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Fourteenth Amendment Personhood: Fact or Fiction?

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NOTES

FOURTEENTH AMENDMENT PERSONHOOD: FACT OR FICTION?

The United States Constitution “has stood the test of over two hundred years [and has] preserved and protected our basic rights and liberties.”¹ The interpretation of this governing document must be limited to ensure uniformity of law and equality of rights.² Such limitation becomes crucial, particularly when considering the social, moral, religious, political, and economic evolution of our country since the drafting of the Constitution.³ The United States Supreme Court, and the judicial branch in general, have nevertheless created legal fictions to afford select groups constitutional rights that neither the Constitution nor the amendments thereto specifically guarantee.⁴

¹ Robert Dole, *The Constitution and the Congress*, in THE CONSTITUTION OF THE UNITED STATES OF AMERICA 120 (1995). Some posit that “our” should include “real” people rather than entities such as the corporation. See *Corporations are Not Persons*, 134 CONG. REC. E1385 (Hon. Bruce Morrison inserting into the record an op-ed piece written by Ralph Nader and Carl J. Mayer, originally published in THE WASHINGTON POST on April 9, 1988).

² Cf. *Roe v. Wade Anniversary Views on Abortion*, “The 25th Anniversary of *Roe v. Wade: Has it Stood the Test of Time*”: Before the Senate Subcomm. on the Constitution, Federalism, and Property Rights, Jan. 21, 1998, [hereinafter *Roe v. Wade Anniversary Views*] (testimony of Gerard V. Bradley) (characterizing Justice White’s dissent in *Roe v. Wade* and stating that the decision was “well outside the bounds of proper constitutional adjudication”). But see Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?* 19 HARV. J.L. & PUB. POL’Y 9, 53 (1995) (examining *Brown v. Board of Education*, 349 U.S. 294 (1955), and lamenting that the Court did not “attack the dragon [of segregation] with zeal, once they decided that the intent of the Framers . . . was either irrelevant or inconclusive”).

³ See Thomas P. O’Neill, *What the Constitution Means to Us Today*, in THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 1, at 117 (elaborating on the expansion of our country from a weak union of four million members to a reigning “world superpower” 243 million members strong).

⁴ See generally Tejshree Thapa, Note, *Expounding on the Constitution: Legal*

Part I of this Note will explore the original purpose of the Fourteenth Amendment. Part II will examine the concept of the legal fiction and the Court's employment of it to grant rights to groups and entities that are not explicitly granted rights under the United States Constitution. Parts III to VII will address corporate and fetal life, provide an overview of the judicial treatment of such lives, and consider the greater concept of life by examining the lack of constitutional protection in the fetal abortion context. Analogies will be drawn between the fetus and the human being, comparing this relationship with that between the corporation and the human being.

This Note does not attempt to argue that the corporate entity should be denied constitutional personhood. Likewise, it does not purport to address the right to choose an abortion, abortions in the context of rape and incest, nor when the mother's health is in jeopardy. The dilemmas raised by abortion are indeed personal and appropriate for another forum. This paper does address the blatantly illogical reality of including a corporation in the definition of personhood and granting it expansive rights while denying a fetus the same treatment. At a minimum, the fetus is due, and must be granted, the same constitutional protections as the corporation.

I. FOURTEENTH AMENDMENT: PURPOSE AND INTERPRETATION

Various interpretations exist for the true purpose of the original enactment of the Civil Rights Amendments and the Fourteenth Amendment.⁵ It is widely accepted that the Fourteenth Amendment was intended to be "a civil rights amendment,"⁶ designed to safeguard newly emancipated blacks from

Fictions and the Ninth Amendment, 78 CORNELL L. REV. 139, 147-50 (1992) (describing various constitutional legal fictions).

⁵ The Fourteenth Amendment provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protections of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). See generally Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 967-1002 (1998) (chronicling the enactment of the Fourteenth Amendment and discussing the original meaning of its Privileges and Immunities Clause).

⁶ The "slavery amendments," namely the Thirteenth and Fourteenth Amendments, are considered the "most important expansion of civil rights in the United States." *Civil Rights and Discrimination* (visited Feb. 15, 1999) <<http://www>.

unfair governmental treatment.⁷ Adopted in 1868, the Fourteenth Amendment was enacted to give Congress the power to counter the “black codes” established following the passage of the Thirteenth Amendment—codes aimed at limiting the civil rights of the newly emancipated black slaves.⁸ Not coincidentally, the Fourteenth Amendment was enacted the year following the culmination of the Civil War “to prevent the South from terrorizing and tyrannizing the new freedmen and the white unionists who had opposed secession in several Southern states.”⁹

The Fourteenth Amendment’s Due Process Clause has served as a medium for creating rights not guaranteed by the text of the Constitution.¹⁰ As a result, we have witnessed the expansion of the umbrella of constitutional protection to cover groups never originally intended to be guaranteed protection.¹¹ Reflecting this notion, the intent to empower or personify the corporation cannot be found anywhere in the original adoption of the Fourteenth Amendment.¹² Corporations, notwithstanding

nylawchristopher.com/Discrimination.html>.

⁷ See *Corporations are Not Persons*, *supra* note 1; Bittker, *supra* note 2, at 10.

⁸ See *Civil Rights and Discrimination*, *supra* note 6 (visited Feb. 15, 1999).

⁹ *Does the 14th Amendment Apply to the Second?* (visited Oct. 29, 1998) <<http://www.arcrafts.com/think/Legal/KATES/dk002.html>>.

¹⁰ See ANTONIN SCALIA, A MATTER OF INTERPRETATION FEDERAL COURTS AND THE LAW 39 (Amy Gutmann, ed., 1997) (explaining that the Court has “smuggled in] new rights . . . under the Due Process Clause (which . . . is textually incapable of containing them)”).

¹¹ See ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169–70, 329–30 (1989) (positing that the original understanding of the Constitution did not include modern privacy rights and rights against sex discrimination); EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863–1869, at 109–13 (1990) (suggesting that originally the Fourteenth Amendment was not understood to require the integration of schools or to give blacks the right to vote).

¹² See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 578 (1949) (Douglas, J., dissenting). Justice Douglas explained that there was “no suggestion in [the] submission [of the Fourteenth Amendment to the people] that it was designed to put negroes and corporations into one class and so dilute the police power of the States over corporate affairs and quoted Arthur Twining Hadley’s position that:

The Fourteenth Amendment was framed to protect the negroes from oppression by the whites, not to protect corporations from oppression by the legislature. It is doubtful whether a single one of the members of a Congress who voted for it had any idea that it would touch the question of corporate regulation at all.

Id. (sources omitted); Ralph Nader and Carl J. Mayer, *Court Doctrine Thwarts Reform*, BATON ROUGE ADVOC., May 5, 1998, available in 1998 WL 4897693 (explaining that no explicit statement by the Framers can be found illustrating an intent to include corporations in the definition of “person” of the Fourteenth

that reality, have long used the Fourteenth Amendment as a weapon to secure rights.¹³ Even more ironic is that "of the cases in [the Supreme] Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent [had] invoked it in protection of the negro race."¹⁴ This irony is particularly noteworthy as the adoption of the Fourteenth Amendment was completely void of an intent to include corporations within the scope of constitutional protection.¹⁵

II. LEGAL FICTIONS

The legal fiction is a tool employed by the courts to create rights and is used both for convenience and to serve the ends of justice.¹⁶ This is particularly troublesome when one considers that the judicial branch, which is to interpret laws¹⁷ and which was originally described as "the least dangerous to the political rights of the Constitution"¹⁸ and the "weakest"¹⁹ branch, has come to be described as "an important legal and political institution."²⁰

Amendment).

¹³ See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 589 (1990) ("Once armed with the fourteenth amendment, corporations wielded it with considerable force [as] 'more than 50 per cent. asked that its benefits be extended to corporations.'" (citing *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting))).

¹⁴ *Connecticut Gen. Life Ins. Co.*, 303 U.S. at 90 (citing CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 138 (1912)).

¹⁵ See *Connecticut Gen. Life Ins. Co.*, 303 U.S. at 85-86 ("Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection."); *Corporations are Not Persons*, *supra* note 1; see also Hodding Carter III, *Viewpoint, Court Packing: Tradition of Both Left and Right*, WALL ST. J., Sept. 18, 1986 (opining that the decision of the United States Supreme Court to include "corporations" within the Fourteenth Amendment definition of "person" was primarily an effort to "safeguard" property).

¹⁶ See I. MAURICE WORMSER, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATION PROBLEMS* 9 (1927).

¹⁷ See THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts.") (emphasis added).

¹⁸ *Id.* at 465.

¹⁹ *Id.* See 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 167 (J.V. Prichard, ed. & Thomas Nugent, trans. 1914) ("Of the three powers . . . , the judiciary . . . is next to nothing.") (emphasis added).

²⁰ THOMAS G. WALKER & LEE EPSTEIN, *THE SUPREME COURT OF THE UNITED STATES: AN INTRODUCTION* 21-22 (1993) (explaining that the Court often engages in decision making that not only has social effects but is indicative of current political trends).

Employing various tools including the legal fiction, the judiciary is now creating laws, a function that it is performing in a dangerous and alarming manner.²¹ The courts, which are now seemingly completely unchecked, have created justifications to rationalize this behavior.²² It is posited that, "judicial lawmaking is part of the very constitution of American democracy, albeit an extremely controversial part."²³ The Court has manipulated the Constitution and "use[d]. . . constitutional text as a springboard for announcing new rights not expressly mentioned in the text."²⁴

²¹ See William J. Bennett, in *THE END OF DEMOCRACY: THE JUDICIAL USURPATION OF POLITICS* 65–66 (Mitchell S. Muncy, ed., 1997) ("[C]ourts are acting in remarkably inappropriate and injurious ways."). Perhaps the lack of oversight of such action is due to the gradual nature of the judiciary's self-determined evolution. See Mary Ann Glendon, in *A MATTER OF INTERPRETATION*, *supra* note 10, at 113–14 (referring to Tocqueville and stating that "Tyranny. . . need not announce itself with trumpets. It may come softly—so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects.").

²² See generally Steven Frias, Note, *Power to the People: How the Supreme Court Has Reviewed Legislation Enacted Through Direct Democracy*, 31 *SUFFOLK U. L. REV.* 721, 725 (1998) (discussing judicial activism and judicial legislating).

²³ Amy Gutmann, *Preface to A MATTER OF INTERPRETATION*, *supra* note 10, at ix (explaining the underestimation of the role of judicial lawmaking). This theory has been referred to as the nonoriginalist theory. See T.R. VAN GEEL, *UNDERSTANDING SUPREME COURT OPINIONS* 52 (2d ed. 1997). In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), Supreme Court Justice Brennan, in a dissenting opinion, demonstrated his alignment with the nonoriginalist viewpoint when he wrote,

In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice . . . the plurality ignores the kind of society in which our Constitution exists . . . [The Constitution is a] *living* charter[,] it is [not] a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.

Michael H., 491 U.S. at 141 (Brennan, J., dissenting) (emphasis added); see also *McCulloch v. Maryland*, 4 Wheat. 316, 408 (1819) (stating that the Constitution must evolve with changing times and circumstances in order to survive); VAN GEEL, *supra* at 52 (explaining the view that the Constitution must "be adaptable to new circumstances, to new problems, to new moral ideas"); SCALIA, *supra* note 10, at 6 (stating that common-law courts had two functions: "to apply the law to the facts [and] the more important one . . . to make the law").

²⁴ VAN GEEL, *supra* note 23, at 54. Such rights have included the right of privacy, which, in turn, has translated into a right to use contraceptives, see *Griswold v. Connecticut*, 381 U.S. 479 (1965), and the right to be informed of an entitlement to counsel and a right to remain silent upon arrest, see *Miranda v. Arizona*, 384 U.S. 436 (1966). There have been warnings against the inherent contradictions of a democracy in which the non-representative and insulated judicial branch oversees the elected branches of government and creates its own laws. See *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). "[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people . . . it exercises control, not in behalf of the prevailing majority, but against it." ALEXANDER M.

III. CONSTITUTIONAL PERSONHOOD AND RIGHTS

Constitutional personhood has been defined to include natural persons²⁵ and constitutional persons,²⁶ which presumably includes those "juridical persons" upon whom the Court has felt it appropriate to grant constitutional rights.²⁷ Query whether a "constitutional person" includes only the "unnatural." Judicial and statutory definitions of "person"²⁸ over the years have come to include a variety of entities and characters, including the "natural"—human aliens,²⁹ illegitimate children,³⁰ and mi-

BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962). As a result, the people of the country become governed no longer by the United States Constitution but by an elite few governing the masses, resulting in a return to the days of narrow-minded nobility.

The gravity of a Supreme Court which sits as ruler and dictator was discussed by Abraham Lincoln in his first inaugural address:

[T]he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 579, 585-86 (Roy P. Basler ed., World Publishing 1969) (1946) (emphasis added); see also ROBERT L. MACEY, *OUR AMERICAN LEVIATHAN UNBOUND: THE JUDICIAL PERVERSION OF AMERICAN FREEDOM* xiii (1974) (asserting that it is the responsibility of the American people to inspect, analyze, and challenge Supreme Court decisions to ensure the sanctity of the Constitution).

²⁵ See Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1445 (1992) (defining a "natural person" as a "biological being").

²⁶ See *id.* at 1446-47 (defining a "constitutional person" as "one who is protected by the Constitution of the United States; in other words . . . one who is granted constitutional rights") (footnote omitted).

²⁷ See *id.* at 1445 (describing the judicial inclusion of artificial beings in the definition of personhood). "Juridical persons are legal constructs, such as corporations." *Id.*

²⁸ See generally BLACK'S LAW DICTIONARY 1142 (6th ed. 1990) ("In general usage, a human being (*i.e.* natural person), though by statute term may include labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.") (citation omitted).

²⁹ See *Foley v. Connelie*, 419 F. Supp. 889, 891 (S.D.N.Y. 1976), *aff'd*, 435 U.S. 29 (1978) (holding that aliens are "persons" within the meaning of the Fourteenth Amendment's Equal Protection Clause); *C.D.R. Enter., Ltd. v. Board of Educ.*, 412 F. Supp. 1164, 1168 (E.D.N.Y. 1976), *aff'd*, 429 U.S. 1031 (1977) (including resident aliens within the scope of "person" under the Fourteenth Amendment's Equal Protection and Due Process protections).

³⁰ See *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (establishing the personhood of illegitimate children under the Equal Protection Clause of the Fourteenth Amend-

nors,³¹—as well as the “unnatural”—foreign governments,³² labor unions,³³ nursing homes,³⁴ municipalities, and government units.³⁵ Some have gone so far as to consider the personhood of artificial intelligence and computer programs.³⁶

One example of a prevalent “unnatural” or “constitutional” person is the corporation. The corporation as a person for Fourteenth Amendment purposes was created through the use of the judicial legal fiction.³⁷ Over the years, the personhood of a “corporation” under the Fourteenth Amendment has become well established.³⁸ Though Supreme Court precedent clearly grants the corporation Fourteenth Amendment personhood protections, the issue has not been free from dispute or debate.³⁹ It is con-

ment).

³¹ See *In re Scott K.*, 595 P.2d 105, 108 (Cal. 1979) (concluding minors are “persons” with rights under the United States Constitution).

³² See *Pfizer, Inc. v. Government of India*, 550 F.2d 396, 399 (11th Cir. 1976), *aff'd*, 434 U.S. 308 (1978) (holding that foreign governments that have general access to sue in the court system are also entitled, as “persons,” to initiate treble damage suits for antitrust violations under the Clayton Act).

³³ Labor unions have been interpreted to be “persons” under the Sherman Act and the Clayton Act, *see, e.g.*, *Casey v. FTC*, 578 F.2d 793, 797 (9th Cir. 1978), as well as under the Bankruptcy Code, *see e.g.*, *Highway & City Freight Drivers, Dockmen & Helpers, Local Union No. 600 v. Gordon Transp. Inc.*, 576 F.2d 1285, 1287 (8th Cir. 1978).

³⁴ See Deborah M. Naglak, Essay, *Medicare/Medicaid Reimbursement Issues A Provider's Perspective*, 5 J.L. & HEALTH 79, 86 (noting that both nursing homes and hospitals have been included within the definition of personhood).

³⁵ See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (holding that government officials are “persons” under 42 U.S.C. § 1983 (1994)); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 397 (1978) (including cities, as municipal utility operators, within the definition of a “person” under antitrust laws).

³⁶ See Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1255–80 (1992) (examining whether artificial intelligence should be granted “the rights of constitutional personhood”).

³⁷ See WORMSER, *supra* note 16, at 15 (stating that the corporation “is a distinct person . . . by process of fiction” (emphasis added)).

³⁸ See Will Pinkston, *Delaware: The State in Which to Incorporate*, TENNESSEAN, Sept. 7, 1997, available in 1997 WL 12845449 (defining a corporation as “a legal entity chartered by a U.S. state or the federal government . . . [r]egarded by courts as an artificial person”).

³⁹ See Rivard, *supra* note 25, at 1451–54 (describing the judicial decision underlying the precedent as “an important conclusion . . . based on . . . little reasoning”); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 308–12, 328–75 (1990) (discussing the Supreme Court precedent surrounding corporate personhood for Fourteenth Amendment purposes and concluding that, under our modern economic system, existing legal theories of corporate personhood are inadequate). See generally Mark M. Hager, *Bodies Politic: The Progressive History of Organizational Real Entity Theory*, 50 U. PITT. L. REV. 575 (1989) (detailing the arguments underlying the concept of corporate person-

tended that the Court's inclusion of the corporation within the scope of personhood was a haphazard judicial declaration,⁴⁰ based on various pressures and motives, rather than well-reasoned constitutional interpretation.

In *Santa Clara County v. Southern Pacific Railroad Co.*,⁴¹ the Court declared that a corporation is protected by the same rights as natural persons for purposes of the Fourteenth Amendment Equal Protection Clause, thus eliminating any uncertainty and providing an anticlimactic end to the debate.⁴² Chief Justice Morrison R. Waite⁴³ stated:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are . . . of [the] opinion that it does.⁴⁴

Two years later, in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,⁴⁵ the Court reaffirmed corporate personhood under both the Due Process and Equal Protection clauses of the Fourteenth Amendment.⁴⁶

Did the members of the Court exercise legal reasoning, understanding the purpose and conforming to the spirit of the Fourteenth Amendment? Chief Justice Waite was the very justice who stated that to deny women the right to vote was not a violation of the Fourteenth Amendment,⁴⁷ and authored opinions which limited the protection of newly-emancipated slaves.⁴⁸

hood).

⁴⁰ See *Corporations are Not Persons*, *supra* note 1 (asserting that the Court "simply decreed that corporations were persons").

⁴¹ 118 U.S. 394 (1886).

⁴² See *id.* at 396.

⁴³ Chief Justice Waite's term on the Court began with his appointment in 1874 and ended with his death in 1888. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 906 (Kermit L. Hall et al. eds., 1992) [hereinafter OXFORD].

⁴⁴ *Santa Clara*, 118 U.S. at 396. Chief Justice Waite's statement was made prior to oral argument in *Santa Clara*. See *id.* The parties' briefs had extensively argued this point. See *id.* The actual opinion was written by Justice Harlan. See *id.* at 397.

⁴⁵ 125 U.S. 181 (1888).

⁴⁶ See *id.* at 188-89.

⁴⁷ See *Minor v. Happersett*, 88 U.S. 162 (1874); see also OXFORD, *supra* note 43, at 906.

⁴⁸ See *United States v. Cruikshank*, 92 U.S. 542 (1875) (refusing to allow federal intervention into various state actions that allegedly breached Fourteenth Amendment protection); *United States v. Reese*, 92 U.S. 214 (1875) (upholding the dismissal of one of two indictments against Kentucky election inspectors for violating

Justice William B. Woods,⁴⁹ a member of the Court during the time the Civil War Amendments were read in a constricted manner,⁵⁰ held a conservative view of the Fourteenth Amendment. His desire to limit the power of the federal government fueled his decisions and "played a significant role in helping to limit the ability of the Fourteenth Amendment to act as a vehicle to protect individual rights."⁵¹ Despite the articulated concerns about the expansion of individual rights and attempts to limit and constrict the scope of the Fourteenth Amendment, the Court has freely expanded corporate rights.

Although corporations are generally governed by state law,⁵² nevertheless, "[t]he Court's various substantive due process and freedom of contract decisions between 1890 and 1937 strengthened the hand of corporations in their dealings with employees, unions, consumers, and state legislatures."⁵³ The Court, despite attempts to "eschew[] responsibility for the law of corporations directly,"⁵⁴ has greatly affected the development and growth of corporate rights.⁵⁵

Despite the questionable circumstances surrounding its evolution, the corporation now undoubtedly qualifies as a person under the Fourteenth Amendment. Greater corporate constitu-

the Fifteenth Amendment by not allowing an otherwise qualified citizen of African descent to vote); *see also* OXFORD, *supra* note 43, at 906.

⁴⁹ Justice Woods was appointed to the Court in 1880 and remained a justice until his death in 1887. *See* OXFORD, *supra* note 43, at 938.

⁵⁰ *See* Civil Rights Cases, 109 U.S. 3 (1883) (holding that the application of the Civil Rights Act provisions, which entitled all persons to full and equal enjoyment of private accommodations, to the states was not authorized by the Civil War Amendments and was therefore unconstitutional).

⁵¹ OXFORD, *supra* note 43, at 938.

⁵² *See* OXFORD, *supra* note 43, at 198; *see also* Chrysler Corp. v. Ford Motor Co., 972 F. Supp. 1097, 1102 (E.D. Mich. 1997) (stating that the law of the state of incorporation will govern in matters of internal corporate governance); *In re Schepps Food Stores, Inc.*, 160 B.R. 792, 797 (Bankr. S.D. Tex. 1993) (finding that state law governs a director's duties to the corporation and its shareholders); *Brown v. Kleen Kut Manuf. Co.*, 714 P.2d 942, 945 (Kan. 1986) (determining that the law of the state in which a corporation was formed will govern corporate liability).

⁵³ OXFORD, *supra* note 43, at 199. *See* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down minimum wage provisions); *Adair v. United States*, 208 U.S. 161 (1908) (allowing dismissal of employees based on union membership); *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the state could not put maximum limits on the number of hours an employer required an employee to work, in this case, of those in the baking industry); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (guaranteeing the right to enter into out-of-state contracts).

⁵⁴ OXFORD, *supra* note 43, at 199.

⁵⁵ *See id.*

tional protections, however, are not without limit.⁵⁶ The Due Process clause of the Fifth Amendment states, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."⁵⁷ While corporations are included under the definition of "person" with respect to property rights,⁵⁸ liberty protections have been limited, until now, to natural persons alone,⁵⁹ though there may be a current trend in the opposite direction.⁶⁰ Despite Fifth Amendment due process protection, corporations are not granted protection against self-incrimination.⁶¹ It is agreed that the constitutional protections of the corporation are currently insufficient and must be increased.⁶² Nonetheless, corporations have been granted substantial constitutional pro-

⁵⁶ For a general overview of corporate rights and protections, see Mayer, *supra* note 13; see also "The Right to Govern is Reserved to Citizens": Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes, 135 CONG. REC. E2804, E2805 (Rep. Jim Slattery) (explaining that corporations, though included under the interpretation of "person" under the Fourteenth Amendment, are not included as such for apportionment); *The Immigration Act of 1989*, 135 CONG. REC. S7858, S7888 (positing that the term "persons" is not used, defined, or interpreted the same way in every instance in which it is used in the United States Constitution).

⁵⁷ U.S. CONST. amend. V. Although the wording of the Fourteenth Amendment differs slightly, its effect is the same. See U.S. CONST. amend. XIV, § 1 (providing "nor shall any State deprive any *person* of life, liberty, or property, without due process of law").

⁵⁸ See Rivard, *supra* note 25, at 1452 n.103 (providing an overview of Court decisions establishing the inclusion of the corporation in the definition of personhood under the Fourteenth Amendment Equal Protection Clause and the Due Process Clause with respect to property rights).

⁵⁹ See *Hague v. CIO*, 307 U.S. 496, 514 (1939) (limiting the protections of the Privileges and Immunities clause of the Fourteenth Amendment to natural persons); see also Rivard, *supra* note 25, at 1454 ("[T]here is no coherent theory underlying corporate entitlement to intangible liberty rights.").

⁶⁰ See Rivard, *supra* note 25, at 1454 (describing the Court's protection of corporate liberty rights under the Fourth Amendment).

⁶¹ See, e.g., *Braswell v. United States*, 487 U.S. 99 (1988); *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944); *Hale v. Henkel*, 201 U.S. 43 (1906); *In re Grand Jury Witnesses*, 92 F.3d 710 (8th Cir. 1996); *United States v. Dean*, 989 F.2d 1205 (D.C. Cir. 1993); *United States v. Wujkowski*, 929 F.2d 981 (4th Cir. 1991).

⁶² See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* vii (1995) (declaring that, "[t]he inadequacy of constitutional protection of the corporation is most glaring in the area of corporate governance"). Cf. Seth H. Ruzi, Comment, *Reviving Trespass-Based Search Analysis Under the Open View Doctrine: Dow Chemical Co. v. United States*, 63 N.Y.U. L. REV. 191, 210-28 (1988) (arguing that the Court erred in excluding commercial property from Fourth Amendment protection against unreasonable searches in *Dow Chemical*, 476 U.S. 227 (1986)).

tections.⁶³

IV. THE CORPORATION AND MODERN CORPORATE BEHAVIOR

The corporate framework, in one form or another, has long been in existence.⁶⁴ Several corporate theories have developed over the years.⁶⁵ The corporation is, at times, said to "ha[ve] an identity and existence of its own."⁶⁶ As an independent entity, a corporation can continue in existence immune from the effects of shareholder, officer or director death, incapacity, and the effects of share transfer.⁶⁷

⁶³ See *Hale*, 201 U.S. at 76 (granting the corporation Fourth Amendment protection); Rivard, *supra* note 25, at 1454 (stating that corporations are afforded First and Fourth Amendment constitutional protection). But see *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (stating that "[w]hile they may and should have protection from unlawful demands . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy") (citation omitted). *Morton Salt's* limitation on corporate constitutional protection has been called into question, however, in *Dow Chemical*, where the Court examined whether government surveillance of a corporate facility violated a right to privacy. 476 U.S. at 230-38. The Court, based on the facts, ultimately concluded that a right to privacy had not been invaded, but fell far short of declaring that no such right existed. See *id.* at 239.

⁶⁴ See ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE § 64, at 126 (1976) (summarizing the ancestry of the modern day American corporation including "the legislative charter grants of early nineteenth century America, the English royal trading and colonizing charters of the sixteenth century, the boroughs and religious orders of the renaissance, the priestly colleges of ancient Rome, and the trading partnerships of Babylonia or Assyria"); *Bad Company: How to Civilize the Corporation, Dollars & Sense* (CNN television broadcast, July 17, 1998) [hereinafter *Bad Company*] (describing the formation of early European corporations not as business enterprises but as "embodiments of social stability and cohesion-monasteries and universities, boroughs and guilds . . . reconcil[ing] individual behavior with larger social ends").

⁶⁵ For example, the trust theory is characterized by the notion that the corporation "belongs" to the investing shareholders. ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) reprinted in FEDERAL OR STATE REGULATION OF CORPORATE GOVERNANCE: THE HEIGHTENING BATTLE FOR CORPORATE CONTROL 290, 293 (Arthur M. Borden & Herbert A. Einhorn, eds., 1978). It is interesting to compare the absolute control theory, namely, that the groups in control possess absolute authority with no obligation to the general community, see *id.* at 294, with the neutral technology theory, which asserts that community interests outweigh those of the corporation, and upon a balancing of their claims and interests, these various groups should be provided with a share of the income stream based on "public policy rather than private cupidity." *Id.* at 294-95. For a general overview of various corporate theories, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

⁶⁶ WILLIAM A. KLEIN & JOHN C. COFFEE, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 108 (6th ed. 1996).

⁶⁷ See *My Corporation* (visited Aug. 10, 1998) <<http://www.mycorporation.com/Corporation.htm>>.

Though the corporation has historically been considered within a property context,⁶⁸ it is most commonly referred to in terms of personhood, as the corporation is the representation of the different persons of whom it is composed.⁶⁹ Corporate governance, "the economic and legal dimensions of the relationship between shareholders and managers,"⁷⁰ is founded upon this notion of corporate constituents.⁷¹ Some modern theories of the corporate entity describe the corporation not as a collection of persons such as shareholders, but as a collection of interested parties: "employees, creditors, suppliers, [and] community groups."⁷²

"[S]eparation of ownership and control"⁷³ is a central theme in modern day corporate governance.⁷⁴ Some corporations have been subject to scrutiny for making modifications to their organizational structure, including: changing the composition of the

⁶⁸ Compare Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1385-86 (1995) (referring to the historical view that the corporation was merely property that provided its governing constituents protection from liability and financial gain), with Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 DUKE L.J. 173, 175 (1989) ("[C]ontrary to popular belief, it is not particularly useful to think of corporations in terms of property rights.").

⁶⁹ Indeed, "[t]he word 'corporation,' derived from the Latin *corporatus*, made into a body, designates a body of men joined together for a common purpose." Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 565 (1987). See DOUG HENWOOD, *WALL STREET: HOW IT WORKS AND FOR WHOM* 246 (1997) (referring to corporate directors, officers, and shareholders as the three "critical constituencies").

⁷⁰ BUTLER & RIBSTEIN, *supra* note 62, at vii (positing various forms of corporate regulation).

⁷¹ See KLEIN & COFFEE, *supra* note 66, at 108 (explaining that in order to best understand a corporation, it is necessary to "decompose" the corporate whole into its individual components); Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 283 (1998) ("Corporate law is primarily about shareholder, boards of directors and managers, and the relationships among them."). The role of shareholders in modern day corporate governance, however, is questionable at best.

⁷² GREGORY V. VARALLO & DANIEL A. DREISBACH, *FUNDAMENTALS OF CORPORATE GOVERNANCE: A GUIDE FOR DIRECTORS AND CORPORATE COUNSEL* 5 (1996) (explaining the expansion of modern corporate theory).

⁷³ Ownership is described in the corporate context as having three distinct interests: "interests in an enterprise," "power over an enterprise," and "acting with respect to the enterprise." BERLE & MEANS, *supra* note 65, at 290.

⁷⁴ See *id.* at 292-93 (posing the notion that shareholder interaction is pivotal to the corporation and to the regulation of the activity within the corporate hierarchy). Berle and Means' approach has been characterized by some as the "separation of ownership and control" thesis. See BUTLER & RIBSTEIN, *supra* note 62, at 2.

board of directors or its committees, implementing mechanisms for increasing the autonomy of outside board members, and altering board functions in general.⁷⁵ Ideally, the shareholders, a primary constituency in the corporate composition, should play an integral role in the corporation's life.⁷⁶ The role of shareholders in modern day corporate governance, however, is marginal at best as their exclusion from corporate decision-making is now the norm.⁷⁷ Shareholders regularly have little reason outside of financial incentive to invest in a corporation. Moreover, although shareholders were once, incorrectly, considered to control the wealth of the corporation, modern dissatisfaction has been attributed to the few individuals managing the corporation and usurping any role the shareholders may have had in the decision-making process.⁷⁸

It is true that the actions of corporate entities parallel human behavior.⁷⁹ Generally speaking:

The corporation *may cause death, injury, disease, and severe physical pain* by decisions resulting in pollution, poor design, inadequate quality control, plant safety, and working conditions. Corporations also may impose severe deprivations of income, well-being, and effective personal freedom by decisions on hiring, firing, employment practices, and plant locations. Finally, corporations *may exercise influence, power, control, and*

⁷⁵ See VARALLO & DRIESBACH, *supra* note 72, at 5-8 (discussing high-profile disputes in corporate governance).

⁷⁶ See BUTLER & RIBSTEIN, *supra* note 62, at 2 (explaining that corporations are "democratic institutions," and shareholder input to directors and to other aspects of the corporation is through voting and the proxy mechanism); see also Barry D. Baysinger & Henry N. Butler, *Race for the Bottom v. Climb to the Top: The Ali Project and Uniformity in Corporate Law*, 10 J. CORP. L. 431, 440 (1985).

⁷⁷ See John Nichols, Editorial, *Unlike Corporations, Unions Practice Democracy*, CAPITAL TIMES, July 7, 1998, at 8A (describing the exclusion of shareholders in corporate mergers and negotiations); see also Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1086 (1995) (explaining that as the number of shareholders increases shareholder involvement in business affairs decreases); Shani L. Fuller, Comment, *Shareholders, Directors, and Other Constituencies: Who's On First in Oregon Corporate Takeover Law?*, 30 WILLAMETTE L. REV. 347, 350 (1994) (discussing the decreased shareholder involvement of shareholders in the Ford Motor Company).

⁷⁸ See ADOLF A. BERLE, POWER 203-04 (1969) (observing that, "[t]oday . . . criticism is . . . often directed against the right of private managers, as heads of corporations, to hold the power of accumulation and investment"); see also BERLE & MEANS, *supra* note 65, at 291-92 (explaining that true incentive lies not with the mass individuals that are engaged in group ownership but with the handful of men in the board room exercising actual control over the company).

⁷⁹ See Schane, *supra* note 69, at 563 (summarizing various corporate actions).

even coercion over employees, customers, suppliers, and others by manipulating expectations of reward and deprivations, by advertising propaganda, promotions and demotions, not to mention illegal practices.⁸⁰

Corporations "may enter into contracts, buy and sell land, commit torts, sue and be sued, [yet] cannot hold public office [or] vote in elections."⁸¹ They can incur debt and are responsible for the payment of taxes.⁸² Corporations also have standing to assert federal claims, such as civil rights violations under section 1983.⁸³ Though corporations cannot be imprisoned, they do qualify as persons under criminal statutes and can be held criminally liable and accountable for fines.⁸⁴

Speech on the part of corporate actors, that is, expression of

⁸⁰ Abraham J. Briloff, *LBOS and MBOS in the Takeover Alphabet Soup: Some Questions for Lawyers, Answers From an Accountant*, 15 J. CORP. L. 171, 195-96 (1990) (emphasis added).

⁸¹ Schane, *supra* note 69, at 563.

⁸² See *My Corporation*, *supra* note 67; WILLIAM L. CARY & MELVIN ARON EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 118 (7th ed. 1995) (discussing the entity nature of corporations and providing an overview of corporate taxation); see also DEL. CODE ANN. tit. 8, § 122(13) (1991) (authorizing Delaware corporations to borrow money); N.Y. BUS. CORP. LAW § 202(7) (McKinney 1986) (empowering New York corporations to borrow money).

⁸³ See *Board of Managers v. West Chester Areas Sch. Dist.*, 838 F. Supp. 1035, 1041 (E.D. Pa. 1993), *aff'd in part, rev'd in part on other grounds*, 52 F.3d 313 (3d Cir. 1995) (noting that "[a] corporation is a 'person' entitled to the protections of the Fourteenth Amendment," and that "a 'person' need not be a member of a protected class to sue under the Fourteenth Amendment or federal civil rights statutes if its complaint is that it was treated differently because of its association with members of a protected class"); see also *Advocates for the Arts v. Thomson*, 532 F.2d 792, 794 (1st Cir. 1976) (holding that because a plaintiff's corporate status "ha[d] no bearing on its standing to assert violations of the first and fourteenth Amendments under 42 U.S.C. § 1983"); *Auburn Med. Ctr. Inc. v. Peters*, 953 F. Supp. 1518, 1520 (M.D. Ala. 1996) ("[A] corporation is a 'person' within the meaning of the due process clause. . . [and] has standing to sue under § 1983 for violations of its due process rights."); *Rhode Island Affiliate, ACLU v. Rhode Island Lottery Comm.*, 553 F. Supp. 752, 768 n.12 (D.R.I. 1982) ("It is well established that a corporation . . . has standing to assert violations of the First and Fourteenth Amendments under § 1983.").

⁸⁴ See *United States v. Vitek Supply Corp.*, 151 F.3d 580, 585 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999) ("Corporations cannot be imprisoned. Only money is at issue."); Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1334-35 (1996) (discussing the broad definition of "person" in the RICO Act); Richard E. Welch III, et. al., *Criminal Liability for Professional Partnerships: Two Perspectives*, 38 BOSTON B. J. 4, 15 (1994) (describing criminal liability for corporate illegal behavior as "an accepted cornerstone in federal criminal jurisprudence" and the theory of respondeat superior as a most important method in corporate control and in the correction of abuses).

ideas and espousing of beliefs, is one of the closest parallels between the corporate world and its human counterpart. Corporate speech in today's society is commonplace and at times surpasses individual speech in terms of effectiveness.⁸⁵ There is no doubt that corporate speech is included within First Amendment protections.⁸⁶ Though some believe that corporate speech has grown exponentially out of control and that limitations on this growth are required, it is conversely warned that "[a]llowing the government to discriminate against disfavored messages is a recipe for disaster."⁸⁷

It has been argued that the First Amendment does not concentrate solely on "speaker autonomy" but also encompasses the need for the free flow of information to prevent the government from suppressing contrary views.⁸⁸ According to Justices Holmes and Brandeis in their noteworthy dissent in *Abrams v. United States*,⁸⁹ "the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁹⁰ Though speech plays an obvious role in political awareness, decision making, and obtaining personal information,⁹¹ the Court may

⁸⁵ See Briloff, *supra* note 80, at 195; Terry Ann Halbert, *The First Amendment in the Workplace: An Analysis and Call for Reform*, 17 SETON HALL L. REV. 42, 51 (1987) ("Corporate speech acquires a superior effectiveness compared to individual speech because the former can afford a vastly more expensive 'megaphone.'"); Herbert I. Schiller, *Television is a Social—Not a Biological or Technological—Problem*, 68 TEX. L. REV. 1169, 1174 ("Philip Morris and Time-Warner 'speak,' and millions of households, domestically and internationally, hear their voices, amplified by national television. In comparison, the individual citizen's voice, if expressed loudly enough, may reach across the living room.").

⁸⁶ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778, 784 (1978) (addressing "whether the corporate identity of the speaker deprives th[e] proposed speech of what otherwise would be its clear entitlement to protection" and holding that a corporation is not deprived of such First Amendment protection regardless of whether a "material effect on its business or property" exists); *id.* at 804 (White, J., dissenting) ("There is now little doubt that corporate communications come within the scope of the First Amendment.").

⁸⁷ Stephen R. Shapiro, in *Speech and Power: Is First Amendment Absolutism Obsolete?*, NATION, July 21, 1997, at 16.

⁸⁸ See *Bellotti*, 435 U.S. at 783 (articulating the purposes of the First Amendment, including "its role in affording the public access to discussion, debate, and the dissemination of information and ideas"); Kathleen Sullivan, in *Speech and Power: Is First Amendment Absolutism Obsolete?*, NATION, July 21, 1997, at 18 (discussing the dangers of allowing excessive government intervention in the regulation of speech).

⁸⁹ 250 U.S. 616 (1919).

⁹⁰ *Id.* at 630 (Holmes, J., dissenting).

⁹¹ See BUTLER & RIBSTEIN, *supra* note 62, at 59 (discussing corporate campaign

have failed to distinguish the protection of First Amendment speech from private corporate regulation.⁹² Though some believe that corporate speech must be curtailed, this idea must be distinguished from the notion of taming the giant corporation by regulating and limiting it through other laws, including antitrust laws,⁹³ the imposition of corporate taxes,⁹⁴ and the promotion of labor unions.⁹⁵

It is important to determine whether the expansion of corporate speech is really due to corporate domination of individual rights per se or to a simple gap between wealth and the lack thereof.⁹⁶ It is a common contention that the marketplace of ideas⁹⁷ is now dominated by the "rich, who outspend their rivals and distort public debate."⁹⁸ Inevitably, money has the ability to purchase power and influence. Cognizant of these economic gaps, however, corporations have aggressively used First Amendment privileges to gain certain benefits in attempts to defeat progress in corporate income tax referenda, health and safety investigations, and criminal antitrust actions.⁹⁹ Corporate

activities in a First Amendment context).

⁹² See Shapiro, *supra* note 87, at 12 (emphasizing that "the current Supreme Court 'cannot seem to distinguish between government efforts to censor speech and government efforts to regulate private power'").

⁹³ See *id.*

⁹⁴ See BUTLER & RIBSTEIN, *supra* note 62, at vii (positing various forms of corporate regulation).

⁹⁵ See *id.*

⁹⁶ See BERLE & MEANS, *supra* note 65, at 295 ("A couple of hundred corporate managers can make decisions controlling most of our industrial economy."). Certainly, this is not a new notion. See THE FEDERALIST NO. 12, at 91 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The prosperity of commerce is now perceived and acknowledged . . . as the most productive source of national wealth.").

⁹⁷ Justice Holmes emphasized the importance of this "free trade in ideas." *Abrahms*, 250 U.S. at 630 (Holmes, J., dissenting). The importance of maintaining a fluid and healthy "marketplace of ideas" has been celebrated time and again by the Court. See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329, 2351 (1997); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 769 (1996); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 831 (1995).

⁹⁸ Shapiro, *supra* note 87, at 16; see also James A. Gardner, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 918, 933 (1984) (discussing the ability of wealthy political candidates to win elections by outspending poorer rivals, and to "distort the expression of the electoral will"); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 191-92 (1991) (explaining that wealthy political candidates wield greater control over the mass media, enabling those candidates to win office seats by outspending opponents).

⁹⁹ See *Corporations are Not Persons*, *supra* note 1 (describing specific instances

assertion of constitutional rights has not been limited to the First Amendment; corporations have also attempted to invoke certain Fourth Amendment privileges, such as Dow Chemical Company's unsuccessful attempt to use the unreasonable search and seizure clause as a way to circumvent governmental monitoring of its compliance with environmental laws.¹⁰⁰

Though it may appear that corporations are granted rights more liberally than are individuals, the fact that corporations take full advantage of the constitutional rights they are granted hardly something to criticize. In *Minneapolis & St. Louis Railway Co. v. Beckwith*,¹⁰¹ the Supreme Court clearly recognized the right of corporations to "invoke the benefits of . . . the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it."¹⁰² Though the growing demand for modern corporate social responsibility likely results in faulting corporations for using or, in the opinion of some, abusing the rights granted them, perhaps the problem lies not in the exercise of these rights, but in the granting of such rights in the first place, which allows the corporate entity to become so powerful. Nevertheless, the power of the modern corporation is undeniable. The actual extent of corporate power may not be fully understood.¹⁰³

Speech is power. . . . Yesterday's free speech principles have become today's power principles—for the powerful . . . The problem traces back at least to . . . when the Supreme Court first treated corporations as persons entitled to constitutional liberties . . . [C]ommunication is the handmaiden of commerce . . .

by Boston and Idaho companies from 1978–1988); *My Corporation*, *supra* note 67 (delineating the various constitutional rights granted the modern day corporation including the freedom of speech on public issues irrespective of material corporate effect); Nader and Mayer, *supra* note 12 (claiming that corporations have "corrupt[ed] the political process in a manner neither the Framers of the Bill of Rights nor the creators of the [Fourteenth] Amendment even dreamed would be possible"). See generally Robert B. Reich, *The New Meaning of Corporate Social Responsibility*, CAL. MGMT. REV., Jan. 1, 1998, at 8 ("Corporations have become steadily more aggressive and effective in the political arena during the past several decades.").

¹⁰⁰ See *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986) (holding that a warrant is not needed for aerial observations and photographs of an industrial complex).

¹⁰¹ 129 U.S. 26 (1889).

¹⁰² *Id.* at 28.

¹⁰³ See Shapiro, *supra* note 87, at 11–12.

Money is speech . . . [and] it is power. And when moneyed speech receives new absolute protection, the power dynamic of freedom changes immensely. . . . In the process, citizen democracy succumbs to corporate democracy.¹⁰⁴

Whether corporations have "absolute protection" and whether "citizen democracy" has succumbed to "corporate democracy" is subject to debate. Though it is commonplace to assert that corporations are taking advantage of individuals and their rights, corporations undoubtedly have positive influences upon society.¹⁰⁵ The increased dominance of the corporation has benefited the country's economic growth and development.¹⁰⁶ Corporate entities impact society in a positive way, creating benefits for many to whom they would otherwise be unavailable.¹⁰⁷ Nevertheless, though corporations may benefit the na-

¹⁰⁴ Ronald K.L. Collins & David M. Skover, in *Speech and Power: Is First Amendment Absolutism Obsolete?*, NATION, July 21, 1997, at 12.

¹⁰⁵ See *Society and Politics Greenpeace: The Economist Chronicles Group's Evolution*, AMERICAN POLITICAL NETWORK, Aug. 5, 1998 (attributing the idea that "[E]fforts by multinational corporations to address environmental issues have reduced the need for activist groups" to an essay published in *Economist*).

¹⁰⁶ See BERLE, *supra* note 78, at 379 (1969) ("Corporate power has served the United States well. In substantial measure, the material prosperity of the country is due to it."). But see David Friedman, Opinion, *Back to Basics: Greed and Spin have Replaced Discipline and Collaboration as the Engines of Economic Growth*, L.A. TIMES, Sept. 6, 1998, at m1 (concluding that "[t]he nation's future lies in fostering [entrepreneurship rather than] the corporate dinosaurs of years past").

¹⁰⁷ See Reich, *supra* note 99, at 8 (describing a new trend in corporate responsibility and an apparent corporate interest in placing increased importance on the societal effects of its operations rather than the typical emphasis on investor wealth maximization); David Ong-Yeoh, *Companies: Call for Good Corporate Governance Growing*, BUS. TIMES, July 8, 1998, at 6 (indicating an example of the growing belief that "companies must be responsible for their decisions which impact on society" and the understanding that "when business[es] make decisions today, it impacts on society so . . . social, ethical and environmental factors [must be considered]"); *id.* ("[G]ood corporate citizenship is also good for business."); Marilyn Carlson Nelson, *Giving Back to the Community: Corporate Responsibility*, Address at the Greater Minneapolis Chamber of Commerce's Portfolio Series Luncheon (Nov. 12, 1997), in VITAL SPEECHES 343 (Mar. 15, 1998) ("Clearly, philanthropy is not hazardous to corporate health!").

For instance, International Business Machine Systems (IBM) has supported those with learning disabilities through "product ideas, subsidized access to IBM's speech technology, research with disabled students, loan of the time of IBM engineers, direct financial grants and marketing" while Intel "has provided millions of dollars of the best Intel microprocessors for . . . use in . . . systems for [the disabled]." *Technologies for the Disabled, Developing Partnerships for Assistive and Universally Designed Technology for Persons with Disabilities: Hearing Before the Subcomm. on Technology of the House Comm. on Science*, 105th Cong. (1998) (statement of James R. Fruchterman, President, Arkenstone Inc.) (providing exam-

tion, the overall detrimental effect on individuals and society appear, perhaps, to tip the scale in the opposite direction.

Corporations reap benefits above and beyond those of normal citizens and, as a result, may limit individual rights and freedoms. The rights of the private individual sacrificed at the expense of the corporate giant is an all-too-common characterization.¹⁰³ As a result, corporations have come to be viewed as self-ruling entities and dominators of power and control,¹⁰⁹ having been described as more powerful than the Nazi movement.¹¹⁰ For example, in revisiting the expansive arena of corporate speech one finds that the corporation may have thwarted the effect of the voice of the individual.¹¹¹ This monopoly is not only perceived in the forum of commercial or personal speech, but applies also to political speech and discourse. It is a popular sentiment that big business dominates the government itself, with the voices of citizens going unheard.¹¹²

Examples exist outside of speech as well, with the environmental arena serving as another forum of concern. Corporations, it is argued, continuously violate environmental laws. Though they may suffer public relations backlashes, such violations are small concerns to corporate survival since the corporation can pass costs incurred on to consumers and since the revocation of its corporate charter is improbable.¹¹³ Corporations have also

ples of the exercise of corporate responsibility by large corporations); *see also* Reich, *supra* note 99, at 8 (noting an example of corporate desire to "invest in the future").

¹⁰³ An additional factor is the possibility that the bar has deserted its responsibility to represent and protect the people and has become an extension of the corporation. *See* Morton Mintz, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, PROGRESSIVE, Apr. 1, 1997, at 42 (positing that certain attorneys represent the interests of the large, private corporation at the expense of the interests of the nation).

¹⁰⁹ *See* Briloff, *supra* note 80, at 195 ("The corporation is both a product of and a contributing participant in the power structure and belief system of society."); Floyd Abrams, *in Speech and Power: Is First Amendment Absolutism Obsolete?*, NATION, July 21, 1997, at 12 (questioning whether "corporations have too much to say in determining national policy").

¹¹⁰ *See* Wendy Kaminer, *in Speech and Power: is First Amendment Absolutism Obsolete?*, NATION, July 21, 1997, at 14 ("But if Nazis are more vicious than the average corporation they're also less powerful; their ravings have relatively little effect on the democratic process or the free flow of ideas.")

¹¹¹ *See id.*

¹¹² *See* Bennett, *supra* note 21, at 85; Mark Presky, Letter to the Editor, *Ruling Against Campaign Limits*, L.A. TIMES, Jan. 14, 1998, at B6 ("The interests of the people will be heard only when the great moneyed influences are quieted.")

¹¹³ *See* Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private*

been criticized for receiving preferential treatment, for example, in the form of tax subsidies over and above those received by their individual, private citizen counterparts.¹¹⁴ Corporations are clearly subject to taxation; but the corporate tax agenda is often fulfilled to a greater extent than that of private citizens, with taxpayers "pad[ding] profits for big businesses."¹¹⁵ Not only do corporations reap benefits from governmental favoritism but "systems of accountability are endangered" when corporations become too familiar with the government.¹¹⁶

Corporations have been referred to as "artificial persons" which have been "award[ed] . . . superhuman privileges" by the judicial branch of government.¹¹⁷ Some have gone so far as to consider them "unaccountable Frankensteins" with quasi-human powers "nonetheless constitutionally shielded from . . . law enforcement [and] accountability to real persons such as workers, consumers and taxpayers."¹¹⁸ Moreover, corporations bear the reputation of "not ever be[ing] trusted,"¹¹⁹ and are often regarded as entities with disproportionate advantages over society at the expense of its individual members.¹²⁰ Is it, however, a valid

Cause of Action for Revoking Corporate Charters in Response to Environmental Violations, 13 PACE ENVTL. L. REV. 219, 224 (1995) (postulating that the ability to revoke corporate charters because of abuses or violations has become meaningless).

¹¹⁴ Federal spending could be reduced by approximately \$150 billion annually with the elimination of corporate subsidies, grants, and tax breaks. See Ray Santisteban, Editorial, *Aid to Dependent Corporations*, BALTIMORE SUN, Mar. 4, 1997 (explaining that approximately 60% of domestic corporations and 74% of international corporations were excused from the payment of federal taxes, causing the government to forego approximately \$150 billion in potential tax revenues).

¹¹⁵ Modern public corporations are astounding in size and worth, with their value often exceeding the gross national product of many nations. In 1994, General Motors led sales with \$123 billion, Federal National Mortgage led in assets with \$273 billion, General Motors led in profits with \$5.7 billion, and General Electric led in market value of common stock worth \$92.5 billion.

¹¹⁶ Harry Hurt III, *Parks Brought to you by . . . Can IMG do for Cities What it Has Done for Tiger Woods and the Pope?*, in U.S. NEWS & WORLD REP., Aug. 11, 1997, at 42.

¹¹⁷ *Corporations are Not Persons*, *supra* note 1.

¹¹⁸ *Id.*

¹¹⁹ Frank Antonucci, Editorial, *Corporate Greed Time for Union to Draw the Line Against Carrier*, POST-STANDARD (Syracuse, N.Y.), April 16, 1998, at A11, available in 1998 WL 4350951 (describing Carrier corporation's threat to close its operations and its alleged attempt to place the blame on company employees).

¹²⁰ See Terry Anderson, Viewpoints, *One Way the U.S. is a Force of Evil*, BUFFALO NEWS, Jan. 14, 1998, at B3, available in 1998 WL 5991828 (alleging the involvement of major United States corporations in international arms trade and blaming America for worldwide societal devastation).

proposition that corporations are abusing the rights they have been granted to the detriment of greater society?¹²¹ There is a movement to subject corporations to greater regulation,¹²² supported by the belief that the government has unjustifiably granted the corporation too much power. The government must derive its powers from "the great body of the society, [rather than] from an inconsiderable proportion or a favored class of it."¹²³ The question then seems to be whether modern day corporations represent such a "favored class" given disproportionate constitutional protection by the Court. In defining the rights of various groups the Court has employed the legal fiction to extend constitutional rights to groups that otherwise would be denied those protections. But are these legal fictions being drawn by the Court to suit its own desires as well as those of politically-empowered corporate interests? The answer appears to lie in the determination of whether the corporation fits within the framework of the Fourteenth Amendment "person"¹²⁴ or whether it is one of the more flagrant and persistent abuses of the legal fiction constructed by the Court.

V. THE UNITED STATES CONSTITUTION: EVOLVING OR GOVERNING?

The Constitution has been described as a "Living Constitution"¹²⁵ that "would have snapped if it had not been permitted to

¹²¹ Some would answer in the affirmative. For example, revelations of corporate exploitation of children in the workplace seem, today, routine. See Nicole J. Krug, Note, *Exploiting Child Labor: Corporate Responsibility and the Role of Corporate Codes of Conduct*, 14 N.Y.L. SCH. J. HUM. RTS. 651, 651 (1998) (describing the problem as one of "epidemic proportions").

¹²² See BUTLER & RIBSTEIN, *supra* note 62, at ix. "[T]he corporate form is so powerful that it needs to be controlled to limit massive externalization of costs by corporations and wealth transfers to corporations from other groups. [Furthermore,] regulation is needed to protect corporate investors from malfeasance by remote corporate managers." *Id.*

¹²³ THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

¹²⁴ See *supra* note 5 (quoting the text of the Fourteenth Amendment). It has been posited that the framers of the United States Constitution did not intend for the document to address specific situations but, rather, that the words of the Constitution govern through a comprehensive interpretation of its terms. See SCALIA, *supra* note 10, at 37 ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.").

¹²⁵ SCALIA, *supra* note 10, at 42.

bend and grow."¹²⁶ It is apparent that "American society . . . has undergone constant change in virtually all facets of its existence—geography, demography, economics, law, politics, technology, employment, industrialization, . . . social structure[,] . . . environmental conditions [and] international affairs."¹²⁷ One may opine that the meanings of certain terms and interpretations by the Framers should not be used as definitions centuries later to establish the parameters of constitutional rights.¹²⁸ Accordingly, "[l]egal change" is required "to respond to the existing and often changing social or economic conditions."¹²⁹ What, however, should the "guiding principle" for this judicial evolution be?¹³⁰ Some maintain the answer is public opinion¹³¹ while others argue it is the will of the majority.¹³² As a government that allows, moreover promotes, the evolution of public opinion, the concept of a Living Constitution transforms¹³³ a historic governing document into a fluid document reflecting majority views rather than providing a governing and continuous mandate of

¹²⁶ *Id.* at 41. Various approaches to constitutional interpretation exist. Originalism is the doctrine of interpretation which adheres to the language and history of the Constitution. Justice Antonin Scalia is one of the strongest proponents of this theory. See *Roe v. Wade Anniversary Views*, *supra* note 2; see also Carter, *supra* note 15 (explaining that Justice Scalia, together with Chief Justice Rehnquist, have come to be known as "apostles of . . . judicial restraint"). Conversely, judicial activism erases such boundaries and calls for a stronger interaction between constitutional law and real politics. See *Roe v. Wade Anniversary Views*, *supra* note 2.

¹²⁷ BARRY R. SCHALLER, *A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL* 120 (1997) (describing change as "inevitable . . . desirable and even necessary").

¹²⁸ See Laurence H. Tribe, *in* *A MATTER OF INTERPRETATION*, *supra* note 10, at 85–86 ("[I]t seems to me quite impossible to sustain the proposition that understandings or meanings frozen circa 1791 can possibly serve as the definitive limits to certain freedoms as enforced today").

¹²⁹ SCHALLER, *supra* note 127, at 120–21 (emphasis omitted).

¹³⁰ SCALIA, *supra* note 10, at 45.

¹³¹ *But see* THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[G]overnment [has] been instituted . . . [b]ecause the passions of men will not conform to the dictates of reason and justice without constraint."). As such, it appears that the government was originally envisioned to control the popular will and to funnel it into the legislative process. See *id.* at 109 (establishing that the ultimate power in the newly formed union must rest with the "persons of the citizens").

¹³² See SCALIA, *supra* note 10, at 47 ("If the courts are free to write the Constitution anew, they will . . . write it the way the majority wants . . . This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority.").

¹³³ See *id.* at 44–45 (explaining that the entire idea of living constitutionalism is diametrically opposed to the "antievolutionary purpose of a constitution").

the rights of the country's inhabitants. The Court, "[b]y trying to make the Constitution do everything that needs [to be done] from age to age, [will] have caused it to do nothing at all."¹³⁴

The success of our government is based on a document that is over 200 years old and has only twenty-seven constitutional amendments. Though in the past the amendment process was relied upon to initiate constitutional change, today the modern judiciary has assumed that role. For example, if the Nineteenth Amendment,¹³⁵ which granted women the right to vote, was an issue today, it is likely that judicial initiative rather than constitutional amendment would be the mechanism used to implement such a change.¹³⁶ The Court, as demonstrated through the concept of the legal fiction, has in fact bent and stretched the Constitution to afford rights where it has deemed it appropriate and to deny them where perhaps more merited. It is debatable whether the Constitution should evolve or govern. But if "bending" and "growing" are, in fact, valid propositions, it logically follows that as the Court created the legal framework for the recognition and protection of the personhood of the corporate entity in the 1880s, it has the prerogative and should do the same for the fetus in the 1990s.¹³⁷

VI. *IN RE* LIFE: CORPORATION V. FETUS

Though a corporation is now included in the constitutional definition of personhood, this legal fiction at some point naturally exhausts itself. A corporation, however defined, does not and cannot carry with it those biological and psychological characteristics which vivify a person—namely *life*. Though a subject in its own right, the judicial creation of the corporate person serves as a natural springboard to genuine issues of personhood.

¹³⁴ *Id.* at 47. See Autumn Fox & Stephen R. McCallister, *An Eagle Soaring: The Jurisprudence of Justice Antonin Scalia*, 19 CAMPBELL L. REV. 223, 304 (1997) ("An evolving constitution may travel through the vagaries of time, but a dead constitution—in all of its stillness—affords protection not just for the moment, and not for one person, but for all time and for all people.")

¹³⁵ See U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.")

¹³⁶ See SCALIA, *supra* note 10, at 47.

¹³⁷ For the view that a fetus may still deserve certain protections even if it does not fall within the constitutional definition of a "person," see LEONARD GLANTZ, *ABORTION AND THE STATUS OF THE FETUS* 107 (H. Tristram Engelhardt, Jr. & Stuart F. Spicker eds., 1984).

One is led to explore the realistic and practical ramifications of denying the fetus those protections guaranteed by the constitutional framers—namely *life*, liberty, and the pursuit of happiness.¹³⁸

Corporate personhood is not the first and most certainly will not be the last of legal fictions,¹³⁹ yet it is certainly one of the more visible. Courts have engaged in an intellectual shell game to offer corporations protections while simultaneously denying such protections to other beings, such as fetuses, though they come closer to “living” than does the corporate entity.¹⁴⁰ It has been posited that corporations are substantially similar to “flesh-and-blood human” beings and, as such, are rightfully considered persons.¹⁴¹ But the relationship between the fetus and the per-

¹³⁸ See SCHALLER, *supra* note 127, at 156–57 (citing Myrdal, a mid-twentieth century European commentator, who stated that “Americans ‘of all national origins, religion, creeds, and colors, . . . hold in common the most *explicitly expressed* system of general ideals’ of any Western nation [including] ‘the essential dignity and equality of all human beings, of inalienable rights to freedom, justice, and opportunity.’”) (footnotes omitted); *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 803 n.11 (1980) (asserting that Blackstone’s vision of liberty influenced the Framers and quoting his statement that “[t]he right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation’”) (emphasis omitted). Does it, then, withstand reason that the “inalienable right to opportunity” includes the right to be born into the world?

¹³⁹ The legal fiction is a tool commonly used in legal jurisprudence. See *United States v. Dalm*, 494 U.S. 596, 622 (1990) (Stevens, J., dissenting) (referring to the doctrine of sovereign immunity, the idea that no wrong can be committed by the ruler, as “the vainest of all legal fictions”); *Conservatorship v. Drabick*, 245 Cal. Rptr. 840, 854 (Ct. App. 1988) (acknowledging that allowing an unconscious patient to choose whether to receive medical treatment is a legal fiction). A legal fiction is also assumed by Justice O’Connor in using the reasonable observer for endorsement test purposes, which is, in her view, “a personification of a community ideal of reasonable behavior, determined by the . . . social judgment.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (quoting PROSSER & KEETON ON TORTS 175 (5th ed. 1984)); *Allegheny County v. ACLU*, 492 U.S. 573, 635–36 (1989).

¹⁴⁰ See Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1451 (1987) (discussing courts’ treatment of corporations as persons). In contrast to corporations, partnerships are not treated as citizens. See *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 456 (1900); see also Robert J. Tribeck, *Cracking the Doctrinal Wall of Chapman v. Barney: A New Diversity Test for Limited Partnerships and Limited Liability Companies*, 5 WIDENER J. PUB. L. 89, 130 n.36 (1995) (citing *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189, 196–97 (1990)).

¹⁴¹ See Schane, *supra* note 69, at 564 (noting that the Supreme Court has been defining corporate personhood since the nineteenth century). But corporations are not “persons” for purposes of the Fifth Amendment Double Jeopardy clause. See *Doe v. United States*, 487 U.S. 201, 206 (1988).

son is more intellectually and physiologically analogous than is the fictional relationship between the corporation and the person.¹⁴² Does it stand to reason that the framers intended the corporation to receive greater personhood protection than the fetus? Some would answer in the affirmative.¹⁴³ But if the "artificial being"¹⁴⁴ of the corporation, composed of technical rules of governance,¹⁴⁵ can be afforded the same protections as a human being, should not a fetus, arguably living, be afforded the same?¹⁴⁶ It seems this rationale can be reduced to basic common sense which, arguably, is lacking in the current governance of this nation.¹⁴⁷

The term "person" may have a broad legal definition. For example, in statutory form "person" may refer to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (1994); see also *United States v. Best Foods*, 118 S. Ct. 1876, 1882 (1998) ("The term 'person' is defined in CERCLA to include corporations and other business organizations."); Jonathan R. Siegel, *Suing the President: Non Statutory Review Revisited*, 97 COLUM. L. REV. 1612, 1709 n.385 (1997) (citing Lon Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 379 (1930-1931) for the proposition that an odd reversal has occurred between the term "person" and "corporation" over time). Although using "person" to refer to a corporation began as a fiction, this usage has become so widely accepted that it is now necessary to say "natural person" when referring to a "person" who is not a "corporation." See Siegel, *supra* at 1709.

¹⁴² See Charles Wolfe, *Joseph Lambert to Succeed Stephens as Chief Justice*, ASSOCIATED PRESS POL. SERV., June 9, 1998, available in 1998 WL 7421438 (quoting newly-appointed Justice Joseph E. Lambert of the Kentucky Supreme Court who stated that a viable fetus should be protected by criminal law in the same way a "person" is).

¹⁴³ Arnold H. Loewy, *Why Roe v. Wade Should be Overruled*, 67 N.C. L. REV. 939, 942 n.21 (1989) ("There is not a shred of historical evidence, of which I am aware, that would suggest that the framers thought of fetuses as persons against whom the State could not act except with due process of law.").

¹⁴⁴ *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (describing the corporate entity as "an artificial being, invisible, intangible, and existing only in contemplation of law . . . [and] possesses only those properties which the [state-created] charter of its creation confers upon it, either expressly, or as incidental to its very existence").

¹⁴⁵ "Corporations" should be distinguished, however, from "companies." See CONARD, *supra* note 64, at 136-38 (distinguishing the technical aspect of the corporation from the company which encompasses companionship, fellowship, and relationships between partners).

¹⁴⁶ See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (defining "life" as an "animate being: the quality that distinguishes a vital and functional being from a dead body or purely chemical matter").

¹⁴⁷ See SCHALLER, *supra* note 127, at 123 (stating that government tends to "operate to frustrate and humiliate citizens in defiance of common sense" and citing Philip K. Howard for the proposition that "by the absence of the one indispensable ingredient of any successful human endeavor: use of judgment . . . we have constructed a [legal] system [which] basically outlaws common sense" (citing PHILIP K.

The constitutional framers foresaw the liberty interests of future generations, as evidenced by their desire to explicitly secure the right of "posterity."¹⁴⁸ Rationalizing the exclusion of the fetus¹⁴⁹ from the definition of constitutional personhood while at the same time including the corporation appears inconsistent. Assuming, arguendo, that the inclusion of the fetus was not intended by the framers, the Court is free to treat the fetus in the same way it has treated the corporation and create constitutional protections unfounded in the constitutional text for the fetus.¹⁵⁰ Accordingly, the Court should further its pronouncement of rights under the "evolving constitution"¹⁵¹ by following the guideline that "new rights are needed as a way of instrumentally advancing and making more secure the broad purposes of expressly mentioned rights."¹⁵² It would seem, based on past actions, that the Court could confidently protect the interests of the fetus by creating new rights through legal fiction or through any other device of its choice.

"The corporation does not exist in nature; unlike real persons it has no existence independent of the government that cre-

HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994)).

¹⁴⁸ See U.S. CONST. preamble ("We the People of the United States, in Order to . . . secure the Blessings of *Liberty* to ourselves and *our Posterity*, do ordain and establish this Constitution for the United States of America.") (emphasis added); WEBSTER'S, *supra* note 146 (defining "posterity" as "the offspring of one progenitor to the furthest generation . . . all succeeding generations"). The framers' vision to guarantee future security parallels Biblical scripture. See *Proverbs* 29:18. ("Where there is no vision the people perish.") Furthermore, it is posited that the Constitution and the structure of government was meant, implicitly perhaps, to serve as a means to achieving the spiritual guarantees articulated in the preamble. See MACEY, *OUR AMERICAN LEVIATHAN UNBOUND*, *supra* note 24, at 66.

¹⁴⁹ See *Roe v. Wade Anniversary Views*, *supra* note 2 (listing Justice Blackmun's reasons for denying the fetus Fourteenth Amendment protection as: (1) lack of legal precedent; (2) uncertainty as to the Framers' intent to have the word "person" apply to fetuses based on its usage in constitutional text; and (3) because limitations on abortions were not as strict when the amendment was adopted).

¹⁵⁰ See *supra* note 10 and *infra* note 175 and accompanying text (positing that the Court has in fact created rights not explicit in the text of the United States Constitution specifically with respect to corporations).

¹⁵¹ See SCALIA, *supra* note 10, at 41-42 (describing features of an evolving constitution). *But see* Fox & McCallister, *supra* note 134, and accompanying text (describing the benefits of a sound, unevolving governing document). See generally, JETHRO K. LIEBERMAN, *THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING* (1992).

¹⁵² VAN GEEL, *supra* note 23, at 81 (discussing Chief Justice Warren's creation of the right to a "Miranda warning").

ates it."¹⁵³ This concept of personhood was considered early on by Blackstone: "*Natural persons* are such as the God of nature formed us; *artificial* are such as are *created* and devised by *human laws, for the purposes of society and government*, and are called corporations or bodies politic."¹⁵⁴ True, the fetus has not been granted the benefit of the legal fiction to establish its "existence" or its "artificial personhood." Nevertheless, and more convincing of fetal personhood is that the fetus exists, realistically, entirely independent of the government. Though the corporation is totally dependent on the government for its "life," the fetus has life irrespective of whether the government endows it with one. Some maintain that the corporation indeed exists, and that it merely relies on the government to afford it a "personality" via the construct of a legal fiction.¹⁵⁵ Whence the corporation gets its existence is largely irrelevant. "The law [treats] the corporation . . . in many respects *as though it were a natural person—which assuredly it is not.*"¹⁵⁶ And, if the "existing" corporation is granted a personality and legal rights, then the fetus, whose existence is independent of the government, should be given the benefit of a fiction as well, whether it be of "life" or of "personality." It is alarming that the judiciary has granted greater freedoms and protections to the completely fictional de jure corporate person than to the de facto fetal life already in existence.

The reasons for lack of fetal protection remain open for debate. Approximately three in ten pregnancies end in abortion,¹⁵⁷ and although fetal abortion appears to be declining, such statistics lend support to the intensity of the abortion contest.¹⁵⁸ Out-

¹⁵³ *Bad Company*, *supra* note 64.

¹⁵⁴ BLACKSTONE'S COMMENTARIES ON THE LAW 67 (Bernard C. Gavit ed., Washington Law Book 1941) (emphasis added).

¹⁵⁵ See WORMSER, *supra* note 16, at 8 ("Whatever of 'fiction' . . . is involved in the conception of the corporation is found in the fact that the law endows the corporation with personality.").

¹⁵⁶ *Id.* (emphasis added).

¹⁵⁷ See ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 173 (1997). Compare with CNN Interactive, *Public Outcry Comes Too Late to Stop Controversial Abortion* (visited July 25, 1998) <<http://cnn.com/WORLD/9608/06/britain.twins>> (noting that the abortion rate in Great Britain, where abortion was legalized in 1967, is approximately one abortion for every four births).

¹⁵⁸ See generally MARK CRUTCHER, ACCESS THE KEY TO PRO-LIFE VICTORY 19 (1998) (noting that abortion rates in the nation and in the majority of states declined between the late 1980s and early 1990s) (citing statistics of the Alan

side of the traditional "liberty" arguments currently disseminated that balance the rights of the mother against those of the unborn, one argument for the continued denial is the inevitable commotion that would arise in current constitutional law were the Court to recognize the fetus as a person entitled protection.¹⁵⁹ Another argument for lack of fetal protection is the negative effect such protection would have on medical advances and treatments.¹⁶⁰ Nevertheless, in 1997, one-half of Americans considered abortion on par with the murdering of a child.¹⁶¹ A 1987 survey by the Alan Guttmacher Institute listed the top four reasons for aborting a fetus as: (1) concerns about the way a child would affect the mother's life; (2) inability to afford the child; (3) desires to avoid single parenthood or existing problems in a relationship; and (4) lack of preparation for child-rearing responsibilities.¹⁶² Opponents of abortion argue that the primary reason for aborting the fetus is convenience coupled with a complete disregard for the living. Supporters of these positions condemn the use of abortion as a cure for "physical or psychological discomfort of the mother, over-population, financial hardships, [or] social insecurity."¹⁶³

The Supreme Court, in *Roe v. Wade*,¹⁶⁴ addressed the above-

Guttmacher Institute); *id.* (stating that the abortion rate in the United States during the 1980s decreased by six per cent); *U.S. Abortion Rate Fell Again in 1995*, ASSOCIATED PRESS, December 4, 1997, available in 1997 WL 4895208 (according to the Center for Disease Control, the percentage of legal abortions performed in 1995 had "[fallen to] the lowest level in two decades"); *id.* (drawing a correlation between the decrease in the number of available abortion providers and the number of abortions being performed).

¹⁵⁹ See generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

¹⁶⁰ See Michael S. Simon, Note, "*Honey, I Froze the Kids*": *Davis v. Davis and the Legal Status of Early Embryos*, 23 LOY. U. CHI. L.J. 131, 132-33 (1991) (suggesting the detrimental effects of including early embryos within the legal definition of "personhood" on modern infertility treatment).

¹⁶¹ See *Roe v. Wade Anniversary Views*, *supra* note 2 (citing a *New York Times* poll).

¹⁶² See Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?* FAMILY PLANNING PERSPECTIVES, July/Aug. 1988, at 169-70.

¹⁶³ See JOHN MEYENDORFF, *MARRIAGE: AN ORTHODOX PERSPECTIVE* 64 (1984) (positing that though these "social evils" need to be solved, abortion is not the solution). Meyendorff also opines that "[I]f abortion is accepted as a normal procedure in facing the ills of society, there is absolutely no reason why killing could not be accepted as a 'solution' . . . in other situations, particularly in illness and old age." *Id.* at 64.

¹⁶⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

mentioned anti-abortion arguments when it weighed the rights of the fetus as a *person* against the mother's liberty right to abort the fetus.¹⁶⁵ In *Roe*, the Court was faced with the issue of whether a fetus was a "person" within the meaning of the Fourteenth Amendment.¹⁶⁶ Rather than answer this question absolutely, the Court held that a state's interest in protecting "fetal life" only becomes compelling subsequent to viability.¹⁶⁷ That is, a fetus is not afforded protection as a "person" before birth, but is afforded some protection after it becomes viable. The Court, in effect, decided that the status of the unborn should depend solely on the liberty interests of its mother.¹⁶⁸

Several justifications were provided in support of this controversial decision. Justice Blackmun articulated that one of the reasons the fetal protection claim had to fail was because there was no case law supporting the classification of a fetus as a "person" under the Fourteenth Amendment.¹⁶⁹ Another factor

¹⁶⁵ See *id.* at 151–52; *Roe v. Wade Anniversary Views*, *supra* note 2.

¹⁶⁶ See *Roe*, 410 U.S. at 158 ("All this . . . persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.") (footnote omitted). Certain states, including Wisconsin and Connecticut, have diverted from this conclusion. See *id.* at 158 n.55.

¹⁶⁷ See *Roe*, 410 U.S. at 163–164 (defining "viability" as the point at which the unborn "presumably has the capability of meaningful life outside the mother's womb[,] and, as such, the time at which the state has a compelling interest to protect the fetus); see also Planned Parenthood Federation of America, Inc., *Abortion and Fetal Viability* (visited July 26, 1998) <<http://www.plannedparenthood.org/library/abortion/fetalviability.html>> (providing a general overview of the fetal viability issue).

¹⁶⁸ See *Roe*, 410 U.S. at 162 ("[T]he unborn have never been recognized in the law as persons in the whole sense."); see also Dawn E. Johnsen, Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986) (reiterating the traditional rationale articulated in *Roe* that the fetus had no individual rights independent of its mother).

The victory of a woman's liberty interest over the life of the fetus in *Roe* has been challenged by recent state legislation limiting a pregnant woman's freedom. See *Pregnant Drug Abusers Face Detention*, CHICAGO TRIB., June 17, 1998, at 16, available in 1998 WL 2867478 (describing a recent Wisconsin law which allows various professionals to report drug or alcohol abusing pregnant women to the authorities who can then have the women hospitalized or sent to a rehabilitation center); Bob Herbert, *Fetal Protection Conceals Real Agenda*, MILWAUKEE J. SENTINAL, June 16, 1998, at 12, available in 1998 WL 6333375 (citing a *New York Times* article on the new Wisconsin law and emphasizing that the law provides no criminal sanctions although it does allow authorities to take action against abusive women. Conversely, the article proceeds to note that viewing the fetus as a person could lead to an erosion of women's rights, particularly the right to have an abortion.).

¹⁶⁹ See *Roe*, 410 U.S. at 157; see also *Roe v. Wade Anniversary Views*, *supra* note

the Court relied on was the use of the word "person" in other instances in the Constitution clearly did not include the fetus.¹⁷⁰ This legal reasoning cannot withstand scrutiny. The argument that the use of a term throughout the Constitution generally should determine its meaning in specific instances is certainly flawed as it assumes a uniformity of meaning that may not exist. In fact, a wide application of this principle would call into question the constitutional rights of otherwise protected parties.¹⁷¹ For example, though children are at times a protected class, all constitutional provisions referring to "persons" do not apply *prima facie* to children.¹⁷² Based on this rationale, one could deny children and newborn infants constitutional protections and justify the decision by citing the instances throughout the Constitution in which children are not included in the definition of a "person."¹⁷³ Thus, infanticide theoretically would be constitutionally permissible.¹⁷⁴ Should we then apply this reasoning to corporations? The corporation, as a "person," has been denied constitutional protections in certain instances, yet it remains protected under the Fourteenth Amendment. Relying on Blackmun's reasoning in *Roe*, one could use instances where constitutional personhood protection was not afforded to the corporation to preclude the corporation from receiving Fourteenth Amendment protection.¹⁷⁵

Should the Court's rationales in *Roe* be held in high esteem? To reiterate, the Court's reasoning has also been criticized for determining the interests of the fetus based on the interests of others,¹⁷⁶ mirroring the *Dred Scott* era.¹⁷⁷ As a result, by denying

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¹⁷⁰ See *Roe*, 410 U.S. at 157; see also *Roe v. Wade Anniversary Views*, *supra* note

2.

¹⁷¹ See Rivard, *supra* note 25, at 1449-50.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ As established, though the corporation has been afforded legal personhood for purposes of the Fourteenth Amendment Equal Protection Clause and the Fifth and Fourteenth Amendment Due Process Clauses, it has not been granted the right against self-incrimination also guaranteed a "person" by the Fifth Amendment. See *Bellis v. United States*, 417 U.S. 85 (1974) (holding this right limited to natural persons).

¹⁷⁶ See *Roe*, 410 U.S. at 113 (conditioning fetal right to life upon the mother's right to privacy).

¹⁷⁷ See *Dred Scott v. Sanford*, 60 U.S. 393, 404 (1856) (concluding that the ability of blacks to claim the rights and privileges of the Constitution hinged on the status

fetal personhood protections, “the Court created [an entire] class of human beings who are disposable property.”¹⁷⁸ Despite the later Court’s unwillingness to overrule *Roe* in *Planned Parenthood v. Casey*,¹⁷⁹ the Court’s reasoning in *Roe* may be described as an “arbitrary resolution of the abortion matter, no different in kind from the bare minimum that our politics could have supplied.”¹⁸⁰

The Supreme Court’s decision in *Casey* has, in turn, been vehemently criticized for its exemplification of a complete disre-

of their ancestors). The Court’s decisions have been criticized for this erred reasoning in the determination of rights:

[*Roe*] is simply wrong . . . [in] permit[ing] one individual’s status as a person [to] depend upon the interests of others. We have had some awful experience with that ideology, and it took a civil war to clean up the mess left by the Supreme Court which bought into that approach in *Dred Scott*.

Roe v. Wade Anniversary Views, *supra* note 2, at 10.

¹⁷⁸ 136 CONG. REC. 25,36334 (daily ed. Oct. 27, 1990) (statement of Sen. Humphrey).

¹⁷⁹ 505 U.S. 833 (1992). *Casey* reaffirmed *Roe*’s central holding that a pregnant woman’s right to privacy enabled her to choose whether to abort her pregnancy. But a plurality rejected *Roe*’s trimester analysis and recognized instead a state’s substantial interest in potential life. *See id.* at 872–73; Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 J.L. & HEALTH 135, 137 (1994–95) (assessing *Casey*’s impact on the *Roe* decision).

Roe’s viability as legal precedent is debatable. Advances in science and technology prompt constant debate as to whether an opinion, relying on scientific knowledge over 25 years old, should remain legally binding. *See* Stenger, *supra* at 158 (“While medical and technological developments continue to change . . . it remains a challenge to express experience and change in the law.”). This problem seems to have been foreshadowed at the time of the *Roe* decision itself. *See* Jay Floyd, Esq., Asst. Att’y Gen. of Texas, Argument Before the Supreme Court in *Roe v.*

Wade (Dec. 13, 1971) (transcript available at <<http://cnn.com/SPECIALS/1998/roe.wade/audio/argue/transcript.html>> (visited June 11, 1998)) (“As medical science progresses, maybe the law will progress also.”). It is clear that the scientific underpinnings of the *Roe* and *Casey* decisions are disputable today, particularly as medical advances continuously push the point of viability to earlier stages in fetal development. *See* *Wallace v. Wallace*, 421 A.2d 134, 139 (N.H. 1980) (Douglas, J., dissenting) (noting that using any specific timetable for determining fetal viability is problematic because “it turns open the ever-changing progress in the field of medical science”). Indeed, current scientific breakthroughs have been deemed the “unimaginable.” Rhonda Rowland, *Scientists Analyze Days-Old Embryo for Genetic Defects* (visited July 26, 1998) <<http://cnn.com/HEALTH/indepth.health/womens.health/embryo.diagnosis/index.html>>.

¹⁸⁰ *Roe v. Wade Anniversary Views*, *supra* note 2, at 9 (quoting Professor John Ely, a supporter of legal abortion, who remarked that “*Roe* is bad because it is bad constitutional law, or rather because it is *not* constitutional law”) (emphasis added). *Id.* at 8; *see also* Stenger, *supra* note 179, at 138 (opining that one of the main flaws in the *Roe* decision was that the Supreme Court’s decision left no room for states to formulate their own solutions).

gard for the original foundation on which this country was built; namely, the concept of a Union supplanted with individual declarations of liberty.¹⁸¹ A fundamental principle since the inception of our government is that to live in the Union, individuals must sacrifice certain individual rights to serve the good of the nation.¹⁸² The unique characteristic and beauty of the United States is its composition of many people with differing viewpoints. So long as such differences exist, views and personal convictions will span the length of the spectrum. Though such individuality and uniqueness are desired, they must not overshadow the central principles of the union. As Robert Bork stated:¹⁸³

Americans now place less value on what we owe others as a matter of moral obligation; less value on sacrifice as a moral good, on social conformity, respectability, and observing the rules; less value on correctness and restraint in matters of physical pleasure and sexuality—and correlatively greater value on things like self-expression, individualism, self-realization, and personal choice.¹⁸⁴

The Court, in the view of many, has become notorious for "failing to require individuals to take responsibility for their own actions; failing to protect human values and to promote societal

¹⁸¹ See *infra* note 182 and accompanying text; Richard A. Erb, Jr. & Alan W. Mortensen, *Wyoming Fetal Rights—Why the Abortion "Albatross" is a Bird of a Different Color: The Case for Fetal-Federalism*, 28 LAND & WATER L. REV. 627, 652 ("The idea that the United States Supreme Court alone can fairly legislate and adjudicate social policies violates traditional federalism. This violation manifests itself in decisions such as *Roe*.") (footnote omitted).

¹⁸² See THE FEDERALIST NO. 2, at 37 (John Jay) (Clinton Rossiter ed., 1961) ("[I]t is equally undeniable that whenever and however [the government] is instituted, the people must cede to it some of their natural rights . . ."). Some argue that the barrage of individual freedoms sought by people of society today is out of control. Furthermore, they revert back to the notions of early America that focused on religion as the regulating force of such "complete" individual freedoms. See Robert N. Bellah, *Religion and Legitimation in the American Republic*, SOCIETY, Jan. 11, 1998, at 199 (citing Tocqueville, who "saw religion as the great restraining element that could turn naked self-interest into . . . 'self-interest rightly understood,' that is, a self-interest that was public spirited and capable of self-sacrifice").

¹⁸³ Robert Bork was the Acting Attorney General for Richard Nixon during the Saturday Night Massacre and was later a nominee for United States Supreme Court. His nomination failed to obtain Congressional approval in 1987.

¹⁸⁴ BORK, *supra* note 157, at 65 (quoting William J. Bennett). This notion harkens back to the inception of our present government and, particularly, to the first Vice-President of the United States John Adams, who said that "[w]e have no government armed with power capable of contending with human passions unbridled by morality and religion." Bellah, *supra* note 182, at 193.

responsibility; [and] failing to . . . create a sense of coherence among the conflicting interests involved."¹⁸⁵ The Court in *Casey* correctly stated that

[o]ur Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that *the Constitution's written terms embody ideas and aspirations that must survive more ages than one*. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.¹⁸⁶

Although the Court acknowledged the necessity of ensuring the Constitution's continuity, whose terms "must survive more ages than one,"¹⁸⁷ it engaged in an about-face, manipulating its commitment to the Constitution and conveniently disguising its creation of a society of individuals in terms of liberty. The *Casey* Court obliterated the communal foundations of our country,¹⁸⁸ opting instead for a country where each person is, so to speak, the master of his own destiny with the opportunity to define his own sense of reality.¹⁸⁹ The Court proclaimed that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁹⁰ Although this statement may have historic support at some level,¹⁹¹ the Court created a "heretofore unheard-of constitutional right to 'personal dignity and autonomy.'"¹⁹² The Court's declaration thus completely defies the United States' republican form of government.¹⁹³ Furthermore, the concept of "personhood," em-

¹⁸⁵ SCHALLER, *supra* note 127, at 137 (alluding to the illuminations of Herzog's character in *The Sweet Hereafter*). "When courts . . . [do not] reforc[e] the goals of individual responsibility and societal well-being, they are incapable of serving either truth or justice." *Id.*

¹⁸⁶ *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992) (emphasis added).

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* notes 180–184 and accompanying text.

¹⁸⁹ See *Casey*, 505 U.S. at 833.

¹⁹⁰ *Id.* at 851.

¹⁹¹ For such an example, see Declaration of the Rights of Man and of the Citizen (August 26, 1789), arts. 1, 4 and 5, translated in 10 THE NEW ENCYCLOPAEDIA BRITANNICA 71 (15th ed. 1985) and cited in SCALIA, *supra* note 10, at 134.

¹⁹² BORK, *supra* note 157, at 103.

¹⁹³ See Bellah, *supra* note 182, at 197 ("A republic as an active political community of participating citizens must have a purpose and a set of values. . . . [and] must attempt to be ethical in a positive sense and to elicit the political commitment of its

bodying a great deal more than "individuality," demands an integrated sense of self within a greater social order. The Court's decision in *Casey* reduces persons to the equivalent of isolated, Cartesian beings.

The United States Supreme Court was intended to interpret the Constitution based on sound legal reasoning and deliberation, not to decide social and political policies.¹⁹⁴ The Supreme Court, according to some, has superseded its constitutional authority in that an issue as divisive as abortion should be left to the democratic process *vis a vis* the constitutional amendment process and individual state legislative initiatives.¹⁹⁵ Because of certain ideological blocs on the Court¹⁹⁶ and the greater role that the personal beliefs of individual justices¹⁹⁷ have played in the judicial appointment process in recent years, one is led to believe that the judiciary is failing to fulfill its duties of deciding issues narrowly, exercising self-restraint, and identifying and surpassing its own biases.¹⁹⁸ This is evidenced by appointers having greater concern about nominees' positions on salient issues than with their overall jurisprudential approaches.

citizens."). The United States, though often referred to as a democracy, is indeed a republican form of government—with votes cast for representative electors rather than, for example, convening at the town square for a literal one person, one vote poll.

¹⁹⁴ See Margaret G. Farrell, *Revisiting Roe v. Wade: Substance and Process in the Abortion Debate*, 68 IND. L.J. 269, 306 (1993) (stating that courts have traditionally employed "reasoned judgment") (quoting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

¹⁹⁵ See *id.* at 307 ("Historically, the resolution of questions of a fundamentally moral nature has been considered a state prerogative. . . . Thus, not only did *Roe* preempt state moral prerogatives and . . . legislative decision making[. . .] [it] diminished] . . . state and legislative authority."); Chuck Colson, *The Human Life Amendment* (visited Feb. 13, 1999) <<http://www.breakpoint.org/scripts/60813.html>> ("Passing a constitutional amendment would achieve a restoration of the democratic process, for ratification will involve an extended, formal process by which the people, not the courts, can decide the most divisive issue of our time. It could be a national referendum on the legal status of unborn children."). See generally *supra* note 181.

¹⁹⁶ See Robert H. Smith, *Uncoupling the "Centrist Block"—An Empirical Analysis of the Thesis of a Dominant, Moderate Block on the United States Supreme Court*, 62 TENN. L. REV. 1, 4 (1994) (describing the cohesive voting of the ideological blocs of the Supreme Court Justices).

¹⁹⁷ See Erb & Mortensen, *supra* note 181, at 627 (describing the importance of a Supreme Court nominee's position on abortion in the confirmation process).

¹⁹⁸ See BORK, *supra* note 11, at 114, 220 (1990) (stating that the *Roe* decision is merely an expression of the Court's own subjective views about the morality of abortion).

It is said that corporate characteristics parallel that of a human being, including the ability to cause death, injury, disease, and severe physical pain,¹⁹⁹ to enter into agreements and transactions, and to pay taxes.²⁰⁰ These attributes are not, however, those that come to mind as being the essence of "personhood." A person is thought of as one who breathes, grows, and develops. A person has facial attributes, a beating heart, and physical processes. In addition, a person has sensory perceptions, is endowed with reason, and experiences emotions.²⁰¹ However creative the legal fiction drawn, the corporation cannot be said to possess any of these traits.

From the moment of conception the fetus has living characteristics. An embryo²⁰² develops rapidly from the moment of its creation²⁰³ and can suffer injury in as little as seventy-two hours after conception.²⁰⁴ By two weeks of development, differentiation has begun, as cells begin to take on characteristics which enable them to form specific organs, including the "nervous system (including the brain), the skin and the hair . . . [, parts of] the gastrointestinal tract, the liver, pancreas and thyroid . . . [as well as] the skeleton, connective tissues, blood system, urogenital system and most of the muscles."²⁰⁵ By the third week of fetal development, the heart, as well as the brain, spinal cord, muscles, and skeletal structure, have all started to develop,²⁰⁶ as have the

¹⁹⁹ See *supra* notes 79–80 and accompanying text.

²⁰⁰ See *supra* notes 81–82 and accompanying text.

²⁰¹ In contrast, a corporation with its legally defined personhood, lacks such characteristics. See *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994) (concluding that a corporation cannot suffer from emotional distress as it "lacks the cognizant ability to experience emotions"); *Dynamic Image Techs., Inc. v. United States*, 18 F. Supp.2d 146, 151 (D.P.R. 1998) (articulating the absence of a legal principle delineating corporate suffering of intentional infliction of emotional distress).

²⁰² The term "embryo" generally refers to the developing child from the moment of conception to ten weeks of development, after which it is called a fetus. See GLADE B. CURTIS, *YOUR PREGNANCY WEEK BY WEEK* 95 (3rd ed. 1997). For the purposes of this paper the two will be used interchangeably, as a legal distinction has not been created between the terms "embryo" and "fetus" but, rather, between the viable and unviable fetus. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113, 160 (1972).

²⁰³ See CURTIS, *supra* note 202, at 37 (explaining that the embryo is a group of quickly developing cells).

²⁰⁴ See *id.* at 52 (explaining that embryonic damage from the use of drugs during pregnancy can lead to injury "as early as [three] days after conception").

²⁰⁵ *Id.* at 47 (explaining the development of the germ layers of cells which develop into various bodily systems and organs).

²⁰⁶ See *id.* at 54.

fetus's eyes.²⁰⁷ At one month, the brain chambers, limb buds,²⁰⁸ and occasionally, the heartbeat²⁰⁹ can be observed. At five weeks of fetal development one finds progress in the brain and eyes, and the presence and formation of the nostrils, intestines, pancreas, and the bronchi of the lungs.²¹⁰ At six weeks, the tubes that connect the throat and lungs are formed, arms and legs develop further, and fingers and toes are visible.²¹¹ At seven weeks the baby "looks more recognizable as a human being,"²¹² and is capable of movement.²¹³ At nine weeks of development, fingernails appear and the external genitals may begin to distinguish gender.²¹⁴ The fetus, at ten weeks old, possesses an audible heartbeat. Likewise, most bones have started to form, digits have separated, sex characteristics can be determined by observable external genitalia, the digestive system can excrete and absorb substances, hormones are produced, insulin is secreted, and there is fetal movement inside the uterus.²¹⁵ Such movement is definite, including squinting and the movement of the mouth, fingers, and toes.²¹⁶ By the time the fetus is eleven weeks old, its body and face resemble that of a fully developed human.²¹⁷ At the thirteenth week, ossification of the skeletal system occurs and the fetus may be observed sucking its thumb.²¹⁸

When the fetus is between four and five months old, it begins activity and movement which can be felt by the mother, a process referred to as "quickening."²¹⁹ Approximately one month later, the digestive system is developed enough to enable the fetus to swallow, absorb needed materials, and pass unabsorbed substances.²²⁰ Development continues, and at twenty-five weeks, a little over six months of development, the eyelids will open and

²⁰⁷ See *id.* at 223.

²⁰⁸ See *id.* at 63.

²⁰⁹ See *id.* at 62.

²¹⁰ See *id.* at 70.

²¹¹ See *id.* at 78.

²¹² *Id.* at 86.

²¹³ See *id.* at 86 (noting that ultrasound technology can detect the movement of the body and limbs).

²¹⁴ See *id.* at 102.

²¹⁵ See *id.* at 109, 193.

²¹⁶ See *id.* at 110.

²¹⁷ See *id.* at 117.

²¹⁸ See *id.* at 131.

²¹⁹ *Id.* at 138, 248 (referring to quickening as "the beginning of . . . bonding" and as "miraculous").

²²⁰ See *id.* at 176.

the baby will blink.²²¹ Incidentally, twenty-five weeks of fetal development marks the beginning of the third trimester.²²²

Unlike a corporation, a fetus may suffer bodily injury²²³ and death. The corporate parallels of injury or death—hostile takeover and voluntary or involuntary bankruptcy—hardly parallel the effects injury and death have on the human being. At the embryonic stage a fetus may be harmed by environmental pollutants and by medicinal and chemical factors which can lead to lead poisoning, cerebral palsy, microcephaly, ambiguous genital development, abnormalities of the bones, hands, reproductive organs, and central nervous system, mental retardation, limb defects, blindness, and possibly miscarriage.²²⁴ The use of drugs and alcohol likewise can have detrimental effects on the child's health, including an increased chance of deformities and miscarriage.²²⁵

The Court in *Planned Parenthood v. Casey*²²⁶ rejected the "rigid trimester framework,"²²⁷ holding that no state has a right to place an "undue burden" on a mother's right to obtain an abortion prior to fetal viability.²²⁸ Is this, however, a meaningless distinction? Legally, viability is the point at which a state may "promot[e] its interest in the potentiality of human life" and can regulate and proscribe abortions.²²⁹ When one looks at the physical reality of fetal viability, however, one sees that although the means, that is, the trimester approach as compared to the fetal viability approach, may have changed, the result has stayed the same. The third trimester is marked at twenty-five weeks of fetal development.²³⁰ Realistically, "[b]etter methods of caring for premature babies have contributed to higher survival statistics [so that t]oday, infants born as early as [twenty-five] weeks of

²²¹ See *id.* at 225.

²²² See *id.* at 222.

²²³ See *Headley v. Ohio Gov't Risk Mgmt. Plan*, No. CT97-0022, 1998 WL 346863, at *1 (Ohio Ct. App. June 24, 1998) (Gwin, J., dissenting) (noting that a corporation cannot suffer bodily injury).

²²⁴ See CURTIS, *supra* note 202, at 51, 90–91 (explaining that the fetus should be protected from chemicals and pollutants to ensure healthy development).

²²⁵ See *id.* at 52 (emphasizing the deleterious effects of cocaine use on a child in utero).

²²⁶ 505 U.S. 833 (1992).

²²⁷ *Id.* at 878.

²²⁸ See *id.*

²²⁹ *Id.* at 879.

²³⁰ See generally CURTIS, *supra* note 202, at 207–14.

pregnancy can survive."²³¹ Earlier than that, however, fetal viability is less than promising. The premature birth survival rate for a fetus weighing 1.1–1.5 pounds,²³² or in terms of time, at twenty-two to twenty-three weeks of development,²³³ is a mere 43%.²³⁴ Can one realistically say that a fetus, which has grown through to twenty-five weeks of development as outlined above, cannot be deemed a "life?" The Court, though perhaps less "rigid" in its rationale, seems to have created a distinction without a difference and has in effect ordained that life begins at approximately twenty-five weeks of fetal development.

But is it for the Court to determine when life begins? Setting aside the examination of viability and trimesters, the basic truth is that fetal development parallels that of a human being. Is one to say that the fetus is due less protection than a corporation because a corporation possesses more traits of "personhood" than does the fetus? It is argued that:

[One] cannot . . . believe that a corporation which "can level mountains, fill up valleys, lay down iron tracks and run railway cars on them" is "a mere conception of the legislative mind," or that it is a mere "artificial being invisible, intangible and existing only in contemplation of law," or that it is only an "invisible, intangible essence of air."²³⁵

Can a life with a developing brain, functioning organs, muscle, and skeletal structure seriously be denied at least as much protection as corporations, rivers, and lakes? Does the corporation deserve greater protection than a fetus with a beating heart simply due to its ability to "lay down iron tracks and run railway cars on them?" This seems to be, at best, an absurdity.

The passage of laws purporting to protect fetuses by declaring them "persons" is an accelerating national trend,²³⁶ and not a

²³¹ *Id.* at 240.

²³² *See id.*

²³³ *See id.* at 201, 207.

²³⁴ *See id.* at 240.

²³⁵ WORMSER, *supra* note 16, at 7 (footnote omitted) (quoting *New York Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481 (1909)); *see also* *Sierra Club v. Morton*, 405 U.S. 727, 742–43 (1972) (Douglas, J., dissenting) ("A ship has a legal personality, a fiction . . . [and] the ordinary corporation is a 'person' . . . [s]o it should be . . . [with] valleys, alpine meadows, rivers, lakes . . . [and] air . . .").

²³⁶ *See* Sam Orr, *Equality is One Tough Equation*, *FLORIDA TODAY*, June 26, 1998, available in 1998 WL 11940419 (discussing the Wisconsin law that recognized a fetus as a person with a right to life).

new phenomenon. Legal history²³⁷ is not completely devoid of the idea that the moment of conception is the moment at which life begins.²³⁸ In fact, some courts have held that human life begins at conception. A Tennessee appellate court in *Davis v. Davis*,²³⁹ although subsequently overruled,²⁴⁰ believed the conundrum of denying personhood protections to a fetus could not withstand reason when it articulated that a healthy fetus is, indeed, a person.²⁴¹ Though it hinges on viability, the Supreme Court has let stand a 1997 South Carolina ruling which expands the definition of "child" under child-neglect and child-abuse statutes to include the unborn fetus.²⁴² Following this trend of fetal protection, South Dakota and Wisconsin have passed laws allowing a husband, doctor, or guardian to request a court order that would confine a pregnant woman abusing "alcohol or drugs."²⁴³ These laws not only allow the government to make demands on a pregnant woman, but also delegate that right to other "interested

²³⁷ See *Donald Raum v. Restaurant Assocs., Inc.*, N.Y. L.J., July 13, 1998, at 26 (explaining that, "a fetus is considered a person when its injuries give rise to a criminal assault prosecution"); Herbert, *supra* note 168, at 12 (explaining recent legislation signed into law by Wisconsin Governor Tommy Thompson defining the "unborn child" as a human being from fertilization to birth). In the context of a survival statute, even a stillborn fetus has been considered a "person." See *Wartell v. Woman's and Children's Hosp., Inc.*, 676 So.2d 632 (La. Ct. App. 1996), *rev'd*, 704 So.2d 778 (La. 1997).

²³⁸ See CNN Interactive, *Roe v. Wade* (visited June 22, 1999) <<http://cnn.com/SPECIALS/1998/roe.wade/audio/index.html>> (Texas Asst. Att'y. Gen. Robert Flowers explaining that "[i]t is the position of the state of Texas that upon conception, we have a human being . . .").

²³⁹ No. E-14496, 1989 WL 140495, at *1 (Tenn. Cir. Ct. Sept. 21, 1989).

²⁴⁰ See *Davis v. Davis*, 842 S.W.2d 588, 594 (Tenn. 1992) (concluding that "[w]ithout live birth, the Supreme Court has said, a fetus is not a 'person'").

²⁴¹ See *Davis*, 1989 WL 140495, at *9 (articulating the primary issue in the case as "When does human life begin?").

²⁴² See *Whitner v. South Carolina*, 492 S.E.2d 777, 779 (S.C. 1997) ("South Carolina law has long recognized that viable fetuses are persons holding certain legal rights and privileges."); see also *Hall v. Murphy*, 236 S.C. 257, 261 (1960) (holding that denying a viable fetus personhood was "unsound and illogical" and unjust); Regina M. Coady, Comment, *Extending Child Abuse Protections to the Viable Fetus*: *Whitner v. State of South Carolina*, 71 ST. JOHN'S L. REV. 667, 682 (1997) (analyzing the *Whitner* decision and arguing that "[t]he child's physical location is irrelevant. . . [and that a] mother must not evade responsibility for abusing her child at the child's most vulnerable stage, its fetal stage").

²⁴³ S.D. CODIFIED LAWS § 34-20A-70 (Michie 1986) (South Dakota's Title 34 Public Health and Safety Subchapter 34-20A "Treatment and Prevention of Alcohol and Drug Abuse" statute); WIS. STAT. ANN. § 48.19 (West Supp. 1998) (Wisconsin's Children's Code Subchapter "Holding a Child or an Expectant Mother in Custody").

part[ies].²⁴⁴ Arguably, constitutional rights should be personal and the liberty of neither the mother nor the child in utero should be determined based on the rights of another. Nevertheless, the trend toward protecting the fetus, unable to protect itself, is evident.

Again, is it for the courts to determine when life begins, or is "life" a theological or medical designation?²⁴⁵ The Court in *Roe*, stated:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology . . . [are unable to] arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.²⁴⁶

Ironically, this is exactly what the Court did. Historically, until *Roe*, the government of the United States had never limited nor forced the meaning of life. "It is not recorded that any American government, from the founding on, has ever thought it worthwhile to compel anyone's concept of meaning or of the mystery of human life."²⁴⁷ Yet the Court has in effect, proclaimed a beginning of life and imposed it upon members of society.

VII. WHEN DOES LIFE BEGIN?

The questions of whether the fetus is a person and when personhood begins are not new inquiries. Several theories of fetal personhood have emerged. The chromosomal completion theory is centered on the notion that from "the moment of fertilization . . . the creature . . . [which] has all the attributes of a human from the beginning . . . is not . . . a 'potential life'²⁴⁸ . . .

²⁴⁴ WIS. STAT. ANN. § 48.213 (West Supp. 1998) (allowing a court appointed legal guardian to make the application for confinement).

²⁴⁵ See Douglas O. Linder, *The Other Right-To-Life Debate: When Does Fourteenth Amendment "Life" End?*, 37 ARIZ. L. REV. 1183, 1187 (1995) (querying whether personhood should be defined biologically, philosophically, or religiously).

²⁴⁶ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

²⁴⁷ BORK, *supra* note 157, at 103.

²⁴⁸ See *id.* at 174-76; see also Mario Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective* (Speech at the Univ. of Notre Dame, Sept. 13, 1984), in MORE THAN WORDS: THE SPEECHES OF MARIO CUOMO 37 (1993) ("[T]he whole community . . . should agree on the importance of protecting life—including life in the womb, which is at the very least potentially human and should not be extinguished casually.") (emphasis added); *id.* at 42 ("A fetus is different from an appendix or a set of tonsils. At the very least . . . the full potential of human life is indisputably there."); MEYENDORFF, *supra* note 163, at 64 (positing that the cure for

social evils “cannot be achieved by killing innocent victims who possess a full potential for . . . human life”).

Other less compelling theories exist. The fetal consciousness theory is founded on the belief that “it is doubtful that a fetus becomes conscious until well after the time most abortions are performed, and even if he or she is conscious, that would not put the fetus at a level of awareness comparable to that ‘of a dog, let alone a chimpanzee.’” BORK, *supra* note 157, at 178. One recognizes the inherent weakness of this theory when looking at patients in persistent vegetative states [hereinafter PVS]. There are many similarities between a fetus and a PVS patient. “PVS patients continue to breathe, have blood pressure, react to light, and respond with merely physical reflexes, such as grimacing or yawning.” Linder, *supra* note 245, at 1184 (footnote omitted). Like the fetus, PVS patients have recently become the subject of a new argument in the right to life debate, which has spiraled out of the fetal right to life debate. *See* Linder, *supra* note 245, at 1183 (describing the recent trend in the right to life debate and adding PVS patients among aborted fetuses as a subject of the right to life controversy); *see also* BORK, *supra* note 157, at 176 (addressing similarities between the fetus and the PVS patient). The underlying issue in the PVS scenario is whether the state can justifiably terminate medical treatment—that is, supporting or aiding the taking of a human life—irrespective of the PVS patient’s consent. *See* Linder, *supra* note 245, at 1183 (explaining the debate between those who believe such state action is wrong and in violation of its authority and those who believe that it is a “pragmatic choice” in a world of detached and reasoned considerations of medical options).

Tangential issues in the PVS debate pit the value of ongoing medical care against the value of life. *See id.* at 1186 (noting that exorbitant public health costs are receiving increased scrutiny). *But see id.* at 1187 (suggesting an increase in the number of PVS patients and the growing trend toward euthanasia may be providing ammunition for the movement supporting the termination of the lives of PVS patients). Many of the same concerns voiced in the fetal abortion context are expressed in the PVS context. *See* MEYENDORFF, *supra* note 163, at 64 (drawing an analogy between the aborting of a fetus and the killing of the terminally ill stating that “[i]f the ‘terminally’ sick . . . were put quietly to death, what a psychological relief for those psychologically and materially responsible for their continued existence! But what a horrible and totally unhuman perspective for society! [I]t is quite frightening to discover how close to its realization we already are.”) (emphasis added). Since the fetus is indeed a person, as is the PVS patient, it is argued that the fetus is entitled to the same protections afforded a human being. *See* Johnsen, *supra* note 168, at 602. Likewise, fetuses should be afforded greater protections under the law due to their complete inability to protect themselves. *See* CNN World News Briefs, *Canada bill bans sex selection, surrogate motherhood* (visited June 22, 1999) <<http://cnn.com/WORLD/9606/14/newsbriefs/index.html>> (highlighting Canadian legislation in response to certain genetic and reproductive practices and identifying them as “‘contrary to the principles of human dignity, respect for life, and protection of the vulnerable’”). One of the more troubling illustrations of the particular need for fetal protection was the discovery of 30 human fetuses in a dirt field in San Bernadino, California. *See* CNN Interactive, *Children find boxes containing human fetuses* (visited June 22, 1999) <<http://cnn.com/US/9703/15/briefs/pm/fetus>>.

The anatomical viability theory, centered on the point at which the fetus’ physical body can sustain its own life, completely ignores both fetal development up until the point of viability as well as the theological and philosophical views of when life begins. *See* *Abortion and Fetal Viability*, *supra* note 167. The Planned Parenthood home page defines “fetal viability” as the point at which,

[but] a life with potential."²⁴⁹

This theory proposes that because a fetus is chromosomally complete at the point of conception it is fully human from the beginning.²⁵⁰ Thus, it provides one of the strongest arguments in support of the view that a fetus is a person from the moment of conception. This parallels the Warnock Report on Human Fertilization and Embryology published by the Warnock Committee.²⁵¹ In its report, the committee enunciated that individual human development begins at fourteen to fifteen days of fetal growth.²⁵² As such, it is posited that the fetus inside the mother's body should not be considered merely a "clump of tissues"²⁵³ but

[the fetus] reaches an "anatomical threshold" when critical organs, such as the lungs and kidneys, can sustain independent life. Until the air sacs are mature enough to permit gases to pass into and out of the bloodstream, which is extremely unlikely until at least 23 weeks gestation (from last menstrual period), a fetus cannot be sustained even with a respirator, which can force air into the lungs but cannot pass gas from the lungs into the bloodstream.

Id. (quoting the collective amicus brief of the American Medical Association, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American Fertility Society, American Medical Women's Association, American Psychiatric Association, and American Society of Human Genetics for *Webster v. Reproductive Health Services*, No. 88-605, at 7 (October Term 1998)).

²⁴⁹ BORK, *supra* note 157, at 175 (quoting *Roe v. Wade* language of "potential life"). Bork explains that:

[T]he new organism is . . . a different individual. This cell produces specifically human proteins and enzymes from the beginning. Its chromosomes will heavily influence its destiny until the day of its death, whether that death is at the age of ninety or one month after conception.

The cell will multiply and develop, in accordance with its individual chromosomes, and, when it enters the world, will be recognizably a human baby. From single-cell fertilized egg to baby to teenager to adult to old age to death is a single process of one individual. . . . It is impossible to draw a line anywhere after the moment of fertilization and say that before this point the creature is not human but after this point it is. It has *all the attributes of a human from the beginning*, and those attributes were in the *forty-six chromosomes with which it began*. . . . Such creature is not a blob of tissue or . . . a "potential life" . . . [but rather] a *life with potential*.

Id. (emphasis added).

²⁵⁰ See *id.* at 174-76.

²⁵¹ See MARY WARNOCK, A QUESTION OF LIFE—THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY (1985).

²⁵² See *id.* at 59 (holding that state regulation of embryonic research should begin when the fetus reaches approximately two weeks). See Stenger, *supra* note 179, at 144 (providing an overview of the Warnock Report).

²⁵³ Terry Gross, *James McCartney on the 25th Anniversary of Roe v. Wade*, FRESH AIR, Jan. 22, 1998, available in 1998 WL 2923510 (quoting Dr. James McCartney, Chair of the Department of Philosophy, Villanova University, and Eth-

rather as "the human form taking shape."²⁵⁴

"The moral debate over abortion centers on the point in the development of the fertilized ovum when it has acquired those characteristics that entitle it to moral respect."²⁵⁵ As stated earlier, there is strong public sentiment for the proposition that life begins at conception.²⁵⁶ The Warnock Committee recognized this public sentiment as strong support for the view of the "absolute sanctity" of life from the moment of conception.²⁵⁷ Life, however, has not always been deemed to begin at conception.²⁵⁸ Historically, "[a]t conception and the earliest stage of pregnancy before quickening, no one believed that a human life existed; not even the Catholic Church took this view."²⁵⁹ The modern Christian view of this issue, however, is that life begins at the moment of conception. The Catholic Church teaches that, "[h]uman *life* must be respected and protected absolutely from the *moment of conception*. From the first moment of his existence, a human being must be recognized as having the rights of a *person*—among which is the inviolable right of every innocent being to life."²⁶⁰ Similarly, in the view of the Orthodox Christian churches, the celebrations of the Feast of the Conception of St. John the Baptist and the Feast of the Annunciation of Christ²⁶¹ lend direct support for the inherent belief that human life begins at conception rather than at the time of viability.²⁶² Likewise, the Hebraic prophecies in the Old Testament lend support to life beginning prior to birth, as one finds in Jeremiah, "[b]efore I formed you in the womb I knew you, before you were born I dedicated you."²⁶³

The ability to procreate has been described as "a God-like privilege of man, which he has no right to refuse if he wants to

ics Consultant, Catholic East Health System).

²⁵⁴ *Id.*

²⁵⁵ BORK, *supra* note 157, at 176.

²⁵⁶ *See id.* at 174; WARNOCK, *supra* note 251.

²⁵⁷ Stenger, *supra* note 179, at 142.

²⁵⁸ *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE AND LAW IN THE UNITED STATES 1867–1973 8 (1997).

²⁵⁹ *Id.* (footnotes omitted).

²⁶⁰ CATECHISM OF THE CATHOLIC CHURCH 547 § 2270 (1994) (emphasis added). The official rules of the Catholic Church provide for excommunication as a penalty for aborting a life in the mother's womb.

²⁶¹ The Feast of the Annunciation of Christ is the celebration of the Conception of Christ Himself, as Man, in the womb of the Virgin Mary. *See* MEYENDORFF, *supra* note 163, at 64.

²⁶² *See id.*

²⁶³ *Jeremiah* 1:5.

preserve the 'image and likeness of God' given him at his creation."²⁶⁴ "Indeed, for those who believe a fetus has a soul and is a unique, irreplaceable object of God's affection and human responsibilities, it is hard to imagine how the fetus could not have interests and rights commensurate with those responsibilities."²⁶⁵ To that end, undoubtedly the aborting of a fetus is, in Biblical tradition, "an interruption of human *life*."²⁶⁶ In light of the many "persons" that have been afforded constitutional protection throughout our history, it appears that fetal life should likewise be granted those same rights and protections, as demonstrated by traditional legal doctrine and various religious beliefs.

It is commonly argued that one must be born and alive to qualify as a person.²⁶⁷ Yet the intent of our Constitution's framers regarding the definition of a "person" remains unclear. Assuming, arguendo, that the framers intended that only the living receive constitutional protection, it appears that satisfying the criterion of "living" may have been insufficient. Arguably, the framers' intent was to include only the typical white male property owner in their meaning of "person."²⁶⁸ Their intent to include blacks, women, and other minorities, who were considered at the time less than equal to white property owning males, is questionable, especially when general views on issues such as slavery are considered.²⁶⁹ Today, the idea of non-whites being

²⁶⁴ MEYENDORFF, *supra* note 163, at 61.

²⁶⁵ Daniel J.H. Greenwood, Review Essay, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 589 (1994).

²⁶⁶ MEYENDORFF, *supra* note 163, at 64.

²⁶⁷ This ignores the legal fiction of the personhood of the corporation, which is neither "born" nor "alive." See *supra* notes 37-46 and accompanying text.

²⁶⁸ See Orr, *supra* note 236 ("The issue of personal freedom is very touchy, but the Constitution is clear in this regard. It was written to permit a *man* to do pretty much as he pleases, and I use the term *man* with foresight.") (emphasis added).

²⁶⁹ See THE FEDERALIST NO. 54, at 336 (James Madison) (Clinton Rossiter ed., 1961) (explaining the general objection to including slaves in representation calculations was the notion that "[s]laves are considered as property, not as persons . . . [and should be] comprehended in estimates of taxation which are founded on property, and to be excluded from representation which is regulated by a census of persons"). Madison rejected the notion of slaves exclusively as property interests:

[One] must deny the fact that slaves are considered merely as property, and in no respect whatever as persons. . . . [T]he slave may appear to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property. In being protected, on the other hand, in his life and in his limbs, against the violence of all others, [and in] his liberty . . . the slave is no less evidently regarded by the

denied personhood protections is inconceivable. But the history of Supreme Court decisions has endorsed this notion, establishing the real potential for such drastic consequences. In *Dred Scott v. Sanford*,²⁷⁰ it was held that blacks were "beings of an inferior order," and as such would be considered mere "ordinary article[s] of merchandise and traffic."²⁷¹ Thus, individuals who clearly are born, alive, and human, were considered property rather than persons.²⁷²

That type of decision is not unusual. Historically, the Court has violated fundamental rights, as in *Dred Scott*. The effects of the *Dred Scott* decision were dreadful. "[I]t took a civil war to clean up the mess left by the Supreme Court . . . in *Dred Scott*."²⁷³ Does this "public sentiment" that governed at that time in any way justify or excuse the intolerable treatment of black slaves? The obvious answer is "no." It is crucial to consider whether, in another 150 years, we will awaken to discover that the current treatment of the fetus is as appalling as was the treatment received by black slaves, obviously persons, almost 150 years ago.

CONCLUSION

The United States Supreme Court has deemed the corpora-

law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property.

Id. at 337. The general sentiment of the time nonetheless persisted, as Madison classified slaves, in the same Federalist Paper, as both persons and property.

The federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixed character of persons and of property. This is in fact their true character. It is the character bestowed on them by the laws under which they live; and it will not be denied that these are the proper criterion; because it is only under the pretext that the laws have transformed the Negroes into subjects of property that a place is disputed them in the . . . [census]; and it is admitted that if the laws were to restore the rights which have been taken away, the Negroes could no longer be refused an equal share of representation with the other inhabitants.

Id.

²⁷⁰ 60 U.S. 393 (1856).

²⁷¹ *Id.* at 407.

²⁷² See *Cabinet for Human Resources v. Women's Health Servs., Inc.*, 878 S.W.2d 806, 809 (Ky. Ct. App. 1994) (McDonald, J., concurring) (comparing the *Roe* and *Dred Scott* decisions and stating that "eventually [*Roe v. Wade*] will be buried as an atrocity and rightfully recognized as one of the most immoral laws of humankind, comparable to the [*Dred Scott*] holding").

²⁷³ *Roe v. Wade Anniversary Views*, *supra* note 2.

tion a "person" under the Fourteenth Amendment and has afforded corporations great constitutional protections. The Court, in delineating corporate rights and protections, has not based its decisions upon the rights of others. Nevertheless, in the context of fetal life, the Court has persistently balanced fetal rights against the liberty interests of the mother. The determination of one's rights must not be based on those of another. The affording of rights to a class of "persons" must be determined through interpretation of the United States Constitution and the amendments thereto.

Undeniably the Court has created and extended rights where it has deemed appropriate, regardless of whether the judiciary has assumed powers it was not originally intended to have. This is perhaps the prime example of how the Court-created legal fiction guarantees and creates rights for "persons" to whom such rights otherwise would be unavailable. Likewise, the Court must afford the fetus, whether through the employment of the legal fiction or the recognition of the fetus as a life from the moment of conception, constitutional protection as a "person" under the Fourteenth Amendment.

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