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The Derivative Nature of Corporate Constitutional Rights

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THE DERIVATIVE NATURE OF CORPORATE CONSTITUTIONAL RIGHTS

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ABSTRACT

This Article engages the two-hundred-year history of corporate constitutional rights jurisprudence to show that the Supreme Court has long accorded rights to corporations based on the rationale that corporations represent associations of people from whom such rights are derived. The Article draws on the history of business corporations

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in America to argue that the Court's characterization of corporations as associations made sense throughout most of the nineteenth century. By the late nineteenth century, however, when the Court was deciding several key cases involving corporate rights, this associational view was already becoming a poor fit for some corporations. The Court's failure to account for the wide spectrum of organizations labeled "corporations" became increasingly problematic with the rise of modern business corporations that could no longer be fairly characterized as an identifiable group of people acting in association. Nonetheless, the Court continued to apply the associational rationale from early case law and expand corporate rights into the realm of speech and political spending without careful analysis of when the associational approach would be appropriate.

We set forth a theoretical framework that we believe is consistent with the underlying logic of the Court's jurisprudence, based on the concepts of derivative and instrumental rights. Specifically, we argue that the Court, to date, has not granted constitutional rights to corporations in their own right. Instead, it has granted rights to corporations either derivatively, when necessary to protect the rights of natural persons assumed to be represented by the corporation, or instrumentally, when necessary to protect the rights of parties outside the corporation. Further, we consider the implications that this framework, with a more nuanced view of the spectrum of corporations in existence, would have if applied to recent corporate rights cases, such as Citizens United. *We believe this framework provides a principled path forward for the difficult line drawing between corporations that needs to be done.*

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INTRODUCTION

Many Americans believe that the Supreme Court surely must have gotten it wrong in *Citizens United v. FEC* when the Court held that corporations can spend unlimited amounts of corporate treasury money on independent political expenditures.[1] Politicians and grassroots organizations have called for a fix to *Citizens United* in the courts or through the political process.[2] Legal scholars have examined *Citizens United* in depth—both defending and criticizing the case on a number of grounds—often engaging with the case primarily in the context of the First Amendment, campaign finance jurisprudence, or modern business law.[3]

Justice Frankfurter once observed that "[t]he history of American constitutional law in no small measure is the history of the impact of the modern corporation."[4] In that spirit, we add to the contemporary debate by examining corporate history from the earliest corporations in America through today's multinational conglomerates to shed light on the Court's recent corporate rights jurisprudence, to help us see its logic and its flaws, and to provide insight into future cases. The story of *Citizens United*, as well as of other recent cases, such as *Burwell v. Hobby Lobby Stores, Inc.*, concerning the religious liberty rights of business corporations,[5] are but a chapter in a

1. 558 U.S. 310, 365-66 (2010).

2. *See, e.g.*, Susanna Kim Ripken, *Corporate First Amendment Rights After* Citizens United*: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209 (2011).

3. *E.g.*, Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412 (2013); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); *see* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012); Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217 (2010); *see also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in* Citizens United, 61 CASE W. RES. L. REV. 497 (2010).

4. FELIX FRANKFURTER, THE COMMERCE CLAUSE: UNDER MARSHALL, TANEY AND WAITE 63 (1937).

5. 134 S. Ct. 2751 (2014).

much longer tale about the history of corporations in America and their treatment under the Constitution.

In this Article, we take up a set of questions about the history of corporations and corporate rights jurisprudence to better understand what the Supreme Court has wrought: What was the Court's understanding of the nature of corporations at the time that it decided some of the key early cases on the constitutional rights of corporations? Was this consistent with the population of corporations at the time? How did the Court's understanding evolve as it decided subsequent cases? Was the Court's understanding consistent with the role and function that corporations have played in society? And if not, how might a different or better understanding of corporations have led to a better outcome of corporate constitutional rights decisions by the Court?

In examining these questions, we find that the Court accorded constitutional rights based on a view of corporations as associations of persons, and that this view was largely consistent with what the actual population of corporations in the United States looked like during the period of the Court's earliest jurisprudence. But this characterization was already a poor fit for some corporations by the late nineteenth century. Furthermore, the Court's characterization of corporations as associations has not properly evolved to account for the wide spectrum of organizations labeled "corporations." This has become increasingly problematic as the Court has moved from early case law concerning the property and contract rights of corporations to the realm of corporate speech, political spending, and exercise of religion.

We then articulate a theoretical framework which we believe is consistent with the underlying logic of the Court's jurisprudence, based on the concepts of derivative and instrumental rights. We consider the implications of applying this framework, along with an appreciation of the spectrum of corporations in existence, to recent corporate rights cases, such as *Citizens United*. We argue that this framework provides a path forward in the very difficult and necessary project of line drawing between corporations. In this way, we attempt to draw upon a richer history of corporations and case law concerning the scope of their constitutional protection to theorize a more nuanced and grounded treatment of corporations.

This Article proceeds in four parts. In Part I, we review Supreme Court decisions involving corporations and constitutional rights through the nineteenth century to show that even if not clearly articulated, the Court's reasoning in these cases was based on an understanding of corporations as associations of individuals—more like partnerships or membership organizations than the large, publicly traded business corporations of today. This tracing of early case law shows that despite public perceptions, the Court has never based its corporate rights jurisprudence on the idea that a corporation is a constitutionally protected "person" in its own right. The Court has instead granted constitutional rights to corporations to derivatively protect the rights of the natural persons that are assumed to be represented by the corporation, or that are interacting with the corporation.

In Part II, we observe that the Court's view of corporations as associations of persons was largely consistent with what the actual population of corporations in the United States looked like until the late nineteenth century. However, by that time, when the Court was deciding several important cases on the constitutional rights of corporations, it was becoming problematic to regard all corporations as associations. American businesses were undergoing a dramatic transformation. Some business corporations were becoming much larger, with business activities that spanned the continent and even extended internationally. A number of huge corporations were formed by the merging together of groups of smaller corporations. Some of the larger corporations had thousands of employees. They were also quickly becoming publicly traded, with hundreds, and sometimes thousands of passive investors. They were becoming professionally managed, so that they no longer reflected the goals, aspirations, and efforts of a founder or a few individual investors. They were taking on identities—often tied to brands—that were truly separate from any of their individual investors, directors, or managers, and their separate corporate identities were being promoted to facilitate their interactions with customers, suppliers, employees, and the communities in which they operated.

By about 1910, a sizable class of very large, branded, publicly traded corporations had emerged, and for these entities, it was no longer credible that they would be seen as proxies for the interests

of a well-defined and identifiable group of individual investors or other participants. Although there might have been some matters in which such a corporation could appropriately be viewed as representing the aggregate interests of its investors (or perhaps of its managers, employees, or customers), in many matters, its interests could not be clearly identified with any particular group of individuals. Meanwhile, the corporate form continued to be used for nonprofits, cooperatives, political units, clubs, and advocacy associations, for which the idea of the corporation as a proxy for an association of individuals remained valid. Thus, the spectrum of types of organizations encompassed by the term "corporation" had rapidly expanded over the course of the nineteenth century. This change made it increasingly problematic for the Court to broadly rule on constitutional rights as to all corporations in general.

In Part III, we examine how the Supreme Court responded to the rise of modern business corporations. In the early twentieth century, the Court recognized corporate criminal liability and certain constitutional protections for corporations in the context of searches and trials. And since the 1970s, the Court has recognized protections for commercial speech, corporate political spending, and statutory protection for religious free exercise. Yet we find that despite the transformation in the types of corporations in existence, and the different legal questions presented, the Court has not carefully analyzed its legal theory of corporate rights, nor has it expressly articulated a framework for thinking about corporations that could guide its decision making in a consistent way.

In Part IV, we observe that even without such a framework, the Court consistently treated corporate rights as either derivative or instrumental rights. From this observation, we propose a framework for thinking about when a corporation should be extended constitutional protections. First, we focus on the derivative rights rationale as a line-drawing mechanism. If the Court is going to recognize a corporate right, it should be able to identify the specific group of natural persons from whom the corporate right is derived. Further, the natural persons said to be represented by the corporation must have associated for purposes related to the rights at issue in the case. Second, we observe that when the Court instead uses an instrumental rationale for according a corporate right, the basis for

the right is weaker because it is further attenuated from a natural person with an original basis for the right. This implies that some constraint or regulation may be appropriate to ensure the purpose of the right is served. We argue that many of the Supreme Court's corporate rights decisions fit well within this framework, at least as to the facts of the specific cases if not to the breadth of the Court's rulings. Thus, this Article is a rethinking, but one that is conceptually rooted in the Court's own jurisprudence. Moreover, the framework provides a basis for line drawing in future cases when logic and policy are not well served by granting the same constitutional protections to all corporations.

I. EARLY SUPREME COURT JURISPRUDENCE CONCERNING CORPORATE CONSTITUTIONAL RIGHTS

The text of the U.S. Constitution does not expressly refer to corporations. The Supreme Court faced one of its earliest tasks of interpreting how a constitutional provision applies to corporations in the 1809 case *Bank of the United States v. Deveaux*.[6] The case concerned Article III, Section 2, Clause 1 of the Constitution, which together with the Judiciary Act of 1789 provides that the federal judiciary may hear "cases" or "controversies" between "citizens" of different states.[7] Determining whether diversity jurisdiction existed for natural persons was relatively straightforward, but it was unclear whether a corporation was a "citizen" for this purpose and if it was, of what state the corporation was a citizen.

In holding that diversity jurisdiction exists when there is "complete diversity" of state citizenship between the shareholders of a corporate party and the opposing party, the Supreme Court looked to the natural persons composing a corporation.[8] The corporation in the case, the first Bank of the United States, was established under an act of Congress in 1791 and its shareholders, president, and

6. 9 U.S. (5 Cranch) 61 (1809).

7. *Id.* at 87-88; *see also* Dudley O. McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 879 (1943) (discussing diversity jurisdiction).

8. *Deveaux*, 9 U.S. (5 Cranch) at 88-92. Complete diversity exists when none of the plaintiffs is a citizen of the same state as any of the defendants. *See, e.g.*, 13E CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3605 (3d ed. 2013).

directors were all citizens of Pennsylvania.[9] It sued in the name of "[t]he President, Directors and Company of the Bank of the United States," and averred that the defendants, Deveaux and Roberts, were citizens of Georgia.[10] Writing for the Court, Chief Justice Marshall explained that the corporate entity itself was not a "citizen." The corporation had no right to sue or be sued in federal court unless the Court looked to the rights of its "members": "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name."[11]

The Court found it could look to these members because "[s]ubstantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution of the national tribunals."[12] Relying on English law, the Court found precedent for understanding a corporation as "a mere creature of the law, invisible, intangible, and incorporeal" yet also for including corporations "within terms of description appropriated to real persons."[13] The Court recounted one English case in which the "judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual" rather than finding the "characters

9. *Deveaux*, 9 U.S. (5 Cranch) at 62-63, 73 (argument of Binney for plaintiffs in error). Two other cases were argued and considered together with *Deveaux*: *Hope Insurance Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 57 (1809), involving two citizens of Massachusetts suing an insurance company incorporated in Rhode Island, and *Maryland Insurance Co. v. Woods*, 10 U.S. (6 Cranch) 29, 43 (1810), involving a plaintiff that was a citizen of Pennsylvania and a defendant insurance company composed of citizens of Maryland. The Court found the averment in *Hope Insurance Co.* insufficient because it specified the state in which the corporation was incorporated but did not allege the citizenship of the shareholders. *Hope Ins. Co.*, 9 U.S. (5 Cranch) at 61. It appears from the *Deveaux* holding and the subsequent consideration of the *Maryland Insurance Co.* case on its merits that the Court found the averment sufficient in that case as it indicated the citizenship of its members. *Maryland Ins. Co.*, 10 U.S. (6 Cranch) at 43; *Deveaux*, 9 U.S. (5 Cranch) 61.

10. *Deveaux*, 9 U.S. (5 Cranch) at 62, 73.

11. *Id.* at 86.

12. *Id.* at 87-88.

13. *Id.* at 87-88.

of the individuals who composed it were completely merged."[14] Likewise, the Court noted that in the case at hand, "the corporate name represents persons who are members of the corporation."[15]

Thus, although the Court recognized that incorporating meant creating a separate artificial being, from its earliest case considering the treatment of corporations under the Constitution, the Court saw the corporation as representing the identifiable group of people who had chosen to associate through the corporate form. Partnerships and corporations were therefore initially treated the same for purposes of diversity jurisdiction.[16]

The Court continued to consider the interests of individuals who had associated through the corporate form in the 1819 case *Trustees of Dartmouth College v. Woodward*.[17] The twelve trustees of the college, who had been incorporated as "The Trustees of Dartmouth College" to run the religious and literary institution, brought a suit for the corporate property after the New Hampshire state legislature passed acts amending the corporate charter.[18] The state legislature's acts gave the state control over the college by creating a board of state-appointed overseers and transferring property vested in the old trustees to a new board of trustees.[19] At issue was whether the state legislature's acts violated the Contract Clause of the Constitution, which prohibits states from passing any law "impairing the obligation of contracts."[20]

The Court held that the New Hampshire state legislature's act to unilaterally alter the charter of Dartmouth College indeed violated the Contract Clause.[21] The Court reasoned that the corporate charter

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14. *Id.* at 90.

15. *Id.* at 90-91 (explaining that the Court would "consider the character of the individuals who compose" the corporation "when they use the name of the corporation, for the purpose of asserting their corporate rights").

16. Debra R. Cohen, *Citizenship of Limited Liability Companies for Diversity Jurisdiction*, 6 J. SMALL & EMERGING BUS. L. 435, 452 (2002). For cases following *Deveaux*, see *Commercial & R.R. Bank of Vicksburg v. Slocomb, Richards & Co.*, 39 U.S. (14 Pet.) 60 (1840); *Bank of the United States v. Martin*, 30 U.S. (5 Pet.) 479 (1831); *Bretthaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238 (1828); and *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821).

17. 17 U.S. (4 Wheat.) 518 (1819).

18. *Id.* at 550.

19. *Id.* at 539-49.

20. *Id.* at 588-89.

21. *Id.* at 518, 652-54; *see also* Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 560 (1830) ("It has been settled that a contract entered into between a state and an individual, is as fully

was a contract as it effectively represented an agreement between the people who applied for it and the government body that granted it.[22] Further, it was a contract within the meaning of the Contract Clause because the corporate charter was for a private rather than public institution.[23] That is, the Contract Clause pertained to contracts for private property—it "did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government," but rather to restrain state legislatures from impairing "contracts respecting property, under which some individual could claim a right to something beneficial to himself."[24] The case therefore turned on whether the Court construed Dartmouth College as private in nature. The Court reasoned that it was private because despite incorporation requiring a government grant, the founder had started the school at his own expense, and it was further funded by private donations from individuals who wished to promote its religious and educational aims.[25] The donors no longer had a direct interest in the property as it was an "eleemosynary," or charitable institution, but the Court explained that the corporation "stands in their place" to distribute the property as they would have done, through the acts of its trustees.[26] In sum, in extending constitutional protection to the corporation, the Court looked to the founders, donors, and trustees in identifying the human persons whose rights would otherwise be impaired.

After rulings on diversity jurisdiction and the Contract Clause, the Supreme Court addressed whether corporations were "citizens" for purposes of Article IV's Privileges and Immunities Clause. In the 1839 case *Bank of Augusta v. Earle*, the Court found there were limits to the scope of constitutional protections for corporations.[27] An Alabama citizen had refused to honor bills of exchange issued by a Georgia bank on the basis that the bank was a foreign corporation

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protected by the tenth section of the first article of the constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract.").

22. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 626-27.

23. *Id.* at 627-29.

24. *Id.* at 628-29.

25. *Id.* at 631-39.

26. *Id.* at 642.

27. 38 U.S. (13 Pet.) 519, 586-87 (1839).

that had no right to contract outside of its chartering state.[28] The bank claimed that it had the rights of a "citizen" to enter another state and conduct business.[29] Although the case involved a bank, as in *Deveaux*, in contrast to earlier approaches, the Court refused to consider the individual members composing the corporation and their interests.[30]

Chief Justice Taney expressed concern that relying on an associational view of the corporation might undermine the policy of shareholder limited liability that was gaining acceptance at the time and would put members of a corporation on higher ground than members of a partnership when contracting in another state.[31] In his words:

> If ... the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner.[32]

Article IV's Privileges and Immunities Clause, the Court reasoned, never intended to give citizens privileges and at the same time exempt them from liabilities.[33] When "a corporation makes a contract, it is the contract of the legal entity" and the corporation itself is not a "citizen" for purposes of the Privileges and Immunities Clause.[34] Instead, the principle of comity may permit a corporation to make valid contracts in another state.[35] The Court distinguished between rights granted to corporations because the corporation served as a

28. *Id.* at 521-22.

29. *Id.* at 523-24.

30. *Id.* at 586-87.

31. *Id.* at 586; *see also* Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 306-07 (1990) (discussing *Bank of Augusta v. Earle*).

32. *Bank of Augusta*, 38 U.S. (13 Pet.) at 586.

33. *Id.*

34. *Id.* at 587.

35. *Id.* at 588-92. Comity is a principle by which the courts of one jurisdiction voluntarily give effect to the laws of another out of deference and respect. 30 AM. JUR. 2D *Executions, Etc.* § 670 (2013).

proxy for its members, shareholders, or contributors, and rights that were available only to citizens directly.

In the 1840s and 1850s, the Court reexamined its approach to diversity jurisdiction, established earlier in *Deveaux*. In *Louisville, Cincinnati & Charleston Railroad v. Letson*, the Court overruled *Deveaux*, finding that it was "carried too far" and not "entirely satisfactory."[36] *Letson* involved a factual difficulty: the defendant railroad had a banking corporation shareholder and an insurance company shareholder, each of which had shareholders from New York, the same state of citizenship as the plaintiff.[37] If the Court had followed *Deveaux*, federal jurisdiction would be lacking as diversity of state citizenship was not complete between the railroad shareholders and the plaintiff.[38] Instead, the Court held that the corporation was a "citizen" of the state in which it was incorporated, at least for purposes of diversity jurisdiction.[39] That is, in contrast to its earlier approach, the Court looked no further than the "artificial entity" and its state of incorporation.[40] However, just ten years later, in *Marshall v. Baltimore & Ohio Railroad*, the Court changed the rationale back to the notion that a suit by or against a corporation is regarded as a suit by or against its shareholders.[41] Further, in determining the "citizenship" of the railroad, the Court established a conclusive presumption that all shareholders of a corporation are citizens of the state of incorporation.[42] This approach offered the logistical ease of *Letson*, while perpetuating the *Deveaux* Court's

36. 43 U.S. (2 How.) 497, 554-56 (1844).

37. *Id.* at 551; *see also id.* at 498 (argument of Mazyck for plaintiffs in error).

38. *Id.* at 552; *see also* McGovney, *supra* note 7, at 879 ("It was that predicament that forced the Court to overrule the *Deveaux* case.").

39. *Letson*, 43 U.S. (2 How.) at 555 ("A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."). Before *Letson*, the Court had continued to follow *Deveaux* when determining diversity jurisdiction and "would look beyond the mere corporate character, to the individuals of whom it was composed." Commercial & R.R. Bank of Vicksburg v. Slocomb, Richards & Co., 39 U.S. (14 Pet.) 60, 64 (1840).

40. *Letson*, 43 U.S. (2 How.) at 555.

41. 57 U.S. (16 How.) 314, 325-29 (1854).

42. *Id.* at 328-29.

vision of regarding the corporation as a citizen because of its shareholders.[43]

The influence of these earlier cases was evident by the 1850s and 1860s. In *Dodge v. Woolsey*, in 1856, the Court allowed the shareholder of a bank to bring suit in federal court against the bank and its directors for refusing to challenge a tax assessment made against the bank in violation of its original charter, which had set a lower tax level.[44] In this early shareholder derivative action, the Court allowed for diversity jurisdiction, arguably extending and slightly undermining its rationale in *Marshall*.[45] Despite *Marshall*'s presumption that all shareholders are citizens of the corporation's state of incorporation, the Court found diversity between the shareholder and the corporation on the basis of the shareholder's adverse stance in the case.[46] Yet at the same time, the Court was still following *Marshall*'s general logic in determining the corporation's state of citizenship and the opinion reflected a willingness to look through the corporation to see if an injury to the corporation was an injury to its shareholders.

Further, the *Dodge* case reflected the influence of *Dartmouth College* as the Court continued to hear Contract Clause claims in cases involving corporate charters.[47] Over time, this line of cases engendered more controversy as jurists disagreed about whether and how to give corporate charters strict construction and whether states were allowed to modify or revoke special privileges with regard to eminent domain, tax, or police regulations.[48] *Dodge* illustrated this controversy with the majority ruling that the tax impaired the obligation created under the corporate charter, and Justice

43. For a discussion of the subsequent history of federal jurisdiction rules, see Cohen, *supra* note 16, at 455-62.

44. 59 U.S. (18 How.) 331, 336, 346-47 (1856).

45. *See id.* at 341-45 (allowing a shareholder to sue his own corporation in equity where there is a "breach of trust").

46. *Id.* at 341.

47. In the nineteenth century, the Contract Clause was one of the most frequently litigated constitutional provisions and "[n]early ninety percent of all contract clause cases involved state-granted franchises, mainly corporate charters." Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 3 n.2, 7 (1986) (citing B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 95, 101, 243 (1938)).

48. *Id.* at 36-54, 70-72. For an early case in which the Court strictly construed a corporate charter, see *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

Campbell's dissent arguing that the state's power to tax was inalienable and not "renounced in favor of chartered associations."[49] In the next couple of decades, the Court moved in the direction suggested by the dissent, upholding state police power to regulate corporations against Contract Clause claims,[50] but it did not move beyond conceptions of the corporation as an artificial entity representing an association or aggregate of investors.[51] The Court also reaffirmed, in *Paul v. Virginia*, its earlier conclusion from *Bank of Augusta* that a corporation was not a citizen for purposes of the Article IV Privileges and Immunities Clause.[52] Thus, on the whole, the case law reflected a view of the corporation as an artificial entity representing an association of individuals, and the Court used this view in limited rulings to protect the contract and property interests of the shareholders or members, whom it saw as the natural persons composing the corporation.[53]

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49. *Dodge*, 59 U.S. (18 How.) at 370-80 (Campbell, J., dissenting); *see also* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1619-20 (1988) ("It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created .... Every privilege granted or right conferred ... being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless or corrupt legislation." (quoting THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 335 (2d ed. 1871))); *id.* at 1635 (discussing "[t]he close connection between the rise of the general corporation act and the subsequent judicial revolt against the special subsidy").

50. *See, e.g.*, R.R. Comm'n Cases, 116 U.S. 307, 329-30, 351-52, 355 (1886); Ruggles v. Illinois, 108 U.S. 526, 533 (1883); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 670 (1878); Hovenkamp, *supra* note 49, at 1625-27 (discussing the decline of the Contract Clause doctrine in the late nineteenth century); *see also* James W. Ely Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371, 376, 387-92 (2010).

51. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 73 (1992); *see also* Hovenkamp, *supra* note 49, at 1630-32 (discussing the railroads' arguments in the 1870s *Granger Cases* based on the associational view of the corporation).

52. 75 U.S. (8 Wall.) 168, 181-82 (1868); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

53. A number of corporate law scholars have distinguished the "artificial entity" view of corporations from the "association" view of corporations, however, our reading of nineteenth-century cases is that the Court used both phrases, but did not intend to suggest that the phrases represented different or inconsistent views. *See, e.g.*, Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1449-50 n.23 (1987) (explaining that Chief Justice Marshall's use of the word "artificial" referred to the "entity's property-holding capacity" on behalf of investors, and characteristics such as perpetual succession: "The natural way to hold property was as an individual human being; the artificial way was as a corporation").

After the Civil War, in 1868, the Fourteenth Amendment was adopted as one of three Reconstruction Amendments. Section 1 of the Fourteenth Amendment includes the Privileges or Immunities, Equal Protection, and Due Process Clauses.[54] The Court's first decisions interpreting the Fourteenth Amendment raised important questions regarding the aim of its protections and the scope of state police power to regulate business.

In the *Slaughter-House Cases*, the Court's first major decision on the Fourteenth Amendment, the Court very narrowly interpreted the Privileges or Immunities Clause.[55] As a constitutional exercise of state police power, the Court upheld a Louisiana law that confined all slaughtering of animals in the New Orleans area to a specific slaughterhouse located south of the city limits.[56] In so holding, the Court stated that the new amendments should be interpreted in light of the purpose of ensuring the freedom of African Americans, and it narrowly read the Privileges or Immunities Clause to distinguish between the rights of state and national citizenship, finding that the butchers' claims opposing the state-created monopoly and limits on their occupational practice were not within the meaning of the Fourteenth Amendment.[57] Justice Field dissented, arguing for a more expansive reading of the Fourteenth Amendment and criticizing the majority for vitiating the Privileges or Immunities Clause. Separate dissents by Justices Bradley and Swayne argued that the state regulation deprived the butchers of their property rights without due process of law in violation of the Fourteenth

54. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 protection of the laws.").

55. 83 U.S. (16 Wall.) 36, 74-80 (1873).

56. *Id.* at 59-65.

57. *Id.* at 73-74. For a discussion of the *Slaughter-House Cases*, see Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 297-300 (2006); David S. Bogen, *Rebuilding the* Slaughter-House*: The* Cases' *Support for Civil Rights*, 42 AKRON L. REV. 1129, 1131-34 (2009); Wilson R. Huhn, *The Legacy of* Slaughterhouse, Bradwell, *and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1052-601 (2009); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the* Slaughter-House Cases, 109 YALE L.J. 643, 650-86 (2000).

Amendment.[58] In this early period after the passage of the Fourteenth Amendment, the Court also upheld, in *Munn v. Illinois* and its companion *Granger Cases*, legislation that set maximum railroad and grain storage rates.[59] The Court relied again on the concept of state police power to regulate conduct when necessary for the public good.[60]

By the early to mid-1880s, *Santa Clara County v. Southern Pacific Railroad* came to the Supreme Court raising the question of whether a corporation is a "person" within the meaning of the Fourteenth Amendment.[61] The case represented a group of similar tax cases involving various railroad corporations, including a companion case brought by San Mateo County against the Southern Pacific Railroad Company.[62] These cases all concerned whether a provision of the California constitution violated the Fourteenth

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58. *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 111-12 (Bradley, J., dissenting); *id.* at 126-28 (Swayne, J., dissenting).

59. 94 U.S. 113, 133-36 (1877). The *Granger Cases* included: *Stone v. Wisconsin*, 94 U.S. 181 (1877); *Winona & St. Peter R.R. v. Blake*, 94 U.S. 180 (1877); *Chicago, Milwaukee & St. Paul R.R. v. Ackley*, 94 U.S. 179 (1877); *Peik v. Chicago & North-western Railway*, 94 U.S. 164 (1877); and *Chicago, Burlington & Quincy R.R. v. Iowa*, 94 U.S. 155 (1877).

60. *See Munn*, 94 U.S. at 133-36.

61. 118 U.S. 394, 410-17 (1886). Before *Santa Clara*, the Court had previously referred to corporations as "artificial persons" and "associations of persons" as discussed above, and had construed the term "person" in various statutes and treaties as including corporations. *See, e.g.*, United States v. Fox, 94 U.S. 315, 321 (1876) (construing the term "person" as used in the English Statute of Wills, and incorporated into New York state law, as including corporations); United States v. Ins. Cos., 89 U.S. (22 Wall.) 99, 104 (1875) (construing a statute that provided for suits by "persons" to recover proceeds from the sale of property captured during the Civil War as including corporations); Soc'y for Propagation of the Gospel in Foreign Parts v. Town of New-Haven, 21 U.S. (8 Wheat.) 464, 489-92 (1823) (construing a corporation as a "person" whose property was protected by the Treaty of Peace of 1783 between the United States and Great Britain). In several instances before *Santa Clara*, the Court rejected corporate claims of equal protection and due process without addressing whether corporations had such rights. Stone v. Farmer's Loan & Trust Co., 116 U.S. 307, 331, 335-36 (1886); Mo. Pac. Ry. v. Humes, 115 U.S. 512, 523 (1885); The Ky. R.R. Tax Cases, 115 U.S. 321, 328, 336 (1885); Chi. Life Ins. Co. v. Needles, 113 U.S. 574, 579-84 (1884); The Sinking-Fund Cases, 99 U.S. 700, 718-19 (1879); R.R. v. Richmond, 96 U.S. 521, 529 (1878).

62. Santa Clara Cnty. v. S. Pac. R.R., 18 F. 385 (C.C.D. Cal. 1883) (including as defendants the Southern Pacific Railroad Company, the Northern Railroad Company, and the Central Pacific Railroad Company); San Mateo v. S. Pac. R.R., 13 F. 722 (C.C.D. Cal. 1882). These cases are also known as the *Railroad Tax Cases*. For a detailed discussion of the history and resolution of the *Santa Clara* and *San Mateo* cases, see HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 414-28 (1968); and Malcolm J. Harkins III, *The Uneasy Relationship of* Hobby Lobby, Conestoga Wood, *the Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 201 (2014).

Amendment of the U.S. Constitution by allowing all taxpayers except "railroads and other quasi-public corporations" to deduct the value of mortgages from their property tax assessment.[63] The railroad corporations claimed this provision violated their equal protection rights and they refused to pay their tax bills, forcing various counties to institute suits to recover the delinquent taxes and enabling railroads to test the validity of their claims.[64]

As was customary for Supreme Court justices at the time, Justice Field had traveled to his home state of California to hear cases in the circuit court below, and his opinions provide useful insight into views of corporations at the time. To start, in the *Santa Clara* circuit opinion, Justice Field broadly interpreted Section 1 of the Fourteenth Amendment and characterized corporations as associations. He explained that "private corporations consist of an association of individuals united for some lawful purpose, and [are] permitted to use a common name in their business and have succession of membership without dissolution."[65] The individuals "do not, because of such association, lose their rights to protection, and equality of protection."[66] In Justice Field's view, the Fourteenth Amendment protects the property of persons—which he referred to as "members" or "corporators"—who were "united" or "associated" together in a "corporation" or "union."[67] That is:

> [W]henever a provision of the constitution or of a law guaranties to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to

63. *Santa Clara*, 118 U.S. at 404, 409 (emphasis omitted). At oral argument, counsel for the railroads discussed that the United States government had invested $30 million in the Central Pacific Railroad Company, and that the railroads, a "great national undertaking," provided the "one means of carrying on the interchange of military, postal, financial, civil and commercial operations between the thirty-eight States of this Union from the shore of the Atlantic to the tranquil Pacific." Transcript of Oral Argument of Geo. F. Edmunds, Defendants in Error at 10, 16, 18, *Santa Clara*, 118 U.S. 394 (No. 464); *see also Santa Clara*, 18 F. at 387 ("It is contended that congress has selected these corporations as the special agents and instruments of the nation for public purposes, and to that end has clothed them with faculties, powers, and privileges to enable them to construct and maintain their roads as postal and military roads of the government.").

64. *Santa Clara*, 118 U.S. at 404, 409.

65. *Santa Clara*, 18 F. at 402.

66. *Id.*

67. *Id.* at 402-04.

> corporations; not to the name under which different persons are united, but to the individuals composing the union. The courts will always look through the name to see and protect those whom the name represents.[68]

This is because "to protect [corporations] from spoliation is to protect the corporators also."[69]

> Surely these great constitutional provisions, which have been, not inaptly, termed a new *Magna Charta*, cannot be made to read, as counsel contend, "nor shall any state deprive any person of life, liberty, or property without due process of law, *unless he be associated with others in a corporation*, nor deny to any person within its jurisdiction the equal protection of the laws, *unless he be a member of a corporation.*" How petty and narrow would provisions thus limited appear in the fundamental law of a great people![70]

While characterizing corporations as associations, Justice Field recognized the widespread use of corporations for business as well as nonbusiness purposes, and noted the vast property aggregated in manufacturing and other companies, and the large scale of railroad corporations in particular.[71] He made particular note of the miles of railway, the value of the roads, and the 1.6 million people employed in the operation and construction of railroads.[72] From this observation, Justice Field commented that "all this vast property which ... promotes civilization and progress" is not "lifted" from

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68. *Id.* at 403.

69. *Id.* at 404.

70. *Id.*

71. *Id.* at 404-05 (including in his description of corporations "religious, educational, or scientific" organizations, which most likely were nonprofit corporations, and noting extensive amounts of property held in corporations).

72. *Id.* at 405. In his concurring opinion, Judge Sawyer referred more directly to the plaintiff's argument, which is perhaps what spurred the Court's reflection on the size and wealth of the defendants:

> Great stress was laid in the arguments of plaintiffs' counsel upon the growing and overweening power and greed of corporations; and it was vehemently asserted that this is a struggle between the people and the corporations for supremacy; that corporations by corrupt means, and through their large and wide-spread influence, have obtained, and they are obtaining, control of legislatures, etc.

Id. at 437 (Sawyer, J., concurring).

"constitutional guaranties, by reason of the incorporation of the companies; that is, because the persons composing them—amounting in the aggregate to nearly half the entire population of the country—have united themselves in that form under the law for the convenience of business."[73]

Likewise, in his related *San Mateo* circuit opinion, Justice Field acknowledged the large scale of the railroad corporations before the court, but maintained a characterization of corporations as associations of persons deserving equal protection of their property:

> The questions ... received from the court the most patient and thoughtful examination. Indeed, their examination has been accompanied with a painful anxiety to reach a right conclusion, aware as the court is of the opinion prevailing throughout the community that the railroad corporations of the state, by means of their great wealth and the numbers in their employ, have become so powerful as to be disturbing influences in the administration of the laws .... Whatever acts may be imputed justly or unjustly to the corporations, they are entitled when they enter the tribunals of the nation to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.[74]

Justice Field further explained: "Private corporations are, it is true, artificial persons, but with the exception of a sole corporation, with which we are not concerned, they consist of aggregations of individuals united for some legitimate business."[75] Given their widespread use for everything ranging from business to charity, "[i]t would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a

73. *Id.* at 405 (majority opinion).
74. San Mateo v. S. Pac. R.R., 13 F. 722, 730 (C.C.D. Cal. 1882).
75. *Id.* at 743.

corporation."[76] The Amendment protects "the property of the corporators."[77]

Counsel for the defendant railroads also promoted the view of corporations as associations in their briefs and oral arguments before the Supreme Court and the circuit court below. For instance, George Edmunds stated in oral argument for the railroads, "The equality of protection is an equality of protection to men, whether they are associated or dissociated."[78] Similarly, William Evarts, also counsel for the defendant railroads, characterized the corporate form as a way for natural persons to collectively hold property:

> It is of no consequence whether the property ... is owned by a firm, or by a joint association, or by a corporation, or by a man, or by a hundred men ... because you have taken wholly from the range of discussion and diversity from the State any opportunity to make these discriminations.[79]

In the *San Mateo* case, John Norton Pomeroy wrote for the defendant railroads: "The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators."[80] These formulations focused on protecting the property of the corporators and treated "the corporation as a species of partnership."[81]

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76. *Id.* at 744. Likewise, Chief Judge Sawyer concurred in *San Mateo*, as he did in *Santa Clara*, with a reference to corporations as "corporators ... united into an ideal legal entity" and as an "artificial being between the real beneficial owners and the state, for the simple purpose of convenient management of the business." *Id.* at 757-58 (Sawyer, C.J., concurring). Chief Judge Sawyer also relied on *Bank of the United States v. Deveaux*, asserting that the case had settled "that the corporators are united into an ideal legal entity, called a corporation, [and this] does not prevent them from having a right of property in the assets of the corporation which is entitled to [constitutional protection]." *Id.*

77. *Id.* at 747 (majority opinion). Both Justice Field and Chief Judge Sawyer rejected the suggestion in the *Slaughter-House Cases* that the protection afforded in the Fourteenth Amendment was intended to include only African Americans. *Id.* at 740-41; *id.* at 761 (Sawyer, C.J., concurring).

78. Transcript of Oral Argument of Geo. F. Edmunds, for Defendants in Error, *supra* note 63, at 14.

79. Transcript of Oral Argument of William M. Evarts, for Defendants in Error at 13, *Santa Clara*, 118 U.S. 394 (1886) (No. 464); *see also id.* at 17 (noting that corporations are "of common right, by which all the people in California can aggregate themselves").

80. *San Mateo*, 13 F. at 758 (Sawyer, C.J., concurring) (quoting John Norton Pomeroy for defendants).

81. Mark, *supra* note 53, at 1442; *see also* HORWITZ, *supra* note 51, at 73 ("Up to the 1880s,

When *Santa Clara* rose up to the Supreme Court on appeal, Chief Justice Waite disposed of the railroads' Fourteenth Amendment claims in a comment made before oral argument:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.[82]

The Court's opinion, written by Justice John Marshall Harlan, avoided ruling on the constitutional issue, instead taking a narrower approach by finding that the tax assessment was void because of a technical defect.[83] Chief Justice Waite's statement from the bench was included only in the court reporter's headnotes, which lack the binding effect of the law.[84]

Nineteenth-century cases decided after *Santa Clara* do little to further flesh out the Court's view of the corporation, but what little they do in this regard is consistent with an associational view. In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, the Court held that corporations are not "citizens" for purposes of the Fourteenth Amendment's Privileges or Immunities Clause.[85] This holding followed from earlier cases concerning the Privileges and Immunities Clause of Article IV, such as *Bank of Augusta v. Earle* and *Paul v. Virginia*.[86] Nonetheless, the opinion noted as an aside: "Under the designation of person [in the Fourteenth Amendment] there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."[87] A

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there was a strong tendency to analyze corporation law not very differently from the law of partnership."); *id.* at 90 (discussing Victor Morawetz's 1882 *A Treatise on the Law of Private Corporations*, which "treated corporations as virtually indistinguishable from partnerships").

82. *Santa Clara*, 118 U.S. at 396 (headnotes).

83. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1643.

84. *See* GRAHAM, *supra* note 62; Mark, *supra* note 53, at 1463-64; Pollman, *supra* note 83, at 1643.

85. 125 U.S. 181, 187 (1888).

86. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 581-82 (1839); *see also supra* text accompanying notes 27-35, 52.

87. *Pembina Consol.*, 125 U.S. at 189; *see* Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205, 209

year later in *Minneapolis & St. Lewis Railroad v. Beckwith*, the Court rejected the Fourteenth Amendment due process and equal protection claims of a railroad corporation, but generally affirmed "that corporations can invoke the benefits of provisions of the constitution and laws which guaranty to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it."[88]

We see from this history that the Court repeatedly treated corporations as artificial entities representing associations of individuals, and found constitutional rights for corporations as *derivative* rights—derived from the rights of natural persons behind the corporation. The other notable limit of these nineteenth-century cases is the subject matter. These early cases recognizing corporations as holders of constitutional rights, or "persons" under the Constitution, responded to questions about whether corporations should have the property and contract rights and protections afforded to individuals. From *Dartmouth College*, involving the protection of a corporate charter as a contract, to *Santa Clara*, involving the protection of the property interests of railroad corporations, the context remained a question of contract and property.[89] Even the Court's early case law concerning diversity jurisdiction, at its core, represented a corporation attempting to vindicate a property right. The essential dispute in *Bank of the United States v. Deveaux* was the bank's challenge of a Georgia statute that purported to tax the bank.[90] The Supreme Court itself characterized this line of cases as concerning "where contracts or rights of property are to be enforced by or against corporations."[91]

(1888) (rejecting Fourteenth Amendment claim of railroad company because "when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions").

88. 129 U.S. 26, 28 (1889) (citing *Pembina Consol.*, 125 U.S. at 189; Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886).

89. *See* Hovenkamp, *supra* note 49, at 1641 (noting that the doctrine of corporate personhood addressed the "problem [of] guaranteeing that the owners of property held in the name of a corporation would receive the same constitutional protections as the owners of property held in their own name").

90. 9 U.S. (5 Cranch) 61, 63 (1809).

91. *Paul*, 75 U.S. (8 Wall.) at 177-78. Legal literature around this time also discussed the case law as concerning property and contract rights. *See* GRIFFITH OGDEN ELLIS, QUESTIONS ANSWERED AND DIFFICULTIES MET FOR STUDENTS OF LAW 40, 41 (1899) (noting that the word

Further, when the Court made its *Santa Clara* ruling, the Fourteenth Amendment had not yet been used to make provisions of the Bill of Rights applicable to the states.[92] Thus, the Court's early jurisprudence recognizing corporate property as having certain constitutional protections was, at least in hindsight, relatively modest in scope, even though some jurists and commentators expressed concern about privileges, monopolies, and growing concentrations of wealth.[93] The case law "merely affirmed that corporate property was protected as property of the corporators."[94] In addition, certain constitutional protections had been refused to corporations—such as the protections of the privileges and immunities of "citizens" under Article IV and the Fourteenth Amendment—which underscored that rights accorded to corporations were circumscribed.[95] In short, by the late nineteenth century, the Court had accorded certain constitutional protections to corporate property and contracts, with a view toward protecting the persons associating through the corporate form, but this protection was limited in scope.

In the next Part, we examine available data on the actual population of corporations in the United States between the early nineteenth and twentieth centuries to make the case that the Court's use of an associational rationale in its treatment of corporations under the Constitution was reasonable until late in the nineteenth century. However, by the end of the century, much larger corporations emerged, with features that could no longer support a characterization as associations of identifiable people.

"person" in the Fourteenth Amendment, "for depriving a person of property," applies to corporations); Simeon E. Baldwin, *Private Corporations*, *in* TWO CENTURIES' GROWTH OF AMERICAN LAW, 1701-1901, at 261, 282 (1901) ("As holding the position of a citizen, while not necessarily entitled to claim such political rights as those of suffrage or representation in the legislature, the corporation may assert at least a *prima facie* title to the ordinary civil rights of property and contract, belonging to the individual.").

92. *See* Hovenkamp, *supra* note 49, at 1643.

93. *See, e.g.*, Siegel, *supra* note 47, at 57-66 (discussing the "central status" of private property in the economic, political, and moral thought of nineteenth-century Americans, and the contrasting concern with privilege and monopolies); *see also* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 174 (1985) ("The *Santa Clara* decision was not thought of as an innovation but instead was regarded as following a line of cases going back almost seventy years to the *Dartmouth College* case.").

94. *See* Mark, *supra* note 53, at 1463.

95. Ruth H. Bloch & Naomi R. Lamoreaux, *Corporations and the Fourteenth Amendment* (Tobin Project Working Paper) (on file with authors).

II. CORPORATIONS IN EARLY AND PRE-TWENTIETH CENTURY AMERICA

The concept of a legal entity with existence separate from its individual owners has existed for many centuries, with some scholars tracing the roots of corporations to ancient Rome and medieval and Renaissance Italy.[96] Eighteenth-century Scottish writer Stewart Kyd provided the classic definition of a corporation as "a collection of many individuals, united into one body," that has "perpetual succession under an artificial form" and is "vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued."[97] As our focus is on the history of corporations in the United States and their treatment under the Constitution, we start with an examination of corporations in late eighteenth- and early nineteenth-century America.[98]

A. Late Eighteenth and Early Nineteenth Century: Business Corporations Before General Incorporation Acts

Typologies of corporations provide helpful insight into the population of early American corporations. In 1828, jurist and legal scholar James Kent, in his famous *Commentaries on American Law*, observed that corporations were either "ecclesiastical" or "lay."[99] Ecclesiastical corporations were religious institutions, such as churches or monasteries, that possessed charters from the state enabling them to hold property continuously over time, regardless of turnover of the members or the people who managed the property. Lay

96. Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1336 (2006); *see also* David F. Linowes, *The Corporation as Citizen*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 345, 345 (A. E. Dick Howard ed., 1992).

97. 1 STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS 13 (Garland Publ'g, Inc. 1978) (1793) (emphasis omitted).

98. For a history of pre-nineteenth-century corporations, see generally 1-2 JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF CORPORATIONS (Harvard Univ. Press 1917); Eric Hilt & Jacqueline Valentine, *Democratic Dividends: Stockholding, Wealth, and Politics in New York, 1791-1826*, 72 J. ECON. HIST. 332 (2012); Eric Hilt, *Early American Corporations and the State* (Tobin Project Working Paper) (on file with authors).

99. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 221 (De Capo Press 1971) (1827).

corporations were "again divided into eleemosynary and civil."[100] Eleemosynary corporations included hospitals, colleges and universities, or organizations that provided charitable services. Civil corporations were "either public or private."[101] By public corporations, Kent meant entities that existed for "public political purposes only, such as counties, cities, towns, and villages."[102] For these non-business organizations, incorporation provided "a mechanism for holding property for some public, charitable, educational, or religious use," in a way that promoted stability by keeping the institution's property locked in and separate from that of its owners, members, or managers.[103]

"Private" corporations were the only category of corporation that could engage in commercial activity.[104] In the late eighteenth and early nineteenth century, such business corporations were still quite rare—most businesses were organized either as individual proprietorships or as partnerships,[105] and corporations required charters issued by special acts of the state legislatures.[106] Between 1781 and 1791, American states chartered only thirty-two business corporations.[107] Most of these were created to provide transportation infrastructure such as canals and bridges, and the rest included banks, insurance companies, and manufacturing companies.[108] This list reflects how state legislatures often granted special charters to early private corporations to serve quasi-public purposes, engaging in

100. *Id.* at 222.

101. *Id.*

102. *Id.*

103. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 423-24 (2003); *see* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392-93 (2000).

104. *See* Blair, *supra* note 103, at 424.

105. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 36 (1977); Blair, *supra* note 103, at 394; Mark, *supra* note 53, at 1443-44 ("Until nearly the end of the nineteenth century business was generally conducted by single proprietorships or partnerships rather than corporations.").

106. GEORGE HEBERTON EVANS, JR., BUSINESS INCORPORATIONS IN THE UNITED STATES, 1800-1943, at 10 (1948), *available at* http://perma.cc/B3UZ-SZGG ("[During] the first three-quarters of the 19th century ... most incorporations were by special charter."); *see* Hilt, *supra* note 98 (explaining that American state legislatures initially chartered corporations individually by special act).

107. Hilt, *supra* note 98, at 5-6.

108. *Id.*

business while also providing a needed service to the public.[109] For example, a state legislature's act providing a corporate charter to an insurance company states that it would "'alleviate the distress of, and afford immediate relief to, sufferers' from fire damage" and a bank charter from the time states it "will probably be of great public utility."[110]

Notwithstanding the small number of charters and stated quasi-public purposes, "the creation and regulation of business corporations were among the most contentious issues faced by the American states," inciting debate over whether they truly served the public interest and whether they would corrupt politics or the economy.[111] The wealthy dominated stock ownership.[112]

In the decades after 1791, the rate at which businesses incorporated increased.[113] Recent scholarship by Richard Sylla and Robert Wright shows that by 1840, legislatures of various states had issued 9270 such special charters, although many of these apparently never raised enough capital to begin operation.[114]

According to business historian Alfred Chandler, there were still no "middle managers" in the organizational structures of business corporations by the 1840s,[115] and many businesses continued to be small, single unit operations managed by the founder or his family.[116] That is not to say that all corporations were perceived as small in the economic life of the time. Bank chartering was politically contentious, for example, and some banks were quite large businesses for the era—the Bank of New York counted a number of prominent politicians as shareholders and was founded with

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109. Blair, *supra* note 103, at 424; Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, AND CULTURE 29, 32-33 (Kenneth Lipartito & David B. Sicilia eds., 2004); *see* Hilt, *supra* note 98.

110. Hilt, *supra* note 98, at 6.

111. *Id.* at 1-5.

112. *Id.* at 2, 8 (providing data showing the mean assessed wealth of New York stockholders in 1791 and 1826 was nearly three times that of the general population).

113. *See id.*

114. Richard Sylla & Robert E. Wright, *Corporation Formation in the Antebellum United States in Comparative Context*, 55 BUS. HIST. 653, 657 tbl.1 (2013).

115. CHANDLER, *supra* note 105, at 3.

116. Until the 1840s, "[i]n farming, lumbering, mining, manufacturing, and construction the enterprise remained small and personal. In nearly all cases it was a family affair. When it acquired a legal form, it was that of a partnership." *Id.* at 50.

$500,000 of capital.[117] But as Joseph Sommer observed, banking in the early nineteenth century still had the character of merchants' "[c]lub[s]," "credit union[s]," or "cooperative[s]."[118] And as Henry Hansmann and Mariana Pargendler have recently shown, many early corporations, such as turnpike and canal corporations, represented local merchants and landowners pooling resources to establish transportation infrastructure or a public utility from which they would directly benefit as customers.[119] Even though they facilitated large aggregations of wealth and engendered political controversy as a consequence, early corporations could thus be seen as devices by which an identifiable group of persons could come together to accomplish a specific project.

B. 1840-1895: Rapid Growth in the Use of Business Corporations

Use of the corporate form for businesses began growing rapidly in the mid-nineteenth century, and this trend continued through the later part of the century. Between 1840 and 1860, Sylla and Wright count 13,149 more special charters issued by states, plus they estimate that as many as 4000 more corporations had been chartered without special legislative acts in states that had passed some form of general incorporation statute.[120]

Such general incorporation statutes provided broader access to the corporate form and eliminated the requirement of obtaining a special act of the legislature, which had proven to be a system susceptible to corruption by political interests.[121] The process of moving to general incorporation took place in some states by amendments to state constitutions, occurring in waves starting in the 1840s and going until the turn of the century, by which time nearly all states

117. Hilt, *supra* note 98, at 23.

118. Joseph H. Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFF. L. REV. 1011, 1021, 1034-35 (2001).

119. Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 959-62, 966-67 (2014).

120. Sylla & Wright, *supra* note 114; *see also* EVANS, *supra* note 106, at 10 (identifying the period from 1843 to 1861 as one of three "long waves of incorporation" in nineteenth-century United States).

121. Jessica L. Hennessey & John Joseph Wallis, *Corporations and Organizations in the United States After 1840*, at 3, 29 (Tobin Project Working Paper) (on file with authors) (discussing how general incorporation laws provided an "economic solution to the political problem" of antidemocratic corruption of corporate privileges given to special groups and elites).

had general incorporation.[122] According to historian Eric Hilt, "[A]s the state government became more democratic, broader elements of society were enabled to found business corporations, or invest in those that were created. Shareholders and directors remained atypical of the population, but became less so over time as larger numbers of corporations were created."[123] By far, the majority of the newly formed corporations in the early to mid-nineteenth century were either financial firms (banks and insurance companies), or transportation firms (such as bridges, canals, roads, and the early short-line railroads),[124] and many of the transportation firms had been financed at least partly with public money.[125] Mining, utilities, and manufacturing firms made up most of the rest.[126] Many of these corporations were still relatively small.[127] Events of the time continued to reflect a complicated relationship between corporations and the state. For example, some state governments had sovereign debt crises resulting from defaults on borrowing that had been used to invest in canals, railroads, and banks.[128] In response, a dozen states wrote new constitutions containing restrictions on public investment in private corporations and adopting general incorporation acts.[129]

Railroads were the first large, modernized businesses in America. The first railroad boom did not begin until the late 1840s and

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122. *Id.* at 11 tbl.1.

123. Hilt, *supra* note 98, at 15.

124. Sylla & Wright, *supra* note 114, at 28; *see also* EVANS, *supra* note 106, at 20 tbl.11 (providing data by industry and decade on corporations chartered in Maryland, New Jersey, New York, and Ohio). In the 1840s, manufacturing and mining firms represented more than 40 percent of incorporations in Maryland, New Jersey, and New York, and only about 5 percent of firms incorporated in Ohio. EVANS, *supra* note 106, at 20 tbl.11.

125. CHANDLER, *supra* note 105, at 34. Chandler reported that "[o]nly a small number of American railroads were initially operated by the state," but that "the charters of the early roads generally provided for close legislative oversight of these new transportation enterprises." *Id.* at 82.

126. *See* Sylla & Wright, *supra* note 114, at 28.

127. Lamoreaux, *supra* note 109, at 34 ("[T]he vast majority of enterprises that took out corporate charters were small and medium-sized firms.").

128. John Joseph Wallis & Barry R. Weingast, *Dysfunctional or Optimal Institutions?: State Debt Limitations, the Structure of State and Local Governments, and the Finance of American Infrastructure, in* FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 331, 344 (Elizabeth Garrett et al. eds., 2008).

129. *Id.* at 344-45; *see also* Thomas K. McCraw, *American Capitalism, in* CREATING MODERN CAPITALISM: HOW ENTREPRENEURS, COMPANIES, AND COUNTRIES TRIUMPHED IN THREE INDUSTRIAL REVOLUTIONS 303, 310 (Thomas K. McCraw ed., 1997).

1850s.[130] Before that time, railroads had not fundamentally changed existing routes or modes of transportation, and had merely connected existing commercial centers and supplemented existing water transportation.[131] Railroad lines were rarely more than fifty miles long.[132] As railroad technology improved in the 1840s and 1850s, railroads expanded and enjoyed commercial success. In the 1840s, over 6000 miles of railroads went into operation, and in the 1850s, over 21,000 more miles of railroad were constructed.[133] The largest of the railroads tapped into capital markets around the globe (especially in England, France, and Germany) to finance their development, mostly in the form of debt capital or bonds.[134] By the early 1860s, railroads in the United States were the largest business corporations and had grown tremendously, but were still fragmented and had not yet come together into a well-integrated system.[135] The number and size of manufacturing and other industrial corporations also grew in the 1860s to help provide supplies for the warring armies during the Civil War, and although the war disrupted railroad construction in the South, it continued apace in the rest of the country.[136]

Railroad corporations moved to the forefront of managerial innovation as they confronted and dealt with the logistical complexities they faced in coordinating the new volume of labor and business.[137] Top managers of the hundreds of local and regional railroads began meeting to coordinate the establishment of physical connections between the railroad tracks, uniform operating procedures, and standardized technology to manage increased long-distance

130. CHANDLER, *supra* note 105, at 82.

131. *Id.*

132. *Id.*

133. *Id.* at 83; *see also* Jac C. Heckelman & John Joseph Wallis, *Railroads and Property Taxes*, 34 EXPLORATIONS ECON. HIST. 77, 87 (1997) (providing nineteenth-century railroad statistics).

134. *See* CHANDLER, *supra* note 105, at 91-92. Chandler estimated that railroads raised a total of $700 million in investment capital in the 1850s and began tapping into capital markets in France, Germany, and Britain. *Id.* at 90-91.

135. *See id.* at 122.

136. Evans documented an upsurge in incorporations in the 1860s, "after the outbreak of hostilities" in the Civil War, and then "a decade of readjustment" when incorporations slowed down in the 1870s. *See* EVANS, *supra* note 106, at 31.

137. *See* CHANDLER, *supra* note 105, at 81-121.

traffic.[138] By the 1880s, these gatherings morphed into over a dozen different associations, representing specialized functions carried out by railroad managers and employees, and frequently holding meetings to discuss national standards for procedures and equipment.[139]

The activities of these associations led to changes in the design and technology of trains, and the organization and administration of railroad lines, that greatly improved productivity and through traffic.[140] But to a greater extent than previously experienced by any industry, the railroads had high capital and other fixed costs relative to the total costs of providing services.[141] Over time, these high fixed costs encouraged individual railroads to try to cut rail rates to attract traffic from competing lines.[142] The resulting rate competition destroyed profits and led to attempts by competing rail lines to try to collaborate with each other to control rates.[143] Such efforts at cooperation to control competition repeatedly failed, however, and were subject to attack by farmers' granges and merchants' boards of trade.[144] This situation resulted in railroads, led by individuals, such as Charles Crocker, Edward H. Harriman, Mark Hopkins, Leland Stanford, Jay Gould, and Cornelius Vanderbilt, acquiring and merging into huge systems that operated thousands of miles of track.[145]

As for other types of business corporations, some corporations had begun marketing their products across large stretches of the country, making use of the new railroads to transport goods long distances. During this period corporations began using brands to

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138. *See id.* at 122-33.

139. *See id.* at 130-31 (listing the associations that helped to organize and standardize railroad operations).

140. *Id.* at 132-33.

141. *Id.* at 134.

142. *Id.*

143. *See id.* at 134-37.

144. *Id.* at 141-42.

145. *See id.* at 134, 159-61, 167. By the 1870s and 1880s, local governments went through a debt crisis, mostly over debts they had incurred to invest in public works projects and railroads. *See* Wallis & Weingast, *supra* note 128, at 356-59. Some states instituted restrictions forbidding local governments from investing in private corporations. *Id.* at 360. These state and local government debt crises likely raised awareness of the large scale of investment in corporations at the time, particularly railroads, the potential for corruption these investments represented, and the critical importance of corporations for local government infrastructure and investment.

identify the source of their products and assure consumers of the quality of the products carrying the brand.[146]

Despite the growth in the number and size of corporations, by 1880, Louis Galambos asserts that there were still "hardly any private businesses" that rivaled the railroads in scale, in the sophistication of internal management systems, in the extent to which they used capital raised from anonymous financial markets, or in the extent to which they had a recognizable brand or otherwise had a distinct identity that investors, employees, and customers were likely to view as separate from the founders or founding families.[147] Likewise, Morton Horwitz has stated, "Before 1890, only railroads constituted 'large, well-established, widely known enterprises with securities traded on organized stock exchanges, while industrials, though numerous, were small, scattered, closely owned, and commonly regarded as unstable.'"[148]

Although John D. Rockefeller was rapidly expanding Standard Oil in the 1870s, it was not until 1882 that he converted his empire from a loose coalition of individual closely held firms to the "trust" form that effectively consolidated the operation and management of these firms.[149] Prior to being organized as a trust, Standard Oil was initially perceived as an association of oil refiners, rather than as a separate entity with a distinct identity. After the Sherman Antitrust Act passed in 1890, Rockefeller and the other major investors in the enterprise frequently tried to conceal the fact that the individual corporations in the trust were managed in a highly coordinated way. But it was not until 1899, after Rockefeller had officially retired, that Standard Oil Company of New Jersey became the holding company for the firms that had been part of the trust, so that the

146. Examples include Singer sewing machines and Ivory soap in the 1860s and 1870s. *See* Blair, *supra* note 103, at 442-49.

147. LOUIS GALAMBOS, THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880-1940: A QUANTITATIVE STUDY IN SOCIAL CHANGE 7 (1975); *see also* McCraw, *supra* note 129, at 320 ("Before the 1880s, even the largest manufacturing firms seldom had been capitalized at more than $1 million.").

148. Horwitz, *supra* note 93, at 209 (quoting Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities, 1887-1902*, 29 BUS. HIST. REV. 105, 106 (1955)); *see* Leslie Hannah, *A Global Census of Corporations in 1910*, at 3-4, 8 (CIRJE, Univ. of Tokyo & London Sch. of Econ. Discussion Paper No. CIRJE-F-878, 2013), *available at* http://perma.cc/EQ3Y-LKYY; *see also* Sylla & Wright, *supra* note 114.

149. GALAMBOS, *supra* note 147, at 7.

organization became a single giant corporation.[150] Similarly, Andrew Carnegie's iron and steel interests had grown to substantial size by 1880, but continued to be organized as "closely owned partnerships" until they converted in 1892 to the corporate form.[151]

Until at least the 1890s, therefore, the universe of corporations in the United States consisted of a small number of very large railroad firms, hundreds of smaller railroads that had yet to be consolidated into smoothly functioning systems, other transportation and public works firms serving localized markets and generally financed locally, a few large firms in mining and manufacturing, a small number of large banks, and tens of thousands of much smaller corporations, in a whole range of industries, that were still closely held and operated much like partnerships.[152] By 1890, corporations were just beginning to emerge as powerful entities, independent of their founding families or of the group of businessmen who consolidated to form them.

Thus, it may have been a stretch, but not a great one, for the Court to still regard the largest corporations of the time, such as the railroads in the *Santa Clara* case, as associations of individuals.[153] The Court likely continued this characterization because the largest firms, following the path of the railroads, had in fact been formed by the joining together of groups of smaller firms, and the combinations

150. DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 44-47, 97-98 (1991).

151. Horwitz, *supra* note 93, at 210; *see also* GALAMBOS, *supra* note 147, at 7.

152. *See* EVANS, *supra* note 106, at 47, 48 tbl.16 (listing all corporations formed near the end of the nineteenth century with more than $20 million in capitalization that were formed in New Jersey, the "chief home of the large corporation in this period"). From 1846 through 1898, only twenty-five companies this large or larger were chartered in New Jersey, only five of which were chartered before 1890, and four of these were railroads, transportation, or public works firms. Then, in 1899, fifty such large corporations were chartered in New Jersey, a large share of which were manufacturing or distribution companies. *See id.*

153. The Southern Pacific Railroad and Central Pacific Railroad, defendants in the cases that had been joined together in *Santa Clara*, were widely known to be controlled by a group of four railroad barons, called The Big Four. They included Leland Stanford, Collis Potter Huntington, Mark Hopkins, and Charles Crocker. OSCAR LEWIS, THE BIG FOUR, at v (1938). U.S. Supreme Court Justice Field, who is widely believed to have supported the position of the railroads in this case, was a personal friend of these men. *See* TED NACE, GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY 89 (2003) ("Field socialized with the railroad men, and when Leland Stanford organized Stanford University he appointed Field as a trustee.").

did not initially have well-integrated, unified, and self-perpetuating management structures.

By 1895, however, the great merger movement of the turn of the century was beginning, and over the next ten years, modest-sized corporations in dozens of industries would consolidate into very large corporations with monopoly control, or near-monopoly control over their markets.[154] With the widespread increase in size, liquidity, managerial hierarchy, dispersion of share ownership, and branded identity of corporations that quickly developed during this time, the landscape of corporations had truly changed. But by then, the Supreme Court had already laid down some of the important principles that would guide its decisions about the property and contract protections of corporations and continue to shape the constitutional treatment of corporations into the twenty-first century.

C. 1895-Early 1900s: Mergers and Consolidations and the Rise of Modern Corporations

The transformation that occurred in business corporations in late nineteenth-century America was nothing short of amazing. Historians Jessica Hennessey and John Wallis have put this transformation in context, explaining that although other large organizations had historically existed, such as governments, armies, and churches, "none of them reached the level of managerial sophistication and close coordination of capital, labor, products, and markets of the late 19th century firms."[155]

A merger movement took hold in the 1890s, by which a dynamic played out in dozens of industries that followed the general pattern of the earlier railroad mergers.[156] Firms that operated only one, or

154. EVANS, *supra* note 106, at 47-49; *see* NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904, at 1-2 (1985). Morton Horwitz regards the merger movement as the third of "three stages in the efforts of corporations to achieve consolidation": the first being the "pool" or "'loose' form of agreement employed by railroads, beginning in the 1870s, to fix rates and regulate traffic," the second being the creation of "trust[s]" or holding companies, and the third being the "merger movement of 1898-1903." Horwitz, *supra* note 93, at 198-99.

155. Hennessey & Wallis, *supra* note 121, at 1. Alfred Chandler observed that "the American businessman of 1840 would find the environment of fifteenth-century Italy more familiar than that of his own nation seventy years later." CHANDLER, *supra* note 105, at 455.

156. *See* LAMOREAUX, *supra* note 154, at 1; *see also* CHANDLER, *supra* note 105, at 320-39.

a few facilities, built new factories that incorporated mass-production technology, and expanded rapidly to serve the growing consumer market.[157] Many firms then found themselves with substantial excess capacity during the depression of 1893, and had strong incentives to cut prices to try to keep their plants operating at high levels of throughput.[158] The result was ruinous competition that threatened to bankrupt hundreds of medium-sized firms.[159] Faced with such competitive pressures, firms tried to organize themselves into cartels to keep prices from collapsing, but the cartels were unsustainable. And in any case, Congress made such collaborative activities illegal in 1890 with the Sherman Antitrust Act.[160] So in industry after industry, leading business people sought help from law firms to consolidate, and from 1895 to 1904, huge numbers of small- to medium-sized corporations merged into very large corporations with monopolies or near-monopolies in their industries.[161]

Despite the large size of corporations that resulted from these consolidations, the Supreme Court may have continued to regard them as associations, at least in the early years after the merger movement, because they had been formed from groups of smaller, closely held firms, often owned by or closely identified with some entrepreneur or family, that had joined together to try to solve a common problem. In fact, most of the big consolidations were formed from groups of five or more smaller firms that were still identified with their founders or a founding family that held most of the stock.[162]

From the 1890s, however, other changes in the population of corporations were taking place that were at odds with the idea that business corporations were just associations of people. State laws changed to facilitate mergers by permitting corporations to hold stock in other corporations and to enter into consolidation agreements on the basis of approval by a majority of shareholders, rather than unanimous approval of shareholders.[163] Corporations were also

157. *See* LAMOREAUX, *supra* note 154, at 12.

158. *Id.*

159. *See id.* at 14.

160. HARLAND PRECHEL, BIG BUSINESS AND THE STATE 61-62 (2000).

161. LAMOREAUX, *supra* note 154, at 2 ("[M]ore than half of the consolidations absorbed over 40 percent of their industries, and nearly a third absorbed in excess of 70 percent.").

162. *See id.* at 1 n.1.

163. *See* Horwitz, *supra* note 93, at 201-03; *see also* PRECHEL, *supra* note 160, at 32-41

increasingly run by boards of directors, or professional managers, instead of by the founders, or the shareholders themselves.[164] As Chandler famously observed, "The visible hand of managerial direction had replaced the invisible hand of market forces in coordinating the flow of goods from the suppliers of raw and semifinished materials to the retailer and ultimate consumer."[165] And after 1890, "industrials began to be listed on the Stock Exchange and to be traded by leading brokerage houses."[166] By this time, a "number of industrial enterprises were beginning to serve the entire nation," and by the turn of the century, "the names of many integrated, multifunctional enterprises had become household words."[167] Indeed, with the rise of mass retailers, mail-order houses, and chain stores, came the rise of complementary businesses like advertising agencies that began to have a national scope.[168] One of the important functions of these advertising agencies was to create and maintain branded identities for corporations that were distinct from the business people who founded, owned stock, or worked in the corporations. The corporate form thus became the dominant way to organize large-scale business of a type that had never been seen before.

III. THE SUPREME COURT'S TWENTIETH-CENTURY CORPORATE RIGHTS JURISPRUDENCE AND APPROACH TO THE RISE OF MODERN CORPORATIONS

In this Part, we bring our examination of corporate history and the Supreme Court's corporate rights jurisprudence through the twentieth century and to recent cases. How did the rise of the modern business corporation undermine the idea that corporations were just associations of people? Did the Court address in its constitutional rights jurisprudence the transformation that occurred in the types of corporations in existence? Did the Court characterize or

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(discussing liberalization of state corporate laws); Lamoreaux, *supra* note 109, at 48 ("[T]he new laws made possible the formation of businesses operating on an unprecedented scale.").

164. Horwitz, *supra* note 93, at 214-16.

165. CHANDLER, *supra* note 105, at 286.

166. Horwitz, *supra* note 93, at 210.

167. CHANDLER, *supra* note 105, at 288-89.

168. *See id.* at 224-35, 290.

treat corporations in a way that reflects the role and function they have come to play in the contemporary era?

A. Giant Corporations Emerge

By 1910, the U.S. economy had come to be dominated by hundreds of very large corporations. The transition was extraordinary. As of 1898, historian David Bunting estimates, only about 300 business corporations in the United States had more than $1 million in capital.[169] By 1904, he estimates that some 3000 corporations could meet this size test.[170] Most of these corporations had been formed through the industry-by-industry combinations of dozens of smaller corporations during the great merger movement, so these corporations were not just large, they also had near monopoly control, or at least oligopoly control, over their industries.[171] The one hundred largest industrial corporations together accounted for about 30 percent of all industrial capital in the United States in the early twentieth century, according to Bunting's calculations.[172] These corporations included names we still recognize today: U.S. Steel, Standard Oil of New Jersey (now Exxon), National Biscuit Co. (Nabisco), E. I. DuPont de Nemours Powder (DuPont), and General Electric.[173] By 1901, "the nation's railroads had been combined into seven large rail systems."[174]

The new giant corporations were not just larger than corporations had been in the nineteenth century, they were in many ways, qualitatively different. They were no longer likely to be controlled by the founder or family of the founder, but were likely to have hundreds, or even thousands of shareholders, who traded their shares in public securities markets,[175] and hundreds or thousands of employees.[176]

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169. DAVID G. BUNTING, THE RISE OF LARGE AMERICAN CORPORATIONS, 1889-1919, at 13, 70 tbl.8 (1986).

170. *Id.* Another study found that between 1895 and 1919, 4628 firms disappeared by being merged into corporations capitalized at more than $1 million. *Id.* at 36.

171. *See id.* at 30 tbl.3.

172. *Id.* at 4.

173. For a list of the one hundred largest industrial corporations in the United States in 1905, see BUNTING, *supra* note 169, at 165-66 tbl.17.

174. *Id.* at 48.

175. *See* Thomas R. Navin & Marian V. Sears, *The Rise of a Market for Industrial Securities, 1887-1902*, 29 BUS. HIST. REV. 105, 130, 133 (1955).

176. *See* CHANDLER, *supra* note 105, at 3.

They also increasingly had professional management.[177] The leaders of these modern corporations were consciously creating bureaucratic structures so that the management systems could operate more or less independently of who filled what roles in the system.[178] "Bureaucracies place emphasis on impersonal decisions made by a staff of experts filling positions which, theoretically at least, do not change when the personnel does," Galambos observed.[179] "Men fill these positions on the basis of explicit technical qualifications, and in a normal career they advance in regular steps within the organization."[180]

The managers of these corporations were also working to establish branded identities that were deliberately separate from, and not tied to, any particular director, founder, manager, or other leader in the organization. These managers gave the corporations names that were less likely to be linked to individual founders, and more likely to suggest that they had a dominant position in their markets: American Can, Standard Oil, Continental Tobacco, General Chemical, and Atlantic and Pacific Tea Company.[181]

The size and impersonal nature of modern corporations made them, to some extent, objects of fear and suspicion on the part of the consumers of their products, as well as by other business people. Thomas W. Lawson, a "broker, banker, and corporation man" by his own description, said in 1906:

> During the last twenty years there has grown up in this country a set of colossal corporations in which unmeasured success and continued immunity from punishment have bred an insolent disregard of law, of common morality, and of public and private right, together with a grim determination to hold on to, at all hazards, the great possessions they have gulped or captured.[182]

Although modern corporations often had the ability to manipulate markets and prices, squeeze out competitors, cheat their investors,

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177. *See id.* at 3-4.

178. *See id.* at 8.

179. GALAMBOS, *supra* note 147, at 4.

180. *Id.*

181. *See* CHANDLER, *supra* note 105, at 234, 321, 355, 357, 387, 415-16.

182. BUNTING, *supra* note 169, at 3 (quoting THOMAS W. LAWSON, FRENZIED FINANCE: THE CRIME OF AMALGAMATED 6-8 (William Heinemann ed., 1906)).

and oppress their workers, they also, as they do today, help bring the benefits of efficiencies in production and distribution to the masses. As a consequence, public attitudes toward corporations adapted and softened over the first few decades of the twentieth century.[183] Middle-class people became the managers and workers in these corporations, the consumers of their goods, and the investors in their shares.[184] Herman Thomas Warshow reported that the number of individuals who owned corporate stock rose from 4.4 million in 1900 to 14.4 million in 1922.[185] His analysis of income tax returns from 1916 through 1922 also showed that a growing share of individuals of relatively modest income reported income from dividends during this period.[186] "The largest and most significant increase in dividends received has taken place in the class of incomes below $5,000 per annum [equivalent to about $71,000 in 2014 dollars], in the group which includes the 'wage-earning class,'" Warshow reports.[187]

These developments likely changed the image that most people had about what corporations were, and what they did. Galambos's extensive study of opinions about large corporations and their role in the economy among the middle classes shows a very complex evolution of public opinion, but concludes that by 1919:

> [M]iddle-class Americans found new ways to talk and think about corporate enterprise. Increasingly, they bought goods from companies, not octopuses; they worked for firms, not trusts. By 1919 they viewed these businesses in a relatively impersonal light. In the previous generation many citizens had been upset not just with big business but with Gould and Vanderbilt. After 1902, they focused on J. P. Morgan, Andrew Carnegie, and John D. Rockefeller, but they still felt that behind the office doors of the largest companies there were real, live men who were, for better or for worse, deciding what should be produced, where it

183. *See* GALAMBOS, *supra* note 147, at 117.

184. *See* H. T. Warshow, *The Distribution of Corporate Ownership in the United States*, 39 Q. J. ECON. 15, 20-21 (1925).

185. *Id.* at 16.

186. *See id.* at 18 tbl.1.

187. *Id.* at 20. There are problems with this finding because Warshow grouped taxpayers by nominal income, unadjusted for inflation, rather than by income percentile. Without having access to the details behind Table 1, it appears that the trend he identifies in the data would probably still be there if the data were properly adjusted.

> should be manufactured, and how much it should be sold for. If Americans were upset with the trusts, they could locate their enemy and perhaps (via the Clayton Act) even punish him for his wrongdoing. During the First World War, however, public attention drifted away from the plutocrats and empire builders who had personalized the corporation.... From the First World War on, Americans increasingly looked upon the corporation as an impersonal bureaucracy beyond the control of any one man.[188]

By the middle of the twentieth century, what had emerged to dominate the U.S. economy and imagination was, as Galambos tells us, "a new culture, a corporate culture, which included, ... a new public image of the giant corporation."[189] Although people were generally concerned about the possibility of abuse of power, they also found that "the bureaucratized corporation shared many values with the middle-class reformers who led the progressive movement in state and national politics."[190]

It is important to keep in mind, however, that discussions about the nature and function of corporations, and concerns about the impact of corporations on public policy, often treat "corporations" as synonymous with "big business." To be sure, the new entities that emerged at the end of the nineteenth century and shaped thinking about corporations through most of the twentieth century were indeed very big businesses,[191] as we have discussed. But in addition to big corporations, there have always been small, closely held business corporations, and numerous other types of organizations, such as nonprofits, cooperatives, and membership organizations, all organized using the corporate form. Our discussion is intended to underscore this diversity of uses of the corporate form, which increased with the rise of large, modern business corporations.

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188. GALAMBOS, *supra* note 147, at 261.
189. *Id.* at 15.
190. *Id.* at 18.
191. *See* CHANDLER, *supra* note 105, at 3.

B. Corporate Criminal Liability, Related Protections, and Other Early Twentieth-Century Legal Developments

While the early twentieth century brought the emergence of large, widely held business corporations in many industries, in the legal world the early twentieth century ushered in Progressive Era regulation,[192] and a period in American legal history known as the *Lochner* Era.[193] During this period, the Court used the due process clauses of the Fifth and Fourteenth Amendments as the basis for protecting substantive economic liberty and struck down regulations that it viewed as interfering with this liberty.[194] Two notable developments arose in this time concerning the history of corporate rights: Congress enacted the first federal campaign finance law with the Tillman Act of 1907, and the Court recognized corporations as subject to corporate criminal liability and as holders of certain related protections.

The Tillman Act, which banned corporations from spending money "in connection with" any federal election, came in response to a public call for reform.[195] Public concern arose in the 1890s when corporations began contributing significant amounts to political candidates and parties.[196] Momentum for reform gained steam when President Theodore Roosevelt was charged with accepting large corporate contributions in his 1904 presidential election, and shortly after, when newspaper headlines exposed life insurance company

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192. *See, e.g.*, United States v. UAW, 352 U.S. 567, 570 (1957) (describing turn-of-the-century regulation such as the "Sherman Law," which "was a response to the felt threat to economic freedom created by enormous industrial combines," and the income tax law of 1894, which "reflected congressional concern over the growing disparity of income between the many and the few").

193. *See* Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 754 n.16 (2009) (noting various definitions for the *Lochner* Era, including "the period from 1900 until World War I" and "the period from1890 until 1937").

194. For examples from the voluminous historical and legal literature discussing the *Lochner* Era, see Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 881-83 (2005); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 2-6 (1991); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 873-75 (1987).

195. Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864; *see also UAW*, 352 U.S. at 570-77 (discussing the Tillman Act and its genesis).

196. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 881 (2004).

executives who had used corporate funds for self-serving political contributions.[197] Rhetoric concerning this scandal and the need for campaign finance regulation relied, in part, on an associational view of the corporation, seeing the harm as one not only to the public and democracy generally,[198] but also to shareholders of the corporation in particular.[199] In calling for the Tillman Act, President Theodore Roosevelt told Congress: "All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes."[200]

This version of the associational view reflects the separation of ownership and control that was already well underway at the time.[201] It sees the corporate property as that of the shareholders and not that of a distinct entity, but it sees the corporation as, in effect, representing shareholders and managers with potentially divergent interests. Also notable is that politicians and others used

197. *See id.* at 886-93.

198. *See, e.g.*, *UAW*, 352 U.S. at 570 (noting there "was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption" and, which historians have noted, "threatened to undermine the political integrity of the Republic") (quoting SAMUEL E. MORRISON & HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 355 (Oxford Univ. Press 4th ed. 1950)); *id.* at 576-77 (quoting one of the Senate leaders debating passage of the Tillman Act who referred to "business interests and certain organizations" as "associations of individuals" when discussing political contributions to candidates and the corrupting effect that "is harmful to the general public interest").

199. *See* Winkler, *supra* note 196, at 873 ("At the turn of the century, when Congress and the states first adopted bans, corporate political contributions were also understood to be corrupt because they amounted to a misuse of 'other people's money': company executives were opportunistically misappropriating the company owners' money to purchase legislation benefiting the executives themselves.").

200. *UAW*, 352 U.S. at 572 (quoting 40 CONG. REC. 96 (1905)); *see also* Winkler, *supra* note 196, at 919-23 (discussing possible political motivations behind President Roosevelt's support of the Tillman Act and the shareholder protection rationale).

201. *See, e.g.*, NAOMI R. LAMOREAUX, INSIDER LENDING: BANKS, PERSONAL CONNECTIONS, AND ECONOMIC DEVELOPMENT IN INDUSTRIAL NEW ENGLAND 135-36 (1997) (discussing how many nineteenth-century banks had a dominant management group that also held a substantial share of the stock, even though there was also a wider network of passive shareholders); Eric Hilt, *When Did Ownership Separate from Control?: Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 649-50 (2008); Naomi R. Lamoreaux & Jean-Laurent Rosenthal, *Corporate Governance and the Plight of Minority Shareholders in the United States Before the Great Depression*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 126, 127-28 (Edward L. Glaeser & Claudia Goldin eds., 2006) (discussing the growing number of corporations between the Civil War and the Great Depression and the problem of minority shareholders).

the associational view to support regulating corporations, whereas the Court had previously used it as a rationale for extending protections to corporations.[202]

The other notable legal development in the early twentieth century was that the Court definitively recognized corporate criminal liability. Early common law had not held corporations subject to criminal liability because of the conceptual difficulty in attributing an act and intent to a corporation.[203] By the early twentieth century, however, lower courts began importing tort and agency principles to hold corporations vicariously liable for criminal acts performed by corporate agents.[204] In addition, federal regulation of economic activity through criminal statutes, such as antitrust laws, had grown by this time and raised issues concerning the government's power to prosecute corporations.[205]

In its landmark decision *New York Central & Hudson River Railroad v. United States*, in 1909, the Supreme Court held for the first time that a corporation could be held criminally liable for acts by its agents.[206] The case concerned the constitutionality of the Elkins Act, which provided that a common carrier was subject to criminal liability for the acts of its officers, agents, and employees in offering illegal rebates.[207] Counsel for the defendant railroad argued that the Elkins Act was unconstitutional because levying a

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202. *See* Winkler, *supra* note 196, at 875 (discussing how the separation of ownership and control contributed to concern about opportunism in corporations, particularly that "owners were forced into unwanted political associations").

203. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 481, 492 (1909) (citing Chief Justice Holt and Blackstone and explaining that early common law held that a corporation could not commit a crime in its corporate capacity); *see also* Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 396-400, 404-15 (1982) (discussing the history of corporate criminal liability in England and America).

204. *See, e.g.*, United States v. Van Shaick, 134 F. 592, 609 (S.D.N.Y. 1904); United States v. John Kelso Co., 86 F. 304, 308 (N.D. Cal. 1898); *see also* Brickey, *supra* note 203, at 404-15. Note that this analysis signaled a shift in thinking because it saw corporate officers as agents not of the shareholders, but of the corporation, a separate entity. If the Court had seen corporate officers and directors as agents of shareholders, then one would expect the shareholders to be held vicariously liable.

205. *See* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 814-16 (1996).

206. *See N.Y. Cent. & Hudson R.R.*, 212 U.S. at 481.

207. *See id.* at 482-83.

fine on a corporation for the acts of its employees amounted to taking money from innocent shareholders without due process of law.[208] This argument looked through the corporation to its shareholders. In establishing corporate criminal liability, the Court did not ground the development in a theory of the corporation, however, but rather turned to public policy, explaining:

> We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine .... While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.[209]

Corporate criminal liability was a significant development in the law, but the Court's lack of theoretical grounding gave it an ad hoc quality.

In the 1906 case *Hale v. Henkel*, the Court held that corporations enjoy Fourth Amendment protections against unreasonable searches and seizures but may not claim the Fifth Amendment privilege against self-incrimination.[210] In extending Fourth Amendment protection to corporations, the Court followed its pattern of using an associational view of the corporation. The Court explained that a corporation receives Fourth Amendment protection because it "is, after all, but an association of individuals under an assumed name and with a distinct legal entity."[211] When individuals organize "as a collective body it waives no constitutional immunities appropriate to such body."[212] For example, the Court noted that a corporation's

208. *See id.* at 492.
209. *Id.* at 495-96.
210. 201 U.S. 43, 43-44 (1906).
211. *Id.* at 76.
212. *Id.*

property cannot be taken without compensation and a corporation is entitled to due process and equal protection under the Fourteenth Amendment.[213]

But the Court ruled that a corporation cannot claim the Fifth Amendment privilege against self-incrimination because that right "is purely a personal privilege of the witness."[214] The Court explained that the privilege against self-incrimination operates only when a witness is asked to incriminate himself, not a third party, including the corporation for which an agent acts.[215] This reasoning emphasized the individual nature of the privilege against self-incrimination and the separate legal identity of the corporation. The Court further bolstered its conclusion by emphasizing the artificial nature of the corporation as a legal creation under state law and the state's need to oversee corporations:

> [T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter.... It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.[216]

This explanation introduced an element of inconsistency into the Court's analysis as it is not clear why the need to inquire into corporations would justify denying the privilege against self-incrimination to corporations but not also Fourth Amendment protections. In sum, this early twentieth-century case law examining the corporate criminal liability of corporations and related rights at times persisted with views of the corporation as an artificial entity or a concession of the state representing an association of individuals, but it also demonstrated a growing difficulty in using these views consistently and doing so with a changing population of

213. *See id.*
214. *Id.* at 69.
215. *Id.* at 69-70.
216. *Id.* at 74-75.

corporations and corresponding societal needs. Furthermore, it is notable that in extending Fourth Amendment rights, the Court moved into a new area of constitutional protection for corporations—one arguably beyond contract and property interests—and it did not stop to explain whether the associational view still fit this purpose, who was included in this characterization, and whether it appropriately described the corporations involved in the underlying matter.

After this early twentieth-century case law, the Court continued to extend protections to corporations on a variety of bases and sometimes without explanation.[217] The Court eventually reversed course on its rulings from the *Lochner* Era,[218] but the Court did not revisit its ruling on Fourteenth Amendment personhood for corporations that had been attributed to *Santa Clara*.[219] The Court further clarified, and in some instances expanded, corporate rights related to searches and trials.[220] And later in the twentieth century, the

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217. Pollman, *supra* note 83, at 1655-58.

218. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling a liberty of contract decision, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 613, 622-25 (3d ed. 2006) (discussing the Court's move away from its *Lochner* Era decisions).

219. Pollman, *supra* note 83, at 1652-54 (discussing how the Court did not reconsider its treatment of corporations as persons under the Fourteenth Amendment despite notable dissents from Justice Black in *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938), and Justice Douglas in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949)).

220. The Court has clarified that Fourth Amendment protections for corporations are not coextensive in scope with that of individuals. *E.g.*, Henning, *supra* note 205, at 797; *see* Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 205 (1946) ("[C]orporations are not entitled to all of the constitutional protections which private individuals have in these and related matters."); *see also* Marshall v. Barlow's, Inc., 436 U.S. 307, 315-20 (1978) (concluding that a corporation had some expectation of privacy prohibiting warrantless searches to inspect workplace safety, but that the standard for obtaining a warrant to enter a business was lower than that to search a private home). Further, the Court has assumed that corporations can claim the protection of the Double Jeopardy Clause, and has seemingly recognized that corporations have Sixth and Seventh Amendment entitlements to trial by jury in at least some contexts. United States v. Martin Linen Supply Co., 430 U.S. 564, 575-76 (1977) (discussing double jeopardy); Fong Foo v. United States, 369 U.S. 141, 141-43 (1962); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1517 n.211 (1996); *see* Ross v. Bernhard, 396 U.S. 531, 532-34 (1970) (holding "that the [Seventh Amendment] right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury" and noting that "a corporation's suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted"); *see also* S. Union Co. v. United States, 132 S. Ct. 2344, 2349-50 (2012) (recognizing a corporation as

Supreme Court interpreted the First Amendment as protecting corporate speech and political spending. This more recent period put in sharp relief the Court's unarticulated framework of corporate rights as derivative and instrumental, as well as its failure to take account of the differences among different types of corporations.

C. Corporate Rights Jurisprudence on the First Amendment

With limited exception, the question of whether the First Amendment protects corporate commercial speech and political spending did not arise until the 1970s. Previously, governments had regulated without serious restriction corporate advertising, mailings, and political spending.[221] First Amendment protections had been extended to corporations primarily in the narrow context of media corporations and claims brought by the NAACP in the civil rights era.[222]

The commercial speech doctrine started in the 1976 case *Virginia State Board of Pharmacy*, in which the Court ruled that the State of Virginia could not forbid pharmacists from advertising drug prices.[223] Consumer advocates brought the case, arguing that the First Amendment entitles consumers to receive information that

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having a Sixth Amendment *Apprendi* right to jury determination of any fact that increases a criminal defendant's maximum potential sentence, other than the fact of a prior conviction); United Mine Workers v. Bagwell, 512 U.S. 821, 823, 826-27 (1994) (recognizing a *union's* Sixth Amendment right to a jury trial in a criminal contempt proceeding).

221. Mark Tushnet, *Corporations and Free Speech*, *in* THE POLITICS OF LAW 253 (David Kairys ed., 1982); *see also* Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2586-87, 2642 (2008).

222. *E.g.*, NAACP v. Button, 371 U.S. 415, 428 (1963) (validating the NAACP's claim that a state statutory ban on improper solicitation of legal business abridged "the freedoms of the First Amendment, protected against state action by the Fourteenth"); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (holding that state-compelled disclosure of the group's membership list was invalid as restraining the members' freedom of association); Grosjean v. Am. Press Co., 297 U.S. 233, 243-44 (1936) (holding unconstitutional a state license tax imposed on newspaper corporations selling advertising as an impermissible abridgment of speech or of the press under the Due Process Clause of the Fourteenth Amendment).

223. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749-70 (1976). Commercial speech has not been clearly defined, but has been generally understood as speech promoting a commercial activity, product, or service, such as television advertising or marketing. Piety, *supra* note 221, at 2593-95, 2644; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (describing commercial speech as "expression related solely to the economic interests of the speaker and its audience").

pharmacists might advertise about the price of drugs.[224] The State argued that the advertising ban served the public interest by helping to avoid aggressive price competition among pharmacists that might lead to a reduction in the professional services provided by pharmacists to consumers.[225] The Court sided with the consumer advocates, holding that advertising is within the scope of First Amendment protection because of the consumers' interest in the free flow of commercial information.[226] The Court's rationale relied on the idea that consumers had a right to hear the information; suppression of truthful speech about lawful activity could hurt consumers and their ability to make informed decisions in our "free enterprise economy."[227]

The Court continued to develop the commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, in which it held that a state could not completely ban promotional advertising by an electrical utility.[228] The Court explained that the First Amendment protects commercial speech—"that is, expression related solely to the economic interests of the speaker and its audience"—from unwarranted governmental regulation.[229] The Court set out a four-part test for considering questions of commercial speech: whether the speech concerns lawful activity and is not misleading, whether the government has a substantial interest in regulating the speech, whether the regulation directly advances that governmental interest, and whether it has a reasonable fit in serving that interest.[230] As the Court continued to premise the commercial speech doctrine on protecting the listener rather

224. *Va. State Bd. of Pharmacy*, 425 U.S. at 753-54.

225. *Id.* at 757-68.

226. *Id.* at 763-64.

227. *Id.* at 763-65.

228. 447 U.S. at 571-72.

229. *Id.* at 561.

230. *Id.* at 566; *see* Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (refining the last part of the analysis to require a "reasonable fit," rather than the least restrictive means); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 504 (1996) (establishing a heightened form of First Amendment scrutiny for regulation creating a blanket ban on truthful, nonmisleading speech about a lawful product and when the ban serves an interest unrelated to consumer protection). For a discussion of more recent commercial speech case law, see TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT 17-30 (2012), and the *Case Western Reserve Law Review* Symposium, Nike v. Kasky *and the Modern Commercial Speech Doctrine*, 54 CASE W. RES. L. REV. 965 (2004).

than the speaker, the Court did not examine whether this extension of First Amendment protection to corporate speech treats corporations as having interests in self-expression and, if so, from whom such autonomy interests would originate in corporations of different types.

Like the commercial speech doctrine, the Court's jurisprudence on corporate political spending also began in the 1970s. The first of such decisions came shortly after the Court's landmark campaign finance decision in *Buckley v. Valeo*, which equated political spending with political speech and interpreted the First Amendment as a limit on campaign finance regulation.[231] In *First National Bank of Boston v. Bellotti*, the Court held unconstitutional a Massachusetts law that barred banks and corporations from spending money to influence ballot initiatives.[232] Specifically, the state statute at issue prohibited banks and business corporations from making expenditures to influence the vote on referendum proposals on any question submitted to voters "other than one materially affecting the property, business or assets of the corporation."[233] The Court held that by prohibiting such corporate expenditures, the statute "abridge[d] expression that the First Amendment was meant to protect" and the corporate identity of the speaker did not deprive the speech its protections.[234]

In its reasoning, the *Bellotti* Court first rejected an argument that corporations do not have a right to liberty under the Fourteenth Amendment, the means by which the First Amendment is applicable to the states.[235] The Court simply cited the 1886 *Santa Clara* case in a footnote, and a string citation to the limited media corporation cases.[236] Next, the Court labeled the "materially

231. 424 U.S. 1, 39, 143 (1976). Scholars and jurists have argued that while spending money may facilitate speech or amplify its volume, the restriction of spending should not be equated with the restriction of speech. *See, e.g.*, Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 962-63 (2011); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1004-05 (1976); *see also* Jessica Levinson, *The Original Sin of Campaign Finance Law: Why* Buckley v. Valeo *is Wrong*, 47 U. RICH. L. REV. 881, 882-83 (2013).

232. 435 U.S. 765, 795 (1978). Under *Bellotti*, laws burdening corporate political spending are subject to strict scrutiny, a higher standard than commercial speech. *Id.* at 786-89.

233. *Id.* at 767-68.

234. *Id.* at 776.

235. *Id.* at 778-79.

236. *Id.* at 780 n.15.

affecting" requirement of the statute an impermissible subject-based speech prohibition.[237] The Court then explained that the State failed to show a compelling interest to justify the prohibition.[238] According to the Court, the State did not show "that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government," and because referenda are held on issues, not candidates, the risk of corruption was not present.[239] Further, the Court reasoned that the statute's under- and over-inclusiveness undermined the State's argument that shareholder protection was a compelling interest: "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[240]

Notably, the Court's decision failed to consider the importance of who the speaker is and on what basis a corporation would hold a right and be considered a speaker. In so doing, the Court avoided identifying the source of the First Amendment value when a corporation spends from its treasury, and whether that logic would apply to all corporations. Its reliance on the notion of "corporate democracy" avoids engaging with the questions of whether and how people interact and express their voices in or through different kinds of corporations. In this way, the Court failed to recognize the reality of modern corporations, in which shareholders often own stock only indirectly through mutual funds or other institutional investors and are frequently rationally apathetic, without information or a voice in the corporation.[241] Furthermore, the stock ownership of modern, publicly traded corporations changes minute by minute and it is impossible to pinpoint a fixed group of individuals for whom the corporation would be speaking.

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237. *Id.* at 784.

238. *Id.* at 786-95.

239. *Id.* at 789-90.

240. *Id.* at 794.

241. *See* Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009), http://www.yalelawjournal.org/forum/citizens-not-united-the-lack-of-stockholder-voluntariness-in-corporate-political-speech [http://perma.cc/5NWZ-7KGP] (explaining how the procedures of "corporate democracy" offer little to no relief for dissenting shareholders).

The *Bellotti* dissents are more consistent with the logic of earlier Supreme Court jurisprudence than is the majority opinion, and the dissents also take more account of modern corporations. Justice White dissented, joined by Justices Brennan and Marshall, to criticize the majority for "substitut[ing] its judgment as to the proper balance [between competing First Amendment interests] for that of Massachusetts."[242]

> Undoubtedly, as this Court has recognized, *see NAACP v. Button*, 371 U.S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion.[243]

Justice White argued that although "it may be assumed that corporate investors are united by a desire to make money" and commercial speech has some First Amendment protection, "[t]his unanimity of purpose breaks down ... when corporations make expenditures ... designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets."[244] Accordingly, "there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders."[245] In fact, the statute supported the First Amendment value of not forcing individuals to associate with beliefs with which they disagree.[246] Further, the state statute would not impinge on listeners' First Amendment interests because corporate political spending

242. *Bellotti*, 435 U.S. at 804 (White, J., dissenting).
243. *Id.* at 805.
244. *Id.* at 805-06.
245. *Id.* at 806.
246. *Id.* at 812.

"lack[s] ... connection with individual self-expression" and it would still leave individuals composing the corporation "free to communicate their thoughts," even by "form[ing] associations for the very purpose of promoting political or ideological causes."[247]

Justice Rehnquist's dissent in *Bellotti* pointed out that shortly after the Court decided that a corporation is a "person" entitled to protection under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, the Court concluded "that the liberty protected by that Amendment 'is the liberty of natural, not artificial persons.'"[248] The only departures had been the Court's decision in *Grosjean v. American Press Co.*, "that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons,"[249] and in *NAACP v. Button*, "that a nonprofit membership corporation organized for the purpose of 'achieving ... equality of treatment by all government, federal, state and local, for the members of the Negro community' enjoys certain liberties of political expression."[250] The Court had never before considered "whether business corporations have a constitutionally protected liberty to engage in political activities," and the majority was wrong, Justice Rehnquist argued, not to give more deference to the judgment of the Massachusetts court, the U.S. Congress, and the legislatures of the thirty other states that determined that it is "politically desirable and constitutionally permissible" to restrict the political activity of business corporations.[251] Citing *Dartmouth College*, Justice Rehnquist stated, "our inquiry must seek to determine which constitutional protections are 'incidental to [corporations'] very existence.'"[252] Unlike "the power to acquire and utilize property," "[i]t cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial

247. *Id.* at 807.

248. *Id.* at 822 (Rehnquist, J., dissenting) (quoting Nw. Nat. Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906)).

249. *Id.* (discussing Grosjean v. American Press Co., 297 U.S. 233, 244 (1936)).

250. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 429 (1963)).

251. *Id.* at 822-23.

252. *Id.* at 824.

purposes."[253] In fact, "those properties, so beneficial in the economic sphere, pose special dangers in the political sphere."[254]

After *Bellotti*, the Court's corporate political speech jurisprudence took some twists and turns outside of the ballot initiative context,[255] but was extended to include a corporate right to spend on political messages mentioning candidates so long as those messages did not amount to express "vote for or vote against" advocacy.[256] As in the commercial speech cases, the Court has relied on the rights of listeners rather than focusing on the identity of the speaker.[257] This rationale is instrumental—extending a right to corporations to protect the rights of potential listeners, rather than the rights of the corporation itself or the persons composing it.

In the Court's 2010 decision in *Citizens United v. FEC*, the Court further expanded corporate political speech rights by invalidating the federal ban on corporate expenditures from general treasury funds for electioneering communications for or against a candidate for public office.[258] Previously, under the Bipartisan Campaign Reform Act of 2002 (BCRA), any such advertising could be funded only through a corporation's political action committee (PAC).[259] *Citizens United* addressed the rights of a nonprofit corporation that released a documentary through video-on-demand cable television that was critical of Hillary Clinton, then a candidate in the Democratic Party's 2008 presidential primary elections.[260] Anticipating that it would make this documentary, as well as television ads for it, available within thirty days of primary elections, Citizens United

253. *Id.* at 824-25.

254. *Id.* at 826.

255. McConnell v. FEC, 540 U.S. 93, 231 (2003) (upholding limits on electioneering communications); Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990) (upholding a Michigan statute prohibiting use of corporate treasury funds for candidate-related expenditures); FEC v. Mass. Citizens For Life, Inc., 479 U.S. 238 (1986) (holding that a federal prohibition on using corporate treasury funds for expenditures in a federal election unconstitutionally burdened the rights of an anti-abortion nonprofit to publish a newsletter); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 210-11 (1982) (holding that Congress could prohibit a nonprofit from mass soliciting contributions to a segregated fund from nonmembers). *Citizens United* overruled *Austin* and partly overruled *McConnell*. Citizens United v. FEC, 558 U.S. 310, 363-65 (2010).

256. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007).

257. *E.g.*, *Bellotti*, 435 U.S. at 778, 782.

258. *Citizens United*, 558 U.S. 310.

259. 2 U.S.C. § 441b(b)(2) (2012).

260. *Citizens United*, 558 U.S. at 319-20.

sought declaratory and injunctive relief, arguing that the relevant BCRA provision was unconstitutional as applied to the documentary and the ads.[261]

Striking down earlier campaign finance precedent as well as the BCRA provision at issue, the Court broadly extended its ruling to all corporations.[262] The Court eschewed ruling on narrower grounds out of its stated concern about chilling speech,[263] and its view that the BCRA provision "is an outright ban" because PACs, as separate associations, do not actually allow corporations to speak and are "burdensome alternatives."[264] The Court explained that "First Amendment protection extends to corporations," including in the context of political speech, because of the principle established in *Bellotti* that "the Government cannot restrict political speech based on the speaker's corporate identity."[265] Notably, in rejecting arguments that a compelling government interest existed to support the BCRA limitation on corporate political spending, the Court also relied on the *Bellotti* opinion's notion of "the procedures of corporate democracy,"[266] and referred to corporations in multiple instances as "association[s]" or "associations of citizens."[267]

The Court's statement that the corporate identity of the speaker does not matter again implied an instrumental basis for the right—it is the right of the listeners, not the right of the corporation, that is being protected. Yet, the Court also drew on a view of the corporation as an association that has procedures for expressing dissenting viewpoints. The rhetoric of "associations" implies that the Court also had in mind a derivative rationale for the right, but the Court did not actually engage in the necessary analysis to identify from whom such a right could be derived for its broad ruling as to all corporations.[268] In fact, in *Citizens United*, the Court moved away

261. *Id.* at 321.

262. *See id.* at 327 (explaining that the Court would not carve out an exception to the expenditure ban "for nonprofit corporate political speech funded overwhelmingly by individuals").

263. *Id.* at 333-36.

264. *Id.* at 337-39.

265. *Id.* at 342, 346.

266. *Id.* at 361-62 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978)).

267. *Id.* at 343, 349, 354, 356.

268. This is in contrast with the analysis provided in *NAACP v. Button*, in which the Court made clear that in protecting a "nonprofit membership corporation," it was protecting the members. 371 U.S. 415, 419 (1963).

from its earlier attempts in campaign finance jurisprudence to draw a line between nonprofits created to pursue ideological agendas and business corporations.[269]

As with *Bellotti*, it is the *Citizens United* dissent rather than majority opinion that is more consistent with the logic of earlier Supreme Court jurisprudence extending protections to corporations and that takes more account of modern corporations. Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, explained that the majority was wrong to characterize the BCRA provision as a ban because corporations can speak through PACs, every shareholder and executive remains free to electioneer outside of the corporate form, and ideologically inclined individuals could use a 501(c)(4) corporation that does not accept corporate or union money to make expenditures through a corporate form.[270] The law at issue "target[ed] a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it."[271] Moreover, the First Amendment allows for distinctions to be drawn, including by the speaker's identity, as the government routinely restricts the speech of students, prisoners, and its own employees, among others.[272] In addition, "[c]ampaign finance distinctions based on corporate identity tend to be less worrisome" because corporations "are not natural persons," and corporate political spending is "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information."[273]

As the Court recognized in the nineteenth century, corporations might receive protections in order to protect their members, but those protections were limited in scope. Justice Stevens similarly

269. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 258 (1986) (distinguishing between ideological nonprofits and business corporations on the basis that the former's funding streams reflected support for the corporation's political ideas whereas the latter's did not and the business corporation could use economic power to distort the political marketplace); *see also* Monica Youn, *First Amendment Fault Lines and the* Citizens United *Decision*, 5 HARV. L. & POL'Y REV. 135 (2011).

270. *Citizens United*, 558 U.S. at 415-16 (Stevens, J., dissenting).

271. *Id.* at 419.

272. *Id.* at 420-21.

273. *Id.* at 423-24 (quoting FEC v. Beaumont, 539 U.S. 146, 161 n.8 (2003)).

argued that corporations received certain speech protections in order to protect their members, but those protections could be limited in scope: "Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."[274] Further, he recognized that included in the term corporations are entities for which it is not clear "'who' is even speaking when [they] ... place[] an advertisement that endorses or attacks a particular candidate."[275] "Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least."[276]

Finally, the Court further expanded corporate rights in the 2014 decision of *Burwell v. Hobby Lobby Stores, Inc.*, concerning the religious free exercise rights of for-profit corporations.[277] Notably, the Court did not base its decision on the First Amendment, but rather rested on statutory grounds under the Religious Freedom Restoration Act of 1993 (RFRA), a statute passed by Congress to restore broader protection for religious liberty after a Supreme Court decision in 1990 dispensed with the stringent compelling interest standard for First Amendment free exercise claims concerning a neutral, generally applicable law.[278] Nonetheless, *Hobby Lobby* merits discussion here as it relates to corporate rights jurisprudence and represents an expansion of religious liberty protections for business corporations.

Hobby Lobby represented the claims of three corporations: Conestoga Wood Specialties, Hobby Lobby, and Mardel.[279] Conestoga Wood Specialties is a for-profit wood-working business. Five members of a devout Christian family hold the corporation's stock, and the corporation employs 950 people. Hobby Lobby is a for-profit, nationwide chain of arts-and-crafts stores. Five members of a Christian family control the corporation's stock and the corporation

274. *Id.* at 466.
275. *Id.*
276. *Id.* at 467.
277. 134 S. Ct. 2751 (2014).
278. 42 U.S.C. § 2000bb (2012); *see also* Emp't Div. v. Smith, 494 U.S. 872 (1990).
279. *Hobby Lobby*, 134 S. Ct. at 2764-66.

employs over 13,000 people. Mardel is an affiliated business of Hobby Lobby, which operates 35 for-profit Christian bookstores and employs about 400 people.

At the heart of the case was a conflict between the claimed religious beliefs of these three corporations and the Affordable Care Act of 2010 (ACA), which requires employer healthcare plans to include coverage of preventive care specified by the Department of Health and Human Services (HHS).[280] The HHS regulations require nonexempt employers to include coverage of contraception methods approved by the Food and Drug Administration.[281] The *Hobby Lobby* corporations claimed that these regulations made them facilitate access to contraceptive drugs and devices they equated with abortion, violating their religious beliefs and their right to religious freedom under RFRA and the Free Exercise Clause.[282]

In a controversial ruling, the Court accorded RFRA free exercise rights to for-profit corporations for the first time. Specifically, the Court held that the contraceptive coverage requirement of the HHS regulations violated RFRA as applied to closely held, family-owned businesses whose shareholders have sincerely held religious beliefs.[283] To reach this result, the Court first determined that for-profit corporations are included within the reach of RFRA, which concerns "a person's exercise of religion." The Court relied on the Dictionary Act's inclusion of corporations within the term "person," as well as a derivative rights rationale.[284] "A corporation is simply a form of organization used by human beings to achieve desired ends," Justice Alito wrote for the majority.[285] "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[286] To illustrate, Justice Alito noted that the extension of "Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company," and "[p]rotecting corporations from government seizure of their property without just

280. *Id.* at 2759.
281. *Id.* at 2762.
282. *Id.* at 2759.
283. *Id.* at 2774-75.
284. *Id.* at 2768-69.
285. *Id.* at 2768.
286. *Id.*

compensation protects all those who have a stake in the corporations' financial well-being."[287] This led to the conclusion that "protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."[288] Justice Alito did not explain, however, why the shareholders were the appropriate persons from whom to derive a religious exemption from an employee health benefit requirement for the corporation, despite one of the corporations involved having more than 13,000 employees, whose religious beliefs were not considered.

Finally, the Court determined that the contraceptive coverage requirement did not meet RFRA's compelling interest test as applied to Hobby Lobby, Mardel, and Conestoga. The Court concluded that the requirement substantially burdened the exercise of religion, and although the requirement was assumed to be in furtherance of a compelling government interest, it did not represent the least restrictive means for furthering that interest.[289] Thus, the corporations were exempted from the contraceptive coverage requirement.

In a strongly worded dissent, Justice Ginsburg, joined by Justices Sotomayor, Breyer, and Kagan, criticized each step of the majority's analysis.[290] Critically, the dissent emphasized that for-profit corporations embracing persons of diverse beliefs are different from religious organizations that exist to serve a community of believers in the same religion.[291] In addition, "'[c]losely held' is not synonymous with 'small,'" wrote Justice Ginsburg.[292] The majority's analysis disregarded the impact on thousands of employees and dependents who do not share the religious faith of the shareholders. RFRA requires taking account of how a religious-based exemption would harm others.[293] Further, the majority failed to offer instruction on how to resolve intracorporate controversy over religious values and accommodations, merely pointing to state corporate law without elaboration.[294] As the dissent highlighted, although *Hobby Lobby*

287. *Id.*
288. *Id.*
289. *Id.* at 2775-83.
290. *Id.* at 2787-2806 (Ginsburg, J., dissenting).
291. *Id.* at 2793-98.
292. *Id.* at 2797 n.19.
293. *Id.* at 2801.
294. *Id.* at 2797 n.19.

rests on statutory grounds rather than the Free Exercise Clause, the Court has continued down a path of expanding the scope of corporate rights without deeper examination into the complexities of our time.

IV. TOWARDS A CONSISTENT FRAMEWORK FOR ANALYZING CORPORATE CLAIMS TO CONSTITUTIONAL PROTECTIONS

The previous Parts have shown that the Supreme Court's decisions extending constitutional protections to corporations have often been based on a view of corporations as artificial entities representing associations of natural persons. The Court has extended constitutional protections to corporations when it is a necessary or convenient way to protect the rights of the natural persons assumed to be represented by the corporation in question, at least with respect to the issue at stake. Although never systematically explained by the Court, the associational argument clearly indicates that the Court understands corporate rights to be derivative rights, not direct or original rights.[295] In the context of commercial speech and corporate political spending, the Court has continued to use this derivative rights logic and has at times added an instrumental rationale—to protect the interests of natural persons outside the corporation.

With this unarticulated framework, the Court has found that corporations have some rights (e.g., equal protection, due process, protection against unreasonable searches and seizures), but not all of the rights that natural persons have (privileges and immunities, protection against self-incrimination, voting). The latter rights inhere in a person in his or her individual capacity, and individuals are fully protected as to these interests without extending the right to corporations—in fact, extending the privilege against self-incrimination or the right to vote to corporations could undermine justice and the political process.

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295. *See* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 57-78 (1986) (discussing the concept of original and derivative rights); ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 9-51 (2013) (discussing theories of the corporation, including the "bottom-up" perspective which views the corporation as derivatively representing the interests of participants).

The Court has not, however, consistently or carefully distinguished different types of corporations in its constitutional rights decisions. This oversight was potentially problematic even by the late nineteenth century when the Court decided some of the important early corporate rights cases, and it has become more problematic over time. The corporate form is used for political units, such as townships, for nonprofit organizations ranging from food banks or small environmental action groups to large universities and churches, and for clubs and membership associations. It is used by for-profit business organizations, ranging from small closely held businesses to huge, publicly traded, multinational corporations. It is even used by corporations to create entities such as "special purpose vehicles" (SPVs) that have no employees and only a single shareholder (which is another corporation), as a legal way to partition assets and liabilities.[296] Corporations from the above list of categories often have little in common with each other besides the fact that they fall under the label of "corporation." They cannot all be fairly regarded as mere associations of persons.

In this final Part, we examine how the underlying logic of much of the Court's corporate rights jurisprudence could be used to make more principled decisions, taking account of the spectrum of modern corporations. We then grapple with some of the conceptual challenges that recur in corporate rights determinations.

A. Using the Logic of the Derivative Rights Rationale

As the Court has been deciding the scope of corporate rights for over two centuries, we do not start our exploration with a clean slate. We cannot return to a world in which corporations have no recognized constitutional protections. And, even if such a result were plausible, through a constitutional amendment or otherwise, it is not clear that it would be ideal. According rights to corporations often recognizes that human interests are at stake and doing so has served important functions, particularly in bolstering the utility of

296. Thomas E. Plank, *The Security of Securitization and the Future of Security*, 25 CARDOZO L. REV. 1655, 1663 (2004); Comm. on Bankr. and Corporate Reorg. of the Ass'n of the Bar of the City of N.Y., *Structured Financing Techniques*, 50 BUS. LAW. 527 (1995); *see also* Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 135 (1994).

the corporate form as a means of pooling capital to engage in long-term and large-scale business activities. For example, the Court's nineteenth-century jurisprudence according property and contract rights to corporations assured investors of certain basic protections in using the corporate form and guarded against the arbitrary and deleterious exercise of government power. The history of corporations through this time illustrates the vast contributions that corporations, so protected, have made to the country's infrastructure and economic development. Likewise, the other extreme of according corporations all of the constitutional rights that natural persons enjoy would also be unfounded. Corporations organize human activity, but they are not the equivalent of individuals. Neither extreme—of corporations having no rights or having all of the same rights as natural persons—is plausible or desirable.

As a general matter, the Court has therefore been asking the correct question in most cases—an incremental question about whether extending a particular right to a corporation protects the rights of actual people and serves the purpose of the constitutional provision at issue. The Court has largely done this on an ad hoc basis, however, through the language of its associational view of corporations and its unarticulated derivative rights framework.

The derivative nature of rights for corporations requires the Court to pay attention to distinctions, to explicitly acknowledge that, for some purposes, some corporations can usefully and functionally be regarded as aggregates of their members from whom rights could be derived, while other corporations serve other purposes, and cannot be regarded as representing any particular natural person or group of natural persons. The latter is made possible by one of the essential characteristics of the corporate form—that incorporation creates a separate entity under the law.[297] This characteristic has allowed for the growth of corporations in size, as well as for corporations to serve as lasting institutions, with organizational dynamics that cannot easily be tied to identifiable groups of people.[298]

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297. *See* Blair, *supra* note 103, at 407 (discussing the importance of entity status to building lasting institutions with substantial enterprise-specific assets and specialized organizational structures not tied to any individual participants).

298. *See* Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012) (discussing perpetual existence as one of the core legal attributes of the corporate

In *Citizens United*, for example, there was an identifiable group of natural persons who associated to engage in political advocacy.[299] Though the specific individuals behind the corporation might not have been publicly named, they were, nonetheless, a finite identifiable group who had joined together for the specific speech-related purpose. The Court appropriately recognized a derivative right for such an organization.

By contrast, it would not even be possible to identify all of the individual natural persons who might be said to be "represented" by, say, The Coca-Cola Company, which has hundreds of thousands of shareholders, many of them other corporations, and the mix of shareholders changes minute by minute. According to its website, Coca-Cola also has more than 130,000 worldwide "associates," 250 "bottling partners," 23 million retail customer outlets, 468 "community water partnership projects,"[300] 40 "agriculture sustainability initiatives," and countless numbers of other individuals who interact with, or are affected by the company on a regular basis.[301] Even if we could identify the subset of all of these individuals who are U.S. citizens or residents, who would, in theory, be entitled to constitutional protections, it could not be argued that those individuals chose to associate with each other through Coca-Cola for the purpose of expressing themselves politically, or that protecting freedom of speech rights for Coca-Cola would protect the rights of expression of any identifiable group of real people behind the corporation. Thus, the Court's decision to broadly rule as to all corporations in *Citizens United* was unsupported by the logic of derivative rights and by the Court's own prior jurisprudence. It could have instead used this logic to draw lines—to do so it would have had to engage with the reality that it was not accurate to characterize all corporations as "associations of citizens."

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form); *see also* Lynn A. Stout, *The Corporation as Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015) (discussing the corporate form as a legal innovation that allows wealth to be transferred forward and backward through time by virtue of its separate legal identity and perpetual existence).

299. Citizens United v. FEC, 558 U.S. 310, 318-20 (2010).

300. *Coca-Cola 2012/2013 GRI Report*, COCA-COLA CO. (2013), http://assets.coca-colacompany.com/44/d4/e4eb8b6f4682804bdf6ba2ca89b8/2012-2013-gri-report.pdf [http://perma.cc/A8TC-SU4P].

301. *Id.*

We therefore observe that a more principled path forward requires the Court to carefully determine whether there is a factual foundation to support an extension of derivative rights to the corporation at hand. As corporate rights are derivative in nature, it would seem imperative that if the Court is going to recognize a corporate right, it be able to identify the specific group of natural persons from whom the corporate right is derived. Broad rulings as to all corporations do not suffice. Further, the natural persons said to be represented by the corporation must have joined in association for purposes related to the right at issue in the case. The corporation must represent their interests. Otherwise, there is simply no source for a derivative right.

Our next observation concerns the second rationale the Court has offered for recognizing freedom of speech protections for corporations—that a purpose of the First Amendment is to ensure an informed citizenry who have a right to hear or receive information.[302] According to this rationale, corporations must be allowed to engage in politically expressive and commercial speech, so that voters and consumers can have the benefit of the knowledge and expertise that the corporation possesses. This argument recognizes that corporations can sometimes be important repositories of knowledge and expertise.[303]

But the right of potential listeners to hear is a weaker basis for corporate speech rights because it is further attenuated from a natural person with an original basis for the right.[304] The right is accorded to the corporation only instrumentally, as a means of constraining the government from regulating speech that listeners should be able to hear.

As the grounds for the right is instrumental, it implies some additional basis for constraint or regulation. For example, individuals are not allowed to shield themselves from liability for fraud,

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302. *Citizens United*, 558 U.S. at 339-41, 343; First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776-77, 783 (1978).

303. *See* RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 14 (1982) (defining and explaining "routines" as a mechanism by which knowledge gained from prior experience is stored in corporations); Blair, *supra* note 103, at 394-95.

304. *See* DAN-COHEN, *supra* note 295, at 104; *see also* ROBERT POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 73 (2014).

slander, or libel, on the grounds that listeners have the right to hear their speech, even if it is false or misleading.

Further, if speech rights for corporations are justified based on the right of listeners to hear what the corporations have to say, then it is the speech that is the target for protection, not the corporation. The interests of listeners are the concern and it is their interests and liberties that should be protected. It follows, for example, that restrictions made to promote political equality and curb the distorting or "drowning out" effects of corporate spending—known as the "antidistortion interest"—are on more solid ground than the *Citizens United* majority and dissenting opinions acknowledged.[305] Restrictions made for this purpose serve to further the interests of listeners, who are the source or reason for extending protections to corporations in the first instance.

In addition, it follows that corporate speech protections relying on the instrumental rationale could be premised on listeners having access to information about who is behind the speech, what the factual basis for the speech is, and how it is that the corporation has special knowledge and expertise on the topic of the speech. In the case of political speech in particular, there is a public interest in knowing the source of the speech.[306] The value of speech as information in the marketplace of ideas often depends on knowing the identity of the speaker. For example, a group called "Littleton Neighbors Voting No" recently spent $170,000 in a Colorado ballot measure election in order to defeat a zoning restriction that would have kept out a new Wal-Mart store.[307] It came to light that the group was exclusively funded by Wal-Mart, and was not a grassroots group as its name suggested.[308] The informational value of speech from

305. For an argument that the antidistortion rationale did not deserve to be rejected by the majority or abandoned and muddled by the dissent, see Richard L. Hasen, Citizens United *and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 990, 999 (2011).

306. Eight Justices in *Citizens United* voted in favor of the constitutionality of disclaimer and disclosure requirements. The majority opinion noted that disclaimers "insure that the voters are fully informed about the person or group who is speaking." *Citizens United*, 558 U.S. at 368 (internal quotation omitted); *see also Bellotti*, 435 U.S. at 792, n. 32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.").

307. Ciara Torres-Spelliscy, Comments Before the Securities and Exchange Commission Regarding Petition File No. 4-637 10 (Nov. 2, 2011), http://www.sec.gov/comments/4-637/4637-13.pdf [http://perma.cc/4W9C-L23Z].

308. *Id.*

"Littleton Neighbors" is significantly affected by whether the listener knows its specific corporate source of funding. Thus, to the extent corporations are accorded rights for political speech on the basis of listeners' rights, regulation requiring disclosure of the source of corporate political spending is justified.[309]

Information regarding the source of the speech may also give insight into the factual basis or expertise for the speech. For example, Coca-Cola probably has expertise on issues such as international trade, water rights, and franchising and trademark rules, and as long as Coca-Cola is clearly identified as the source of the speech, an argument can be made that the public has a right to have access to information or perspectives disseminated by Coca-Cola on such issues. But it seems unlikely that Coca-Cola would have special expertise that is worthy of constitutional protection on matters such as veterans benefits or same-sex marriage. On issues such as these, which have no connection to the business activities that the corporation is involved in, the derivative rationale for protecting corporate speech is nonexistent (whose rights would be protected?), and the instrumental rationale is weak (how would the available public knowledge be enriched?). Thus, at least with respect to matters such as these, the Court should not require that the government show a compelling justification for regulation.[310] If corporate executives or other persons connected to the corporation have personal views on such matters, they would in no way be restricted from expressing them individually even if for some reason restrictions were imposed on corporations.

In sum, before extending a constitutional protection to a corporation, the Court should carefully consider whether the corporation represents an identifiable group of persons associating for a purpose related to the right in question,[311] or whether the corporation is more appropriately regarded as having its own interests in the

309. For literature discussing the disclosure of corporate political spending, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 924-28 (2013); and Michael D. Guttentag, *On Requiring Public Companies to Disclose Political Spending*, 2014 COLUM. BUS. L. REV. 593 (2014).

310. The less stringent commercial speech standard might be more appropriate. This could be an area for future consideration. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

311. *See supra* Part I.

matter, distinct from that of any specific group of individuals.[312] If it is the former, the purpose of the right at issue may be served by according the right to the corporation—doing so could be necessary or convenient to ensure that the rights of the individuals involved are protected. If it is the latter, the corporation does not have a direct or derivative claim to constitutional protection. The only basis for extending constitutional protection to a corporation in this circumstance would be for an instrumental purpose, which suggests additional constraint or regulation may be appropriate to carry out such purpose.

The line drawing that we are advocating will be difficult. There will be corporations and circumstances that do not clearly fit in the same category as a non-profit political advocacy organization such as Citizens United speaking on the fitness of a candidate for public office, nor in the category of Coca-Cola speaking about international trade matters. Nonetheless, these are the considerations that the Court should be focused on in deciding future cases of corporate political spending, free exercise, and other determinations—not metaphysical questions about the meaning of the legal designation of corporations as "persons" or the facile characterization of all corporations as "associations."

B. Conceptual Challenges in Corporate Rights Determinations

In this final Section, we discuss some lingering conceptual challenges in corporate rights determinations. The first concerns our proposal that if the Court is going to rely on a derivative rights rationale to accord a corporation a constitutional right, the Court should be able to identify the specific group of natural persons from whom the right is derived. This raises obvious questions about how specifically the protected persons must be identified. Must they be identified by name, as the Court listed the five family members who own a controlling share of Hobby Lobby Stores, Inc.?[313] Would it suffice to have a general sense of the persons involved, even if particular identities are unknown or undisclosed as the Court allowed in *NAACP v. Alabama*, in which the very issue at stake was

312. *See supra* Part III.

313. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014).

the members' right to associate without disclosing their affiliation?[314] Would it suffice to simply refer to generic categories such as shareholders or members, as the Court did in *Citizens United*?[315] Whatever test the Court used would have an impact on which corporations would be accorded various constitutional protections.

Our instincts at this time encourage us to believe that the persons whose rights are arguably being protected by according the corporation a right should be a relatively stable group and at least identifiable, if not actually identified. It would be hard to justify, for example, extending a derivative right to a corporation in order to protect the rights of a rapidly changing body of shareholders in large, publicly traded corporations, many of whom are not U.S. citizens or even individual persons but, rather, financial institutions and other corporations.[316] Other corporate participants in large, publicly traded corporations, such as managers and employees, may be relatively more stable in their association with the corporation but still change frequently, and many corporations have disaggregated production models with operations carried out overseas and through contractors.[317]

This line of thinking, we believe, would provide some discipline and set some boundaries around the granting of rights to corporations by keeping the emphasis on whose rights would be protected by doing so. More generally, we suspect that if our analysis were used, a narrower scope of constitutional protections would be accorded to large, publicly traded corporations, but it would not have to mean a denial of all protections so long as sufficiently important public policy reasons existed to hold otherwise.

For example, while the rationale for granting corporations property and contract rights in the nineteenth-century cases was derivative—the Court saw itself as protecting the rights of the

314. 357 U.S. 449, 458-59 (1958).

315. 558 U.S. 310, 361-62, 370 (2010).

316. For a discussion of the intermediation of the U.S. capital markets, see Jill E. Fisch, *Securities Intermediaries and the Separation of Ownership From Control*, 33 SEATTLE U. L. REV. 877 (2010). For a discussion of short term and high frequency trading, see Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265 (2012).

317. *See* Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1131 (2011) (discussing the "Nikefication" of production for many U.S. public corporations using overseas contract manufacturing and a disaggregated model).

natural persons who were investors in corporations—the rationale for granting property and contract rights to large, publicly traded corporations in contemporary times may more appropriately be regarded as instrumental. That is, the persons composing the large, publicly traded corporation may not be a stable, identifiable group of persons from whom rights could be derived, but some rights could still be accorded on an instrumental basis, akin to Justice Rehnquist's suggestion in his *Bellotti* dissent that corporations should only have rights "incidental" to their existence—those necessary to carry out the functions of corporations organized for commercial purposes.[318] In Justice Rehnquist's words, "[t]here can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law."[319] Granting property and contract protections to corporations is fundamental to the utility of the corporate form and protects the integrity of financial markets by preventing the arbitrary taking of property from private hands by the government.

But not all constitutional rights are incidental to the purposes for which states permit corporations to be organized, or could be otherwise justified by the interests of third parties. This approach therefore suggests a narrower, more tailored scope of rights, particularly for large, publicly traded corporations. As Justice Stevens pointed out in his *Citizens United* dissent, every individual remains free to exercise their constitutional rights outside of the corporate form.[320]

Another set of questions that commonly arise in corporate rights determinations is which corporate participants should count in the analysis and what to do when competing interests exist within the corporation. This is a critically important issue for developing a coherent understanding of derivative rights, yet the Supreme Court has failed to give it much consideration.

Parts I and III illustrate that the Court has often looked to the shareholders as the relevant persons from whom to derive rights or has simply referred more vaguely to "members," "individuals," and

318. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 823-28 (1978) (Rehnquist, J., dissenting); *see also supra* notes 248-54 and accompanying text.

319. *Bellotti*, 435 U.S. at 824 (Rehnquist, J., dissenting).

320. *Citizens United*, 558 U.S. at 415-16 (Stevens, J., dissenting).

"corporators" behind the corporation. Looking solely to shareholders might have made sense in the nineteenth century when the Court was answering questions regarding the contract and property interests of corporations. And, at any rate, we can expect corporate participants' interests to be largely aligned with respect to basic contract and property protections for the corporation.

Once the Court arrived at questions of expressive or religious rights for business corporations in contemporary times, however, this was no longer the case and the Court did not have a ready means for determining who should count in the calculation.[321] At times, the Court has pointed to state corporate law as the mechanism for resolving these questions, as in *Bellotti* and *Citizens United* when the Court referred to "the procedures of corporate democracy."[322] In *Hobby Lobby*, when the Court discussed the concept of derivative rights, it referred to the people associated with the corporation as "including shareholders, officers, and employees."[323] And when the Court gave examples, it pointed to Fourth Amendment protection for corporations as "protect[ing] the privacy interests of employees and others associated with the company."[324] When applying this logic to the religious liberty rights at issue, however, the Court merely looked to the "humans who own and control" the corporations.[325] The Court also responded briefly to "concern about the possibility of disputes among owners of corporations" by pointing simply to state corporate law for resolving disagreements about "the conduct of business."[326] The Court did not explain why it would mention employees when generally referring to derivative rights logic and Fourth Amendment protections for corporations, but not when analyzing whether corporations should have religious liberty rights to exempt them from employee healthcare benefit regulations.

The issue of which corporate participants to consider for purposes of derivative rights cannot be easily answered by reference to state corporate law or even corporate law theory. State corporate law

321. *See supra* Part III.C.
322. *Citizens United*, 558 U.S. at 362 (citing *Bellotti*, 435 U.S. at 794).
323. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).
324. *Id.*
325. *Id.*
326. *Id.* at 2775.

provides rules for the internal governance of the corporation, and thus gives insight into who the corporate participants are and what their roles are within the corporation. But how that translates to questions of rights under the Constitution is not obvious. Theories of the corporation could be helpful for buttressing analysis, but they do not provide a single uncontroverted answer.[327]

We believe these issues of who should count in the analysis and what to do when competing interests exist within the corporation merit future work. We are inclined to believe that because no readily available answers exist in corporate or constitutional law, the question of who should count toward derivative rights should be analyzed pragmatically on a right-by-right basis so as to serve the intended purpose of the right. When there are competing interests within the corporation as to a particular right, a more cautious approach to according corporate rights is in order because of the danger of impinging on liberties and because individual rights are still available outside of the corporate form. Our discussion is offered here to begin that discussion.

CONCLUSION

In this Article, we have traced two hundred years of constitutional rights jurisprudence to show that the Supreme Court has relied upon an unarticulated understanding of corporate rights as derivative and instrumental. At the same time, the Court has failed to reconcile this approach with the changed nature of business corporations. Although the Court has not made the mistake of personifying corporations in the way that is popularly imagined, it also has not taken account of large, modern business corporations that cannot be seen as representing an association of identifiable people. Yet the logic of the Court's own framework of corporate rights as derivative and instrumental offers a principled path

327. *See, e.g.*, David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201 (discussing "how theories of the corporation have developed and changed over the last hundred and fifty years"); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1862-64 (2003) (discussing how twentieth-century legal and social thought moved away from a vision of business corporations that included employees to a focus on shareholders vis-à-vis managers to the exclusion of other corporate constituencies).

forward for the difficult line-drawing between corporations that needs to be done. If a corporate right is premised on being derivative in nature, then it would seem imperative that the Court be able to identify the group of persons from whom the right is derived. Some corporations can be appropriately characterized as a group of identifiable persons, while others cannot. If a protection is accorded to corporations on an instrumental rationale, this is a weaker basis for the right because it is further attenuated from natural persons with an original basis for the right, and this suggests grounds for addressing countervailing interests and the need for regulation. The complexities of implementing such a framework are undoubtedly significant, but these are exactly the complexities that must be confronted.