconceptualization brought corporations as artificial persons closer to actual persons. As a result, each step in this process entailed not only a greater claim to political rights for corporations but also a greater susceptibility to the burdens of political obligations. The judicial personification of the corporation radically enhanced the position of the business corporation by furnishing theoretical grounds to assert political rights.[18] However, unnoticed in this development is that judicial personification also makes corporations subject to political obligations.

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17. *See generally* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970 (1970) (providing an overview of the evolution of public policy concerning corporations in the United States); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992) (attempting to define *corporation*); Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005) (commenting on corporate theory transformations from the Roman Empire to the present); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989) (examining the theories of the firm in five parts); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989) (doubting the validity of new economic theories of the firm); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926) (tracing the historical background of corporate personhood); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) (examining the origins of corporate personality); Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253 (1911) (discussing German and French theories of the corporation in the nineteenth century); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (detailing the law's shifting views of corporations); David Millon, *State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L. REV. 903 (1988) (describing shifts in corporate law from regulating the corporation's relationship with society to the corporation's relationship with shareholders); Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009) (describing the contrasting views of the corporation); Miriam Theresa Rooney, *Maitland and the Corporate Revolution*, 26 N.Y.U. L. REV. 24 (1951) (noting the roots of corporate law doctrine in medieval canon law); Paul Vinogradeff, *Juridical Persons*, 24 COLUM. L. REV. 594 (1924) (tracing views on corporate personality from the Roman Empire days to judicial decisions in the early twentieth century); James Boyd White, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship*, 94 YALE L.J. 1416 (1985) (debating what language the law should use in describing corporate limits and purposes).

18. The focus of this Article is on the *judicial* personification of the corporation. For developments in the administrative realm, see, for example, Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 311–13 (1978), which notes that many conflicts over corporate regulations shifted over time from the judiciary to the bureaucracy.

A. Corporations at the Founding

English common law has long recognized that corporations are unique entities. As a case from 1612 held, corporations "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls."[19] The Founders, worried about corporate power as exemplified by the West Indian Company, were skeptical of corporations.[20] Thomas Jefferson, for example, warned of the example of England and hoped to "crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."[21] The Constitution and the Bill of Rights do not mention corporations.[22] Neither do later amendments.[23] Perhaps this is the case because there were few corporations at the time of the founding and they possessed little economic power.[24]

B. The Corporation as an Artificial Entity

Early case law in the young Republic did not conceive of corporations as persons or citizens.[25] This position quickly began to erode. Courts in

19. Case of Sutton's Hosp., (1612) 77 Eng. Rep. 960 (K.B.) 973; 10 Co. Rep. 23 a, 32 b.

20. *See, e.g.*, Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 823 (2004) ("Thomas Jefferson and James Madison cautioned against the dangers of corporations, in part because the American colonies were operated as corrupt English corporations."). For a polemic use of this position, see Ralph Nader & Robert Weissman, *Letter to the Editor: Ralph Nader on Scalia's "Originalism,"* HARV. L. REC. (Nov. 13, 2008, 12:00 AM), http://hlrecord.org/?p=11026.

21. Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), *in* 12 THE WORKS OF THOMAS JEFFERSON 42, 44 (Paul Leicester Ford ed., 1905), *available at* http://files.libertyfund.org/files/808/Jefferson_0054-12_EBk_v6.0.pdf.

22. *See generally* Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence To Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 525–34 (2010) (noting that colonial America was skeptical of corporations); Amanda D. Johnson, Comment, *Originalism and* Citizens United*: The Struggle of Corporate Personhood*, 7 RUTGERS BUS. L.J. 187 (2010) (examining to what extent the Constitution and its Framers recognized artificial persons).

23. *See* 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, pt. 2, at 724 (1987) ("[T]he framers of the Fourteenth Amendment did not have corporations in view.").

24. *See, e.g.*, WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 49 (1997) (noting that at the time of the founding there were only six corporations, other than banks, in existence in the colonies).

25. *See, e.g.*, Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809) (corporations are not persons as the term is used in Article III and the Judiciary Act of 1789). *But cf.* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497,

the early nineteenth century began to conceive of corporations as artificial entities—not aggregations—and focused on the state's constitutive role in their creation and maintenance. Early cases speak of corporations as entities separate from their shareholders and employees. For example, in *Trustees of Dartmouth College v. Woodward*, the Supreme Court referred to the corporation as "an artificial being, invisible [and] intangible."[26] Chief Justice Marshall characterized corporations as having "individuality" as evidenced by holding the power to sue, being amendable to suit, and existing independently of the lives of their shareholders.[27] Legal treatises from this era similarly describe the legal framework of a corporation as a "body, created by law . . . [that is] for certain purposes, considered as a natural person."[28] Courts in these early cases began to interpret the term *persons* in statutes to include corporations as well as natural persons.[29]

Separate from their shareholders and employees, corporations under this framework were conceived as artificial beings. They were legal entities and, as such, owed their existence to the positive law of a state.[30] Individual initiative could charter a particular corporation, but its existence, it was thought, was not intelligible without reference to a legal framework. At its most extreme, this position required special acts of the state legislature for each instance of incorporation.[31] Under this conceptual framework, corporations were undeniably created in part by the state. In contrast to general partnerships that were private agreements and did not depend on the state, corporations were the artificial creations of a state.

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558 (1844) ("[A] corporation created by . . . a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person.").

26. 17 U.S. (4 Wheat.) 518, 636 (1819).

27. *Id.* at 636, 667–68.

28. JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 1 (John Lanthrop ed., 10th ed. 1875).

29. *See* David Millon, 1990 DUKE L.J. 201, 206 n.18 (citing Loudon v. Coleman, 59 Ga. 653, 655 (1877); People v. Assessors of Watertown, 1 Hill 616, 620–21 (N.Y. Sup. Ct. 1841); Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351, 355 (1860)).

30. This theory is thus sometimes also referred to as the "grant," "concession," "fiction," or "creature" theory of the corporation. *See, e.g.*, George Heiman, *Introduction* to OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 27 (George Heiman ed. & trans., 1977) ("[Gierke] contends that the group-person, be it fellowship, association or corporation, has the same attributes as the personality derived from the individual."); Horwitz, *supra* note 17, at 181. For a modern version of this position, see Charlie Cray & Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. FOR SOC. JUST. 305, 307 (2005), which argues "that understanding the fundamentally public nature of corporations is the key to restoring democratic control over them."

31. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188–91 (2d ed. 1985) (explaining that legislatures granted charters "by statute, one by one" in the early nineteenth century, thus making each charter "tailor-made to the case at hand").

The state conferred the privileges of incorporation not merely for the private benefit of economic gain but also for the public welfare.[32]

Corporations under this conception have no independent ontological existence and therefore no independent claim to rights or political influence. Corporations thus had no political rights in this era. An early attempt to cast their artificial personhood as citizenship failed in the Supreme Court.[33] This was the case, in part, because of a suspicion of and hostility toward accumulated and entrenched power that might destabilize the political balance of power.[34] Some states sought to limit the power of corporations further by setting limits on the amount of capitalization[35] and durational existence.[36] Courts also limited the power of corporations by narrowly construing corporate charters and powers.[37] The most dramatic outgrowth of this tendency was development in common law of the ultra vires

32. *See, e.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 548 (1837) (emphasizing that corporations exist to benefit the public). Given this extent of state involvement, few corporations were devoted to pure business objectives. Instead, many corporations chartered in this era pursued public functions like public utilities, insurance, and banking. *See* HURST, *supra* note 17, at 17–18; Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138 (1985).

33. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868) ("The term citizens . . . applies only to natural persons . . . not to artificial persons created by the legislature . . . ."), *overruled in part on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

34. *See* HURST, *supra* note 17, at 30–47. *See generally* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988) (discussing concerns over the relation of economic and political power in the nineteenth century). At the extreme, this led some to advocate for the abolition of corporations. *See, e.g.*, MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS AND BELIEF 201 (1957).

35. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 550–54 nn.5–26 (1933) (Brandeis, J., dissenting in part) (collecting state statutes).

36. *Id.* at 555 n.29; HURST, *supra* note 17, at 44–45.

37. *See, e.g.*, Chewacla Lime-Works v. Dismukes, 6 So. 122, 123 (Ala. 1889) (holding that a company chartered to mine, manufacture, and sell lime rock products had no implied or incidental power to carry on general retail business); Day v. Spiral-Spring Buggy Co., 23 N.W. 628, 629–30 (Mich. 1885) (holding that a buyer was not permitted to prevail on breach of contract claims because the contract involved buyer in activity that went beyond buyer's corporate charter); People *ex rel.* Tiffany & Co. v. Campbell, 38 N.E. 990, 991 (N.Y. 1894) (holding that a corporation chartered to manufacture and sell gold and silverware did not have the power to purchase and resell goods purchased from a foreign manufacturer); Powell v. Murray, 38 N.Y.S. 233, 235 (N.Y. App. Div. 1896) ("The charter of a corporation is the measure of its power, and the enumeration of those powers implies the exclusion of all others." (citing Thomas v. R.R., 101 U.S. 71 (1879))), *aff'd mem.*, 53 N.E. 1130 (N.Y. 1899); *see also* Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797–1845*, 26 LAW & SOC'Y REV. 469, 484–85 (1992) (illustrating the detailed requirements of corporate charters in the case of New York turnpike companies).

doctrine.[38] Under this doctrine, corporations could not bind themselves contractually on matters that were beyond the objectives defined in their charters.[39] Similarly, corporations were not allowed to act beyond the borders of the state that chartered the corporation in the first place.[40] Finally, many states prohibited corporations from acquiring the stock of other corporations.[41] In short, corporations under the artificial entity framework had no political rights as they were conceived as purely economic entities, created by the state and subject to significant control and regulation.

C. The Corporation as an Aggregate Person

Beginning in the late nineteenth century, natural entity theory replaced the conception of the corporation as an artificial creation of state law. Under this new theory, the corporation was the creation of private initiative, not state power. This conception held that corporations cannot be created without the agreement of human beings and, once created, cannot be run without the initiative of human beings. Corporations, thus understood, are aggregate persons.[42] This aggregate person has no ontological status beyond the existence of the natural persons that form and run the corporation. The corporation is not, and cannot be, practically or conceptually distinct from natural persons.[43]

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38. *See generally* Daniel Lipton, Note, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1919–21 (2010) (examining the ultra vires label in the context of political expenditures).

39. *See Thomas*, 101 U.S. at 77 (holding that any ultra vires transaction was void); Pearce v. Madison & Indianapolis R.R., 62 U.S. (21 How.) 441, 444 (1859) (same).

40. See, for example, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586–88 (1839), which held that corporations are not citizens within the meaning of the Article IV Privileges and Immunities Clause. Instead, corporations are the creation of state law and could thus have no power "where that law ceases to operate." *Id.* at 588. As Chief Justice Taney wrote:

> [A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation . . . .

Id.

41. *See, e.g.*, California v. Am. Sugar Ref. Co., 7 RY. & CORP. L.J. 83, 86 (Cal. Super. Ct. 1890).

42. This theory is therefore often called the "aggregate theory" of the corporation. At times, it is also referred to as the "contractual" or "associational theory" to further emphasize the conceptual roots of the corporation in the free and consensual association or bonding together of individuals.

43. 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 1, at 2 (2d ed.1886) ("[It is] self-evident that a corporation is not *in reality* a person or a thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose [it] . . . .").

Accordingly, corporate theory and legal doctrine shifted away from an emphasis on grounding the origin of the corporation in a state grant. Instead, it emphasized the activities of private individuals in forming and running corporations. This shift had important ramifications and encouraged rethinking the relationship between the corporation and the state.

Under the new natural entity theory of the corporation, states gradually relaxed or eliminated restrictions on the economic power and reach of corporations. The rights of individuals, it was thought, did not go away once they bonded together to form and run a corporation. Instead, the corporation had a claim to these rights as an aggregate of natural right bearers.[44] Consequently, states began to allow corporations to purchase the stock of other corporations.[45] States also abolished capitalization limitations.[46] The ultra vires doctrine, meanwhile, was also slowly disappearing from the common law.[47] Similarly, corporations could now operate beyond the borders of the state that chartered them.[48] Corporations, in short, were no longer limited to the powers conferred on them by a state. Because they were now conceived as the creations of private initiative, they were no longer the artificial product of state action and thus not subject to the probing control of the state.[49]

This shift of focus had effects beyond pure economic regulation. Because corporations are nothing more than agreements between private individuals, under the aggregate entity theory of the corporation, corporate property

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44. *Id.* at 3 ("[T]he rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.").

45. *See, e.g.*, Act of Apr. 4, 1888, ch. 269, 1888 N.J. Laws 385; Act of Apr. 7, 1888, ch. 295, 1888 N.J. Laws 445.

46. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 550–54 & nn.5–26 (1933) (Brandeis, J., dissenting in part) (collecting state statutes mandating capitalization limits and removing such limitations).

47. *See* Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 50–53 (1923).

48. *See* S. Ry. v. Greene, 216 U.S. 400, 416–17 (1910); Ludwig v. W. Union Tel. Co., 216 U.S. 146, 164 (1910); Pullman Co. v. Kansas, 216 U.S. 56, 65–66 (1910); W. Union Tel. Co. v. Kansas, 216 U.S. 1, 18 (1910).

49. Simultaneously, the effective control of individual shareholders diminished. *See, e.g.*, Manson v. Curtis, 119 N.E. 559, 562 (N.Y. 1918) (broadening the managerial powers of directors regardless of express delegation by shareholders); Joseph L. Weiner, *Payment of Dissenting Stockholders*, 27 COLUM. L. REV. 547, 547–48 (1927) (discussing states that no longer required unanimity but only simple majority shareholder approval, subject to appraisal rights for dissenters, for mergers and other fundamental corporate changes); *see also* Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 596 (1921) (abandoning the unanimity requirement for many de facto consolidations).

similarly was nothing more than a kind of private property.[50] Therefore, corporate property now commanded the same protection as private property.[51] The same reasoning led the Supreme Court to hold that the Equal Protection and Due Process Clauses of the Fourteenth Amendment protect corporate, as well as natural, persons.[52] These holdings, based on

50. *See, e.g.*, The Railroad Tax Cases, 13 F. 722, 747–48 (C.C.D. Cal. 1882) ("To deprive the corporation of its property . . . is, in fact, to deprive the corporators of their property . . . . [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them . . . ."), *appeal dismissed sub. nom.* Cnty. of San Mateo v. S. Pac. R.R., 116 U.S. 138 (1885); *see also* Santa Clara Cnty. v. S. Pac. R.R., 18 F. 385, 402–03 (C.C.D. Cal. 1883) ("[Corporate property] is property, nevertheless, and the courts will protect it, as they will any other property, from injury or spoliation."), *aff'd*, 118 U.S. 394 (1886).

51. *See Tax Cases*, 13 F. at 747–48.

52. *Santa Clara Cnty.*, 118 U.S. at 396 ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."). The consequences of this decision are felt in a wide variety of Supreme Court cases that depend on the notion that a corporation is a person with respect to property rights. *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880–81 (1985) (Equal Protection Clause); Klein v. Bd. of Tax Supervisors, 282 U.S. 19, 24 (1930) (Equal Protection Clause); Frost v. Corp. Comm'n, 278 U.S. 515, 522 (1929) (Equal Protection Clause); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928) (Due Process and Equal Protection Clauses), *overruled on other grounds by* N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928) (Equal Protection Clause), *overruled on other grounds by* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Ky. Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923) (Due Process and Equal Protection Clauses); Atchison, Topeka & Santa Fe Ry. v. Vosburg, 238 U.S. 56, 59 (1915) (Equal Protection Clause); S. Ry. v. Greene, 216 U.S. 400, 412–13 (1910) (Equal Protection Clause); Blake v. McClung, 172 U.S. 239, 259 (1898) (Due Process and Equal Protection Clauses); Smyth v. Ames, 169 U.S. 466, 522–23 (1898) (Due Process and Equal Protection Clauses); Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations." (citations omitted)); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now well settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." (citations omitted)); Charlotte, Columbia & Augusta R.R. v. Gibbes, 142 U.S. 386, 390–91 (1892) (Equal Protection Clause); Home Ins. Co. v. New York, 134 U.S. 594, 606 (1890) (Equal Protection Clause); Chi., Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 458 (1890) (Due Process Clause); Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889) (Due Process and Equal Protection Clauses); Mo. Pac. Ry. v. Mackey, 127 U.S. 205, 209–10 (1888) (Equal Protection Clause); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188–89 (1888); *cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (finding corporation entitled to compensation under Just Compensation Clause of Fifth Amendment). *Contra* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are . . . personal rights."); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 350–51 (1938)

a conception of the corporation as an aggregate entity, had far-reaching consequences as they laid the groundwork for pre-New Deal challenges to the regulation of corporations.[53]

Using similar reasoning, the Supreme Court conferred, for the first time, Bill of Rights protections on corporations, including Fifth Amendment due process rights[54] and Fourth Amendment protections.[55] Scholars noted that individual rights were transposed to corporations and that this entailed a sharp departure from the principle that the "rights of an individual [were] subject to his disposition and . . . no one else."[56] However, up to this point corporations held rights only to the extent that such rights could be attributed to a collection of real human beings. The corporation held rights only as an aggregate of such individuals.

D. The Corporation as a Natural Entity

The massive expansion of corporations in the late nineteenth century put strain on the plausibility of the aggregate entity theory of the corporation. Shareholder ownership became increasingly dispersed, and the power of corporate managers grew dramatically. It was increasingly difficult to argue that corporations are simply aggregates of individuals. In the minds of many, the corporation had acquired an identity and existence that was difficult to trace back to a set of human beings.[57]

(describing equal protection rights as personal rights); McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, 161–62 (1914) (asserting that the constitutional right is a personal one); *but cf. Pembina*, 125 U.S. at 187 (holding that a corporation is not a citizen within the meaning of the Privileges and Immunities Clause). For fierce critiques of *Santa Clara County*, see, for example, Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 853–54, 856 (1943), and Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938).

53. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53–54, 64 (1905); Allgeyer v. Louisiana, 165 U.S. 578, 590–91 (1897) (holding that the Due Process Clause protects liberty of contract); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 381 (1894) (holding that the Due Process Clause subjects state economic regulatory legislation to a reasonableness test). *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 739 (1986) (analyzing constitutional challenges to economic regulations during the "*Lochner* era").

54. Noble v. Union River Logging R.R., 147 U.S. 165, 176 (1893).

55. *See* Hale v. Henkel, 201 U.S. 43, 76 (1906). *But cf.* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (asserting that in criminal investigations, corporations do not have privacy rights equal to those of individuals).

56. ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS 47 (1897).

57. *See, e.g.*, W. Jethro Brown, *The Personality of the Corporation and the State*, 21 LAW Q. REV. 365, 370 (1905); George F. Canfield, *The Scope and Limits of the Corporate Entity Theory*, 17 COLUM. L. REV. 128, 128–29 (1917); Dewey, *supra* note

Scholars and courts articulated the natural entity theory of the corporation to address these perceived shortcomings of the aggregate entity theory.[58]

Under the natural entity theory of the corporation, the corporation's existence is not only independent of state law but also independent of the individuals that form and run the corporation. Corporations are more than the aggregate of the individuals that work for the corporation or own stock in it. They have character, quirks, and institutional memory. Their goals and intentions are not founded in the goals and wills of any individual or group of individuals. As a result, corporations have a social reality that cannot be captured by a reduction to aggregate action.[59]

Corporations are even, and for the first time, capable of criminal liability under the natural entity theory.[60] They can form *mens rea* and execute an *actus reus* independent of the will of any particular individual.[61] Law thus merely recognizes and sanctions a "naturally" occurring economic trend.[62] Corporations, under this conception, are natural beings, not so different from you or me.

E. From Corporate Personhood to Corporate Citizenship

Conceiving of corporations as natural entities cuts both ways. On the one hand, if corporations are a kind of natural being, then they should enjoy the same rights and protections as other beings. Anything else smacks of discrimination. On the other hand, if corporations as artificial persons are like real persons, then they must also bear the same responsibilities. Just as individuals may not simply pursue their own

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17, at 666–67; Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 404–05 (1916); Machen, *supra* note 17, at 257; Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 287–89 (1928).

58. The natural entity theory of the corporation is also known as the real entity theory or realism theory.

59. This perceived insight mirrors developments in sociology at the time.

60. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 494–95 (1909) (upholding Congress's imposition of criminal penalties on corporations by extending the tort doctrine of respondeat superior); *see also* United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006 (9th Cir. 1972) ("[T]he strenuous efforts of corporate defendants to avoid conviction . . . strongly suggests that Congress is justified in its judgment that exposure of the corporate entity to potential conviction may provide a substantial spur to corporate action to prevent violations by employees.").

61. *See generally* Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81, 103–10 (explaining how "human" laws apply to nonhuman entities whose conduct is the result of actions by individuals).

62. *See, e.g.*, George F. Deiser, *The Juristic Person* (pt. 3), 57 U. PA. L. REV. 300, 304 (1909) ("What really happens is that the state finding certain persons standing in a certain relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.").

selfish ends without regard to others, so too should corporations consider factors beyond profit maximization.

The natural entity theory of the corporation thus provides a theoretical basis for corporate social responsibility.[63] Its central tenet is that some corporate policies that result in diminished profits are justified. Where other constituencies are affected, corporations can, and perhaps should, value those interests more highly than mere profit maximization, just as individuals sometimes can and sometimes should value their self-interests less highly than the interests of those around them. Corporations, under this emerging framework, thus had moral obligations, just as individuals do. In the words of a General Electric Company officer, corporations have "public obligations and perform . . . public duties—in a word, vast as it is, . . . [the corporation] should be a good citizen."[64] In this conceptualization, corporations are not mere economic actors. They have interests and commitments that extend beyond profit. These extraeconomic interests parallel individual moral and political obligations. Corporations are not merely a kind of person; they now are conceived as a kind of citizen.

This is, it turns out, a double-edged sword. The actions of corporations can now be measured against the broader standard of citizenship, but their rights are now also defined by this paradigm.[65] The term *corporate citizenship* reflects this ambivalence. On the one hand, it is frequently invoked by those who look to ground their calls for ethical corporate action in a meaningful theoretical framework.[66] On the other hand, the term

63. *See, e.g.*, E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1162 (1932) ("Business . . . is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers . . . .").

64. *Id.* at 1154 (quoting JOHN H. SEARS, THE NEW PLACE OF THE STOCKHOLDER 209 (1929)). For the most famous critique of Dodd, see generally ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932), which presents a contrasting theory of the corporation as existing to maximize shareholder profits.

65. *Cf.* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (arguing that corporations now challenge government regulation as citizens under the Bill of Rights rather than the Fourteenth Amendment).

66. *See, e.g.*, Edwin M. Epstein, Commentary, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L.J. 207, 219 (2007); *cf.* David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 43–45 (1999) (describing corporate social responsibility as stemming from the public's expectation that corporations will comply with the same social obligations as other citizens).

corporate citizenship is also used by corporations that seek to broaden their political rights to match the rights of proper citizens. Predictably, corporations aggressively pushed for recognition of their newfound rights as corporate citizens.

One area of law where this development is particularly visible is in the context of First Amendment free speech rights.[67] For long, the Supreme Court did not consider the issue of corporate speech.[68] With respect to commercial speech, the Court in 1980 overturned a state regulation that banned utility corporations from promoting the use of electricity in advertisements.[69] The Court held that such advertisement is constitutionally protected free commercial speech under the First Amendment.[70] A corporate ad in the *New York Times* opined that "voices in a democratic society—individual and corporate alike—shouldn't be stifled or filtered through Big Nanny. Whether the topic is cigarettes, or energy policy, or the latest in designer jeans, the First Amendment shield must never be lowered, or selectively applied."[71]

Corporations made the same arguments developed in the context of commercial speech with respect to political speech. In a case from 1978, a coalition of corporations lead by the First National Bank of Boston[72] raised a First Amendment challenge to a Massachusetts statute that

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67. The First Amendment does not mention actual or artificial persons with respect to the freedom of speech. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

68. *See generally* Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008) (tracing the evolution of corporate and commercial speech jurisprudence); Charles D. Watts, Jr., *Corporate Legal Theory Under the First Amendment:* Bellotti *and* Austin, 46 U. MIAMI L. REV. 317, 319–20 (1991) (describing the role of corporate legal theory in the Supreme Court's limited First Amendment decisions involving corporate speech). The foundation for corporate speech was laid by cases about commercial speech, which itself is a recent invention. The Supreme Court considered commercial speech for the first time in 1942. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). That year the Court considered the case of a man who violated a city ordinance by passing out a handbill advertisement. *Id.* at 53. The Court held that "purely commercial advertising" has no First Amendment protection. *Id.* at 54.

69. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 572 (1980).

70. *See id.* at 561. Commercial speech is protected by a balancing test and thus not subject to the same level of protection as other kinds of speech. *Id.* at 562–64.

71. Mobil Corp., Advertisement, . . . *With Liberty and Justice (and Free Speech) for Some*, N.Y. TIMES, Sept. 10, 1987, at A31.

72. The coalition included the First National Bank of Boston, New England Merchants National Bank, Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 768 n.1 (1978).

prohibited corporate campaigning on a graduated income tax referendum.[73] The Supreme Court held that corporate political speech is protected by the First Amendment and that the statute is therefore unconstitutional.[74]

Corporations also soon gained negative free speech rights. In a case from 1986, the public utility Pacific Gas & Electric Company (PG&E) challenged a California state regulation that allowed ratepayer advocacy groups to enclose inserts in the utility's billing envelopes.[75] The Supreme Court ruled that PG&E had a constitutionally protected right under the First Amendment not to associate with speech it opposed.[76]

In the span of less than ten years, corporations had gained commercial, political, and negative free speech rights.[77] They could now, for the first time, intelligibly claim corporate citizenship and the protection of the rights this status afforded them.

This development is the outgrowth of conceiving the corporation as a kind of person with an equal claim to citizenship as other kinds of persons. As a result, corporations can claim the same rights and protections as real citizens, but the corporation must also bear the same legal, social, and moral responsibilities that the natural citizen carries.

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73. *Id.* at 769.

74. *Id.* at 784, 795. A number of commentators have critiqued corporate political speech rights. *See, e.g.*, LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 202 (1985) (arguing that corporate political speech rights provide an unfair advantage for corporations over labor unions); Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 294 (1981) (noting the rights and interests of dissenting shareholders); Gary Hart & William Shore, *Corporate Spending on State and Local Referendums:* First National Bank of Boston v. Bellotti, 29 CASE W. RES. L. REV. 808, 814–17 (1979) (highlighting dangers to the electoral process); Charles R. O'Kelly, 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, 1373 (1979) (arguing that only individuals can speak and that corporate free speech obscures the fact that corporate officers can use corporate assets to broadcast their own views).

75. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 4 (1986) (plurality opinion).

76. *Id.* at 20–21.

77. *But cf.* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 868–72 (2007) (arguing that the notion of corporate personhood has not played a central role in shaping corporate speech rights and that these rights are fairly limited).

F. Recent Trends

These cases and reconceptualizations of the corporation culminated in *Citizens United*,[78] and it remains unclear what political rights are reserved for actual persons and are inaccessible to artificial persons.

The Supreme Court now grants corporations significant rights as artificial persons. Corporations enjoy Fourteenth Amendment due process protection.[79] Under the First Amendment, corporations now have political speech rights,[80] commercial speech rights,[81] and negative speech rights.[82] The Fourth Amendment grants corporations protection from unreasonable searches[83] and unreasonable warrantless regulatory searches.[84] Corporations can invoke the Fifth Amendment Double Jeopardy Clause,[85] Takings Clause,[86] and Due Process Clause.[87] The Sixth Amendment also grants corporations the right to a jury trial in criminal cases.[88]

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78. Citizens United v. FEC, 130 S. Ct. 876 (2010).

79. *See* Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886); *see also* Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations." (citations omitted)); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws." (citations omitted)).

80. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978).

81. Cent. Hudson Gas & Elec. Corp. v. Pub. Utils. Comm'n, 447 U.S. 557, 561–62 (1980).

82. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 20 (1986) (plurality opinion) (holding that corporations have a right not to be forced to associate with the speech of others).

83. Hale v. Henkel, 201 U.S. 43, 76 (1906).

84. Marshall v. Barlow's, Inc., 436 U.S. 307, 312–13 (1978). *But see* Donovan v. Dewey, 452 U.S. 594, 606 (1981) (providing an exception for mining industry); United States v. Biswell, 406 U.S. 311, 317 (1972) (providing an exception for firearms industry); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970) (providing an exception for liquor industry). Because these industries function with licenses from the state, the Court reasoned that they implicitly waived their Fourth Amendment rights. *See Marshall*, 436 U.S. at 313 ("The businessman in a regulated industry in effect consents to the restrictions placed upon him." (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 271 (1973)) (internal quotation marks omitted)).

85. United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977) (holding that the acquittal of a corporation in accordance with the Federal Rules of Criminal Procedure is not appealable because of the Fifth Amendment protection against double jeopardy).

86. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (holding that corporations are entitled to compensation under Just Compensation Clause of the Fifth Amendment).

87. Noble v. Union River Logging R.R., 147 U.S. 165, 176 (1893). *But cf. Hale*, 201 U.S. at 75 ("While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested

Circuit courts have also held that the Constitution affords corporations a liberty interest in their reputation,[89] protects corporations from compelled speech,[90] and grants corporations protection under the dormant Commerce Clause and the right to bring suit under the Americans with Disabilities Act.[91] Some circuits have gone so far as to claim that "[c]orporations are persons whose rights are protected by the [Civil Rights Act],"[92] can bring actions under 42 U.S.C. § 1983,[93] and can have legally operative racial and tribal identities.[94]

Corporations have also attempted to use the Free Exercise Clause of the First Amendment to claim that government regulations infringe the religious rights of the corporation.[95] A growing literature is exploring the possibility

with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.").

88. *See* Armour Packing Co. v. United States, 209 U.S. 56, 76–77 (1908) (labeling a corporate defendant convicted of violating a federal criminal statute as an "accused" for Sixth Amendment purposes); United States v. R.L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971) ("[A] fundamental principle [is] that corporations enjoy the same rights as individuals to trial by jury . . . ."); *see also* Ross v. Bernhard, 396 U.S. 531, 532–33 (1970) (implying a right to a jury trial in civil cases for corporations because a shareholder in a derivative suit would have that right).

89. Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 961–63 (D.C. Cir. 1980).

90. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 72 (2d Cir. 1996).

91. S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 587, 589–91 (8th Cir. 2003).

92. Des Vergnes v. Seekonk Water Dist., 601 F.2d 9, 16 (1st Cir. 1979) (citations omitted). *But cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977) ("[A] corporation . . . has no racial identity and cannot be the direct target of . . . discrimination.").

93. Cal. Diversified Promotions, Inc. v. Musick, 505 F.2d 278, 283 (9th Cir. 1974) ("[Corporate] suits under 42 U.S.C. § 1983 . . . are permissible." (citations omitted)); Safeguard Mut. Ins. Co. v. Miller, 472 F.2d 732, 733 (3d Cir. 1973) (holding that corporations are persons "whose rights are protected by 42 U.S.C. § 1983").

94. *See, e.g.*, Bains LLC v. Arco Prods. Co., 405 F.3d 764, 770 (9th Cir. 2005) (finding that corporation "undoubtedly acquired an imputed racial identity"); Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1059 (9th Cir. 2004) (observing that a corporation acquired "an imputed racial identity"); Pourier v. S.D. Dep't of Revenue, 658 N.W.2d 395, 404 (S.D. 2003) (holding that corporation was "enrolled member" of Indian tribe), *aff'd in relevant part and rev'd in part on other grounds on reh'g*, 674 N.W.2d 314 (S.D. 2004); *see also* Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2094 (2006) ("In the past, courts have pursued equitable outcomes without attributing race to corporations. There is currently a movement away from these prior practices and toward a more liberal recognition of race with respect to corporate persons.").

95. *See, e.g.*, Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1248, 1255, 1257–66 (W.D. Wash. 2007) (considering the successful Free Exercise Clause claim of "two pharmacists and one corporate pharmacy" against a federal regulation requiring that pharmacies dispense contraceptives and abortifacients), *rev'd*, 586 F.3d 1109 (9th Cir. 2009); *see also* Morr-Fitz, Inc. v. Blagojevich, 867 N.E.2d 1164, 1171 (Ill. App. Ct.

of corporate religious identities.[96] The notion of corporate personhood is also steadily evolving with regard to the moral agency of corporations,[97] the availability of human rights claims for corporations,[98] protection for corporations under the Eighth Amendment,[99] corporate capacity for *mens rea*,[100] character evidence,[101] and global corporate citizenship.[102]

2007) (examining challenge to a state regulation on the same issue by corporate and individual defendants), *rev'd*, 901 N.E.2d 373 (Ill. 2008).

96. Some commentators have argued that religion helps drive business ethics. *See, e.g.*, Timothy L. Fort, Commentary, *Religious Belief, Corporate Leadership, and Business Ethics*, 33 AM. BUS. L.J. 451, 452 (1996) ("Religious convictions provide some business leaders with a strong motivation for conducting business ethically even when their profit motive might not."); Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 31–44 (2006) (arguing corporate religious identities can encourage corporations to act beyond their own narrow economic interest); Susan J. Stabile, *Using Religion To Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 873–78 (2004) (describing the ways various faiths encourage businesses to consider the common good). *But cf.* Scott Fitzgibbon, *"True Human Community": Catholic Social Thought, Aristotelean Ethics, and the Moral Order of the Business Company*, 45 ST. LOUIS U. L.J. 1243 (2001) (questioning whether corporate persons can be moral or religious); William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time To Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 125–28 (2004) (same).

97. Commentators have questioned the ability of corporations to maintain morality. *See, e.g.*, Thomas Donaldson, *Moral Agency and Corporations*, 10 PHIL. CONTEXT 54, 58 (1980) (arguing that corporations cannot qualify as moral persons because they are incapable of having the same moral rights as humans); Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, BUS. & PROF. ETHICS J., Spring 1983, at 1, 6–10 (arguing that moral responsibility cannot be ascribed to corporations because they cannot fulfill the *actus reus* and *mens rea* elements). *But cf.* PETER A. FRENCH ET AL., CORPORATIONS IN THE MORAL COMMUNITY 12–23 (1992) (insisting that the corporation is a moral person and can carry moral responsibility for collective acts and intentions that simply cannot be attributed to any one human member).

98. Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. & POL'Y 197, 200 (2007) ("[T]ransnational corporations possess legal personality sufficient to be granted rights in a manner similar to those granted to human beings in modern human rights law."). *See generally* CHRISTOPHER N. J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS (forthcoming 2013).

99. Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1316 (1996) ("[T]he Eighth Amendment centers around protecting property rights rather than personal rights, and therefore its extension [to corporations] does not threaten individual liberties."); *see also* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) ("We shall not decide whether the Eighth Amendment's prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals.").

100. *See, e.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (developing a method for proving corporate intent); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of* Citizens United, 65 U. MIAMI L. REV. 1 (2010) (examining how *Citizens United* could affect approaches to corporate criminal liability); Daniel Lipton, Note, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1928–34 (2010).

Most recently, the Supreme Court announced in *Citizens United* that a ban on corporate speech in the months preceding an election violates the First Amendment.[103] The Court held that First Amendment protections apply to corporate political expenditures even if the use of corporate funds does not have a "material effect on its business or property."[104] Bans on political speech based on the speaker's corporate identity are now prima facia violations of the First Amendment.[105] Federal and state governments may not limit corporate funding of independent political broadcasts in candidate elections. The majority in *Citizen United* argued that political speech is essential to the functioning of a democracy.[106] Whether this speech comes from an individual or corporation is not relevant, according to the majority.[107] Under *Citizens United*, corporations, as artificial persons, are equal to actual persons, at least with respect to the Free Speech Clause of the First Amendment.[108]

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101. Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763 (arguing against extending the ban on character evidence to corporations).

102. *See* Rachel J. Anderson, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, 18 MICH. ST. J. INT'L L. 1 (2009) (examining corporate global citizenship in the context of foreign direct investment law).

103. 130 S. Ct. 876, 897, 917 (2010). The decision has spawned widespread speculation. *See, e.g.*, Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1 ("The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences."); Jess Bravin, *Court Kills Limits on Corporate Politicking*, WALL ST. J. (Jan. 22, 2010), http://online.wsj.com/article/SB10001424052748703699204575016942930090152.html ("The ruling not only strikes down the federal requirement, it also calls into question similar provisions enacted by nearly half the states."). For an earlier, related case, see *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 476 (2007), in which the Court held that a prohibition on the use of corporate treasury funds for political advertisements in the sixty days before an election is unconstitutional as applied to advertisements that do not explicitly endorse or oppose a candidate.

104. *Citizens United*, 130 S. Ct. at 902 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

105. Thus overturning *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

106. *Citizens United*, 130 S. Ct. at 898.

107. *Id.* at 898–99.

108. *Id.* at 900 ("Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'" (quoting *Bellotti*, 435 U.S. at 784)); *see also* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (quoting *Bellotti*, 435 U.S. at 783)).

Citizens United reignited the debate over corporate personhood and corporate citizenship. At heart, this debate is over the scope and meaning of the seemingly simple claim that corporations are artificial persons.[109] As artificial persons, do they enjoy the same rights and protections as actual persons? Do they bear the same obligations? Over time, courts and regulators have answered this question differently, at times granting corporations few economic and political rights, and, more recently, granting corporations more and more rights.

At the same time that courts have expanded the political rights of corporations, they have restricted the ability of the state to exercise jurisdiction over them,[110] readily granted forum non conveniens motions to corporations,[111] limited the extraterritorial application of U.S. laws,[112] and made it easier for corporations to avoid the reach of courts altogether by committing customers and employees to binding arbitration.[113] The

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109. For commentaries on legal personhood in general, see Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369 (2007), and Barbara Johnson, *Anthropomorphism in Lyric and Law*, 10 YALE J.L. & HUMAN. 549 (1998).

110. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (holding that there was no general jurisdiction over a non-U.S. subsidiary in North Carolina based solely on the subsidiary's products being sold in the state); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (holding that a non-U.S. company is not subject to jurisdiction in New Jersey on any stream-of-commerce theory where it sold its products to a distributor in Ohio and never entered, advertised, or sold its products in New Jersey itself); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 145 (2d Cir. 2010) (holding that the Alien Tort Statute does not provide federal subject matter jurisdiction for claims against corporations), *aff'd on other grounds*, 133 S. Ct. 1659 (2013). *But see* Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 927 (9th Cir. 2011) (arguing, in response to a finding that the defendant did not have continuous and systematic contacts with the forum, that promoting international human rights was a state interest that should factor into a finding of personal jurisdiction).

111. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537–38 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

112. Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2877–78 (2010) (affirming that canon or presumption that U.S. laws do not apply extraterritorially applies to the Securities Exchange Act). This holding abrogated earlier circuit cases to the contrary, including *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 667 (7th Cir. 1998); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 418–20 (8th Cir. 1979); and *SEC v. Kasser*, 548 F.2d 109, 115 (3d Cir. 1977).

113. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures); Rent-a-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2279 (2010) (holding that parties alleging that an agreement was unconscionable or otherwise unenforceable must submit that challenge first to the arbitrator rather than to the court); 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) (holding enforceable a collective bargaining agreement that required union members to submit claims under the Federal Age Discrimination in Employment Act to arbitration); Preston v. Ferrer, 552 U.S. 346, 359 (2008) (holding that an agreement to arbitrate supersedes state law requiring disputes over contract validity to be referred

Supreme Court also recently held that the "term 'individual' as used in the [Torture Victim Protection] Act encompasses only natural persons."[114] More recently, in a case considering whether artificial persons can be sued under the Alien Tort Statute or whether the statute applies only to natural persons, the Court ruled on other grounds and left in place a notable circuit split on corporate amenability to lawsuits brought under the statute.[115]

In short, the significant shifts in reconceptualizing corporations and endowing them with political rights and freedoms went unnoticed in the context of political obligations, most centrally the obligation to submit to the jurisdiction of a rights-granting state.

III. PERSONAL JURISDICTION BEYOND LEGITIMACY

As the previous Part showed, corporations are not immutable entities. They look and are allowed to behave differently at different times. Once bearers of mere economic rights, corporations have now morphed into entities with significant political rights. This change has made it intelligible to call corporations persons. As persons, corporations are now subject to political obligations. In turn, the state's exercise of coercive authority over corporations must now conform to the standards of legitimacy.

Personal jurisdiction doctrine has not been attentive to the changing nature of corporate identities. Without this conceptual foundation, personal jurisdiction doctrine focused exclusively on when an exercise of jurisdiction is just, but it neglected to ask when the exercise of jurisdiction is legitimate. This Part demonstrates how personal jurisdiction doctrine has developed oblivious to considerations of corporate identity and legitimacy. Instead, personal jurisdiction doctrine has focused exclusively on justice at the expense of legitimacy.

Courts and scholars of personal jurisdiction have overlooked that the evolution of corporate personhood, recently culminating in *Citizens United*, makes corporations amendable to an analysis of a state's legitimate

initially to an administrative agency); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (holding that the validity of a contract that contains an arbitration clause must first be resolved by the arbitrator rather than by a state court).

114. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1705 (2012).

115. *See Kiobel*, 133 S. Ct. 1659; *see also* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 41 (D.C. Cir. 2011) (holding that corporations are not immune from liability under the Alien Tort Statute); *Kiobel*, 621 F.3d at 145 (concluding that the Alien Tort Statute does not create corporate liability).

right to exercise coercive power over the artificial individual in dispute.[116] Legitimacy and political obligations, concepts previously applicable only to natural persons, can now serve as the cornerstones of the minimum contacts test for artificial persons like corporations.

Previous scholarship has not treated corporations as the kind of entities that can have political obligations.[117] Lacking this pillar, the minimum contacts factors have focused on justice instead, testing whether the imposition or denial of jurisdiction would be just to the defendant, the plaintiff, or the forum.[118] Personal jurisdiction cases have leaned

116. *See supra* Part II.F.

117. Most accounts of personal jurisdiction focus on due process, the interests of the forum, or the inconveniences to the defendant. *See, e.g.*, Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984) (focusing on expectations and benefits); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006) (focusing on the Due Process Clause); Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567 (2007) (defending "the view that constitutional limits on personal jurisdiction arise from basic substantive due process principles"); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343 (2005) (exploring the Due Process Clause's ability "to predict and control . . . jurisdictional exposure"); A. Benjamin Spencer, *Jurisdiction To Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006) (focusing on notice and legitimate state interests); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 747 (1987) (arguing for a personal jurisdiction test based on state regulatory interests); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004) (critiquing the Supreme Court's focus on the Due Process clause as the sole source of personal jurisdiction). *But cf.* Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 726 (1988) [hereinafter Brilmayer et al., *A General Look*] ("Adjudicative jurisdiction is one way in which the state asserts coercive power over individuals. Consequently, the legitimacy of a particular assertion of state power is always an issue."); Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1 (1989) [hereinafter Brilmayer, *Consent, Contract, and Territory*] (identifying consent as a jurisdictional factor); Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 3 (1991) (identifying the sources of different triggering factors for jurisdiction in "traditional liberalism" and communitarianism); Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95 (1984) (identifying the role of the Full Faith and Credit Clause in personal jurisdiction).

118. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) ("A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (listing "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies" as factors relevant to jurisdiction (citing Kulko v. Superior Court, 436 U.S. 84, 93, 98 (1978))); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (noting the defendant's purposeful availment of the forum state); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 648–49 (1950) (examining the forum's interest in regulating the defendant's conduct and the location of witnesses); Int'l Shoe Co. v. Washington, 326 U.S. 310, 314–15, 317, 320 (1945) (probing for defendant's past conduct with regard to the case at hand and examining the defendant's inconveniences if forced to travel).

heavily on the notion of justice through the ages,[119] and the main thrust of the current regime remains on the justice of imposing jurisdiction.[120] It leaves aside whether the imposition of jurisdiction would be legitimate.

Justice and legitimacy are two distinct concepts.[121] Justice measures the extent to which a state succeeds at furthering just policies. Typically, this is a function of distributive principles that structure the allocation of the benefits and burdens of economic activity.[122] In contrast, legitimacy measures whether one can furnish a compelling justification for the authority of the state, coercive and otherwise.[123] Often, these justifications turn on the mode of selecting political leadership or the method of determining policies.[124] Thus, although theories of justice are usually concerned with policies and outcomes, legitimacy is typically concerned with the process that generates these policies and shapes the outcomes.

Just states are often legitimate. However, that is merely an empirical regularity, not a conceptual necessity. A state might be legitimate but not just, just as a state might be just but not legitimate. The traditional example of an illegitimate state is one controlled by a despot or a foreign power.[125]

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119. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350, 356 (1882) (arguing that consent made the exercise of personal jurisdiction over the corporation "eminently fit and just"); Galpin v. Page, 85 U.S. (18 Wall.) 350, 368–69 (1874) (emphasizing the importance of personal jurisdiction because judgment without proper notice and opportunity to be heard amounts to "judicial usurpation and oppression, and never can be upheld where justice is justly administered"); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) ("[The] principle of natural justice . . . forbids condemnation without opportunity for defence."); Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) ("To bind a defendant personally by a judgment when he was never personally summoned, or had notice of the proceeding, would be contrary to the first principles of justice.").

120. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 316 (emphasizing the importance of "traditional notions of fair play and substantial justice" for the personal jurisdiction analysis (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted)).

121. *See* A. JOHN SIMMONS, *Justification and Legitimacy*, *in* JUSTIFICATION AND LEGITIMACY, *supra* note 11, at 122, 122 (arguing that the contemporary philosophy of "showing that a state is justified and showing that it is legitimate . . . [by] requir[ing] the very same arguments . . . obscures the difference between" these two separate concepts).

122. *See, e.g.*, *Asahi*, 480 U.S. at 113–14 (balancing the "severe" burden on the defendant against the plaintiff's minimal benefit).

123. *See generally* RAWLS, *supra* note 11 (examining social cooperation); RAZ, *supra* note 11 (arguing that legitimate political authority entails the right to rule and creates political obligations); SIMMONS, *supra* note 11 (arguing that political authority may be morally justified without being legitimate, but that only legitimate authority generates political obligations).

124. SIMMONS, *supra* note 121, at 137.

125. *Cf. id.* at 130 (arguing that states are legitimate only with the "consent of their members").

Yet it is imaginable that the despot enacts benevolent rules that lead to beneficial and just outcomes. Similarly, one could think of an enlightened colonial regime that orders relations among its subjects in a socially just manner.[126] Similarly, an entirely legitimate state might enact, with the best intentions, misconceived policies that have disastrous and unjust consequences. Political legitimacy and justice might thus come apart in many ways. Ideally, political institutions and practices strive to satisfy the requirements of both justice *and* legitimacy.

However, the current personal jurisdiction doctrine is exclusively focused on justice and completely neglects questions of legitimacy. This is an important and dangerous oversight. Any exercise of legitimate state power must contain a set of reasons that explain why the state coercion over the person is justified.[127] Legitimacy thus depends on connecting political obligations with political rights. Without legitimate political obligations, the state's exercise of power, including the power of its courts, is arbitrary and coercive. However, when such an exercise of power is grounded in a compelling framework of political obligations, it becomes legitimate.

Courts should thus not only ask whether the imposition of personal jurisdiction is just but also whether it is legitimate. To do so, they must include in their minimum contacts test an analysis of the political obligations and political rights of the defendant.

To make this argument, this Part begins where jurisdiction did, with the court's power to bind persons in its jurisdiction. Jurisdiction is the authority of a court to hear and decide a case.[128] Without jurisdiction, a court has no authority to issue a binding opinion.[129] The jurisdiction of federal courts is grounded in the Constitution. However, the Constitution speaks in a precise way only to the jurisdiction of the Supreme Court.[130] Congress defines the jurisdiction of lower courts, subject to the more general constraints imposed by the Constitution.[131] Federal courts possess only the jurisdiction authorized by the Constitution and statute.[132] Congress may bestow inferior federal courts with less jurisdiction than could

126. None of this, of course, is meant to suggest that we should accept some despots or cherish some colonial regimes. These extreme hypotheticals are merely meant to illustrate that justice and legitimacy do not need to go hand in hand.

127. For an example of such coercion, see *infra* text accompanying notes 253–56.

128. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528, 538 (1974) (citing Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913)).

129. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998).

130. U.S. CONST. art. III.

131. *See, e.g.*, Lincoln Prop. Co. v. Roche, 546 U.S. 81, 93 (2005); Kline v. Burke Constr. Co., 260 U.S. 226, 233–34 (1922).

132. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005).

potentially be authorized under the Constitution,[133] but never more.[134] Courts always have jurisdiction to determine their own jurisdiction.[135]

Personal jurisdiction, also known as in personam jurisdiction, gives a court the authority to issue binding decisions on persons involved in a civil case.[136] *Person*al jurisdiction is the jurisdiction of courts over *persons*. There is no separate corporate jurisdiction analysis. Corporations are treated as persons for personal jurisdiction questions.

Personal jurisdiction cases typically probe whether the contacts of the defendant and plaintiff—artificial or natural—with the forum were of the quality and quantity to render the exercise of jurisdiction just. Nowhere in the history and development of the doctrine is the doctrine concerned with questions of obligations and legitimacy.

A. Justice as Notice

During the nineteenth century, personal jurisdiction was based on notice within the forum.[137] Courts had jurisdiction over a person, artificial or natural, insofar as they were able to bind persons and things present within their territory. As the Court explained, the "principle of natural *justice* . . . forbids condemnation without opportunity for defence."[138] Judgment without proper notice and opportunity to be heard amounts to

133. *See, e.g.*, Ankenbrandt *ex rel.* L.R. v. Richards, 504 U.S. 689, 697 (1992) (quoting Palmore v. United States, 411 U.S. 389, 401 (1973)).

134. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491 (1983); *see also* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809) ("Turn to the article of the consitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution.").

135. *See, e.g.*, United States. v. Ruiz, 536 U.S. 622, 628 (2002).

136. I will leave aside questions of in rem and quasi in rem jurisdiction in this subpart.

137. *See generally* Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1250–54 (1998) (chronicling cases and the "era of territorial jurisdiction").

138. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) (emphasis added); *see also* D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 175 (1851) ("Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence."); Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) ("To bind a defendant personally by a judgment when he was never personally summoned, or had notice of the proceeding, would be contrary to the *first principles of justice*." (emphasis added)).

"judicial usurpation and oppression, and never can be upheld where justice is justly administered."[139]

After the passage of the Fourteenth Amendment, the notion of "natural justice" merged with the Due Process Clause. In *Pennoyer v. Neff* the Supreme Court relied on the Fourteenth Amendment to hold that a state court lacked the power to assume jurisdiction over a defendant that was neither domiciled nor present in the state.[140] For jurisdiction to exist, the Supreme Court concluded, the plaintiff must serve a nonconsenting, nonresident defendant within the state's boundaries.[141] Exercises of authority beyond the territorial limits of a state are an improper exercise of power that fails to comply with the Fourteenth Amendment's Due Process Clause.[142] For an exercise of jurisdiction to be just under this framework, the defendant had to be physically present within the forum when served so as to afford an opportunity to defend.[143]

The Court in *Pennoyer* was concerned with the due process rights of individuals. The territoriality test probes whether the exercise of state authority affords the defendant a just opportunity to defend the suit. Justice, tied to a territorial framework, was the guiding principle of the early constitutional personal jurisdiction analysis.

This framework for testing whether an exercise of jurisdiction was just or not proved workable for individuals and resident corporations that could be said to be present in the forum and be served in the forum. But what about nonresident corporations? Under what theory of corporate personhood can they be said to be present within a given state?

Corporations have no body that can be present or not. Their "presence" must thus be ascribed either to corporate activity or corporate agents.[144] But do any corporate activities, no matter how small or unintentional, make the corporation present in the forum so that it can be served? If a corporation really has "no legal existence out of the boundaries of the sovereignty by which it is created,"[145] then how can a corporation ever be subject to personal jurisdiction outside of its place of incorporation?

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139. Galpin v. Page, 85 U.S. (18 Wall.) 350, 369 (1874).
140. 95 U.S. 714, 720 (1877), *overruled by* Shaffer v. Heitner, 433 U.S. 186 (1977).
141. *Id.* at 733–34.
142. *Id.* at 720.
143. *Id.* at 722 ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within [a state's] territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory." (citations omitted)).
144. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it." (citation omitted)).
145. Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

And what about corporate agents? Can any corporate agent be served on behalf of the whole company? Justice as notice provides answers for natural persons, but presents many intractable conceptual problems for nonresident corporations. In an age of increased interstate commerce, this spelled trouble.

B. Justice as Consent

To prevent personal jurisdiction from becoming unjust, a framework other than notice had to be able to account for nonresident corporations. The partial answer was to reconceptualize justice as consent.[146] Strictly speaking, consent does not modify distributive justice evaluations, but consent can be and has been used, as a practical matter, to alleviate concerns about injustice.

Legislators and courts began to argue in this vein that corporate activity outside the state of incorporation was dependent upon the permission of the government where the nonresident corporation desired to operate.[147] Many states subsequently conditioned such permissions on the appointment of a local agent. Such an agent could then be served within the boundaries of the state. The reasoning went that by doing business within the state, the corporation consented to the appointment of a local agent and to be sued

146. Consent can be conceptualized as providing either the foundation of justice or the foundation of legitimacy. For consent to be the basis for legitimacy, it must fulfill different requirements than when it serves as the basis for justice. *See supra* notes 121–26 and accompanying text. Whatever the difference, although some articulations of the Court are compatible with legitimacy arguments, the Court focused on notions of justice instead.

147. St. Clair v. Cox, 106 U.S. 350, 356 (1882) ("The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated . . . ."); *see also* Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 253 (1909) ("In view of the fact that much of the business of the country is done by corporations having foreign charters and principal offices remote from States wherein they transact business, it has been found necessary to make provision for the service of summons upon local agents, in order to give jurisdiction to try controversies which have originated in such States. With this purpose in view many States have provided that foreign corporations, in order to do business within the State, must make provision for service upon some local agent, or by authority conferred upon some state officer to accept service of summons. And but for such statutes and the authority given by the States to obtain service upon local agents there could be no recovery upon the contracts of such companies, unless redress be sought in a distant State where the company may happen to have its home office." (citations omitted)).

in the state. Such consent was a valid basis of jurisdiction for the state courts as well as the federal courts within that state.[148]

As the Court noted in *St. Clair v. Cox*, the consent made the exercise of personal jurisdiction over the corporation "eminently fit and *just*."[149] After all, didn't the corporation consent to the jurisdiction? Although perhaps not legitimate, what could be more indicative of justice being served?[150]

Besides not making any allowances for notions of legitimacy, justice as consent over nonresident corporations quickly encountered four roadblocks. First, many states did not extract actual consent from nonresident corporations as a condition of doing business.[151] Instead, they relied on implied consent as a foundation of the just exercise of jurisdiction.[152] This raises questions about whether the consent was actually meaningful or simply a fiction to disguise an unjust personal jurisdiction regime.[153]

Second, simply because consent was extracted as a condition of doing business does not mean that it extends to all possible cases. As the Court recognized, the consent can be said to meaningfully apply only to cases that had the right kind of connection to the forum.[154] A corporation might appoint an agent but not actually conduct business in the state, or have not conducted business in some years. Consent, in such situations, is insufficient to provide for a just exercise of jurisdiction.[155]

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148. *See, e.g.*, *Ex parte* Schollenberger, 96 U.S. 369, 376 (1878).

149. 106 U.S. at 356 (emphasis added).

150. This statement captures the conceptual intuition that my consent to the unjust acts of a dictator might overcome concerns about the present injustice, but my consent does not render the dictator's rule legitimate. *See supra* notes 125–26 and accompanying text.

151. For the problems that arise where a company had not appointed an agent for the service of process, see *Simon v. Southern Railway*, 236 U.S. 115 (1915), and *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U.S. 8 (1907).

152. *St. Clair*, 106 U.S. at 356 ("And such condition and stipulation may be implied as well as expressed.").

153. *See* Bagdon v. Phila. & Reading Coal & Iron Co., 111 N.E. 1075, 1076 (N.Y. 1916) ("The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction.").

154. *See, e.g.*, *St. Clair*, 106 U.S. at 356–57 (noting that the corporation's consent can extend only to "any litigation arising out of its transactions in the State" and that the corporation must be "engaged in business in the State").

155. *See, e.g.*, Peterson v. Chi., Rock Island & Pac. Ry., 205 U.S. 364, 390 (1907) ("It is settled by the decisions of this court that foreign corporations can be served with process within the State only when doing business therein, and such service must be upon an agent who represents the corporation in its business." (citations omitted)); Pa. Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U.S. 407, 413 (1905) ("In order that a Federal court may obtain jurisdiction over a foreign corporation the corporation must, among other things, be doing business within the State." (citations omitted)); Conley v. Mathieson Alkali Works, 190 U.S. 406, 410–11 (1903) (holding that service within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction

Third, consent to appoint an agent often proved of little practical utility. For example, some agents simply did not inform the corporation of the receipt and content of the process they received. Such lack of notice undermined the justice of basing personal jurisdiction on consent, even where an agent had been appointed and served for business connected to the forum.[156]

Fourth, states could only meaningfully extract consent from nonresident corporations as long as they were able to exclude or prevent nonconsenting corporations from conducting business within their borders.[157] Over time, changes in the interstate commerce doctrine weakened a state's power to exclude nonresident corporations.[158] Because the states could no longer exclude, they could no longer extract explicit consent. Increased reliance on implicit consent raised the question, why bother with the consent framework at all if it provides only such a thin and fragile cover of justice?

With these conceptual problems built into the justice as consent framework, the Court searched for a new approach to personal jurisdiction. This approach would incorporate the previous frameworks of notice and consent and build upon the notion that the nature and quantity of the defendant's contacts with the forum could render the exercise of jurisdiction just.

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over the corporation where, at the time of such service, it had ceased to do business within the state and had designated no agent upon whom service could be made); Goldey v. Morning News, 156 U.S. 518, 521–22 (1895) (holding that service upon an officer of a corporation that neither was doing business within the state nor had an agent or property therein was insufficient).

156. *See* Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928) ("[T]he enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice."). *But cf.* Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 255 (1909) ("We think the State did not exceed its power and did no injustice to the corporation by requiring that when it clothed an agent with authority to adjust or settle the loss, such agent should be competent to receive notice, for the company, of an action concerning the same.").

157. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868) ("Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose."), *overruled on other grounds by* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

158. *See generally* Int'l Textbook Co. v. Pigg, 217 U.S. 91 (1910) (explaining doctrine under which states cannot unnecessarily burden interstate commerce); Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1 (1878) (prohibiting state legislation that hinders interstate commerce).

C. Justice as Presence

Perhaps the foundations of a just exercise of jurisdiction were not to be found in notice or consent, but in the contacts of the corporation with the forum. This insight builds upon the consent cases that held that consent alone is insufficient to establish just grounds for jurisdiction—the corporation must be engaged in some kind of activity within the forum.[159] The new presence framework probed for what kind of activities were required for personal jurisdiction to be just. As Judge Learned Hand put it, the courts are "to inquire whether the extent and continuity of what [the corporation] has done in the state in question makes it reasonable to bring it before one of its courts."[160]

The intuition here is that the corporation is represented by its agents in a forum.[161] The actions of the agents on behalf of the company might establish a sufficiently deep and lasting connection to the forum that the nonresident corporation can be said to be "present" in the forum.[162] Because it is present, exercise over the nonresident corporation is largely akin to the just exercise of jurisdiction over a resident corporation.[163]

The trouble with the presence framework is its vagueness. Just how much activity is required before a company is present?[164] The most systematic way to give shape to the presence doctrine has been through determining whether the corporation was "doing business" within the state.[165] But this formulation hardly improved matters. Instead, it merely led to a jumble of cases, recognizable to students of the modern personal jurisdiction doctrine, about what activities amounted to doing business and

159. Phila. & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) ("A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there.").

160. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

161. *See, e.g.*, *id.* ("The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent [the corporation] . . . .").

162. *See, e.g.*, Tauza v Susquehanna Coal Co., 115 N.E. 915, 917–18 (N.Y. 1917) ("Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents. But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here." (citations omitted)).

163. As many commentators point out, this glances over the home court advantage resident individuals—artificial and real—might have over present nonresidents. *See, e.g.*, Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 784 (1999).

164. *See, e.g.*, *Hutchinson*, 45 F.2d at 141 ("It scarcely advances the argument to say that a corporation must be 'present' in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered.").

165. *See, e.g.*, *id.* at 141.

which were insufficient to constitute doing business in the forum.[166] Judge Hand illustrates the exacerbation many felt with the presence/doing business framework by noting that "[i]t is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[167]

D. Justice as Minimum Contacts

The Supreme Court, realizing the limitations of the notice, consent, and presence frameworks, attempted a new articulation in *International Shoe Co. v. Washington* that focused on the "minimum contacts" necessary to render the exercise of jurisdiction over a nonresident corporation just.[168]

Justice and due process, under the new minimum contacts test of personal jurisdiction, do no longer require that a defendant be "present within the territory of the forum."[169] Instead, for personal jurisdiction to be proper, the defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial *justice*.'"[170]

To determine if the defendant does so, courts would probe the "quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[171] Justice "does not contemplate that a state may make binding a judgment

166. *Id.* at 141–42 ("Possibly the maintenance of a regular agency for the solicitation of business will serve without more. The answer made in Green v. C., B. & Q. R. R. Co., 205 U.S. 530, 27 S. Ct. 595, 51 L. Ed. 916, and People's Tob. Co. v. Amer. Tobacco Co., 246 U.S. 79, 38 S. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537, perhaps becomes somewhat doubtful in the light of International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, and, if it still remains true, it readily yields to slight additions. In Tauza v. Susquehanna Coal Co., supra, there was no more, but the business was continuous and substantial. Purchases, though carried on regularly, are not enough (Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516, 43 S. Ct. 170, 67 L. Ed. 372), nor are the activities of subsidiary corporations (Peterson v. Chicago, R. I. & P. Ry. Co., 205 U.S. 364, 27 S. Ct. 513, 51 L. Ed. 841; Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634), or of connecting carriers (Philadelphia & Read. Co. v. McKibbin, 243 U.S. 264, 37 S. Ct. 280, 61 L. Ed. 710). The maintenance of an office, though always a make-weight, and enough, when accompanied by continuous negotiation, to settle claims (St. Louis S. W. Ry. v. Alexander, 227 U.S. 218, 33 S. Ct. 245, 57 L. Ed. 486), is not of much significance (Davega, Inc., v. Lincoln Furniture Co., 29 F.(2d) 164 (C.C.A. 2)).").

167. *Id.* at 142.

168. 326 U.S. 310, 316 (1945).

169. *Id.*

170. *Id.* (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

171. *Id.* at 319.

in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."[172]

In this analysis, courts may include an "estimate of the inconveniences" to the defendant.[173] Courts may thus exercise personal jurisdiction over a defendant regardless of the defendant's physical presence within the forum state's territorial boundaries.[174] Presence was no longer sufficient or essential for jurisdiction.[175]

Later cases refined the meaning of minimum contacts. For personal jurisdiction to be proper under the minimum contacts analysis, "all assertions of state-court jurisdiction must be evaluated according to the standards [of fair play and substantial justice] set forth in *International Shoe* and its progeny."[176] Here, the court asks for the quantity and quality of the defendant's contacts with the forum,[177] whether the defendant had fair warning that she or he might be haled to that jurisdiction, whether the exercise of jurisdiction foreseeable,[178] and to what extent the contacts exhibited purpose.[179] If the defendant's contacts with the forum are sufficiently continuous and systematic, then the state may justly exercise general jurisdiction over any claim against the defendant, regardless of where it arose.[180] If the defendant's contacts with the forum state are isolated and sporadic, the state may exercise specific jurisdiction only over claims that arise out of the defendant's specific contacts with the forum state.[181]

Next, the court asks whether the defendant can rebut the presumption arising out of the minimum contacts analysis that the exercise of jurisdiction

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172. *Id.*

173. *Id.* at 317 (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)) (internal quotation marks omitted).

174. *See id.* at 316–17.

175. *See* Shaffer v. Heitner, 433 U.S. 186, 211–12 (1977).

176. *Id.* at 212.

177. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) (holding that merely placing an item into the stream of commerce is not purposeful enough).

178. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

179. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958) (testing for purposeful availment of the benefits and protections of the forum state); *see also Asahi*, 480 U.S. at 112 ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.").

180. *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414–16 (1984). General jurisdiction is also sometimes called "all-purpose jurisdiction." *E.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

181. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478–82 (1985) (concluding that Florida had jurisdiction over the defendant in a contract dispute where the defendant performed actions related to the contract in Florida). This type of personal jurisdiction is sometimes called "case-linked jurisdiction." *E.g.*, *Goodyear*, 131 S. Ct. at 2851.

would be reasonable.[182] A defendant can do so by arguing that the assertion of jurisdiction is not in accordance with fair play and substantial justice.

E. Justice to the Plaintiff, the Forum, and the Interstate System

Shortly after *International Shoe* was decided, the Court expanded the justice analysis of the minimum contacts test. Instead of merely asking whether the exercise of jurisdiction was just to the defendant, courts were now instructed to also examine additional factors that probed whether denial of jurisdiction would be just to the plaintiff.

In *Travelers Health Ass'n v. Virginia ex rel. State Corp. Commission*, the Supreme Court confronted the situation where it would be practically prohibitive for the plaintiff to sue in the defendant's distant forum.[183] The Court noted the "unwisdom, unfairness and injustice of permitting [plaintiffs] to seek redress only in some distant state where the [defendant] is incorporated," concluding that "[t]he Due Process Clause does not forbid a state to protect its citizens from such injustice."[184]

Considerations of justice to the plaintiff are especially important where "claims were small or moderate" so that "individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof."[185] "[T]he plaintiff's interest in obtaining convenient and effective relief" has ever since been an important element for courts to weigh when determining whether the exercise of jurisdiction is just or not.[186]

Beyond examining the justice to the defendant and the plaintiff, courts have also emphasized that an exercise of jurisdiction must be just to the forum. A denial of jurisdiction often amounts to a denial of a forum's

182. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

183. Travelers Health Ass'n v. Virginia. *ex rel.* State Corp. Comm'n, 339 U.S. 643, 648–49 (1950) ("[I]f Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit.").

184. *Id.* at 649.

185. McGee v. Int'l Life Ins. Co. 355 U.S. 220, 223 (1957).

186. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citation omitted); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113–16 (1987).

interest in regulating activity.[187] The forum's interests also implicate the convenience of the trial location and the location of witnesses and discovery material.[188] Forum interests are to be considered on par with the interests of the defendant and the plaintiff. All of these interests must be balanced and considered for an exercise of jurisdiction to be just.

A final consideration extends beyond the forum to the "interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."[189] This includes an examination of "the Federal Government's interest in its foreign relations policies."[190] Considerations of justice thus range from the defendant, to the plaintiff, the forum, and indeed, the interstate system.

In all of these manifestations, the modern personal jurisdiction doctrine probes whether an exercise of jurisdiction would be just. Courts do not explicitly probe whether an exercise of jurisdiction would be legitimate—though there are resources in numerous opinions that are compatible with a legitimacy analysis.

Ideally, institutions and practices conform to notions of justice *and* legitimacy. The Court's oversight of legitimacy is consequently troubling, if understandable. As this Part demonstrated, courts have struggled to account for evolving norms of corporate personhood in the context of providing a test that is just to the defendant, the plaintiff, and the forum. Courts have failed to recognize that corporate rights and responsibilities have evolved to the point where we can intelligently speak of corporate personhood. This status as artificial persons has made political obligations and legitimacy a viable category for corporations that can serve to ground the personal jurisdiction analysis.

IV. THEORETICAL FRAMEWORKS OF POLITICAL OBLIGATIONS

This Part argues that political rights and political obligations are intertwined. As applied to corporations, any viable theory of political obligation must consider the rights and freedoms a state grants to

187. *See, e.g.*, *Asahi*, 480 U.S. at 113 (noting "the interests of the forum State"); *McGee*, 355 U.S. at 223 ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.").

188. *E.g.*, *Travelers Health Ass'n*, 339 U.S. at 649 ("In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of *forum non conveniens*." (citation omitted)).

189. *World-Wide Volkswagen*, 444 U.S. at 292; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

190. *Asahi*, 480 U.S. at 115.

corporations before determining whether the corporation is obligated to submit to the adjudicatory power of the state.

To have a political obligation is to have a moral obligation to obey the laws of one's country and to submit to its jurisdiction. Political obligations thus imply legal duties. Without legitimate political obligation, a state's exercise of power is arbitrary and coercive. Conversely, a state's exercise of power is legitimate when grounded in a viable framework of political obligation.

Legitimacy has important consequences for the operation and persistence of a legal system. A legal system that is founded upon and regulated by legitimate principles of political obligation will be constrained and principled. Predictably, a legitimate legal system will be obeyed freely by a greater percentage of the individuals subject to its jurisdiction. Thus, legitimate legal systems are more efficient and more integrated into society.[191]

The notion of political obligation can be used for two important purposes. First, it allows us to judge the legitimacy of a state. Second, it functions as a measuring rod to test whether persons have a moral obligation to obey the laws of a country and to submit to its jurisdiction even when they desire to do otherwise.

There are five main frameworks for analyzing political obligations: (1) Actual and Tacit Consent, (2) Gratitude, (3) Membership, (4) Utility, and (5) Hypothetical Consent.[192] All of these models, in their characteristic ways, link rights to obligations.

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191. The empirical literature on these points is legion. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 24–25 (1990) (asserting that individuals' normative values and perceptions of the legitimacy of a given authority influence their decisions on whether to comply with the law or not); Amy Gangl, *Procedural Justice Theory and Evaluations of the Lawmaking Process*, 25 POL. BEHAV. 119 (2003) (describing "the conditions under which process variables matter as much or more than policy outcomes in individuals' evaluations of the legitimacy of the lawmaking process"); Tom R. Tyler, *Procedural Justice*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 435 (Austin Sarat ed., 2004) (reviewing psychological research on procedural justice). For accounts of procedural justice and the U.S. Supreme Court, see Jeffery J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 12 POL. BEHAV. 363 (1990), and Jeffery J. Mondak, *Substantive and Procedural Aspects of Supreme Court Decisions as Determinants of Institutional Approval*, 19 AM. POL. Q. 174 (1991).

192. These frameworks embody distinct traditions. However, there have been some attempts to integrate them. *See, e.g.*, Gerald Gaus, *Justification, Choice, and Promise: Three Devices of the Consent Tradition in a Diverse Society*, 15 CRITICAL REV. INT'L SOC. & POL. PHIL. 109 (2012) (attempting to "bring the Kantian and Lockean contract traditions together"); George Klosko, *Multiple Principles of Political Obligation*, 32 POL. THEORY

This Part explains these five frameworks of political obligation. It elaborates the sources and limitations of political obligations under each of these five frameworks. Next, it examines whether these frameworks, originally developed for actual persons, can be applied to artificial entities like corporations. Consent, gratitude, membership, and utility all fail at this task. The only viable choice is Kant's hypothetical choice model of political obligations. Under the Kantian framework, the state is necessary for the realization of corporate rights and freedoms. Crucially, political rights under a Kantian framework are conceptually dependent on political obligations. Out of this conceptual dependency arise political obligations for the bearers of these rights and freedoms, including submission to the jurisdiction of the rights-granting state.

A. Consent

In the liberal tradition, political obligations arise out of consent. A person takes on political obligations by consenting to the state's exercise of jurisdiction over him or her. This act of consent must fulfill minimal requirements to serve as a foundation of political and legal obligations. To be binding, consent must be informed, expressed, and given freely.[193]

Some theorists speak of this act of consenting as the creation of a contract. Consent theories are thus often referred to as social contract theories. John Locke is arguably the most influential early social contract theorist. His account of political obligations as grounded in consent serves as an important cornerstone of the liberal tradition. Locke's analysis starts from the state of nature where individuals are not subject to any binding political authority.[194] No government exists in the state of nature,

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801 (2004) (developing a "multiprinciple theory of political obligation, based on the principle of fairness, a natural duty of justice, and . . . the 'common good' principle"); Jonathan Wolff, *Political Obligation: A Pluralistic Approach*, *in* PLURALISM: THE PHILOSOPHY AND POLITICS OF DIVERSITY 179 (Maria Baghramian & Attracta Ingram eds., 2000) (accepting multiple theories of political obligation).

193. These conditions are very complex. For example, it is not clear just how much information the truly consenting person requires or what conditions count as coercive. For an illustration of the complexities associated with consent, consider the test whether consent to search by a police officer was voluntary or not. *See generally* Florida v. Bostick, 501 U.S. 429, 438 (1991) ("'Consent' that is the product of official intimidation or harassment is not consent at all."); Schneckloth v. Bustamonte, 412 U.S. 218, 235 (1973) ("Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection.").

194. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT § 4, at 4 (J.W. Gough ed., 1948) (1690) ("[The state of nature is a state] of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection . . . .").

and there is no overarching power that could legislate or adjudicate disputes. The state of nature is thus marked by a great deal of freedom and independence.[195] However, Locke stresses that the state of nature is also markedly inconvenient, most notably due to the absence of an overarching authority to adjudicate disputes.[196] To overcome these inconveniences, individuals consent to the creation of an overarching political society.[197] Voluntary consent to this political society constitutes the foundation of the moral obligations individuals subsequently have. Individuals become full members of the political society through their consent. They voluntarily take on the burdens of political obligations, including submission to the adjudicatory jurisdiction of the state, and gain the benefits of escaping the state of nature.[198] Here as elsewhere, political obligations and political benefits are closely intertwined.

1. Actual Consent

Actual consent to political authority is an initially attractive theory of political obligation.[199] It functions very much like a valid contract where

195. *Id.* ("[A]ll men are naturally in . . . a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.").

196. The laws of nature govern in the state of nature. They require that "no one ought to harm another in his life, health, liberty, or possessions." *Id.* § 6, at 5. Nonetheless, some people transgress against the law of nature and "invad[e] others' rights and . . . do[] hurt to one another." *Id.* § 7, at 5. The law of nature, according to Locke, grants the injured parties and their allies a right to recover from the offender as "every one has a right to punish the transgressors of that law to such a degree as may hinder its violation." *Id.* § 7, at 5–6. Such punishment should thus be "proportionate to [the] transgression." *Id.* § 8, at 6. However, people are poor judges in their own causes and will frequently overestimate the amount of harm or damage suffered. Passions will run high. Excessive compensation will lead to ill will and potentially additional rounds of retribution. *Id.* § 13, at 8, §§ 124–125, at 62–63. Even if this was not the case, some people in the state of nature may lack the power or opportunity to enforce their rights. *Id.* § 123, at 62, § 126, at 63. The lack of a way to settle disputes fairly and legitimately renders the state of nature not insufferable—as in Hobbes—but sufficiently inconvenient to warrant a state that has the overarching authority to adjudicate disputes.

197. *Id.* § 13, at 8 (asserting that there are "inconveniences of the state of nature" for which Locke "easily grant[s] that civil government is the proper remedy").

198. Nobody, according to Locke, may be forced to enter civil society. *Id.* § 95, at 48. Even if most people in a given territory chose to enter civil society, anybody may abstain and retain his or her liberty in the state of nature, with the usual inconveniences and the added inconvenience of having an organized civil society next door. *See id.*

199. This is, in part, because of historical developments that oriented society towards market transactions between free individuals to whom this metaphor proved appealing.

the parties promise to perform their sides of the bargain.[200] Subsequent to the promise, the parties are bound to terms of the contract. Agreement to these terms is a strong foundation of obligations.[201] These obligations are direct rather than subject to lengthy and tenuous deductions, establish a meaningful relation between the individual and the political community, provide specific rather than general political obligations, and constitute sufficient conditions for the formation of a political society.[202] Actual consent also makes it easy for members, nonmembers, and the state to tell who is subject to political obligations and who is not. The mechanism for moving from nonmember to member is also simple and clear: a manifestation of actual consent suffices.[203] These features of actual consent make it an attractive candidate for grounding political obligation.[204]

However, to be more than a candidate, there need to be actual instances of consent to the political authority of the state. As applied to individuals, actual consent, though attractive, is not realistic. Most people in most times and most places simply do not provide actual consent to their government. The Oath of Allegiance that immigrants must take before they can become U.S. citizens is often taken to be one of the few exceptions to this rule.[205] Numerous theorists claim it as one of the few instances where individuals can be said to provide actual consent to the authority of the state.[206] However, this is somewhat puzzling as the text of the oath

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See, e.g., DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 1–2 (1989); C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 9–106 (1962); Harro Höpfl & Martyn P. Thompson, *The History of Contract as a Motif in Political Thought*, 84 AM. HIST. REV. 919, 919–31 (1979).

200. I conflate here agreeing and promising. Others treat them separately.

201. *See* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 70–71 (1979) ("[T]he model of the promise lends clarity and credibility to a theory of political obligation; for promising is surely as close to being an indisputable ground of moral requirement as anything is. Basing a theory of political obligation on consent, then, lends it plausibility unequaled by rival theories."); *see also* MARGARET GILBERT, A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY 59 (2006) ("[Agreements] may indeed be the most salient source of [direct] obligations, along with promises.").

202. GILBERT, *supra* note 201, at 58–60.

203. *Id.* at 60.

204. *But see* Brilmayer, *Consent, Contract, and Territory*, *supra* note 117, at 17 ("[C]onsent does not establish territorial sovereignty. . . . If one's obligation to obey one's state depends on territorial sovereignty, the role consent plays becomes exceedingly thin. Territoriality instead occupies the crucial role and consent arguments become superfluous.").

205. For the text of the oath, see *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=facd6db8d7e37210VgnVCM100000082ca60aRCRD&vgnextchannel=dd7ffe9dd4aa3210VgnVCM100000b92ca60aRCRD (last updated Sept. 4, 2012).

206. *See, e.g.*, Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3, 12–13 (1981) ("A sincere and freely given oath to uphold the Constitution is plausibly taken to represent an acknowledgement of the character of political authority; it

does not speak to general political obligations and lists only a few specific obligations.[207] None of them are related to submitting to the authority of the state to adjudicate disputes. Actual consent as a theory of political obligations, for individuals, has few defenders.

The story is more complicated for corporations. There, we must ask whether corporations as artificial persons ever consented to the authority of the state and whether such consent is sufficient to place political obligations on corporations, thus making them subject to the jurisdiction of the state.

The answer on the federal level is "no."[208] No federal statute requires that corporations provide actual consent to the political authority of the state. Perhaps this is not surprising, as there are few federally chartered corporations. Corporations are traditionally chartered and regulated primarily by states.

States also do not require corporations to provide actual consent to the general political authority of the state. However, some states require corporations to actually consent to the specific authority of the state to exercise jurisdiction over them.[209] Typically this is done as a condition of

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may be taken as evidence that one both understands and endorses the claims of those in power (and of those who will legitimately succeed them) to the right to rule."); A. John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 796 (1984) ("Perhaps the clearest candidates for the status of express consenter are naturalized citizens, who typically must take an explicit oath of allegiance to the government or constitution of their new country.").

207. *See Naturalization Oath of Allegiance to the United States of America*, *supra* note 205 ("I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the armed forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.").

208. This is in the sense that there is no systematic way in which corporations provide actual consent. However, in individual actions corporations can consent to personal jurisdiction—lack of personal jurisdiction is waivable, lack of subject matter jurisdiction is not. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (holding that the plaintiff consented by contract); Adam v. Saenger, 303 U.S. 59, 67–68 (1938) (holding that the plaintiff consented to the court's jurisdiction by filing suit).

209. *See generally* Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes To Confer General Jurisdiction*, 9 REV. LITIG. 1, 9–16 (1990) (recounting the history and development of the corporate consent doctrine).

incorporation. Another approach is to base the consent of a corporation to jurisdiction on a two-step process. First, the state imposes a statutory requirement on foreign companies to register with state authorities.[210] As a condition of this registration, a foreign company must then appoint an agent in the state, thereby potentially creating sufficient contacts with the forum for a valid exercise of jurisdiction.[211] Even more tenuously, some states simply declare a state official to be an agent of a corporation upon whom valid process may be served.[212] Registration, with or without the appointment of an agent, is then taken by some states as an indicator of actual consent to jurisdiction.

All states require foreign corporations to designate a local resident for process. However, most states do not indicate that this registration entails consent to the jurisdiction of the state.[213] Failure to register does not void contracts entered in that state, does not subject the corporation to prejudice in the state's courts, and does not subject the foreign corporation to penalties.[214] Foreign corporations that did not register simply cannot sue in state courts, but they can still be sued.[215] Corporations thus consent to something when they register with a state. But it is not clear whether they consent, based on this registration alone, to having courts in that state exercise personal jurisdiction over them.[216] This distinction was lost on earlier courts that accepted registration alone as a sufficient basis for

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210. *See id.* at 1 n.1 (collecting statutes); *see, e.g.*, TEX. BUS. ORGS. CODE ANN. § 9.001(a) (West 2011) ("To transact business in this state, a foreign entity must register under this chapter . . . ."); *Irrevocable Consent to Jurisdiction of the Commissioner and New Jersey Courts*, N.J. DEPARTMENT OF BANKING & INS., http://www.state.nj.us/dobi/division_insurance/pdfs/mwic.pdf (last visited Mar. 7, 2013).

211. *See, e.g.*, TEX. BUS. ORGS. CODE ANN. § 9.004 (West 2011) ("The [foreign filing entity's registration] application must state . . . the address of the initial registered office and the name and address of the initial registered agent for service of process that Chapter 5 requires to be maintained . . . .").

212. *E.g.*, *id.* § 5.251 ("The secretary of state is an agent for an entity for purposes of services of process, notice, or demand on the entity if the entity is . . . a foreign filing entity and the entity fails to appoint or does not maintain a registered agent in this state; or the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity; or the entity is a foreign filing entity and the entity's registration to do business under this code is revoked; or the entity transacts business in this state without being registered as required by Chapter 9.").

213. For the importance of this distinction, see, for example, *Shaffer v. Heitner*, in which the Court notes that "Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." 433 U.S. 186, 216 (1977) (footnote omitted).

214. *See, e.g.*, DEL. CODE ANN. tit. 8, § 383 (2011).

215. *See, e.g.*, *id.*

216. *See, e.g.*, Sternberg v. O'Neil, 550 A.2d 1105, 1110 (Del. 1988) ("The state and federal courts . . . are divided as to whether statutory registration can operate as an express consent to personal jurisdiction in the absence of 'minimum contacts.'").

jurisdiction.[217] Modern jurisprudence now generally holds that registration alone is an insufficient ground for consent to jurisdiction.[218]

Actual consent is thus undermined from multiple sides. First, there is often no attempt to ask for actual consent.[219] Second, even where there are hints of a question, it is not clear that the answer is sufficient to create obligations. Third, where there is actual consent, it often fails to create general political obligations. Fourth, the geographic scope of these obligations is narrow—typically confined to the one state. Fifth, it is entirely unclear under actual consent theory and applicable case law which corporate officer or corporate entity is conceptually capable of furnishing

217. *See* Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917); Smolik v. Phila. & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (accepting that appointment of an agent for process constitutes actual consent to general jurisdiction).

218. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (holding that valid exercise of jurisdiction must be based on the quality and nature of the defendant's contacts with the forum); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183–84 (5th Cir. 1992) (holding against consent to personal jurisdiction on constitutional grounds); Leonard v. USA Petroleum Corp., 829 F. Supp. 882, 889 (S.D. Tex. 1993) (holding that a corporation does not consent to jurisdiction merely by registering); *see also* William Laurens Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C. L. REV. 733, 734 (1969) ("The only condition adopted by every state is that foreign corporations name local residents as their agents to accept process. The piecemeal overruling of *Pennoyer* and the consequent development of provisions for service of process on corporations outside forum jurisdictions have eliminated any jurisdictional reason to require local agents." (footnote omitted)). *But cf.* Conner v. ContiCarriers & Terminals, Inc., 944 S.W.2d 405, 409 (Tex. App. 1997) (plurality opinion) (examining whether "a Delaware corporation with its principal place of business in Chicago" had consented to jurisdiction in Texas by registering to do business in the state); Goldman v. Pre-Fab Transit Co., 520 S.W.2d 597, 598 (Tex. Civ. App. 1975) (holding in favor of valid consent through registration). *See generally* Charles W. "Rocky" Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 856–62 (2004) (describing courts' evolving views on the significance of appointing an agent in personal jurisdiction analysis).

219. This is the case, for example, for corporations chartered under federal law like the highly controversial Fannie Mae and Freddie Mac. For additional examples, see 36 U.S.C. §§ 10101–27010 (2006), which contains the corporate charters of over ninety patriotic and national societies, including the Boy Scouts of America, the National Academy of Sciences, and the American Legion, and Hannah L. Buxbaum, *Personal Jurisdiction over Foreign Directors in Cross-Border Securities Litigation*, 35 J. CORP. L. 71, 90–92 (2009), which notes the practical difficulties of requiring foreign directors to consent to jurisdiction in U.S. courts for all claims arising out of their companies' securities activity. Commentators have also examined the context of actual consent of individuals. *See* GEORGE KLOSKO, THE PRINCIPLE OF FAIRNESS AND POLITICAL OBLIGATION 142 (1992) ("[R]elatively few individuals expressly consent to their governments."); SIMMONS, *supra* note 201, at 79 ("The paucity of express consentors is painfully apparent."); M.B.E. Smith, *Is There a Prima Facie Obligation To Obey the Law?*, 82 YALE L.J. 950, 960 (1972–1973) ("[M]any persons have never so agreed [to assume the obligations of citizenship].").

actual consent.[220] Sixth, actual consent theory has difficulties dealing with dissenters and strategic holdouts.[221] Seventh, corporations, under current state law, can theoretically exist forever. This raises the question whether actual consent given at one time could create obligations forever or whether intervening changes could alter or void the original grant of consent.

Even for the few states that explicitly tie incorporation or registration to consent and jurisdiction, the state's authority to exercise jurisdiction is still philosophically problematic. For actual consent to create political obligations, the act of giving must have been intentional, clear, based on premeditation, and voluntary, that is, noncoercive.[222] State statutes and practices may fail on all of these counts. For example, deeming a state official an agent of the company if it should fail to designate its own agent undermines claims to intentional, actual consent. Many companies in the Internet age simply do not register in a state to do business there, and even if they did, they might not appoint an agent or be aware that a state official can function as an agent in this situation. Often, there simply is no actual consent even in the few states that establish a viable framework for companies to consent. And where there is some consent, it might not be sufficiently robust to create political obligations.

As we have seen, actual consent could be a strong source of political obligations but rarely is.[223] People and companies rarely consent to political obligations. Even when they do, the conditions surrounding such consent might not satisfy conditions sufficient to count as voluntary and informed. Absent these conditions, consent, even where present, is insufficient to create binding political obligations. Worse still, even where there is actual, voluntary, and informed consent, such consent is often not broad enough to serve as a robust backdrop of a state's authority to exercise jurisdiction over a company.[224]

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220. Only the C.E.O.? Only the board? Any corporate officer? Or only those designated with this power? Would actual consent necessarily fail if the corporation did not designate an agent with this power?

221. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 108–10 (1974).

222. *See* GILBERT, *supra* note 201, at 64–67.

223. In the context of individual political obligations, some scholars have suggested that people should be given well-structured opportunities to express consent and enter relevant agreements. *See, e.g.*, HARRY BERAN, THE CONSENT THEORY OF POLITICAL OBLIGATION (1987) (contending that political obligation "must rest on the actual personal consent of citizens"). One could imagine a similar movement in the corporate context. *But see* JOHN HORTON, POLITICAL OBLIGATION 33–36 (1992) (questioning whether such consent would be truly voluntary); GEORGE KLOSKO, POLITICAL OBLIGATIONS 123–30 (2005) (same).

224. *See, e.g.*, Margaret Gilbert, *Reconsidering the "Actual Contract" Theory of Political Obligation*, 109 ETHICS 236, 238–41 (1999).

One way that scholars in other contexts have tried to deal with these objections is to give up on actual consent as a foundation of political obligations and to base such obligations in tacit consent instead.

2. Tacit Consent

Tacit consent theory accepts that people might not have given actual consent to political obligations but holds that people's enjoyment of benefits provided by the state can meaningfully be interpreted as constituting consent to political obligations to that state.[225] Consent, under this framework, can be indicated in ways other than expressly stating agreement. As in the usual law of contracts, parties may enter an agreement tacitly under certain conditions.[226] The resulting obligations of the parties are still founded in consent. However, the manifestation of that consent is not express but implied. This raises the question of when we can reliably infer implied consent. What conditions are sufficiently robust to allow us to claim that an entity has entered an agreement?[227] Because entering such an agreement binds a party to meaningful political obligations, the conditions for tacit consent must be well-defined and restrictive.[228]

Theorists vary widely on what number and what kinds of acts are sufficient for tacit consent to create political obligations, including submission to the authority of the state to adjudicate disputes. Some scholars think that participating in the electoral process, especially by voting, is a sufficient indicator of tacit consent.[229] Others focus on the "active participation in the institutions of the state" as indicated by ordinary

225. *See generally* A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274 (1976) (analyzing and explaining tacit consent).

226. Silence is an example familiar from contract theory. It also illustrates how restrictive the conditions must be in that everybody understands that mere silence will be taken as acceptance of a proposal. *See, e.g.*, SIMMONS, *supra* note 201, at 79–82; Simmons, *supra* note 225, at 279–81.

227. *See, e.g.*, LOCKE, *supra* note 194, § 119, at 60 ("Every man being, as has been shown, naturally free, and nothing being able to put him into subjection to any earthly power but only his own consent, it is to be considered what shall be understood to be sufficient declaration of a man's consent to make him subject to the laws of any government. . . . The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds—*i.e.*, how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all.").

228. *See, e.g.*, SIMMONS, *supra* note 201, at 79–82.

229. *See, e.g.*, J.P. PLAMENATZ, CONSENT, FREEDOM AND POLITICAL OBLIGATION 168–71 (2d ed. 1968) (arguing that people consent to a political system by voting and simply "by taking part in its processes").

activities such as sending children to public schools, using the public library, and the like.[230]

Locke, standing at the beginning of the tacit consent tradition, also considered the issue of tacit consent.[231] For him, tacit consent can easily be shown in two ways. First, having any possessions in the territory of a government suffices, for Locke, as a sign of tacit consent to the government. Locke provides the example of accepting inherited property to demonstrate the broad reach of tacit consent. Because the bequeather put the property permanently under the jurisdiction of the government, the bequeathed, by accepting the property, also tacitly accepts the government that governs the property.[232] The second way, for Locke, to tacitly consent to a government is through the "enjoyment of any part of the dominions of any government."[233] Locke's examples are similarly broad: tacit consent is indicated by lodging in the country "only for a week" or by "barely travelling freely on the highway."[234] Given this broad definition, Locke concludes that everybody within the territory of a state provides effective tacit consent to its government.[235]

Locke's account is thus attractive because it potentially gives rise to political obligations for virtually everybody. However, Locke's conditions for tacit consent are too broad. Few people simply walking on a highway would agree that this, by itself, is sufficient ground to morally bind them

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230. PETER J. STEINBERGER, THE IDEA OF THE STATE 218–20 (2004).

231. Others locate the beginnings of the tacit consent tradition earlier in Hobbes. *See, e.g.*, Issak I. Dore, *Deconstructing and Reconstructing Hobbes*, 72 LA. L. REV. 815, 830 (2012); Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y 753, 760 n.20 (2000). Others still go back much further to Plato. *See, e.g.*, Leo P. Martinez, *Taxes, Morals, and Legitimacy*, 1994 BYU L. REV. 521, 530.

232. LOCKE, *supra* note 194, § 120, at 61 ("Whoever therefore from thenceforth by inheritance, purchases, permission, or otherwise, enjoys any part of the land so annexed to, and under the government of that commonwealth, must take it with the condition it is under, that is, of submitting to the government of the commonwealth under whose jurisdiction it is as far forth as any subject of it.").

233. *Id.* § 119, at 60.

234. *Id.* Similarly, some states provide that out-of-state motorists implicitly consent to the designation of an agent in the forum—typically the Secretary of State—that may be served. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356–57 (1927) ("[T]he State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served."). However, this avenue towards establishing personal jurisdiction is fairly narrow and typically applies only with regard to vehicle accidents. Earlier cases held that the consent needed to be explicit and in advance. *Id.* at 356 ("[*I*]*n advance* of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use." (emphasis added) (citing Kane v. New Jersey, 242 U.S. 160, 167 (1916))).

235. LOCKE, *supra* note 194, § 119, at 60 (stating that a political obligation arising out of tacit consent "reaches as far as the very being of any one within the territories of that government").

to obey a government.[236] As many have argued, by making his definition of consent so broad, Locke makes it "almost unrecognizable."[237] Locke's theory of tacit consent, like many others, bases strong political obligations on weak foundations. This weakness in many accounts of tacit consent is instructive: to provide a viable account of political obligations, the strength of morally binding obligations must match equally strong conditions of tacit consent. We might be willing to accept slightly ambiguous expressions of tacit consent for minor political obligations. But for strong political obligations, we require robust expressions of tacit consent that give us confidence that the consent is meaningful.

Therefore, we must ask whether corporations, as artificial persons, can meaningfully be said to have provided tacit consent to meaningful political obligations in general and submission to the jurisdiction of a state in particular.[238]

Current personal jurisdiction doctrine asks a similar question. It inquires whether a defendant had sufficient minimum contacts with the forum state to warrant an exercise of specific jurisdiction. One of the ways to demonstrate such minimum contacts is through purposeful availment of the "benefits and protections" of a state.[239] This language echoes Locke's claim that tacit consent can be indicated by "enjoyment of any part of the dominions of any government."[240] Both build political obligations based on

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236. *See, e.g.*, DAVID HUME, *Of the Original Contract*, *in* THEORY OF POLITICS 193, 203–04 (Frederick Watkins ed., 1951); A. JOHN SIMMONS, ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY 69 (1993) (questioning whether merely walking on the street or inheriting property is sufficient for "deliberate, voluntary alienation of rights"); Simmons, *supra* note 225, at 289 ("Talk of consent in such situations can be no more than metaphorical.").

237. Hanna Pitkin, *Obligation and Consent* (pt. 1), 59 AM. POL. SCI. REV. 990, 995 (1965).

238. Other states take a broader view and view incorporation as a tacit consent to the jurisdiction of the state. *See, e.g.*, Rose v. Granite City Police Dep't, 813 F. Supp 319, 321 (E.D. Pa. 1993) ("The Court lacks jurisdiction over Defendants . . . . The [defendants] are not incorporated or formed under the laws . . . of Pennsylvania . . . .").

239. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."). Some of the other ways of establishing minimum contacts are through purposefully directing activities at the forum state, especially dangerous ones, *see, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985), purposefully directing activities outside the forum state that had consequences in the forum state, *see, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 223 (1977), or initiating relationships with the forum state, *see, e.g.*, *Burger King*, 471 U.S. at 473.

240. LOCKE, *supra* note 194, § 119, at 60.

tacit consent as indicated by enjoying the benefits of a well-ordered political society.[241] Enjoying the benefits of the rule of law and police protection—and all other government benefits—is beneficial and indispensable for many types of interactions. Accepting these benefits might thus be a sign of tacit consent to the political authority of the state. A robust reliance on the benefits and protections of a state can count, under this line of cases and Lockian reasoning, as a tacit acceptance of specific political obligations, most centrally submission to the authority of the state to adjudicate disputes.

Incorporation, under some theories of the corporation, is one way to accept the benefits and protections of a state. Predictably, some states take the view that incorporation alone is sufficient tacit consent to the jurisdiction of the state.[242] However, courts do not count everything as an act of tacit consent. For example, merely placing an item into the stream of commerce is not sufficient to count as accepting such benefits and protections.[243] The doctrine on this question thus recognizes that an entity can make use of a forum without tacitly consenting to its jurisdiction.

Just what counts as sufficient enjoyment of the benefits and protections of a state to count as tacit consent to jurisdiction is fiercely debated. However, independent of where this line is drawn, there is a structural problem with this line of reasoning. Accepting the benefits and protections of a state might imply consent, but these are not definitive signs of consent.[244] People, artificial and real, can enjoy the benefits and protections of a state without intending to signify consent.

Of course, we could simply say that one may not accept the benefits and protections of a state without also accepting political obligations. However, there is no mechanism, legal or otherwise, that makes this all-important demand. Thus, enjoying the benefits and protections of a state may imply

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241. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350, 356 (1882) ("If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process.").

242. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.711 (West 1996) ("The existence of any of the following relationships between a corporation and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation. (1) Incorporation under the laws of this state.").

243. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.").

244. *See* Simmons, *supra* note 225, at 288–89.

consent, but there is no way to make sure that tacit consent is indeed provided. Consent-implying enjoyments are not necessarily genuine consensual acts.[245] There is no reason to think that they are and no way to know for sure. Obligations for corporations, arising from enjoyments of state benefits, thus cannot be grounded in the principle of tacit consent.[246]

B. Membership

Given the practical and conceptual limitations of actual and tacit consent theory, many theorists look to ground political obligations beyond the paradigm of consent. One of these attempts builds upon the intuition that individuals have political obligations as members of a political community.[247] Under this theory, membership and association, not consent, are the bedrock of political obligations.[248] Typically, membership is not coercively imposed on individuals. Instead, it is simply the result of being born in a particular place at a particular time. Membership in a group creates the obligation to comply with the norms that govern it. Individuals who acknowledge membership in the group must acknowledge the general obligation to obey the laws of the group. This theory is thus referred to as the "membership" or "associative" theory.[249]

Theorists in this relatively new framework often analogize the associative approach of political obligations to family obligations. Both, so the argument goes, create and are defined by nonvoluntary obligations.[250] People are born into families just as they are born into political communities. The obligations arising out of membership in a family, like the obligations arising out of the membership in a political community, constitute the member and the group. The obligations define the group,

245. *Id.* at 288.

246. Our strong intuitions about them may instead be grounded in considerations of fairness, gratitude, or fair play. *See, e.g.*, A.D.M. Walker, *Political Obligation and the Argument from Gratitude*, 17 PHIL. & PUB. AFF. 191, 210–11 (1988).

247. *See generally* John Horton, *In Defence of Associative Political Obligations* (pts. 1 & 2), 54 POL. STUD. 427 (2006), 55 POL. STUD. 1 (2007) (defending the idea of associative political obligations).

248. *See, e.g.*, YAEL TAMIR, LIBERAL NATIONALISM 137 (1993) ("[T]he true essence of associative obligations [is that they] are not grounded on consent, reciprocity, or gratitude, but rather on a feeling of belonging or connectedness.").

249. *See generally* Leslie Green, *Associative Obligations and the State*, *in* DWORKIN AND HIS CRITICS 267 (Justine Burley ed., 2004).

250. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 206 (1986) ("Political association, like family and friendship and other forms of association more local and intimate, is in itself pregnant of obligation.").

whether it is a family or a political community. Without them there would be no sense of self-identity or self-understanding. The group and the individual cannot be understood apart from and beyond the obligations that are intrinsic to membership.[251] Because these relationships and obligations are fundamental to our sense of who we are, they are beyond the reach of moral theories.[252]

In an older line of cases, the Supreme Court has used the paradigm of obligations arising out of membership in contexts other than personal jurisdiction. For example, in *Blackmer v. United States*, the Court held that membership in a political community is an adequate basis for the assertion of coercive state authority.[253] In *Blackmer*, Congress had subpoenaed a U.S. citizen living abroad who challenged Congress's authority to do so.[254] The Court held that Blackmer was obligated to obey Congress's command based on his membership in the political community.[255] The Supreme Court explained:

> While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States maintained its authority over him, and he was bound by its laws made applicable to him in a foreign country.[256]

Numerous theorists have attacked the philosophical foundations of membership theory.[257] Some critics point out that membership theory fails to provide moral foundations for political obligations.[258] At best, it is a descriptive account of why many people feel a sense of identity and obligation. But it cannot explain why people should feel that way. The analogy between the political community and the family does not help on this point. It is neither a persuasive nor attractive theory of political obligations. Modern political communities simply lack the intimate relationship of families, and extending the paradigm of the family to entire nations harbors the danger of political paternalism. Similarly, the

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251. *See* Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 347 (1994) (highlighting the role of "noncontractual role obligation[s]" that flow from "roles into which we are born").

252. *See, e.g.*, HORTON, *supra* note 223, at 150–51.

253. 284 U.S. 421, 436–37 (1932). *See generally* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 301–02 (1987).

254. *Blackmer*, 284 U.S. at 433.

255. *Id.* at 443.

256. *Id.* at 436.

257. *See generally* Richard Dagger, *Membership, Fair Play, and Political Obligation*, 48 POL. STUD. 104 (2000) (asserting that the fair play theory is superior to the associative theory of political obligation); Christopher Heath Wellman, *Associative Allegiances and Political Obligations*, 23 SOC. THEORY & PRAC. 181 (1997) (addressing critically the associative theory of political obligation).

258. *See, e.g.*, Dagger, *supra* note 257, at 114–15; Wellman, *supra* note 257, at 181.

membership theory of political obligations does not provide resources to resist group policies that are unjust, exploitative, or immoral. If membership itself is enough to create moral obligations, then members are bound to the group's policies, both moral and immoral.

The membership theory of political obligations thus suffers from general shortcomings. Beyond these foundational shortcomings, it also is not able to generate political obligations for corporations. The analogy between families and political communities, already troublesome for individuals, is even less attractive for corporations because they are not born into a group but are consciously created in a specific forum. In contrast to individuals, corporations do not need to exist, do not need to act in a particular forum, or could cease altogether. They are not natural members of the political community just as they are not members of a natural family.

Membership theory, in short, is unattractive philosophically and inapplicable to corporations. It is unable to generate political obligations for corporations.

C. Gratitude

Besides membership, gratitude is another conceptual foundation upon which political theorists have attempted to build solid political obligations.[259] According to this tradition, citizens owe a debt of gratitude to the state for the benefits the state provides. This debt of gratitude is then supposed to be repaid through a sense of political obligation in general and submission to the jurisdiction of the state in particular. Theories of gratitude differ from consent theories of political obligations because gratitude is owed whether benefits are accepted or merely received.[260]

As applied to corporations, this account suggests that corporations should feel a sense of gratitude for the benefits the state provides, for example, roads that can be used for commerce. However, there are a number of important difficulties with this theoretical framework. First, gratitude is a human emotion. As such, it is not clear that an artificial person like a corporation could feel such an emotion or that it would make

259. *See generally* George Klosko, *Political Obligation and Gratitude*, 18 PHIL. & PUB. AFF. 352 (1989); A.D.M. Walker, *Obligations of Gratitude and Political Obligation*, 18 PHIL. & PUB. AFF. 359 (1989); Walker, *supra* note 246.

260. This avoids the inability of tacit consent theorists to distinguish between consent-implying actions and definitive signs of consent. *See* Simmons, *supra* note 225, at 288–89.

sense to suggest that it should act on it. Second, gratitude is usually owed only to a benefactor who makes a "special effort or sacrifice."[261] We do not owe gratitude to the salesperson for providing us with milk; we owe that person payment. Similarly, a corporation might receive benefits from the state, but that, at best, creates an obligation to pay taxes, not to submit to the jurisdiction of the state. The state did not sacrifice for the corporation—or for the individual taxpayer for that matter—and gratitude would thus be misplaced. Furthermore, benefactors who are motivated by self-interest are not owed gratitude. This implies that a government that provides services and benefits for selfish reasons—for example, only to win the next election—is not owed gratitude. Third, an account that builds political obligations on a debt of gratitude has difficulties defining how this debt must be repaid. Submission to the jurisdiction of the state might be one way to repay a debt, but there are many others. A corporation could easily and persuasively argue that, assuming it does owe a debt of gratitude, it is repaying this debt by employing citizens, paying stock dividends, and creating wealth. The state cannot define the manner in which an alleged debt of gratitude must be repaid because, as Simmons points out, "benefactors are not specially entitled to themselves specify what shall constitute a fitting return for their benefaction."[262] Gratitude, in short, is a thin foundation for political obligations, especially for corporations.

D. Utility

Utilitarianism is another framework for political obligations. In contrast to most other theories of obligations, it is forward-looking rather than backward-looking. Under this framework, political obligations are justified by the future utility derived from obeying the commands of the state, rather than being justified by what the state or citizens did in the past.[263] Speaking broadly, utilitarians argue that we should judge actions by the degree to which they maximize utility. Actors should strive to maximize the net sum of utility in society, as measured, typically, by an aggregate quantification of happiness or well-being. Political obligations derive from this conceptual framework as well: because submitting to the jurisdiction

261. SIMMONS, *supra* note 201, at 170.

262. A. John Simmons, *Political Obligation and Authority*, *in* THE BLACKWELL GUIDE TO SOCIAL AND POLITICAL PHILOSOPHY 17, 34 (Robert L. Simon ed., 2002).

263. *See generally* ROLF E. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS: A UTILITARIAN ACCOUNT OF SOCIAL UNION AND THE RULE OF LAW 81–115 (1975) (examining obligations and political associations); R.M. Hare, *Political Obligation*, *in* SOCIAL ENDS AND POLITICAL MEANS 1 (Ted Honderich ed., 1976) (examining the political obligations of citizens to their countries). But notice that Jeremy Bentham and John Stuart Mill, the founding fathers of utilitarianism, never applied the framework to political obligations.

of the state produces more overall happiness than not submitting to the jurisdiction of the state, persons, artificial and real, have a moral duty to obey, even where they personally experience disutility.

The utilitarian framework is open to a broad range of critiques. Utility is difficult or perhaps impossible to measure, revealed utility devices suffer numerous shortcomings, and one cannot compare utility among actors. Beyond these general critiques, it is also an empirical question whether overall utility is in fact increased if a corporation submits to the jurisdiction of a state or whether the specific harm occurred, say to employees and shareholders, is actually greater than broad benefits to the public, for example, in having a vibrant tort enforcement regime.

More troubling still, utilitarianism has difficulties generating and sustaining adherence to obligations.[264] If the guiding principle is to maximize utility, then obligations have little or no binding force. After all, utility could change or calculations could be redone, and actors might find that the obligations that they had a minute ago no longer have any hold over them. The question whether a corporation should submit to the jurisdiction of a particular state is settled by considering the greatest happiness of the greatest number, not by determining whether the corporation incurred a political obligation. Talk of political obligations simply adds nothing to the utilitarian framework. All questions of obligations are reduced to questions of justice.[265]

E. Hypothetical Consent

Hypothetical consent is the only viable remaining theory of political obligations for corporations. Its foundation lies in an appreciation that the state is necessary for the realization of freedom, rights, and justice. Under this framework, artificial and real persons acquire political obligations because they would have agreed to take on these obligations, *if asked*, in order to secure these rights and freedoms.

One of the cornerstones of this tradition is Immanuel Kant. For Kant, as for Locke, all persons possess innate freedom and rights.[266] These

264. *See generally* HORTON, *supra* note 223, at 63–69; SIMMONS, *supra* note 201, at 45–54.

265. Resort to rule utilitarianism does little to change this structural feature of utilitarian thought.

266. This includes property rights. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 63 (Mary Gregor trans., Cambridge Univ. Press 1991) (1785).

rights, however, cannot be given effect except in civil society.[267] Without a state, these rights are of little value and cannot contribute to human flourishing. Rights cannot be enforced except by a "competent judge" capable of "render[ing] a decision having the force of law."[268] For Kant, this gives rise to an obligation to accept membership in civil society, respect the rights of others, and accept political obligations.[269] Reciprocal freedom is possible only under the law. Without the authority of the state to arbitrate disputes, nobody can enjoy one's rights. The state, in short, is necessary for the realization of freedom and rights.

Given this important role, individuals are under a moral obligation to enter civil society and accept the duties society imposes.[270] Each person therefore has compelling reasons to endorse the existence of the state, as the state is "necess[ary] for the realization of freedom and rights and justice."[271] If asked, a reasonable person would accept the political obligations imposed by civil society, including, importantly, submission to the adjudicatory power of the state.

The Kantian logic thus aims to discover "a way to justify a political system to everyone who is required to live under it."[272] These justifications are the foundations of political legitimacy for the state and political obligations for the subject. Appealing to the ends and values of these subjects, a Kantian account of political obligations binds people based on their own interest in establishing and maintaining a political framework conducive to individual freedom, rights, and justice.

Of course, real persons, if asked whether they will take on political obligations to further these ends, will often be inclined to answer

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267. IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS 116 (John Ladd trans., 2d ed. 1999) ("Although experience teaches us that human beings live in violence and are prone to fight one another before the advent of external compulsive legislation, it is not experience that makes public lawful coercion necessary. The necessity of public lawful coercion does not rest on a fact, but on an a priori Idea of reason, for, even if we imagine them to be ever so good natured and righteous before a public lawful state of society is established, individuals, nations, and states can never be certain that they are secure against violence from one another, because each will have his own right to do what seems just and good to him, entirely independently of the opinion of others.").

268. *Id.*

269. *Id.* at 114–15 (arguing that individuals are obligated to abandon the "state of nature" and enter into a "juridical state of affairs"); KANT, *supra* note 266, at 85–87, 123–24 (arguing that only under the coercive law of the state is "everyone . . . able to enjoy his rights" (emphasis omitted)).

270. IMMANUEL KANT, *Perpetual Peace: A Philosophical Sketch*, *in* POLITICAL WRITINGS 93, 98 (Hans Reiss ed., H.B. Nisbet trans., 2d ed.1991) (arguing that a person who refuses to join political society would "rob[] me of . . . security and injure[] me by virtue of this very state in which he coexits with me").

271. SIMMONS, *supra* note 121, at 140.

272. THOMAS NAGEL, EQUALITY AND PARTIALITY 33 (1991).

untruthfully. They might do so hoping to dodge their obligations while reaping the generalized rewards of an orderly and just political society. They might also answer based on misguided short-term assessments, unfounded emotions, or other flawed reasoning. The Kantian account, as such, does not ask for their actual or tacit consent.[273] Instead, the Kantian process of justification relies on the hypothetical consent of idealized persons.[274] These idealized persons, properly situated, accept the reasons for political obligations. Kantians take this as indicative that actual persons should aspire to accept these political obligations as well.

Kantians thus ask under what conditions a rational actor, given the actor's ends and values, would endorse the existence of the state and accept the political obligations this entails. For individuals, this analysis is rife with complications.[275] However, for corporations the analysis is easier. Although any one particular corporation might be complicated, the idea of the corporation is less ambiguous. Corporations are businesses that, in part, seek to maximize their profits. They tend to succeed at this endeavor where a system of laws and regulations structures commerce efficiently. For example, efficient corporations are hard to imagine without the law of contracts and a set of competent courts to declare contracts valid and enforce them. The ends and values of corporations are thus predictably less diverse than the ends and values of actual persons. Similarly, the rationality and deliberative capacity of corporations is more observable and clear. It is more observable because it is enacted among actual people. The rational capacity of corporations is clearer because they must choose means for only a limited number of ends—again, most centrally, economic efficiency. For these reasons, it is possible to justify to corporations why they depend on the state.

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273. *See, e.g.*, SIMMONS, *supra* note 121, at 147 ("Appeals to hypothetical choice, acceptability, or reasonable nonrejectablity have a very different moral basis and force than do appeals to actual choice . . . . Even appeals to what ought to be chosen in light of the individual's own interests and values are quite different in force from appeals to that individual's actual choices.").

274. With regard to actual persons, the extent of idealization is subject to much debate. More idealized individuals are more likely to accept political obligations but also resemble actual individuals less and less. Conversely, less idealized individuals have difficulties generating robust political obligations but resemble living and breathing individuals more.

275. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 101 (1989) (noting, for good and bad, that sex is a morally arbitrary characteristic and would not be an aspect of idealized deliberating individuals).

Thus, the Kantian framework provides justifications to a corporation why it is better off with a political society in place that bestows rights and freedoms but that also imposes political obligations on everybody, including the corporation itself. Corporations, because they have a significant interest in the existence of a viable state and a viable court system, must under this framework accept the political obligations that are the corollary to these rights and freedoms.

V. RECONNECTING RIGHTS AND OBLIGATIONS: PERSONAL JURISDICTION RECONSTRUCTED

This Part explores the implications of recognizing that political rights and political obligations are inherently intertwined. It reconstructs current personal jurisdiction doctrine to account for the political rights and political obligations of corporations. This does not entail discarding the old personal jurisdiction doctrine. The current doctrine rightly probes whether the imposition of jurisdiction in a particular case would be just. It asks whether an exercise of jurisdiction would offend "traditional notions of *fair play* and substantial *justice*."[276]

In making this determination, courts examine the defendant's contacts with the forum, including the defendant's past conduct with regard to the case at hand,[277] the burden on the defendant,[278] the interests of the forum state,[279] an "estimate of the inconveniences" to the defendant from trial in the forum,[280] the forum's interest in regulating the defendant's conduct and the location of witnesses,[281] the defendant's purposeful availment of the forum,[282] the plaintiff's interest in obtaining relief,[283] the "interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies."[284] All of these factors test whether the imposition or denial of jurisdiction would be just to the defendant, the

276. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (internal quotation marks omitted).

277. *Id.* at 313–15, 320 (identifying that relevant "activities" included both the renting of property in the forum and employing forum residents).

278. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980).

279. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

280. *Int'l Shoe*, 326 U.S. at 317 (quoting Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930)) (internal quotation marks omitted).

281. Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 648–49 (1950).

282. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

283. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) ("A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief.").

284. *World-Wide Volkswagen*, 444 U.S. at 292.

plaintiff, or the forum. The main thrust of the modern regime is thus on the justice of imposing jurisdiction. It leaves aside whether the imposition of jurisdiction would be legitimate.

Justice and legitimacy, as we have seen, are two distinct concepts.[285] However, the current personal jurisdiction doctrine is exclusively focused on justice and completely neglects questions of legitimacy. This is an unnecessary oversight. Legitimacy, as we have seen, depends on connecting political obligations with political rights. Without legitimate political obligations, the state's exercise of power, including the power of its courts, is arbitrary and coercive. However, when such an exercise of power is grounded in a compelling framework of political obligations, it becomes legitimate.

Courts should thus not only ask whether the imposition of personal jurisdiction is just but also whether it is legitimate. To do so, they must include in their minimum contacts test an analysis of the political obligations and political rights of the defendant. In the case of artificial persons, the availability of these rights and obligations fluctuate with time and place, and the use of these rights fluctuates with each individual corporation. These fluctuations are relevant to determinations whether the imposition of jurisdiction is legitimate in a given case.

This Part reconstructs personal jurisdiction doctrine along these lines. It argues that the current doctrine must supplement prongs that test for the justice of imposing jurisdiction with an alternative prong that tests for the legitimacy of imposing jurisdiction. To do so, courts must inquire into the political obligations and political rights of corporate defendants.

The Supreme Court has articulated two theories for establishing personal jurisdiction over a defendant based on contacts unrelated and related to the suit at hand, called general jurisdiction and specific jurisdiction, respectively.[286] This Part explains how the general and specific jurisdiction doctrines can and should be enriched by analyzing the political rights and freedoms of artificial persons.

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285. *See supra* Part III.

286. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 413–16 (1984); *see also* Bell Paper Box, Inc. v. U.S. Kids, Inc., 22 F.3d 816, 819 (8th Cir. 1994) ("'Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state,' while '[g]eneral jurisdiction . . . refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose.'" (quoting Sondergard v. Miles, Inc., 985 F.2d 1389, 1392 (8th Cir. 1993))).

A. General Jurisdiction

General jurisdiction tests whether the defendant has established a "presence" in the forum through "continuous and systematic" activity with the forum.[287] These general contacts do not have to relate to the subject of the suit for purposes of establishing general jurisdiction. If a defendant's contacts with the forum state are sufficiently continuous and systematic, a court may exercise general jurisdiction over any action brought against that defendant, regardless of whether the action is related to the forum contacts.[288] General jurisdiction is thus "dispute-blind."[289] Instead of focusing on the dispute-related activities of the defendant, it examines the defendant's relation to the forum in a broader context. How broad this context can be is unclear. A recent Supreme Court decision[290] adds to the only two other decisions that directly address the issue of general jurisdiction.[291] These three cases provide only examples of what does or does not amount to sufficient contacts for general jurisdiction, but they do not provide a formal test.[292]

Courts and commentators have struggled to define the types and number of activities that courts should consider when making general jurisdiction determinations. As applied to corporate defendants, commentators have focused on a variety of factors, including the location of corporate offices in the forum,[293] the presence of "branch" facilities,[294] whether the corporation

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287. *Helicopteros*, 466 U.S. at 414–16; *see also* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952) (finding general jurisdiction over a Philippine mining company with operations in Ohio).

288. *See Helicopteros*, 466 U.S. at 414.

289. Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 612 (1988).

290. *Goodyear*, 131 S. Ct. at 2857 ("Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State . . . fall far short of the 'the continuous and systematic general business contacts' necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State." (citation omitted) (quoting *Helicopteros*, 466 U.S. at 416)).

291. *See Helicopteros*, 466 U.S. at 413–16; *Perkins*, 342 U.S. at 447–48; *see also* Brilmayer et al., *A General Look*, *supra* note 117, at 724 ("These are the only two Supreme Court cases addressing the issue of general jurisdiction since 1952.").

292. *See, e.g.*, LSI Indus. Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir. 2000) ("Neither the United States Supreme Court nor this court has outlined a specific test to follow when analyzing whether a defendant's activities within a state are 'continuous and systematic.'").

293. B. Glenn George, *In Search of General Jurisdiction*, 64 TUL. L. REV. 1097, 1129 (1990).

294. Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 137 (internal quotation marks omitted).

"adopts" the forum as its sovereign,[295] the place of incorporation,[296] and whether the corporation shapes its corporate policy in the forum or conducts core activities in the forum.[297] Continuous, systematic, and substantial business activities used to be considered sufficient for a finding of general jurisdiction, but are no more.[298] No scholarship has yet considered the political rights and freedoms of a corporation when determining the contours of general jurisdiction.[299]

This is an unnecessary blind spot. The state is necessary, as we have seen, for the meaningful realization of freedoms, rights, and justice. Corporations acquire political obligations because they would have agreed, if asked, to take on political obligations in order to secure political freedoms. Included in the realm of these political obligations is the duty to submit to the jurisdiction of the forum's courts. Under the Kantian framework of political obligations, the existence, exercise, and enjoyment of political rights provide strong reasons why a corporation, again, if asked, would agree to take on political obligations. It is a good trade based on the corporation's own interests in establishing and maintaining a political framework conducive to freedoms and justice. The corporation, given its ends and values, would endorse the existence of the state and accept the political obligations this entails. Of course, if asked about a particular case, the corporation might be tempted to deny this link between political rights and political obligations. This situation baffles actual consent theorists.[300] However, it is of little concern to hypothetical consent theorists because they inquire what a properly situated corporation would answer, not what it actually answered in any given case.[301]

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295. Stein, *supra* note 117, at 758 (noting that adopting a forum entails treating a forum as the corporation's home for most purposes).

296. Brilmayer et al., *A General Look*, *supra* note 117, at 733–34.

297. Sarah R. Cebik, *"A Riddle Wrapped in a Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 36.

298. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2856 (2011) (rejecting the "sprawling view" of general jurisdiction under which "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed").

299. The closest mention that I am aware of is found in Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 87, which notes that "[s]ystematic unrelated activity, such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an 'insider' that he may safely be relegated to the State's political processes."

300. *See supra* notes 219–24 and accompanying text.

301. *See supra* Part IV.E.

The existence, use, and enjoyment of political rights are thus a good foundation for imposing general personal jurisdiction. Courts should consider the exercise of political rights as evidence that a corporation had a sustained interest in the forum sufficient for the corporation to take on the task of trying to influence the forum's policy. For example, corporate expenditures in support of independent political broadcasts in candidate elections, now legal under *Citizens United*,[302] indicate a strong connection and interest in the forum that might be sufficient for the imposition of general jurisdiction.

Similarly, invocation of political speech rights and negative speech rights speak to the interest a corporation has in protecting itself and furthering its own goals through political rights. Where a corporation invokes these rights in a particular forum, it establishes a connection to the forum that should make it easier for a court to find general jurisdiction, just as the presence of additional corporate offices in the forum makes the imposition of general jurisdiction more likely.

Finally, where corporations invoke the protection of the Fourth, Fifth, and Sixth Amendments in a given forum, they demonstrate that they enjoy and use rights in that forum. Use of these rights in a particular forum is evidence that the corporation has a general, non-dispute-specific connection to the forum. Such a connection, again, will push the corporation's contacts across the threshold toward a finding of general jurisdiction.

How politically active a corporation is in a forum thus constitutes evidence of the corporation's interest in the forum and connections with the forum. Such an analysis is attentive to the increased rights afforded to domestic corporations and those denied to foreign corporations.[303] It is also dynamic across time with the expansion and restriction of constitutional rights. Similarly, this approach is also attentive to variations among states depending on the political rights granted to corporations in these states. Finally, an analysis of the enjoyment and uses of political rights is attentive to variation between different corporations. For example, small out-of-state Internet sellers are not likely to invoke political protections or utilize rights to influence the political process, and these factors should speak against a finding of general jurisdiction. In contrast, a corporation that repeatedly invokes political protections and seeks to influence political representatives and the forum's policy should not be allowed to claim that it does not have sufficient contacts with the forum

302. 130 S. Ct. 876, 886 (2010).

303. Under *Citizen United* only domestic corporations are currently permitted to contribute to issue campaigns. *See id.* at 911 (declining to address the government's interest in terms of banning contributions and expenditures by foreign nationals).

to find general jurisdiction. Use of political rights, in this context, can substitute for the presence of corporate offices or branch facilities. Courts should not simply disregard this readily available information but rather incorporate it into their general jurisdiction analysis.

B. Specific Jurisdiction

Specific jurisdiction tests whether the claims of the specific case before the court "arise out of" or "relate to" the defendant's activity in the forum.[304] A court has specific jurisdiction over a nonconsenting defendant only "with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate."[305] Wherever a court claims adjudicatory power over a defendant based on the defendant's forum activities that were related to the suit, the court invokes specific jurisdiction. The boundaries of the analysis are thus defined by the specific dispute before the court. A defendant's general relationship with the forum, apart from and beyond connections with activities that gave rise to the suit at hand, is irrelevant for a finding of specific jurisdiction. Specific jurisdiction is appropriate where a court can find a sufficiently strong connection between the defendant's activities in the forum and the asserted causes of action.

Courts have developed a long, but not exhaustive, list of factors that probe for the strength of that connection. Courts consider the defendant's past conduct with regard to the case at hand,[306] whether the defendant "purposely avail[ed] itself of the privilege of conducting activities within the forum State,"[307] an "estimate of the inconveniences" to the defendant from trial in the forum,[308] the interest of the forum in regulating the defendant's conduct and the location of witnesses,[309] the burden on the defendant, the interests of the forum state, the plaintiff's interest in

304. Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984).

305. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). This article originated the term "specific jurisdiction." *See id.*

306. Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (calling them "activities" and including the renting of property in the forum and employing forum residents as such).

307. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

308. *Int'l Shoe*, 326 U.S. at 317 (quoting Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)) (internal quotation marks omitted).

309. Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643, 648–49 (1950).

obtaining relief,[310] the "interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies."[311]

Courts currently do not consider the political rights of the defendant. This is puzzling. Where the defendant used political rights in the forum to specifically influence policies and procedures that relate to the suit, this amounts to strong evidence that the corporate defendant availed itself of the forum and purposefully acted in it, and that the defense of this suit would not unduly inconvenience the defendant who has shown itself capable of financing and organizing lobbying activities in the forum.

In contrast to the general jurisdiction analysis, the reconstructed specific jurisdiction test does not probe for all kinds of political activities, but only activities that are directly and closely related to the suit at hand. For example, a corporation that lobbied for asbestos tort reform in a particular forum should be more amendable to suit in that forum on an asbestos claim than a corporation that has not made use of its political rights with regard to issues that relate to asbestos litigation. This conclusion is philosophically well-founded and practically meaningful. Use of political rights is a kind of contact that, if sufficiently related to the suit, satisfies the minimal contacts threshold.[312]

VI. CONCLUSION

Current personal jurisdiction doctrine and scholarship are ambiguous and divided about what factors a court must or may consider before it can exercise jurisdiction over a defendant. This is not surprising. Without a clearly articulated theory of political obligation that grounds questions of jurisdiction, personal jurisdiction doctrine is bound to remain confused and unable to command moral respect. It would be illegitimate for a state to exercise jurisdiction over a person, artificial or real, that never had a political obligation toward the state. Political obligations are thus the key for a coherent and normatively compelling doctrine of personal jurisdiction.

Grounding jurisdiction in political obligation allows us to judge in each instance the legitimacy of a state exercising adjudicatory power over a defendant. Political obligations also function as a measuring rod to test

310. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) ("A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief.").

311. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

312. Where information on corporate political spending is not publicly available, federal and state presuit discovery might provide relief. *See generally* FED. R. CIV. P. 27; Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706–07 (1982). For state rules, see, for example, ALA. R. CIV. P. 27, and TEX. R. CIV. P. 202.1, 202.4.

whether persons have a moral obligation to obey the laws of a country and to submit to its jurisdiction even when they desire to do otherwise. With a viable theory of political obligation in place, it becomes possible to explain and justify the state's ability to exercise jurisdiction and the subjects' duty to respect that exercise of jurisdiction.

Crucial to this assessment of political obligations is the availability of political rights and freedoms. This is a factor that courts have long neglected to consider when determining whether the exercise of jurisdiction over a corporation is proper. Political obligation is not a binary variable. Instead, it functions on a continuum depending on the availability of political rights. As a result, the state's authority to claim jurisdiction over defendants similarly varies with the availability of political rights. In times as ours, when corporations enjoy more and more political rights, they should become more amendable to jurisdiction. In short, courts should consider the political rights granted to and exercised by corporations when making personal jurisdiction determinations. Courts should be authorized to exert more jurisdiction over corporations when they enjoy and exercise robust rights and less jurisdiction when they enjoy and utilize less robust rights.

Grounding the doctrine of personal jurisdiction in a compelling normative framework clarifies the doctrine, strengthens its normative base, and generates previously overlooked insights that can be used to expand the adjudicatory reach of courts over corporate wrongdoing.