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Putting the “Corporate” Back into Corporate Personhood

*Caroline Kaeb**

Abstract: The Supreme Court has been wrestling with the doctrinal premises of corporate personhood on several occasions in recent years. The Court follows a long history of jurisprudence that has been criticized as cryptic or nebulous at best by many scholars. Especially since the recent economic crisis, the doctrine of corporate personhood has had polarizing effects on the public debate about the role of corporations in society. At a policy level, the debate revolves around questions about the scope of regulatory reach of the state over business; at a sociological level, the issue presents itself as an oxymoron, whether “corporations have human rights,” as the Wall Street Journal postulated. The article provides an important insight into what is wrong with the majority opinion in Citizens United. The paper argues that corporate legal theory (about the nature of the firm) should inform the debate on corporate constitutional rights in order to avoid intra-corporate conflicts with competing interests of shareholders and—depending on the prevailing corporate theory in a national context—its other stakeholders. In essence, we should put the “corporate” back into corporate personhood.

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INTRODUCTION

The United States has been the perceived thought leader on corporate personhood when compared to major foreign legal systems. As early as 1886, the U.S. Supreme Court coined the legal concept of corporate personhood in its *Santa Clara* decision: “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 those corporations. *We are all of the opinion that it does.*”¹ The Supreme Court’s ruling marked the beginning of a line of jurisprudence that has increasingly watered down the distinction between corporations and human beings. Thus, the Court has endowed corporations with rights that go well beyond the original corporate privilege of limited liability and even beyond mere commercial rights.

The Court has extended to corporations constitutional rights that primarily avail to natural persons, evoking criticism of judicial activism and a pro-business bias.² More recently, the Court reinforced its position on corporate personhood in its infamous decision in *Citizens United* holding that the (corporate) nature of the rights holder is entirely irrelevant when determining the scope of corporate rights under the U.S. Constitution.³

It has even been argued that the United States is the only country in the world providing for corporate personhood in a constitutional context.⁴ But while the United States has become well-known for its long-standing tradition and leading role with regard to promoting corporate personhood, the notion of corporate personhood is not a uniquely American one.

The notion that the United States has an exclusive hold on corporate personhood is a common misperception, particularly with regard to Europe. Granted, unlike in the United States, the manifestations of corporate per-

¹ *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (Waite, C.J.) (emphasis added).

² See Erwin Chemerinsky, Editorial, *The Broad Reach of the Narrow Hobby Lobby Ruling*, L.A. TIMES (June 30, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-hobby-lobby-supreme-court-20140701-story.html>; Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?pagewanted=all&r_0; Gregory P. Magarian, *Hobby Lobby in Constitutional Waters: Two Life Rings and an Anchor*, 67 VAND. L. REV. 67 (2014).

³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 350 (2010) (referring to “the premise that the *First Amendment* generally prohibits the suppression of political speech based on the speaker’s identity); *id.* at 364 (holding that “[t]he *First Amendment* does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech); see also *id.* at 376.

⁴ Rob Kall, *Is the USA the Only Nation in the World with Corporate Personhood?*, ECONOMY IN CRISIS (Apr. 10, 2012), <http://economyincrisis.org/content/is-the-usa-the-only-nation-in-the-world-with-corporate-personhood> (quoting Mila Versteeg) (last visited March 15, 2014)

sonhood have traditionally been more tentative in European legal systems, especially in civil law jurisdictions. This is illustrated vividly by the traditional resistance of European civil law systems to hold corporations criminally liable (as legal persons) under their domestic criminal codes.⁵ It may seem like a natural progression that European legal systems, which have been holding firm on the doctrine of *societas delinquere non potest*,⁶ also would have conceptual troubles acknowledging corporations, as fictional entities, to be holders of constitutional, fundamental, or even human rights. In fact, even though many EU member states have been reluctant to confer entity liabilities and rights on corporations beyond the context of civil and commercial matters,⁷ their domestic courts generally have not barred corporations, as legal persons, from procedural safeguards and substantive rights per se.⁸ Particularly the European Court of Human Rights (ECHR), Europe's regional human rights court, has had a long history of extending the fundamental rights guarantees under the European Convention on Human Rights (the Convention)⁹ to corporations and has been the engine for a pro-business agenda of fundamental rights protections in Europe.¹⁰

Considering that both the U.S. Supreme Court and the ECHR have exercised a proactive approach to corporate rights, a comparative analysis of commonalities and differences in methodology can shed light on how much "corporate" there still is in corporate personhood on each side of the Atlantic and what lessons the two systems can learn from one another. It is imperative that the distinction between corporations and human beings be restored and reinforced through the law. It is simply not sufficient, with reference to "corporate personhood," merely to equate corporations with human beings without accounting for the special characteristics of the corporate form, in terms of fiduciary duties, and the possible intra-corporate tensions resulting from the separation of ownership and control. This article argues that instead it is crucial to account for the characteristics and com-

⁵ Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us about American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 105 (2004).

⁶ "A legal entity cannot be blameworthy."

⁷ Thus, whereas corporations have standing to sue and be sued in civil matters in nearly every jurisdiction, civil law systems (especially in Europe) have been traditionally been reluctant to provide for corporate entity liability in the context of criminal proceedings.

⁸ However, constitutional rights protections under their respective domestic Constitutions have been applied to corporations in a manner that is far more restrictive than in the United States. See Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 12, 2000, 102 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 591, 2001 (Ger.).

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, *opened for signature* Apr. 11, 1950 C.E.T.S. No. 194 (entered into force June 1, 2010) [hereinafter Convention]. The Convention entered into force on September 3, 1953; to date 47 European states are party to the Convention. The Convention provides the treaty basis for the European human rights regime that has aims to ensure compliance with basic human rights principles throughout Europe. See PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS, 891–92 (2013).

¹⁰ MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES 134–35 (2006).

plexities of corporate structures when determining if respective rights protections are applicable to corporations.¹¹ Only then can conflicts with shareholder interests—as the primary constituency of the corporation—be mitigated and unintended consequences pertaining to corporate personhood be avoided.

Corporations are considered entities in their own right,¹² yet they can only act through their agents, while owing a fiduciary duty to the company’s shareholders.¹³ Thus, it is erroneous to think of a corporation in a one-dimensional way, either in terms of an association of individuals or as a person in its own right. Instead, corporations should be perceived as having features of both associations and individuals, at least for the exercise of determining the scope of fundamental rights granted to the corporate entity. Conferring rights on corporate entities acknowledges them as “independent entit[ies] with interests, ends, and knowledge of its own.”¹⁴ Even if one does not go as far as viewing the corporations as an “enforcement agent” of their human constituents’ rights/interests,¹⁵ it still cannot be ignored that corporations constitute a complex structure of a multitude of diverse interests that can conflict with one another and that need to be balanced.

This analysis can extend well beyond avoiding conflict between the rights conferred on the corporate entity and the interests of its shareholders to include interests of a company’s key stakeholders¹⁶ as well. Certainly, this would require a stakeholder-centric corporate objective and governance

¹¹ See Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 108 (1995) (arguing that the respective theory of the nature of the corporation has “implications for the nature and extent of corporate constitutional rights.”); Daniel Greenwood, *Essential Speech: Why Corporate Speech is not Free*, 83 IOWA L. REV. 995, 1024 (suggesting that “[i]f corporate speech is to be corporate at all, there must be a clear explanation of how the group decision legitimately can be made.”)

¹² See generally Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061 (1994).

¹³ See Daniel Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1021 (1996).

¹⁴ David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 221, 223 (2013).

¹⁵ Burt Neuborne, *Of “Singles” Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769, 775 (2012).

¹⁶ There is some variety in how authors have defined the term “stakeholder.” As Donaldson & Preston note regarding a leading example:

The much-quoted Stanford Research Institute’s (SRI) definition of stakeholders as “those groups without whose support the organization would cease to exist” clearly implies that corporate managers must induce constructive contributions from their stakeholders to accomplish their own desired results (e.g., perpetuation of the organization, profitability, stability, growth).

Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 72 (1995) (internal citations omitted).

model under the law of the respective domestic jurisdiction, which has traditionally not been the case in the United States¹⁷ but increasingly has taken hold in European legal systems, such as the UK, France, and Germany.¹⁸ Yet, while it is crucial to account for potential corporate entity-constituent conflicts, there is no one-size-fits-all approach about how to deal with such conflicts—these are inherent in the corporate form and its very nature. Rather, it depends on the prerogatives of the respective legal system how the entity's and constituents' interests ought to be balanced. While in the United States statutory and common law protections might be effective to address these conflicts,¹⁹ different solutions at the constitutional level might be necessary in other jurisdictions, depending on their respective legal culture and the statutory protections available for corporate constituents, namely, shareholders and other stakeholders.²⁰

A transatlantic comparative legal analysis vividly illustrates the role of corporate legal theory (about the nature of the firm) in the corporate rights jurisprudence of the U.S. Supreme Court and the lack thereof in the case law of Europe's "Supreme Court" and its regional human rights court. The European courts have featured a strictly teleological approach, thus avoiding issues of nature of the corporation, ignoring the diversity of shareholder (and stakeholder) interests and glossing over potential intra-corporate conflicts. U.S. doctrine, on the other hand, is much more nuanced, both historically and in a contemporary setting. Thus, the Supreme Court has employed a protection rationale that acknowledges shareholder interests as being distinct and possibly in conflict with the rights of the corporate entity itself, while the jurisprudence in Europe does not account for this potential clash of interests. In its decision in *Hobby Lobby*, the Supreme Court further extended its protection rationale to other stakeholders holding that "the pur-

¹⁷ See *Dodge v. Ford Motor Company*, 170 N.W. 668 (1919) (installing the theory of shareholder wealth maximization as a basic feature of corporate law); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 NYU L. REV. 733, 763–76 (2005) (giving an account of the case law and statutory law in the United States providing for managerial discretion to take into account the interests of constituencies other than shareholders, for example, under constituency statutes and antitakeover laws). In contrast, the majority opinion in the Supreme Court's 2014 decision in *Hobby Lobby* includes language that points towards a stakeholder-sensitive corporate purpose. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014).

¹⁸ See MICHAEL KERR ET AL., *CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS* 113, 126 (2009).

¹⁹ The majority opinion in *Citizens United* dismisses *Austin*'s shareholder protection rationale by holding that "[t]here is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy,'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361–62 (2010) (citation omitted), by which, "presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty," *id.* at 477 (Stevens, J., dissenting).

²⁰ See, e.g. Marco Becht, Patrick Bolton & Ailsa Roell, *Corporate Law and Governance*, in 2 HANDBOOK OF LAW & ECONOMICS 830 (2007); Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. ECON. PERSPECTIVES 117 (2007); see generally THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE & FUNCTIONAL APPROACH (D. W. Puchniak et al. eds., 2012).

pose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees.²¹

Having been faced with the issue whether "a for-profit corporation [is allowed] to deny its employees the health coverage of contraceptives . . . , based on the religious objections of the corporation's owners,"²² the Supreme Court in *Hobby Lobby* has again taken on the fundamental question of the corporate theory underpinnings of the corporate personhood doctrine. Does a company, as a proxy of its shareholders' interests, have beliefs and intrinsic values after all? Or ought the religious beliefs and interests of shareholders be viewed as distinguishable from the corporate entity itself? Is the purpose of the corporate fiction to protect human beings, namely the shareholders and other stakeholders (such as employees) associated with the corporation?²³ These and related questions inform the American legal analysis while the European Courts in their corporate rights jurisprudence are entirely silent on these fundamental questions that go to the very nature of the corporation.

Taking a look to Europe, this article examines what happens when the essence of corporate personhood is ignored. Many would agree that more rights (and more speech) are better,²⁴ but it is also commonly understood that rights can clash with the rights of others, i.e., to grant rights to one person naturally cuts back on the rights of others. The same is true in a corporate context providing one recognizes the corporation from the perspective of its constituents. The danger of not recognizing this is well illustrated in Europe.

A sharp contrast emerges between Europe and the United States on the essential elements requires in examining corporate personhood. The ECHR and the European Court of Justice (ECJ) (together, European Courts) have outright ignored corporate theory and related questions of the nature of the firm from the start. Both European Courts have granted the same guarantees to corporations as to individual persons without accounting for legal principles about the nature of the corporation in general.²⁵ In contrast, the Su-

²¹ While the majority opinion recognizes the need to protect interests of other stakeholders, in the end, the Court's decision was guided merely by the interests of the controlling shareholder of the closed corporation in question. In dissent, J. Ginsburg criticizes the majority opinion for "accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2787 (2014) (Ginsburg, J., dissenting).

²² *Burwell v. Hobby Lobby Stores, Inc.*, SCOTUS BLOG, <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> (last visited Oct. 1, 2015).

²³ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014).

²⁴ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 472 (2010) (citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (Scalia, J., dissenting)).

²⁵ See generally *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990); *Société Colas Est*

preme Court, while not always finding the corporate nature of the rights holder decisive,²⁶ does not turn a blind eye to the nature, organizational structures, and intra-institutional dynamics of the corporation.²⁷ In the United States, corporate theory is an important factor in the corporate personhood debate, as seen both within legal doctrine and in dissents and concurrences challenging majoritarian teleological approach. This has had the effect of deepening the analysis of corporate personhood in the United States, something that is lacking in Europe as result of their atheoretical approach.²⁸

Granted, the Supreme Court's approach to corporate constitutional rights can be perceived as not always coherent and even bifurcated with regard to the methodology applied.²⁹ Whereas the Supreme Court explicitly decided some cases based on corporate theory,³⁰ it found in its decision in *Citizens United* that the corporate nature of the rights applicant is irrelevant.³¹ However, the Supreme Court exhibits an awareness of potential intra-corporate conflicts throughout its case law that is part of a robust debate,³² which is absent in the jurisprudence of its European counterparts. The United States has often been looked to as a model for constitutional design. Even though some scholars have argued that America's leading role is diminishing in that regard,³³ the Supreme Court's methodology on corporate constitutional rights, far more advanced than the European approach, can be seen as a north star for Europe.

There is a great need to recalibrate how we understand corporations and what rights are vested in them. This holds true especially in Europe, where recent developments have amplified the need for the high-level European Courts to reach clarity on the exactly those questions. With the Lisbon Treaty of 2009, the Charter of Fundamental Rights became primary EU law and thus provides constitutional-like protections to all EU citizens from EU acts and legislation.³⁴ Much of the case law of the ECHR is now expected to be imported into the judicial decision-making process of the ECJ,

and *Others v. France*, 2002-III Eur. Ct. H.R. 131 (2002).

²⁶ See *Citizens United*, 558 U.S. at 361–62; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

²⁷ See *Bellotti*, 435 U.S. at 788; see *Citizens United*, 558 U.S. at 361–62 (2010); see *Hobby Lobby Stores*, 134 S.Ct. at 2768 (2014).

²⁸ See EMBERLAND, *supra* note 10, at 146.

²⁹ See Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J., 577, 622, 629 (1990).

³⁰ *Hale v. Henkel*, 201 U.S. 43, 74–76 (1906) ; *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

³¹ *Citizens United*, 558 U.S. at 350, 376 (2010).

³² See *Bellotti*, 435 U.S. at 805–08 (1978) (White, J., dissenting); see also *Citizens United*, 558 U.S. at 475–79 (2010) (Stevens, J., dissenting).

³³ Kall, *supra* note 4 (quoting Milla Versteeg).

³⁴ JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 146–59 (2010).

as the highest EU court.³⁵ In the wake of these developments towards an EU-centric regime of fundamental rights, many questions about the scope of those rights have gained increased importance, especially with regard to the beneficiaries of such protections. In 2009, Intel surprised the legal community in Europe by invoking the due process protections under the Convention as a defense to the EU's anti-trust proceedings against the software giant.³⁶ *The Wall Street Journal* shortly thereafter postulated the following oxymoron: "Do corporations have human rights?"³⁷

Europe is finding itself at a crossroads with regard to corporate personhood and how it manifests itself. The situation at the European level gets further complicated by the reality that, since the Lisbon Treaty, the ECJ and the ECHR have overlapping jurisdiction over fundamental rights protection in Europe.³⁸ Since the concurrent relationship between both courts is not formally defined, it remains unclear what would happen in case of divergent case law between the two courts.³⁹ In light of these new realities in Europe, the need for a coherent and workable methodology with regard to corporate fundamental rights under the treaty regime is indispensable, especially since signs of a divergence between the ECJ and the ECHR on the subject have already become apparent.⁴⁰ This article demonstrates why European Courts should draw upon some of the thinking and analysis that has arisen in the United States on corporate rights in a constitutional context. However, while the Supreme Court provides a workable methodology that is much more nuanced than the one employed by its European counterparts, the justices do not always appear entirely coherent in drawing a clear distinction between corporations and human beings.

This article explains how a detailed comparative analysis of the juris-

³⁵ See Sionaidh Douglas-Scott, *The Court of Justice of the European Union and the European Court of Human Rights after Lisbon*, in *THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON* 153, 161 (Sybe de Vries et al eds., 2013).

³⁶ See Editorial, *Intel's Human Rights*, N.Y. TIMES (Aug. 13, 2009), <http://www.nytimes.com/2009/08/17/opinion/17mon2.html>.

³⁷ Alan Riley, *Do Companies Have Human Rights?: EU antitrust law may violate due process rules*, WSJ.COM (July 28, 2009), <http://online.wsj.com/news/articles/SB10001424052970203609204574314333538014034> (last visited March 15, 2014).

³⁸ See Sionaidh Douglas-Scott, *The Court of Justice of the European Union and the European Court of Human Rights after Lisbon*, 153, 161, 165, in *THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EU AFTER LISBON* (Sybe de Vries et al eds., 2013); Butti, *The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection*, JURIST: Dateline (Sept. 12, 2014, 2:30 PM), <http://jurist.org/datetime/2013/09/elena-butti-lisbon-treaty.php>.

³⁹ See Laurent Scheek, *The Relationship Between the European Courts and Integration Through Human Rights*, 65 HEIDELBERG J. INTL. L. 837, 854 (2005)

⁴⁰ See generally Jaanika Erne, *Discourse Upon the Constituent Human Rights Developments in the European Union*, 12 JURIDICA INTL. 80 (2007); Lorena Rincon-Eizaga, *Human Rights in the European Union: Conflict Between the Luxembourg and Strasbourg Courts Regarding Interpretation of Article 8 of the European Convention on Human Rights*, 11 REV. COLOMB. DERECHO INT. BOGOTA 119 (2008) (Colom.).

prudence of the U.S. Supreme Court and the European Courts can inform both a European way forward that is reflective of the complexities of the corporate form, and can also fill in the blanks in the Supreme Court's jurisprudence on corporate personhood. Section I examines the history of corporate personhood in Europe and the United States and illustrates that the doctrine needs to be understood as a product of the legal context of its time. Section II takes a comparative look at the contemporary corporate personhood doctrine in Europe and the United States and defies the conventional wisdom in legal scholarship of a shared trans-Atlantic pragmatism that ignores the "corporate" in corporate personhood. Section III then illustrates the importance of corporate theory (about the nature of the firm) to avoid intra-corporate conflicts with competing shareholder and stakeholder interests within the corporate personhood doctrine. Conducting an in-depth comparative legal analysis, this section demonstrates the role of corporate theory (and a protection rationale) in the jurisprudence of the Supreme Court and the lack thereof in the jurisprudence of the European Courts. Section IV concludes with the normative implications of a corporate theory-informed approach, in Europe in terms of a doctrinal shift and enhanced institutional cooperation between the high-level European courts and the member states, and in the United States in terms of a refocused doctrinal methodology.

I. THE TRANSATLANTIC HISTORY OF CORPORATE PERSONHOOD

Understanding corporate personhood as a product of its time, rather than as an abstract legal construct that emerged in a legal vacuum, is crucial when conducting a comparative analysis of different legal systems. This section will show that the historical context can help explain the prevailing differences between legal systems and provide guidance on what aspects of one legal system's methodology might successfully translate into the practice of another jurisdiction.

Unlike in the United States, the manifestations of corporate personhood have traditionally been more tentative in European legal systems, especially in civil law jurisdictions. While European states have been reluctant to confer entity liabilities and rights on corporations beyond the context of civil and commercial matters, the United States has long made the leap to endow corporations with personhood in a way that imposes far-reaching liabilities as well as rights.⁴¹ In this section, we first examine early American jurisprudence about the structure of the corporations. The second subsection then demonstrates the implications of the democratization of incorporation for the American legal doctrine on corporate personality. Finally, the Amer-

⁴¹ See Ciepley, *supra* note 14, at 221.

ican legal history of corporate personhood is contrasted with the European experience that has traditionally been coined by tentativeness towards the notion of corporate personality and has recently resulted in institutional tensions between the high-level European Courts and the member states.

A. The “Artificial Entity” as a Structural Limitation on Government

The early corporate personhood jurisprudence by the Supreme Court was guided mainly by an effort to bring corporations under the tenets of federal courts and federal common law and remove corporations from the prerogatives of the states.⁴² This “federalist” agenda in *sensu lato* has dominated much of the 19th century jurisprudence on the issue by the Court. As early as 1819, the U.S. Supreme Court acknowledged corporations as “beings” in their own right, even if “artificial” ones. In its famous *Dartmouth College* decision, the Court applied the Contract Clause to corporations, thereby confirming their right to contract and freedom from impairment by the state in their contractual relationships.⁴³ In *Dartmouth College*, the Court held that the corporate charter granted by the government (here the Crown) was a contract under the U.S. Constitution. This landmark case was the first important milestone in American legal history to emancipate the corporate form and ensure its very existence based on its charter, without any state being able to alter the terms of a corporate charter unilaterally after it was granted.⁴⁴

Another line of early case law dealt with the legal nature of the corporation, in a different context, though. Thus, the Supreme Court first addressed the question of whether a corporation was a “citizen” for Article III diversity jurisdiction purposes in its 1809 decision in *Bank of the United States v. Deveaux*.⁴⁵ At the time, the Court was not ready to embrace the idea of corporate citizenship as a freestanding legal concept. It therefore held in *Deveaux* that a corporation derives its citizenship from the citizenship of its shareholders, rather than from its state of incorporation or principal place of business.⁴⁶ This made it difficult for corporations to satisfy the requirement of complete diversity that would open up federal courts as a litigation forum for corporations.⁴⁷

The question of corporate citizenship under the meaning of Article III jurisdiction was of significant strategic importance since it was the lynchpin

⁴² See Neuborne, *supra* note 15, at 782.

⁴³ *Dartmouth College v. Woodward*, 17 U.S. 518, 576 (1819) (interpreting the Contract Clause, U.S. CONST. art. I, § 10, cl. 1).

⁴⁴ *Id.* at 573.

⁴⁵ *Bank of U.S. v. Deveaux*, 9 U.S. 61, 67 (1809).

⁴⁶ *Id.* at 61, 91–92 (holding that, for jurisdictional purposes, the courts should “look to the character of the individuals who compose the corporation.”)

⁴⁷ See Neuborne, *supra* note 15, at 782–83.

upon which access to federal courts, as a neutral federal judicial forum, was grounded in federal common law.⁴⁸ Eventually, the Court made the leap in its 1844 decision in *Louisville, Cincinnati, & Charleston Railroad v. Letson* that a corporation was a citizen of its state of incorporation for purposes of Article III jurisdiction.⁴⁹ These early efforts to capture the personification of the corporation were still rather tentative and did not grant full-fledged personhood, or even citizenship, to corporations under the 14th Amendment of the Constitution.

The underlying premise of the Supreme Court's dealing with questions about the nature of the corporation during this era, was not to construe corporations as persons or citizens under the Constitution in general but merely in the context of constitutional provisions that would limit the states' power, both judicially and otherwise, over the corporate form.⁵⁰ Corporate personhood during the era of Chief Justice Marshall therefore needs to be understood in terms of a structural limitation on the government, rather than a conferral of rights on the corporation.⁵¹ In that vein, the Court perceived corporations as "mere creatures of law" and as such subject to government regulation.⁵² This understanding by the Supreme Court traces back to the special chartering power that was vested in the state at the time. Accordingly, incorporation was a privilege that was granted by the state legislature upon application for a corporate charter.⁵³

B. The Corporate Personification as a Function of the Democratization of Incorporation

A major shift has occurred during the second half of the 19th century, when the process of incorporation became "democratized" and special chartering was replaced by general incorporation.⁵⁴ This development has had important implications for the increasing personification of the corporation under the law. At the time, the modern business corporation became increasingly available to a broad public as an "investment vehicle with per-

⁴⁸ See *id.* at 782.

⁴⁹ *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 557–59 (1844).

⁵⁰ See Morton Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 184–85 (1985); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1641–42 (1988); Mayer, *supra* note 29, at 580–81.

⁵¹ See David Millon, *Theories of the Corporation*, 1990 Duke L.J. 201, 208 (1990) (discussing the "regulatory notion of corporate law" during the 19th century); Ribstein, *supra* note 9, at 97–99; Thomas Lee Hazen, *The Corporate Persona, Contract (& Market) Failure, & Moral Values*, 69 N.C. L. REV. 273, 280–81 (1991).

⁵² *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

⁵³ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 390–91 (3d ed. 2005); see also Ribstein, *supra* note 11, at 98.

⁵⁴ See Hovenkamp, *supra* note 50, at 1634–35 (discussing how the incorporation process became "democratized" at that time).

petual life, limited liability, and entity-shielding.”⁵⁵ In more and more states, incorporation was no longer a legislative matter, but rather the corporate form could be created through a simple administrative procedure by anyone who was interested in conducting business.⁵⁶ Consequently, incorporation became a right of many, rather than a privilege of the few. The rise of general incorporation profoundly changed the legal conception of the corporation⁵⁷ as it undermined the premise of *Dartmouth* holding that the corporation is an “artificial being” and “a mere creation of the law.”⁵⁸ The changes of the social and economic conditions in the late 19th century significantly paved the way for the emergence of a new theory in corporate law⁵⁹ that views the corporation as “a natural product of private initiative,”⁶⁰ rather than an “artificial creation of state law.” This led to the Supreme Court’s decision in *Santa Clara* in 1886 where the Court held that a corporation is a “person” for the purpose of the equal protection clause of the 14th Amendment.⁶¹ The Court’s *Santa Clara* decision is considered as the watershed moment in American legal history for the personification of the corporation in its own right and can be considered the beginning of corporate personhood as we understand it today, namely in terms of the application of the Bill of Rights to corporations.⁶²

Santa Clara provided the basis for constitutional challenges by corporations against the increasing state regulation of the Progressive Era. But it was particularly the Supreme Court’s approach in *Lochner*⁶³ that effectively complemented the corporation’s 14th Amendment rights against state regulation by reading substantive due process protections into it.⁶⁴ “For the next fifty years, under the banner of substantive due process, and in the guise of ‘persons,’ corporations challenged Progressive era regulation”⁶⁵ During both the *Lochner* era and the subsequent New Deal era, corporations did not focus on making claims of corporate personality in an effort to assert the Bill of Rights. Rather, there were other constitutional battles to be fought until 1937, and at the center were the debate over economic due process rights and, during the New Deal, challenges against overbroad federal

⁵⁵ See Neuborne, *supra* note 15, at 778.

⁵⁶ See Jess M. Krannich, *The Corporate “Person”*: A New Analytical Approach to a Flawed Method of Constitutional Interpretation, 37 LOY. U. CHI. L.J. 61, 75 (2005); FRIEDMAN, *supra* note 53, at 390–91.

⁵⁷ See Krannich, *supra* note 56, at 75–76; Liam Seamus O’Mellin, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 290–30 (2006).

⁵⁸ *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

⁵⁹ See Morton Horwitz, *supra* note 50, at 184–85.

⁶⁰ Millon, *supra* note 51, at 201.

⁶¹ *Santa Clara Cty. v. S. Pac. R. Co.*, 118 U.S. 394, 394 (1886).

⁶² See Morton Horwitz, *supra* note 50.

⁶³ *Lochner v. New York*, 198 U.S. 45 (1905).

⁶⁴ See Mayer, *supra* note, at 588.

⁶⁵ *Id.* at 588–89.

regulatory powers. It is fair to say that “constitutional limitations on federal regulatory power supplanted debates over corporate personhood.”⁶⁶ Over the course of the 20th century, the Court granted extensive rights to corporations that went well beyond the scope of commercial rights, in terms of the right to property⁶⁷ and the right to enter into contracts.⁶⁸

The modern corporate form is very much a product of its history. The analysis of the underlying dynamics that were instrumental in shaping the emerging legal doctrine of corporate personality therefore informs a nuanced understanding of the corporate entity as a product of different socio-economic conditions throughout history. While the “concession theory” has lost much of its significance with the democratization of incorporation procedures,⁶⁹ this stage in the history of corporations has left its traces that are still prominent in contemporary corporate law.⁷⁰ Thus, the corporate form is not simply a “glorified partnership.”⁷¹ Rather, even today, many of its core features, such as limited liability, entity shielding, and indefinite life are created by the law and cannot be instituted simply through contracts.⁷² At the same time, the shift to general incorporation has amplified the importance of the individual shareholders that can organize themselves in the corporate form as an investment vehicle.⁷³ Both strains in American corporate legal history have had a significant impact on how the law views corporations today. It is this multi-layered conception of the corporate entity that has grown over time in American society and under the law and has influenced the long-standing jurisprudence of the Supreme Court on the issue.

C. Europe’s Tentativeness and the Troubled Relationship Between its Courts

In contrast, the corporate rights jurisprudence of the high-level European Courts lacks any discussion about the nature of the corporation. There might be many plausible and even congruent reasons that could account for this neglect of corporate theory in Europe’s case law on corporate fundamental rights under the European Convention on Human Rights. One important factor certainly is the very different historical development of the legal concept of corporate personality in Europe compared to the United

⁶⁶ *Id.* at 598.

⁶⁷ *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896).

⁶⁸ *Trustees of Dartmouth College v. Woodward* 17 U.S. 518 (1819); *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

⁶⁹ See Millon, *supra* note 51, at 212. David Ciepley on the other hand makes a case for returning “to the original theory of the corporation, which in its main points was undisputed for centuries, but which has been out of favor since the end of the 19th century.” Ciepley, *supra* note 14, at 224.

⁷⁰ See Ribstein, *supra* note 11, at 97.

⁷¹ Ciepley *supra* note 14, at 226.

⁷² See Ribstein, *supra* note 11, at 98.

⁷³ See Millon, *supra* note 51, at 211; see also Krannich, *supra* note 56, at 72.

States. In the legal systems of most EU member states and in the European human rights system, the notion of the corporate entity as a person with its very own rights and liabilities has not prospered as it has in the U.S. legal system.⁷⁴ Thus, it was only in the mid-1990s that the major European civil law jurisdictions incorporated provisions for corporate entity liability into their domestic criminal codes.⁷⁵ Many European countries introduced corporate criminal liability provisions in the wake of implementing legislation for the Rome Statute of the International Criminal Court, fulfilling their responsibilities as parties to that treaty, even though the Rome Statute does not require them to do so.⁷⁶ However, even today and despite this overall regulatory trend in Europe, there are still important outliers. For example, Germany remains a “bastion” of the traditional principle *societas delinquere non potest*, with the result that under the German legal system a corporation as a legal person cannot be held criminally liable.⁷⁷

While group rights are a well-established concept in many civil law jurisdictions in Europe,⁷⁸ national courts have been more tentative than the U.S. Supreme Court to grant constitutional rights to business corporations.⁷⁹ Many European courts have taken issue particularly with constitutional rights cases where the profit-driven and purely commercial nature of business corporations leads (*de facto*) to constitutional protection of mere economic activity.⁸⁰ For example, the German Supreme Court held that com-

⁷⁴ The Supreme Court confirmed as early as 1909 that federal criminal statutes applying to “persons” also extend to corporations. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

⁷⁵ See Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1493–94 (2009); see also Joanna Kyriakakis, *Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge*, 56 NETHERLANDS INT’L L. REV. 333, 340–42 (2009).

⁷⁶ See Supplemental Brief of Ambassador David J. Scheffer as Amicus Curiae Supporting Petitioners at 14–20, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165350 (providing a list of nations that have ratified the Rome Statute and where corporations are potentially exposed to criminal liability for atrocity crimes and pointing out that many of these nations introduced corporate criminal liability through the Rome Statute implementation process).

⁷⁷ See Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 142 (2008).

⁷⁸ See, e.g., Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law] art. 19(3), May 23, 1949, BGBl. (Ger.) (“The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.”).

⁷⁹ See Diskant, *supra* note 77, 129.

⁸⁰ This tension is clearly visible where transnational courts, such as the European Court of Human Rights, go against the rulings of domestic courts on interpretation of the Convention. See, e.g. *Societe Colas Est v. F UKr.*, 37971/97 Eur. Ct. H.R. 2002, ¶¶ 41–42 (disagreeing with the French court and holding that the right against violations of privacy extended not only to natural persons, but also to appellant corporations); *Observer and Guardian v. U.K.*, 13585/88 Eur. Ct. H.R. 1991 ¶¶ 72–74 (holding that Article 14, prescribing equal treatment of speech of persons by national origin, extended to news corporations of different national origins); *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) 16, ¶¶ 47–48 (1990) (disagreeing with a Swiss court’s holding that freedom of expression extended only to natural, not corporate, persons).

mercial speech is only protected under the German Basic Law (German Constitution) if the statement in question has a minimum political content, not however if it is merely pursuing the economics interests of the speaker.⁸¹

Despite this reluctance at the national level, the ECHR and the ECJ have broadly applied the human rights protections under the Convention to corporations without addressing the corporate nature of the rights applicant. Both courts have been equating corporations with persons within the meaning of the Convention with no or little corporate law analysis.⁸² This is even more startling considering that the ECHR has persistently encountered resistance by member states such as Germany, France, and Switzerland, which have argued in many instances that the corporate nature of the applicant and the commercial elements of the activity are relevant and do not fit the underlying rationale of free expression and privacy under the Convention.⁸³

In order to appease national voices of judicial activism,⁸⁴ high-level European Courts would be well advised to follow the lead of the Supreme Court and look to corporate theory to inform their analysis about the applicability of fundamental rights provisions to business corporations. The need to inject corporate theory about the nature of the firm into the constitutional analysis in Europe is an imminent one considering that the “personal”⁸⁵ character of rights provisions is particularly prominent now in the human rights regime. After all, human rights are intrinsically linked to the human dignity and liberty of human beings and do not extend easily to legal persons, such as corporations.⁸⁶

It is crucial therefore that the “corporate” be put back into corporate personhood, especially in the context of a human rights regime. From an institutional cooperation perspective,⁸⁷ consulting corporate theory to deter-

⁸¹ Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 12, 2000, 102 BVerfGE 347 (2000), 102 Neue Juristische Wochenschrift [NJW] 591, 2001 (Ger.) (holding that commercial speech is only protected under the German Basic Law [German Constitution] if the statement in question has a minimum political content).

⁸² See *Société Colas Est and Others v. France*, 2002-III Eur. Ct. H.R. 131 (2002); *Hoechst AG v. Commission* Case 46/87 & 227/88 ECJ (1989) (noting that the principle laid down in Article 8 may be regarded as applying not only to natural persons but also to legal persons).

⁸³ See *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 25 (1989); *Niemietz v. Germany*, 251 Eur. Ct. H.R. (ser. A) 97, ¶ 27 (1993); *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) 16, ¶ 44(2) (1990).

⁸⁴ See *EMBERLAND*, *supra* note 10, at 147.

⁸⁵ As the U.S. Supreme Court has pointed out in its decision in *FCC v. AT & T, Inc.*, the fact that corporations are considered “persons” under the law, does not mean that they can hold “personal” rights. The Courts states that “ ‘personal’ is often used to mean precisely the *opposite* of [something that is] business-related.” 131 S. Ct. 1177, 1178 (2011).

⁸⁶ See *EMBERLAND*, *supra* note 10, at 116–17.

⁸⁷ See Alec Stone Sweet & Hellen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 3–30 (Hellen Keller

mine the scope of corporate fundamental rights would provide an opportunity for the ECHR and the ECJ to bring their jurisprudence in line with the approach by national judiciaries in the member states. By addressing the question of the nature of the corporation in the context of corporate entity rights, the (competing) interests of a company’s constituents—primarily its shareholders and potentially also its stakeholders—will inform the analysis and possibly the outcome. Thus, a “human face” would be put on the legal abstraction of the corporate entity and thereby emphasize the group-feature of corporations.

II. THE LOST “CORPORATE” PERSON: A SHARED TRANSATLANTIC JUDICIAL PRAGMATISM?

At first sight, it seems that both American and European Courts share an important common feature in their corporate personhood jurisprudence, namely a judicial pragmatism that is informed by a teleological approach rather than considerations of corporate theory. A closer analysis of the case law, however, reveals that there is a significant divergence in legal approach on both sides of the Atlantic. Respectively, in U.S. courts, the “corporate” nature of the rights applicants is still an integral part of the ongoing legal debate and thereby has significantly shaped the evolution of the doctrine of *corporate* personhood over time.

Looking at the scope of corporate fundamental rights protections, it is common to the American and European legal tradition that commercial rights like the right to property and the right to enter into contracts have always been considered applicable to corporations,⁸⁸ while “human nature” rights such as the right against self-incrimination and the right to life have been considered “purely personal” or intrinsic to natural persons.⁸⁹ Nevertheless, one can discover traction with regard to some rights in a cross-jurisdictional comparison.

For example, the rights to privacy and freedom of expression have been subject to much controversy on both sides of the Atlantic about whether and to what extent such rights apply to corporate actors.⁹⁰

Comparing the American and European juridical approaches to corporate speech and corporate privacy is particularly suited to illustrate the commonalities as well as differences between both systems and the norma-

& Alec Stone Sweet eds., 2008); see also Steven Greer, *What’s Wrong with the European Convention on Human Rights*, 30 HUM. RTS. Q. 680, 682 (2008).

⁸⁸ See EMBERLAND, *supra* note 10, at 110.

⁸⁹ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (holding that “certain ‘purely personal’ guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals.”) (internal citation omitted).

⁹⁰ See EMBERLAND, *supra* note 10, at 147.

tive implications that follow. While the example of corporate speech shows a glaring similarity in judicial interpretative approach, it provides only one dimension to the trans-Atlantic comparison on the issue.

A closer look at the European and U.S. jurisprudence on corporate entity rights uncovers a doctrinal difference with important normative implications, namely the role of corporate theory or, in the case of the Europe, the lack thereof in the analysis of the courts. Corporate theory (dealing with the nature of the corporation and potential intra-corporate conflicts) informs the discussion of the Supreme Court in its corporate speech jurisprudence (and keeps appearing in the form of dissenting and concurring opinions), even if corporate theory was eventually not considered decisive in First Amendment cases for the reasons set forth below.⁹¹ The American case law dealing with corporate privacy further amplifies the role of corporate theory when determining the applicability of constitutional and fundamental rights provisions to corporations.⁹²

This section examines the Transatlantic divide on corporate personhood first by understanding the methodologies employed by American and European legal systems. Then the divide between the two bodies of law is analyzed with an eye to the role of corporate theory about the nature of the firm.

A. The Apparent Transatlantic Conventional Wisdom: From Ontology to Teleology

While traditionally in the United States corporate personality has been a vehicle to ensure access of corporations to federal courts under diversity jurisdiction premises,⁹³ the driving force in Europe has been a broadly advanced human rights regime.⁹⁴ Despite these very different historical contexts in which corporate personhood issues arose, the approach by the ECHR and the Supreme Court is very similar in result and apparently also in methodology when extending fundamental rights protection to corporations.⁹⁵ Both courts have featured a pro-business line of jurisprudence and have applied a broad set of constitutional rights in the United States and fundamental rights in the EU to corporations.

Further, with regard to the methodology applied when determining the applicability of rights protections to corporations, it seems that both courts share many similarities. Their interpretation of respective rights guarantees

⁹¹ See *Bellotti*, 435 U.S. at 803 (1978) (White, J., dissenting); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 393 (2010) (Stevens, J., dissenting).

⁹² See *Hale v. Henkel*, 201 U.S. 43 (1906); *FCC v. AT & T Inc.*, 131 S. Ct. 1177 (2011).

⁹³ See *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 557–59 (1844).

⁹⁴ See *EMBERLAND*, *supra* note 10, at 111 (showing that the ECHR has “settled on a surprisingly favorable view of the applicability of the rights and entitlement to corporate claimants.”).

⁹⁵ See *EMBERLAND*, *supra* note 10, at 146.

is guided in both instances by “pragmatism” rather than theory.⁹⁶ Both systems employ a practice of judicial pragmatism that determines the applicability of rights guarantees to corporations based upon whether such claims would effectively advance the broader interests that the U.S. Constitution and the European Convention on Human Rights seek to protect. Thus, the question is not primarily framed as a matter of ontology,⁹⁷ in terms of whether corporations have rights, but rather as a matter of teleology,⁹⁸ in terms of what broader interests are served.⁹⁹

In contrast, the U.S. Supreme Court early addressed the nature of the corporation to inform the question of constitutional rights guarantees of corporations.¹⁰⁰ However, the recent case law of the Supreme Court seems to signal a shift from “ontology to teleology” on the issue of corporate constitutional rights starting with its 1978 decision in *First National Bank of Boston v. Bellotti* (dealing with corporate election spending as a form of political speech). In its judgment, the Court explicitly elaborated that, in the Court’s view, the “question . . . whether and to what extent corporations have first amendment rights . . . pose[s] the wrong question. [Rather,] [t]he Constitution often protects interests broader than those of the party seeking their vindication.”¹⁰¹ According to the Court, the broader interest protected by the First Amendment is (political) speech as an indispensable element of decision-making in a democratic society. “[T]his is no less true because the speech comes from a corporation.”¹⁰²

This interpretative approach was re-affirmed in *Citizens United* in 2010, where the Supreme Court held that the speaker’s corporate identity is irrelevant and does not justify speech restrictions by the government.¹⁰³ The

⁹⁶ See Mayer, *supra* note 29, at 639; see also EMBERLAND, *supra* note 10, at 134–37.

⁹⁷ The “theory or conception relating to the nature of being” (in this case of the corporation), *Ontology*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/131551?redirectedFrom=ontology&print> (last visited Aug. 22, 2014).

⁹⁸ “The doctrine or study of ends or final causes.” *Teleology*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/198710?redirectedFrom=teleology&print> (last visited Aug. 22, 2014)

⁹⁹ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76 (1978) (holding that [political] speech is “indispensable to decisionmaking in a democracy,” even if it is a corporation that speaks); *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 711, ¶ 53(3) (1979) (holding that the Convention is “an Instrument designed to maintain and promote the ideals and values of democratic society”).

¹⁰⁰ *Hale v. Henkel*, 201 U.S. 43, 74–76 (1906) (granting Fourth Amendment protection to corporations since the latter are “but an association of individuals;” on the other hand, the Court held the right against self-incrimination under the 5th Amendment inapplicable to corporations as corporations are mere “creature[s] of the State,” what is a rendition of the artificial entity theory [i.e., concession theory] rather than the previous natural entity theory [i.e., association theory]); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

¹⁰¹ *Bellotti*, 435 U.S. at 775–76.

¹⁰² *Id.* at 777.

¹⁰³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 364, 376 (2010).

Court followed its line of reasoning from *Bellotti* that is grounded in the underlying theory of the First Amendment suggesting that free speech advances democracy.¹⁰⁴ On the premise of the democratic function of the free speech clause, the Court construed the purpose of the First Amendment as protecting the “open market place of ideas,” where ideas “may compete” freely “without government interference.”¹⁰⁵

This understanding places emphasis on speech as the protected prerogative of the First Amendment rather than the rights of the speaker, thus rendering the corporate identity of the rights applicant irrelevant for the analysis. *Citizens United* has been an important milestone in the Supreme Court’s corporate rights jurisprudence. With its *Citizens United* decision, the Court resolved a conflict between contradictory lines of precedent, namely “a pre-*Austin* line forbidding speech restrictions based on the speaker’s corporate identity and a post-*Austin* line permitting them.”¹⁰⁶ Unlike the Court’s previous decision in *Bellotti*, the Court made a shift in *Austin* towards accounting for the corporate identity of the speaker.

The Court based its decision in *Austin* on an “antidistortion” rationale,¹⁰⁷ according to which government regulation is permissible in order to contain the distortive effect of the business corporation on the “political marketplace.”¹⁰⁸ The Court did not only hold the corporate identity of the speaker to be highly relevant; its decisions in *Austin* and then *MCFL* also suggest a distinction in the corporate form that instructed the Court’s analysis and result. Thus, it distinguished between for-profit and non-profit corporations in the context of (electoral) political speech and upheld statutory restrictions against the former but not the latter.¹⁰⁹ The reasoning advanced by the Court was the danger of “corrosive influence of concentrated corporate wealth” that exists with regard to the participation of for-profit corporations in the political arena whereas the same risks are not posed by non-profit corporations despite their corporate form.¹¹⁰ The Court in *Citizens United* rejected *Austin*’s anti-distortion rationale by overruling the judgment and on

¹⁰⁴ *Id.* at 323.

¹⁰⁵ N.Y. State Bd. of Elections v. Lopez Torres, 552 U. S. 196, 208 (2008).

¹⁰⁶ *Citizens United*, 558 U.S. at 313.

¹⁰⁷ *See id.* at 348 (stating that “[t]o bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest”)

¹⁰⁸ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (citing *Fed. Election Comm’n v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 257 (1986)) (holding that “[the] state-created advantages . . . permit [corporations] to use ‘resources amassed in the *economic* marketplace’ to obtain ‘an unfair advantage in the *political* marketplace.’” (emphasis added)), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹⁰⁹ *Austin*, 494 U.S. at 661 (citing *MCFL*, 479 U.S. at 263) (emphasizing that nonprofit corporations have “features more akin to voluntary political associations than business firms,” thus, statutory restrictions on their campaign finance spending are unconstitutional).

¹¹⁰ *Id.* at 660 (pointing to the “distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form”)

the proposition voiced by Justice Scalia’s dissent in *Austin*, “that there is no such thing as too much speech.”¹¹¹ It thereby dismissed the “concern about corporate domination of the political process”¹¹² in favor of an unrestricted marketplace of ideas.

Prominent First Amendment scholars, such as Martin Redish, have supported this position in a free speech context arguing that “neither the fact that expression has been paid for, nor the presence of an underlying motivation of profit maximization detracts from the social, political, or constitutional values”¹¹³ of corporate speech. In fact, he reaffirms that “if money talks, then restricting the use of money in the expressive market place silences.”¹¹⁴ The notion of adversary democracy, where unfettered political speech between competing points of view should lead to good governance, offers a compelling explanation for the Supreme Court’s position in *Citizens United* that negates the relevance of the corporate nature of the speaker for First Amendment purposes. The theory of adversary democracy acknowledges that democracy presupposes (in a descriptive and normative manner) conflict between competing interests in society.¹¹⁵ It is exactly this competition that helps people realize their self-ruling function in a democratic society.¹¹⁶

Rather than theories of collective democracy, which understand democracy as a cooperative pursuit of a “common will” or “general welfare,”¹¹⁷ the notion of adversary democracy is able to accommodate asymmetries between self-interested behavior and the public interest.¹¹⁸ Construing the normative purpose of the First Amendment in terms of adversary democracy therefore extends the scope of the constitutional guarantee to *all speech* even if “the speaker seeks to advance her own personal interests rather than those other public at large.”¹¹⁹ On this premise, also inherently selfish speech, such as commercial speech, is protected since it promotes diversity and competition of interests that can be considered a catalyst for democracy.¹²⁰ This provides a plausible reasoning for why the Supreme Court dismissed the doctrine of the distortive effect of corporate wealth (by overruling *Austin*).¹²¹

Still, while the corporate identity of the rights applicant has not been deemed decisive in the case of corporate speech rights in *Bellotti* and *Citi-*

¹¹¹ *Citizens United*, 558 U.S. at 472 (2010) (citing *Austin*, 494 U.S. at 660 (Scalia, J., dissenting)).

¹¹² *Austin*, 494 U.S. at 659.

¹¹³ MARTIN H. REDISH, MONEY TALKS 2 (2002).

¹¹⁴ *Id.* at 3.

¹¹⁵ MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT 3 (2013).

¹¹⁶ *See id.* at 2.

¹¹⁷ *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

¹¹⁸ *See* REDISH, *supra* note 115, at 76–77.

¹¹⁹ REDISH, *supra* note 115, at 4.

¹²⁰ *Id.* at 5.

¹²¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

zens United, a more nuanced look reveals that the Court is not entirely oblivious to corporate theory and the intrinsic characteristics of the corporation in its analysis either. Thus, in both cases the Court addresses the concern of competing interests of a company's shareholders and how these conflicts can be remedied.¹²² While the Court has dismissed the concern of distortive effects of corporate speech on the *external* political process, based on the underlying purpose of the free speech clause, it is often overlooked that the Court remains sensitive to the concern of *intra*-corporate conflicts of competing interests. This holds true in the corporate speech context and even more so with regard to corporate privacy claims. This perspective therefore provides important lessons for European Courts, currently wrestling with the prerogatives of corporate personhood. But it also provides some clarity in face of the perceived obscurity of the Supreme Court's treatment of corporate rights under the Constitution.¹²³

As Section III will elaborate, this article argues that corporate theory is relevant to inform the analysis on corporate personhood (and related entity rights at a constitutional level) in order to avoid or mitigate intra-corporate conflict in multi-shareholder corporations. Approaching corporate personhood through the lens of corporate theory prompts the question on what basis corporate directors and management can override the interest of their shareholders and other constituencies. One might be hard pressed to find a reason why a corporation should enjoy constitutionally protected rights that are conflicting with competing shareholder interests. This is particularly true for bill of rights that are non-commercial in their nature and do not protect corporate property. It seems questionable to argue that the separation of ownership and control in the corporate form and the agency costs that shareholders incur as a trade-off for benefits of the corporate form, such as limited liability, might justify treating corporations as homogenous entities in their own right under the Constitution while disregarding competing interests of their shareholders in that analysis. This proposition, as will be shown below, is consistent with the Supreme Court's precedents both pre- and post-*Citizens United*.

¹²² First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 787, 794–95 (1978) (discussing the “interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation” as a justification for statutory restrictions on corporate speech and concluding that shareholders are “competent to protect their own interests” by virtue of “the procedures of corporate democracy”); *Citizens United*, 558 U.S. at 361 (debating the government “interest in protecting dissenting shareholders from being compelled to fund corporate political speech,” deferring again to intracorporate remedies for shareholders).

¹²³ See, e.g., Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497 (2011); Krannich, *supra* note 56, at 62.

B. The Transatlantic Discrepancy: Corporate Theory within Corporate Personhood

The following sections will rebut this conventional wisdom that the United States and Europe have embarked on the same path of a policy-informed judicial pragmatism in their corporate personhood jurisprudence without recourse to corporate theory. Rather, the U.S. doctrine proves to be much more nuanced with regard to the structural complexities of the corporate form. As will be shown below, in the preponderance of its opinions, the Supreme Court has placed the emphasis where it should be: the nature of the corporate structure itself.

While scholars have alleged that there is a common focus on teleology rather than ontology in the corporate rights jurisprudence of the Supreme Court and the ECHR,¹²⁴ little attention has been given to potential differences in methodology, specifically the role of corporate theory or the lack thereof in European jurisprudence. Unlike the Supreme Court, the ECHR has followed a solely policy-oriented approach that does not account for the nature of the corporation as a legal person with distinct attributes under the law and with responsibilities towards its shareholders, as its main constituency. Thus, the ECHR has justified the applicability of the protections under the Convention merely on the basis of a test that asks whether the corporate claim is promoting and maintaining general Convention values, without taking into account potential intra-corporate conflicts, especially with regard to competing shareholder interests.¹²⁵ By under-accounting for the characteristics of the corporation, the ECHR has granted the same guarantees to corporations as to individual persons without any further examination. A discussion about the nature and structure of the corporation as a legal person and how it informs questions pertaining to the “human rights” of corporate entities, is entirely missing in the jurisprudence of the ECHR.¹²⁶

The Supreme Court, on the other hand, has long been wrestling with the corporate personhood question and how it might inform the applicability of constitutional protections under the Bill of Rights to corporations.¹²⁷ The jurisprudence by the Supreme Court therefore provides a rich source for lessons that can inform Europe’s approach in the realm of corporate constitutional rights. Moreover, an in-depth analysis of the Supreme Court’s

¹²⁴ See John Hart Ely, *Flag Desecration: A Case Study*, 88 HARV. L. REV. 1496, 1496 (1975); EMBERLAND, *supra* note 10, at 146; see also Mayer, *supra* note 29, at 634.

¹²⁵ The European Court on Human Rights has explicitly embraced a mode of interpretation that ensures that the right guarantees are “practical and effective” in a way that is promoting the underlying values of the Convention. *Airey v. Ireland*, 32 Eur. Ct. H.R. 21–22 (1981).

¹²⁶ See *Société Colas Est and Others v. France*, 2002-III Eur. Ct. H.R. 131 (2002); *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 44(2) (1990).

¹²⁷ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Hale v. Henkel*, 201 U.S. 43, 74–76 (1906).

case law reveals that the role of corporate theory has not been reflected entirely accurately in the literature. Specifically, it will be shown that the jurisprudence of the Court does not signal a shift away from the ontology of the corporation, but rather is emblematic of a methodology that is sensitive to the corporate nature of the rights applicant and the multi-dimensional character of the corporate form in light of the purpose of the respective rights provision. Despite the *dicta* in *Citizens United* that “[n]o sufficient governmental interest justifies limits on the political speech of *nonprofit or for-profit corporations*,”¹²⁸ the facts in this landmark case have not dealt with multi-shareholder for-profit corporations.¹²⁹ Therefore, even on the premise of the majority opinion in *Citizens United*, it is still crucial to ask the question how this ruling would impact for-profit corporations if it were presented to the Justices. It would require a more sophisticated analysis than the *dicta* of *Citizens United* offers.

III. THE ROLE OF CORPORATE THEORY

There is an important role that corporate theory about the nature of the firm can play in the corporate personhood doctrine. Specifically, it can help account for competing interests of shareholders and other stakeholders and avoid intra-corporate conflicts within the doctrine, as subsection A examines. In subsection B, the jurisprudence of the U.S. Supreme Court is examined with an eye towards the role of corporate theory in the legal analysis and shows that corporate theory has been a consistent part of the Supreme Court’s portfolio of methodologies for corporate personhood. Major cases that are critical to this analysis include *Citizens United*, *Bellotti*, *FCC v. AT&T*, *Hale v. Henkel*, *Morton Salt*, *Hobby Lobby*. This aim of resurrecting shareholder and constituency protection within the corporate personhood doctrine emerges as critical to account for the complex organizational nature of the corporate form. Finally, as examined in subsection C, the European experience demonstrates the negative consequences if the essence of corporate personhood, in other words, the nature of the firm and the diversity of interests of its constituents, including shareholder and other stakeholders, is ignored.

A. Competing Interests of Corporate Constituents

While constitutional protections of corporate speech, documents, and contracts have been looked at primarily through the lens of constitutional law, several scholars have highlighted the importance of corporate theory to address these and related issues. Thus, it has correctly been argued that

¹²⁸ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (emphasis added).

¹²⁹ Neuborne, *supra* note 15, at 791–92.

solving questions relating to “the constitutional limits of government power . . . often depends on how the corporation is characterized.”¹³⁰ The choice of corporate theory has important implications for the nature and scope of corporate constitutional rights.¹³¹

This poses the question what contemporary notion of the corporation most accurately describes its unique characteristics and intra-structural dynamics. As elaborated above, the understanding and treatment of the corporate form is intrinsically situated in the socio-economic context of its time. During much of the 19th century, the “concession theory” was dominating the legal discourse on the nature of the corporation.¹³² Accordingly, the corporation was perceived as an artificial entity created by the state and endowed with the privilege of incorporation.¹³³ In the early 19th century, the Supreme Court described the corporation as “an artificial being, invisible, intangible, and existing only in contemplation of the law” and as such “the mere creature of law.”¹³⁴ The rise of general chartering in numerous states in the second half of the 19th century can be considered a watershed moment in the way legal theory viewed corporations. It marked an end to the concession theory as the prominent legal doctrine with the new incorporation rules changing the very premise of this view that considered the corporation a mere artificial creation of the state at its discretion and with the power to extensively regulate corporate activity.¹³⁵ Democratizing access to business corporations as investment vehicles with beneficial legal characteristics has had a lasting impact on corporate legal theory. Specifically, general incorporation acts “moved the predominant role in corporate organization from the state to the incorporators and shareholders.”¹³⁶ The democratizing effect of general incorporation rules has amplified the role of shareholders as the primary constituency of the modern form of the business corporation.

The changes in incorporation rules gave rise to the association theory, according to which a corporation is perceived and treated as a mere aggregation of its members, in terms of individual shareholders.¹³⁷ While the association correctly, and most importantly, accounts for the constituent role

¹³⁰ Ribstein, *supra* note 11, at 96.

¹³¹ *See id.* at 108.

¹³² *See* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635–40.

¹³³ *See* Millon, *supra* note 51, at 202; *see also* William Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1471 (1989).

¹³⁴ *Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

¹³⁵ Some argue for a revival of the concession/grant theory. *See* Ciepley, *supra* note 14, at 224 (claiming that “the association theory and real entity theory are mistaken” and that the concession theory provides the only coherent solution).

¹³⁶ Philip Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 293 (1990).

¹³⁷ *See* Krannich, *supra* note 56, at 72.

of the shareholders,¹³⁸ it has been argued that it takes the metaphor of the corporation as a mere aggregation of individual human beings too far.¹³⁹ Contrary to what the association theory suggests, the corporation is not a perfect partnership in the traditional sense,¹⁴⁰ but rather *sui generis* in its own nature and structure and with the intra-corporate dynamics that accompany it.¹⁴¹ Thus, unlike in a partnership, the corporation has a separate identity of its own: its contracts, property, and liabilities are separate from its shareholders.¹⁴² It is hard to comprehend why this basic principle of corporate law should not also apply to the question of corporate rights in a constitutional context. Viewing the corporation merely as a proxy for its members and their rights¹⁴³ ignores the separate identity of the corporation under the law.

After all, the corporate form disposes of some features that cannot possibly be established by means of private initiative (i.e., contracts) between individual members, namely limited liability and entity shielding.¹⁴⁴ Rather, some of the unique characteristics of the corporation that set it apart from a partnership exist only by virtue of statutory law.¹⁴⁵ The Supreme Court has displayed this understanding about the nature of the corporate form on several counts. In *Austin v. Michigan Chamber of Commerce*, the Court de-

¹³⁸ See Neuborne, *supra* note 15, at 774 (arguing that “corporate personality is merely a . . . metaphor for a complex set of underlying human activities and relationships”)

¹³⁹ See Greenwood, *supra* note 13, at 1022 (pointing to the “aggregation problem” in terms that “[t]he decision of a group . . . can be quite different from the decisions of the members taken individually.”)

¹⁴⁰ See Ciepley, *supra* note 14, at 226; see also Greenwood, *supra* note 11, at 15 (suggesting that corporate speech is not merely “an instance of ordinary group speech”).

¹⁴¹ See Greenwood, *supra* note 13, at 1032, 1042 (identifying the agency problem within the corporation as function of the fiction of that “the profit motive [is] the primary reason investors participate,” thus ignoring the “diversity of shareholders” and their interests. In other words, arguing that much of the intra-corporate conflicts result from the fact that “corporate speakers are agents answerable to a *principle*, not a *principal*.” [emphasis added]; see also Ribstein, *supra* note 11, at 99 (suggesting that the separation of ownership and control has the effect “that corporate property will not be used efficiently unless the managers are subject to special legal constraints”).

¹⁴² The notion of the corporate person as its own entity is still prevalent even after the demise of the “concession theory” at the end of the 19th century. The end of the government’s chartering authority did not mark the end of corporate person theory, as recent Supreme Court jurisprudence confirms. See Ribstein, *supra* note 11, at 98; see also *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 354–55 (2010) (treating the corporate entity as a “speaker” under the 1st Amendment.); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (emphasizing that corporations “are endowed with public attributes [and] have a collective impact upon society, from which they derive the privilege of acting as artificial entities”).

¹⁴³ Neuborne, *supra* note 15, at 788 (describing “corporate personality as a centralized enforcement agent” for the “interests of decentralized corporate shareholders”).

¹⁴⁴ Proponents of the “contractual theory” on the other hand, view the corporation as a mere nexus of contracts. See generally Henry Butler, *The Contractual Theory of the Corporation*, 11 GEORGE MASON UNIV. L. REV. 99. See also BUTLER & RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION* (1995).

¹⁴⁵ See Ribstein, *supra* note 11, at 98.

scribed the corporation as a “unique state-conferred . . . structure” that disposes of special features such as “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.”¹⁴⁶ Also, in *Morton*, the Court emphasizes the “public attributes” that the corporation derives from the state.¹⁴⁷

There is a range of corporate governance theories that address the question about how to balance corporate decision-making between management and shareholders. According to the theory of shareholder primacy, managers are considered their agents of the shareholders in running the business, which results in the fiduciary duty of corporate managers to further the interests of shareholders, often paired with a call by scholars and commentators for increasing shareholder governance powers within the corporation.¹⁴⁸ Margaret Blair and Lynn Stout, on the other hand, argue in favor of a “team production” theory that treats directors as “mediating hierarchs’ whose job is to balance team members’ competing interests” thereby serving the interests of the entire corporate entity.¹⁴⁹ While some have proposed a theory of director primacy that confers broad discretion on management in the pursuit of pure shareholder value maximization,¹⁵⁰ Blair and Stout allow management to take into account non-shareholder interests in their decision making process.¹⁵¹

These theories illustrate the spectrum of views on the power allocation within the corporation. However, there is a clear common thread that becomes apparent. Under these theories, the interests of shareholders guide management decision-making in the modern corporation, but the theories differ on the extent of management’s independence. It is therefore fair to say that modern corporate law is premised on the pursuit of shareholder interests,¹⁵² while at the same time acknowledging the corporation as an entity created by private initiative and market forces.¹⁵³ This leads to complex intra-corporate dynamics and competing interests within the corporate form that need to be accounted for when dealing with the question of constitu-

¹⁴⁶ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658, 660 (1990). While the Supreme Court overruled *Austin*, finding the anti-distortion rationale does not hold, the case still provides useful guidance as to how the Court views the nature and structure of the corporation.

¹⁴⁷ *Morton Salt Co.*, 338 U.S. at 652.

¹⁴⁸ See generally Bernard Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992).

¹⁴⁹ Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 291 (1999).

¹⁵⁰ See Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 604 (2006).

¹⁵¹ Blair & Stout, *supra* note 149, at 253

¹⁵² See Einer Elhauge, *supra* note 17, at 735–36; MICHAEL DOOLEY, *FUNDAMENTALS OF CORPORATION LAW* 97 (1995); ADOLF BERLE JR. & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 220–32 (1932).

¹⁵³ See Millon, *supra* note 53, at 202–203.

tional rights of corporations.

While the Supreme Court in *Citizens United* has overruled *Austin*'s anti-distortion rationale that deals with the impact of corporate wealth on society in a democratic system, the impact on the interests of shareholders still requires a thorough examination by the courts. Simply extending rights to corporations as if they were natural persons would ignore a major complexity that is inherent in the very nature and design of the corporation, i.e., the legal separation of the corporate entity and its shareholders. In order to shed light on the question whether and to what extent corporations should have constitutional rights, it is crucial first to recognize that the corporation is not a homogenous entity but it is characterized by internal dynamics and potentially competing interests.¹⁵⁴ Those intra-corporate tensions trace back to the separation of ownership and control within the corporate governance structure. Thus, "modern corporate law, by locating the center of corporate authority in a board of directors . . . , makes clear that the shareholders . . . have no right to run the corporation or determine its goals."¹⁵⁵

This separation creates opportunities for abuse of power by corporate management that requires checks and balances in the form of legal constraints.¹⁵⁶ The fiduciary duty owed by management to the corporation, and therefore ultimately to the shareholders, addresses this need. Against the backdrop of this inherent tension in the corporate form, one should pause before arguing that that competing shareholder interests could simply be overridden without a thorough analysis of remedies available for shareholders, especially minority ones. While it is the common understanding that the benefits of using the corporate form as an investment vehicle come at a price,¹⁵⁷ namely in the form of agency costs, this rationale does not easily extend to or even hold true with regard to non-commercial aspects, such as political speech or privacy prerogatives of the corporate entity. Daniel Greenwood characterizes the questions pertaining to corporate speech as a special form of an agency problem in terms of "role morality."¹⁵⁸ He claims that traditionally, "[a]gency cost theory . . . treats the interests of shareholders as deeply unproblematic and deeply antipolitical."¹⁵⁹ Corporate law operates on the fiction that shareholders are entirely "monolithic" and therefore are only motivated by one single-unified goal, profit maximization, and

¹⁵⁴ Neuborne, *supra* note 15, at 789 (about "intra-corporate conflicts" in multishareholder corporations.) See also Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006).

¹⁵⁵ Greenwood, *supra* note 11, at 1007–08.

¹⁵⁶ See Ribstein, *supra* note 11, at 96, 99.

¹⁵⁷ Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency costs and Ownership Structure*, 3 J. FIN. ECON. 305, 305 (1976).

¹⁵⁸ Greenwood, *supra* note 11, at 1038.

¹⁵⁹ *Id.* at 1040.

the economic return on their investment.¹⁶⁰ In the context of corporate speech, Greenwood describes this legal phenomenon accurately by stating that “[c]orporate speakers are agents answerable to a principle [i.e., the primacy of the profit motive of shareholders], not a principal [i.e., the shareholders with their actual values and interests].”¹⁶¹

While this seems appropriate when management makes business decisions that are primarily commercial in nature, it raises serious questions when the corporation is entering the “political market place” by virtue of corporate speech or is exercising other non-commercial bill of rights, such as privacy.¹⁶² Shareholders cannot be seen as part of the legal fiction of a unified and single goal of profit maximization, but rather should be conceived as part of a group of individuals with diverse values and interests, economic and otherwise, which can significantly deviate from management’s interests.¹⁶³ Greenwood puts it concisely when he explains that “[t]he humans who stand behind the shares have various and conflicting goals, as all people do: they want their shares to increase in value, of course, but they may also want decent jobs for their kids or neighbors, attractive and safe cities, a clean environment, and other things that, from time to time, conflict with the increase in value of their shares.”¹⁶⁴ Unlike when the corporation makes ordinary investment decisions, where management is enjoying great discretion under the “business judgment rule,” a different standard seems necessary when the corporation is claiming political rights as a citizen under the constitution.¹⁶⁵ In this instance, corporations should be treated like a legal group (rather than a fiction), when determining whether and to what extent corporations can claim constitutional or fundamental rights that were originally and traditionally intended for natural persons.

It is crucial that corporate theory about the nature of the firm informs the debate on corporate constitutional rights so that competing interests of shareholders are taken into account and intra-corporate conflicts are avoided. European courts in particular need to recognize corporations as complex organizational creatures with different constituents and a diversity of interests that can be aligned but that can also be at odds with each other. Failing to do that can lead to intra-corporate conflicts resulting from the diversity of shareholder and other stakeholder interests that can be at odds with the interests of management, especially when we are talking about extending non-commercial rights to corporations.

¹⁶⁰ *Id.* at 1037.

¹⁶¹ *Id.* at 1042.

¹⁶² See Ciepley, *supra* note 14, at 225.

¹⁶³ See Iman Anabtawi, *supra* note 156 (arguing that the largest modern shareholders have private interests that are both substantial and in conflict with maximizing overall shareholder value.)

¹⁶⁴ Greenwood, *supra* note 11, at 1040–41.

¹⁶⁵ See *id.* at 1019.

The existence of competing shareholder interests does not necessarily and automatically require barring corporations from rights protections under the Bill of Rights or the European Convention on Human Rights all together. Rather, a detailed and critical analysis of the available remedies for shareholders under the respective legal or economic systems is required.

B. The Relevance of the Corporate Identity in U.S. Supreme Court Jurisprudence

The corporate personhood debate has a long history in the practice of the U.S. Supreme Court. *Citizens United* can be understood as a watershed moment, where the Supreme Court solved the tension between different (contradictory) strands of its precedents concerning corporate speech restrictions. The Court described the dilemma that it was facing: “[This] Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them.”¹⁶⁶ Looking at the last century of the Court’s case law, some commentators have argued that the Court’s debate on the status of corporations under the Constitution increasingly has moved away from an analysis that is informed by ontology and thus by corporate theory.¹⁶⁷ Indeed, *Citizens United* explicitly overturned *Austin* and thus “returns to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech based on the speaker’s corporate identity.”¹⁶⁸

Citizens United can be seen as the penultimate manifestation of corporate personhood on the premise that the corporation is a real/natural entity with its own “voice.”¹⁶⁹ On its face, one might conclude that *Citizens United* (and its reference to *Bellotti*) achieved total rights equality between corporations, as legal persons, and natural persons. The corporate identity of the speaker is perceived as irrelevant and does not justify speech restrictions.¹⁷⁰ Rather, corporate speech restrictions are subject to strict scrutiny, which requires the Government to show that the statutory restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”¹⁷¹

In the discussion below, we explore American jurisprudence that defines corporate personhood. Five landmark cases chart the reasoning of the

¹⁶⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 313 (2010).

¹⁶⁷ See, for example, Mayer, *supra* note 29, at 629–51 (arguing the “demise of corporate theory” and the Court’s interpretative shift “from theory to pragmatism”).

¹⁶⁸ *Citizens United*, 558 U.S. at 315.

¹⁶⁹ See Reuven Avi-Yonah, *Citizens United and the Corporate Form*, WISCONSIN L. REV. 999, 1040 (2010).

¹⁷⁰ *Citizens United*, 558 U.S. at 364, 376.

¹⁷¹ *FEC v. Wisconsin Right to Life*, 546 U.S. 410, 464 (2007).

Supreme Court. *Citizens United* and *FCC v. AT&T* reveal that the Court’s methodological approach is coherent with regard to the application of corporate theory in light of the narrow cases before it; a reasoned analysis of both cases demonstrates that (despite contrary voices in the scholarship) corporate theory has not been abandoned in general by the Court. *Hale v. Henkel*, *Morton Salt*, *Bellotti*, and *Hobby Lobby* further explain the role of corporate theory (about the nature of the firm) as a common thread of the Supreme Court’s jurisprudence over the course of the last century.

1. A Reasoned Understanding of Citizens United and FCC v. AT&T

However, despite contrary voices in the scholarship,¹⁷² no truly authentic conclusion can be drawn from *Citizens United* regarding the role of corporate theory in the corporate personhood debate. It is not that the majority of justices would necessarily dispute the logic of putting the “corporate” back into corporate personhood, but they are simply reaching decisions on a different plane of analysis in the narrow case before them. *Citizens United* does not mark a general course change in the conception of corporate personhood, but it decides a specific case with facts that did not require an in-depth examination of corporate theory and competing interest of shareholders.¹⁷³

The decisive lynchpin that determines the Court’s methodology in this case is the nature of the free speech right. In his dissent, Justice John Paul Stevens concisely describes the majority opinion’s reasoning as follows:

Recognizing the weakness of a speaker-based critique of *Austin*, the Court places primary emphasis not on the corporation’s right to electioneer, but rather on the listener’s interest in hearing what every possible speaker may have to say. The Court’s central argument is that laws such as § 203 have “deprived [the electorate] of information, knowledge and opinion vital to its function,” [majority opinion, at 38], and this “interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”¹⁷⁴

The lack of corporate theory in the analysis of the Court is consistent with the purpose of the First Amendment as described by the Roberts Court and First Amendment scholars, namely to protect speech rather than the rights of the speaker.¹⁷⁵ Thus, with this understanding of the First Amend-

¹⁷² See, e.g., Mayer *supra* note 29, at 629.

¹⁷³ See Neuborne, *supra* note 15, at 79–92; Tabatha Abu El-Haj, *Friends, Associates, and Associations: Theoretically and Empirically Grounding the Freedom of Association*, 56 ARIZ. L. REV. 53, 109–10 (2014).

¹⁷⁴ *Citizens United*, 558 U.S. at 469 (Stevens, J., dissenting).

¹⁷⁵ See Martin Redish & Howard Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998) (suggesting that

ment as being non-speaker-centric leads to an analysis by the Court that is not (heavily) informed by corporate theory simply because it is not decisive in this case, i.e., in a free speech context under the U.S. Constitution.¹⁷⁶

This does not mean, however, that the Court dismissed corporate theory in general and for all cases involving corporate constitutional rights. Specifically, in its 2011 decision in *Federal Communications Commission v. AT&T*¹⁷⁷, the first corporate rights decision by the Court following *Citizens United*, the Court demonstrated that the corporate identity might not always be irrelevant. Unlike *Citizens United*, this case dealt with corporate privacy considerations against mandated disclosure of financial and other business information under the Fourth Amendment. In its judgment in *FCC v. ATT*, the Supreme Court follows in the footsteps of its early analysis in *Hale v. Henkel* and *Morton Salt*, where the Court relied heavily on corporate theory in order to determine the scope and limits of corporate privacy rights.¹⁷⁸ In *FCC v. AT&T*, the Court re-focused on the nature of the corporation as a rights holder with a “formalist” and “linguistic analysis”¹⁷⁹ that points towards a disconnect between the notion of corporations as “persons” and the attribute of “personal” privacy.¹⁸⁰ The Roberts Court rejected the reasoning of the Court of Appeals that “‘personal’ must mean relating to those ‘person[s]’ [as defined in the statute]: namely, corporations and other entities as well as individuals.”¹⁸¹ Greenwood accurately restates the holding of the Court as follows: “In ordinary English usage, corporations do not have ‘personal’ privacy. While the word ‘person’ often includes corporations in legal jargon, the adjective ‘personal’ does not carry that special

“[r]egardless of the expression’s source, such speech undoubtedly has the effect of aiding the self-realization of the recipients of that expression.”); see also *Citizens United*, at 349 (majority opinion) (reaffirming *Bellotti* by holding that “political speech is ‘indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation’”) (internal citation omitted); see also Barry P. McDonald, *The First Amendment and The Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 258 (2004).

¹⁷⁶ See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 775–76 (1978), which holds that the “question whether and to what extent corporations have first amendment rights . . . pose[s] the wrong question. [Rather,] [t]he Constitution often protects interests broader than those of the party seeking their vindication.”

¹⁷⁷ *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1177 (2011).

¹⁷⁸ *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906) (focusing its analysis on corporate theory, the Court employed the artificial entity theory to deny corporations fifth amendment protections, while granting them fourth amendment protections based on the rationale of the real entity theory. This Court has often been criticized for this “schizophrenic view on corporate personality.” Mayer, *supra* note 29, at 621; *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (applying the artificial entity theory and concluding that the privilege of incorporation from the government “carries with [it] an enhanced measure of regulation.”)

¹⁷⁹ Daniel Greenwood, *FCC v. AT&T: The Idolatry of Corporations and Impersonal Privacy*, 2011 HARV. L. & POL’Y REV. ON-LINE, <http://harvardlpr.com/online-articles/fcc-v-att-the-idolatry-of-corporations-and-impersonal-privacy/>.

¹⁸⁰ *FCC v. AT&T Inc.*, 131 S. Ct. at 1181.

¹⁸¹ *Id.* at 1181 (citing Brief of Resp. AT&T 8, 14–15).

meaning. 'Personal' is the opposite of bureaucratic, impersonal, or business, not its synonym, and 'personal privacy' never means 'business secrets.'"¹⁸²

The Court has taken a bifurcated approach to corporate personhood under the Constitution, as manifested in the dichotomy between its early case law in *Hale v. Henkel* and *Morton Salt*, and its decision in *Bellotti* and its recent ruling in *Citizens United*. In the latter judgment, the Court followed an approach where the speaker is irrelevant and the applicability of corporate rights is determined by a teleological approach. In light of the Court's linguistic analysis in *FCC v. AT&T* that hinges heavily on the nature of the corporation, Daniel Greenwood criticizes the Court's perpetuating inconsistency as follows: "Why is ordinary meaning important here, but irrelevant when corporations assert constitutional rights that the text grants only to human beings?"¹⁸³

The "free marketplace of ideas" paradigm under the First Amendment,¹⁸⁴ which disregards the corporate nature of the rights holders, and the "personal privacy" paradigm,¹⁸⁵ which relies exactly on the corporate nature of the rights holders, are not intrinsically inconsistent. Rather, how pronounced the corporate theory analysis is in each case depends on the extent to which it is influenced by the underlying purpose of the respective Bill of Rights provision.¹⁸⁶

The First Amendment protects not only the "self-expression of the communicator" but also of the "right to hear or receive information" as a function of "the interchange of ideas."¹⁸⁷ One could argue that the protection extends to a 'third-party beneficiary' that is distinct from the actual rights holder. Larry Ribstein points out that "[th]e First Amendment does not guard corporations' expressive rights, but rather the *public's interest* in hearing what corporations have to say."¹⁸⁸ The debate on corporate protections under the Fourth Amendment on the other hand illustrates that corporate theory can play a crucial role when determining the applicability of certain constitutional rights to corporations. Unlike speech rights, privacy rights are, by their very nature, intrinsically dependent on the human or corporate nature of the rights holder.¹⁸⁹ The purpose of privacy rights is to

¹⁸² Greenwood, *FCC v. AT&T*, *supra* note 179.

¹⁸³ *Id.*

¹⁸⁴ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 810 (1978) (emphasizing "the role of the *First Amendment* as a guarantor of a free marketplace of ideas."); see also *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008).

¹⁸⁵ *Federal Communications Comm'n (FCC) v. AT&T Inc.*, 131 S. Ct. 1177, 1180 (2011).

¹⁸⁶ See *Bellotti*, 435 U.S. at 778 n.14 (1978) (holding that "[w]hether or not a particular guarantee is . . . unavailable to corporations . . . depends on the nature, history, and purpose of the particular constitutional provision.")

¹⁸⁷ *Bellotti*, 435 U.S. at 806 (1978) (White, J., dissenting)

¹⁸⁸ Larry Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. UNIV. L. REV. 1022, 1022 (2010).

¹⁸⁹ See *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1177-78 (2011), which holds that "'personal privacy'

protect the rights holder first and foremost, specifically from arbitrary government intrusion, and secure an inalienable sphere of personal privacy.¹⁹⁰ It is thereby a function of personal liberty in the United States.¹⁹¹

It is not surprising that the Supreme Court relied heavily on corporate theory and related questions about the nature of the corporation in its debate on corporate protections under the Fourth Amendment. The practice of the Court has been extremely consistent in this regard over the last century. The Court's early analysis in *Hale v. Henkel* was deeply grounded in corporate theory and the discussion about corporate personality.¹⁹² However, the decision is not cohesive with regard to the specific corporate theory that is applied by the Court; rather, the decision is a reflection of the deep divergence over legal questions pertaining to corporate personality at the time.¹⁹³ Thus, while the Court granted Fourth Amendment protections to corporations on grounds of the natural entity theory,¹⁹⁴ it denied the corporate form Fifth Amendment protections based on the artificial entity theory.¹⁹⁵ Granted, this "two-faced view of the corporation" has been perceived as mysterious by the scholarship,¹⁹⁶ yet the Court shows a clear adherence to methodology that is deeply informed by corporate theory in its analysis. The Court continued to decide corporate Fourth Amendment cases on the bases of corporate theory, this time the artificial entity theory. In *Morton Salt*, when dealing with Fourth Amendment protections against broad government requests for document production (regarding pricing, among others), the Court pointed to the "privilege of acting as an artificial person" that corporations derive from society.¹⁹⁷ This reiteration of the artificial entity theory led the Court to allow such government requests even if they were "caused by nothing more than official curiosity."¹⁹⁸

The most recent corporate privacy case that the Supreme Court examined, namely *FCC v. AT&T*, discusses the corporate identity of the rights claimant in terms of semantics, rather than legal doctrines about corporate

[under the Freedom of Information Act] . . . conveys more than just 'of a person'; it suggests a type of privacy evocative of human concerns—not usually associated with an entity like AT&T."

¹⁹⁰ See Anita Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandaries for the Common Law*, 20 JOHN MARSHALL L. REV. 607, 629 (1987).

¹⁹¹ See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004).

¹⁹² See *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906).

¹⁹³ See Mayer, *supra* note 29, 622; see also Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 139 (2013)

¹⁹⁴ *Hale*, 201 U.S. at 76.

¹⁹⁵ *Id.* at 75.

¹⁹⁶ See Mayer, *supra* note 29, at 622; see also Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U.L. REV. 731, 741 (2013).

¹⁹⁷ *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

¹⁹⁸ *Id.*

personality.¹⁹⁹ Yet, the corporate nature of the applicant is clearly relevant for the Court’s analysis in this case, unlike the impression to the contrary in *Citizens United* and *Bellotti*. The case of *FCC v. AT&T* also illustrates the important role of corporate theory as it provides a vehicle to account for competing interests of corporate constituents, including shareholders and potentially also stakeholders based on the prevailing doctrine of the corporate objective. Unlike other cases before, *FCC v. AT&T* did not deal with protections sought against intrusive government inquiries. Rather, *FCC v. AT&T* had already disclosed the information to the government and instead sued to prevent the Federal Communications Commission (FCC) from disclosing the information to the public, “including AT&T’s investors, employees, customers, and competitors.”²⁰⁰ It is important to realize that “privacy rights that conceal the inner working of a business from view free the institution [i.e., the corporation] and its decision makers from responsibility to its stakeholders,”²⁰¹ who might have a vested interest in disclosure of the information. This is particularly true for a company’s shareholders as a corporation’s major constituency (and principal) under modern corporate law. Granting corporations a right to privacy might help to perpetuate illegal or anticompetitive business conduct and thus harm the shareholders’ investment as the main constituents of the corporate form. Over the last century, corporations were granted “privacy rights protection seclusion, confidentiality, and [even] secrecy.”²⁰² Especially the latter cases raise issues of potentially competing shareholder and stakeholder interests that can be effectively addressed by applying corporate theory.

Even though the Court’s methodology in *FCC v. AT&T* might seem to be in tension with the approach in *Bellotti* and *Citizens United*, *FCC v. AT&T* in fact reinforces the test promulgated in *Bellotti*, as recently endorsed in *Citizens United*.

Certain ‘purely personal’ guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals. . . . Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.²⁰³

FCC v. AT&T focuses its analysis on whether a corporation can be ascribed “personal privacy” rights as an exemption of disclosure under the

¹⁹⁹ Federal Communications Comm’n (FCC) v. AT&T Inc., 131 S. Ct. 1177, 1177 (2011).

²⁰⁰ Greenwood, *FCC v. AT&T*, *supra* note 179.

²⁰¹ *Id.*

²⁰² Allen, *supra* note 190, at 629.

²⁰³ First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

Freedom of Information Act (FOIA).²⁰⁴

The rights-specific character of the Supreme Court's corporate personhood jurisprudence should not be overstated, and more research is required to examine the historical purpose of free speech and particularly privacy rights under the Constitution with regard to corporations. However, it is fair to say that the status of corporations under the Constitution cannot be discussed in a vacuum, but needs to be seen in the context of the respective rights provisions.

Thus, despite the Supreme Court's holding in *Citizens United*, corporate theory is still relevant when determining corporate rights and regulatory powers of the state. Corporate theory might not always be a decisive factor in the analysis of the Court depending on the interpretation of the rights provision in question, but it did not vanish from the Supreme Court's methodological approach to corporate personhood in principle, as some commentators have argued.²⁰⁵ It is still an integral part of the methodological approach by the Court, as the Court has most recently reaffirmed in its decision in *Hobby Lobby*, where understanding the nature, structure, and constituents of the corporation remains highly relevant to the analysis.²⁰⁶ A study of the Supreme Court's case law shows that, contrary to some voices in the scholarship, the Court has not dismissed corporate theory,²⁰⁷ but rather subsumes it under larger objectives, such as democracy and the "free

²⁰⁴ *FCC v. AT&T* deals with a matter of statutory interpretation. Thus, the Court emphasizes that "this case does not call upon us to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law," but rather it deals with a question of statutory interpretation. *Federa Communications Comm'n (FCC) v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011). Still, *FCC v. AT&T* provides important lessons for the corporate personhood debate. Even if the privacy term under the FOIA might not be identical to the privacy concept under the 4th Amendment, it can be assumed that they are at least congruent. The scholarship has been discussing the case of *FCC v. AT&T* as a progression of the Court's jurisprudence on corporate rights, especially since this has been the first decision after *Citizens United* dealing with the issue of corporate rights. See Mark Walsh, *Making It Personal: Corporate Rights are Again at Issue as AT&T Wants to Keep Info a Secret*, 97 A.B.A. J. 18, 18 (2011).

²⁰⁵ See Mayer, *supra* note 29, at 620 (arguing that "[a]fter 1960, the Court abandoned theorizing about corporate personhood.")

²⁰⁶ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (holding that "the purpose of extending rights to corporations is to protect the rights of people associated with the corporation."); see also *Id.* at 15 (holding that "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else")

²⁰⁷ Compare Wayne Batchis, *Citizens United and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of The Association*, 36 N.Y.U. REV. L. SOC. CHANGE 5, 31 (2012) and Jessica A. Levinson, *We the Corporations?: The Constitutionality of Limitations on Corporate Electoral Speech after Citizens United*, 46 U.S.F.L. REV. 307, 307-08, 318 (2011) with Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 516 (2011) (emphasizing the importance of corporate law to inform the Supreme Court's corporate speech jurisprudence). For a compelling different view on the issue, see Amy J. Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 581 (2012) (focusing on "citizenship" rather than "personhood" to address the issue of corporate political speech).

market of ideas," if so mandated by the underlying purpose of the respective Bill of Rights provision.²⁰⁸

2. Resurrecting Shareholder and Constituency Protection within Corporate Personhood

Citizens United (and, for that matter, the *Bellotti* standard) should not be considered the benchmark from which to draw conclusions on the role (or demise) of corporate theory in the American corporate personhood debate for reasons set forth below. This is particularly true with regard to questions about how to treat competing shareholder and constituency (i.e. stakeholder) interests within the corporate personhood discussion.

(a) The Common Thread of Corporate Theory

It is not that the majority of justices would necessarily dispute the logic of putting corporate back into corporate personhood, but they are simply reaching decisions in the narrow case before them. On the facts of the case, *Citizens United* dealt with a nonprofit corporation. If one takes a conservative reading of the case, one must conclude that *Citizens United* has more limited implications for the corporate personhood debate than often argued.²⁰⁹ Acknowledging the significance of the ruling with regard to political speech of non-profit corporations, it is important not to overinflate the ruling beyond the specific facts of the case. One can fully support of *Citizens United* and still ask the question how this ruling would impact for-profit corporations if such a case were presented to the nine Justices. It remains open how the Supreme Court would decide a case where a major publicly held multi-shareholder company, such as Google Inc., for example, used general treasury funds to support a certain political candidate or simply to contribute to a debate on issues of general interest, such as public health, for example. The company's management may find such corporate activities in line with the company's motto and corporate culture of "do no evil,"²¹⁰ but shareholders might have divergent interests, especially on controversial issues of public policy.²¹¹

It is often overlooked that while the Supreme Court in *Citizens United*

²⁰⁸ See Mayer, *supra* note 29, at 629, 633.

²⁰⁹ Allison R. Hayward, *Citizens United: Correct, Modest, and Overdue*, 2 AKRON J. CONST. L. & POL'Y 1, 2-3 (arguing *Citizens United* had a narrow impact and left long-settled precedent intact), <http://www.akronconlawjournal.com/articles/citizens-united-correct-modest-and-overdue.pdf>.

²¹⁰ See BENJAMIN EDELMAN & THOMAS EISENMANN, GOOGLE INC. 17, 19 (Harv. Bus. Pub. 2010).

²¹¹ It can be argued that no intracorporate conflict exists if management can show that the expenditures made are in the corporation's economic interest, such as lobbying efforts with regard to favorable legislation and regulation. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 806 (1978) (White, J., dissenting).

overturned the anti-distortion rationale of *Austin* (dealing with the corrosive effects on the *external* political process), the Court has not yet spoken on the merits and in sufficient detail to the constitutional rights premises of multi-shareholder for-profit corporations and *intra*-corporate conflicts that might arise in those large corporations. Thus, “despite the dictum in *Citizens United*—which actually dealt with the clearly protected speech of a nonprofit corporation similar to MCFL . . . it remains open how the Court would hold in a case where the speech was exercised by a multi-shareholder for-profit corporation.”²¹² Also, in its most recent decision in *Hobby Lobby*—dealing with the religious exercise of a closely held corporation solely owned by one single family—the Court again avoided (and incidentally glossed over) possible *intra*-corporate conflicts, which in fact existed with regard to numerous of Hobby Lobby’s employees.²¹³

Even in the cases where the Court has dealt with corporations in a nonprofit form, the Court raises the issue of conflicting shareholder interests, often in *dicta*.²¹⁴ This can be understood as an indication that the Court’s holding in *Citizens United*, declaring that the corporate identity of the speaker is irrelevant in establishing its personhood under the First Amendment,²¹⁵ does not automatically hold true for the general status of corporations across the entire Bill of Rights and the Constitution. Rather, the Court’s treatment of *intra*-corporate conflicts and how they can be remedied at the internal corporate governance level, at the statutory level, or in the market place²¹⁶ signals that the Court did not intend to dismiss corporate theory from the corporate personhood debate all together. This is reinforced by the fact that the Court on several occasions throughout the judgment has referred to different theories about corporate personality, including the real entity as well as the association theory.²¹⁷

Burt Neuborne has convincingly argued that, “in settings where *intra*-corporate conflicts of interest are likely to exist, the [U.S. Supreme] Court

²¹² Neuborne, *supra* note 15, at 791-92.

²¹³ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794–95 (2014) (Ginsberg, J., dissenting).

²¹⁴ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 361-62 (2010); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 675, 676 n.8 (1990) (While the Michigan State Chamber of Commerce in this case characterizes as a nonprofit corporation, the Court still addresses the issue of “protection of dissenting shareholders” in “ordinary [i.e. forprofit] business corporations.” The Court reaffirms that “[w]e have long recognized the importance of state corporate law in ‘protect[ing] the shareholders’ of corporations chartered within the State.” (internal citation omitted)); *Fed. Election Comm’n v. Mass. Citizens for Life (MCFL)*, 479 U.S. 238, 264 (1986) (emphasizing that MCFL “has no shareholders,” what “ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity”).

²¹⁵ *Citizens United*, 558 U.S. at 350, 376.

²¹⁶ *Id.* 37-71; *id.* at 476 (Stevens, J., dissenting).

²¹⁷ See *Citizens United*, 558 U.S. at 354, 356 (2010) (majority opinion) (characterizing the corporation as an “associations of citizens”); *id.* at 354–55 (referring to the speech and “voice” of the corporation as a real entity that deserves protection).

requires each human rights-holder to assert his or her own constitutional rights without recourse to a centralized enforcer [i.e., the corporation].”²¹⁸ This attention to intra-corporate conflicts as part of the Court’s legal analysis is an important function of corporate theory in the Court’s thinking on corporate personhood. In that vein, the Supreme Court has assessed privacy-based claims based on the interests of shareholders and has denied corporate privacy rights if the disclosure of corporate information would advance the interests of the members of the corporate community, while exemptions from reporting would merely benefit a few corporate insiders.²¹⁹ Also, the Supreme Court’s jurisprudence on corporate speech protection under the First Amendment has not been entirely blind to the corporate organizational structure even though the Court has held in *Bellotti* that the corporate identity of the speaker was not relevant. Thus, Justice Lewis F. Powell’s majority opinion in *Bellotti* addressed the question whether the interests of “shareholders whose views differ from those expressed by management on behalf of the corporation” ought to be protected in the face of corporate political spending by management.²²⁰

The Court had the opportunity to speak to the shareholder protection rationale in cases involving for-profit multi-shareholder corporations on several occasions in the 1970s, but it never decided the issue.²²¹ For example, in *Bellotti* (involving a bank’s use of general treasury funds to oppose a referendum proposal on raising state personal income tax) the majority opinion touched upon the issue of protection of shareholder rights as a compelling state interest to justify a statutory speech restriction.²²² But in the end the Court left the issue unresolved.²²³ The decision holds that the statute was both underinclusive and overinclusive in protecting shareholder rights “under the circumstances of this case,”²²⁴ thus “leaving open the [question of the] constitutionality of an appropriately drawn shareholder protection statute.”²²⁵

The Court reasoned as follows: “The statute is said to serve this interest by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both underinclusive and

²¹⁸ Neuborne, *supra* note 15, at 788.

²¹⁹ See *California Bankers Association v. Shultz*, 416 U.S. 21, 55, 81 (1974); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970).

²²⁰ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978).

²²¹ See *Bellotti*, 435 U.S. at 788; *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338, 353 (1977); *California Bankers Ass’n*, 416 U.S. at 55, 81; *Colonnade Catering Corp.*, 397 U.S. at 75.

²²² *Bellotti*, 435 U.S. at 794–95.

²²³ In the context of the specific facts of this case, this might not be surprising considering that “given the subject matter of the referendum . . . , it was highly unlikely that intracorporate conflicts of interest over the speech existed” on part of the shareholders.” Neuborne, *supra* note 15, at 792.

²²⁴ *Bellotti*, 435 U.S. at 795; see also *id.* at 793–94.

²²⁵ Neuborne, *supra* note 15, at 792.

overinclusive.”²²⁶ The Court decided the issue on the same grounds in *Citizens United*,²²⁷ thus perpetuating its “decision-avoidance route”²²⁸ on the question.

The Roberts Court further expressed in *dicta*, again in reference to *Bellotti*, that “there is little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”²²⁹ In the eyes of the Court, “[t]hose reasons are sufficient to reject this shareholder protection interest.”²³⁰

The enormous trust that the Court vests in such “procedures” while abdicating judicial oversight of fundamental shareholder interests in the performance of corporate actions that are blatantly political in character leaves much to be considered. The constitutionality of the shareholder protection rationale requires a more sophisticated examination than the cursory treatment that *Citizens United* and *Bellotti* offers on the issue. These are concerns that were raised first by Justice Byron White in his dissent in *Bellotti*²³¹ and then by Justice Stevens in his dissent in *Citizens United*.²³² Justice Ginsburg in her dissent in *Hobby Lobby* adds another dimension to the protection rationale underpinning the corporate personhood debate, namely the impact on other constituencies, in other words, stakeholders, of the corporation.²³³ The legal academy should ponder these considerations afresh. We take up the issue below.

Several commentators have described the Supreme Court’s analysis as too “unsophisticated”²³⁴ since it shows the “tendency to anthropomorphize the corporation as a freestanding, sentient being”²³⁵ and lacks a thorough discussion of “the corporation, as a collective entity.”²³⁶ Greenwood emphasizes the crucial role of corporate theory in the corporate personhood debate by explaining that “[i]f corporate speech is to be corporate at all, there must be a clear explanation of how the group decision legitimately can be made.”²³⁷

(b) The Shortfalls of the “Corporate Democracy” Argument

It is questionable whether regular procedures of “corporate democra-

²²⁶ *Bellotti*, 435 U.S. at 793–94.

²²⁷ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 362 (2010).

²²⁸ Neuborne, *supra* note 15, at 792.

²²⁹ *Citizens United*, 558 U.S. at 361–62 (internal citation omitted).

²³⁰ *Id.*

²³¹ *Bellotti*, 435 U.S. at 802–22 (White, J., dissenting).

²³² *Citizens United*, 558 U.S. at 475–79 (2010) (Stevens, J. dissenting).

²³³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2787(2014).

²³⁴ Greenwood, *supra* note 11, at 1013; *see also* Ciepley, *supra* note 14, at 223.

²³⁵ Neuborne, *supra* note 15, at 772.

²³⁶ Greenwood, *supra* note 11, 1011.

²³⁷ *Id.* at 1024.

cy” sufficiently protect the rights of shareholders as the majority in *Bellotti* suggested²³⁸ and the majority in *Citizens United* confirmed (in *dicta*).²³⁹ In his dissent, Justice Stevens voiced concerns of “coerced speech” on part of shareholders “who disagree with the corporation’s electoral message” when management uses general treasury funds for electioneering expenditures.²⁴⁰ Unlike the majority opinion (in *dicta*), Justice Stevens defies the notion that “abuse [of shareholder money] [can be] corrected by shareholders ‘through the procedures of corporate democracy.’”²⁴¹ Justice Stevens introduces important aspects pertaining to corporate theory and the characteristics of the corporation into the discussion that the majority opinion merely scratched at the surface and left unresolved in the end.

The majority Court in *Citizens United* followed the approach of the *Bellotti* Court with regard to the shareholder protection rationale. Based on *Bellotti*, procedures of “corporate democracy” as a vehicle for shareholder protection are to be understood to include “intracorporate remedies,” and “judicial remed[ies].”²⁴² The *Bellotti* Court stated:

Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation’s charter, shareholders normally are presumed competent to protect their own interests. In addition to intra-corporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.²⁴³

Like Justice White more than 20 years earlier,²⁴⁴ Justice Stevens raises concerns to dismiss the shareholder protection rationale without further analysis.²⁴⁵ Justice Stevens warns about relying upon intra-corporate governance systems and statutory actions since corporate law scholarship has found that “[i]n practice . . . many corporate lawyers will tell you that ‘these rights are so limited as to be almost nonexistent,’ given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.”²⁴⁶ Especially, since general chartering has become the prevailing practice, shareholders’ leverage over management

²³⁸ First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978).

²³⁹ Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 362 (2010).

²⁴⁰ Citizens United, 558 U.S. at 475 (Stevens, J., dissenting).

²⁴¹ *Id.* at 476–77 (citing First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978)).

²⁴² First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 794–95 (1978).

²⁴³ *Id.*

²⁴⁴ *Id.* at 804–06 (White, J., dissenting).

²⁴⁵ See *Citizens United*, 558 U.S. at 475–79 (Stevens, J., dissenting).

²⁴⁶ *Id.* at 477.

has decreased even more.²⁴⁷

Also, the reasoning that dissenting shareholders are “free to withdraw [their] investment at any time and for any reason,”²⁴⁸ falls short of a sophisticated in-depth analysis in light of corporate theory. Justice White, in his dissent in *Bellotti*, has undertaken a more thorough analysis of corporate theory to inform the discussion about the shareholder protection rationale. Thus, he accurately points out that usually corporations are “operated for the purpose of making profits.”²⁴⁹ Under modern-day corporate law, this common purpose unites the shareholders. Justice White emphasizes that “[t]his unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities 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.”²⁵⁰ When this “unanimity in purpose breaks down,”²⁵¹ as Justice White put it, the corporate law premise that shareholders share a common purpose, i.e., to increase the value of their investment, does not hold anymore and shareholders morph again into the diverse groups of interests, beliefs, and values they are in reality, even if not under the corporate law fiction.²⁵² This results in intra-corporate conflict when the corporation (through its management) engages in political speech.²⁵³

Intra-corporate conflict can take different forms, however, depending on the right in question. Cases pertaining to corporate privacy claims vividly illustrate this point. In those cases, the asserted right to privacy against disclosure requirements of financial and other business information can conflict with “the interests of members of the corporation community,”²⁵⁴ primarily shareholders, this would “shield . . . the enterprise from being used for unlawful purposes”²⁵⁵ or “prevent . . . organized crime from gaining foothold in the industry”²⁵⁶ and thus protect shareholders’ investment.

It is certainly true that shareholders invest in a company voluntarily and can withdraw their investment at any time by simply selling their stock. Unlike in partnerships, exit is easily possible in corporations due to the liq-

²⁴⁷ See Morton Horwitz, *supra* note 50, at 181; see also William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1489 (1989).

²⁴⁸ *Bellotti*, 435 U.S. 765, 794 (1978) (majority opinion).

²⁴⁹ *Id.* at 805 (White, J., dissenting).

²⁵⁰ *Id.* at 805–06 (White, J., dissenting).

²⁵¹ *Id.*

²⁵² See Greenwood, *supra* note 11, at 1037.

²⁵³ Note that not all cases, where a corporation claims First Amendment rights, necessarily produce an intra-corporate conflict. Thus, as Burt Neuborne accurately observes, in “commercial speech, free press, and nonprofit corporation cases, . . . an intracorporate commonality of interest in asserting free speech protection undoubtedly exist[s].” Neuborne, *supra* note 15, at 792.

²⁵⁴ *Id.* at 789 (citing *California Bankers Association v. Shultz*, 416 U.S. 21 (1974)).

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970)).

liquidation protection and the feature of perpetual life that is inherent in the corporate form.²⁵⁷ Usually, if an organization does not reflect the goals of (some of) its shareholders, those dissenting shareholders may leave the organization. It is fair to assume that this “exit” mechanism . . . will keep the leadership relatively representative.”²⁵⁸ Corporations, however, “may have more features of exit failures [for non-financial reasons] than many other organizations, due to the importance of the profit motive as the primary reason investors participate.”²⁵⁹ Moreover, since the corporate form has become the most important investment vehicle of modern times operating on a strict profit-maximizing premise,²⁶⁰ it is difficult to argue that shareholders should foreclose an economic opportunity (which is the very reason why they invested in the first place) if they disagree with the politics of the corporation.²⁶¹ The inherent risk is that “people who have invested in the business corporation for purely economic reasons” might be taken advantage of if they are not willing to “sacrific[e] their economic objectives.”²⁶²

Granted, a dissenting shareholder is not compelled to continue being a member of a corporation, but it compels him to choose his political beliefs over his economic goals. Pointing to the “exit solution” does not, however, solve the shareholder protection issue pertaining to the corporate personhood discussion. This is particularly true, since, as Justice Stevens highlighted, “[m]ost American households that own stock do so through intermediaries such as mutual funds and pension plans, [citation omitted] which makes it more difficult both to monitor and to alter particular holdings.”²⁶³ The absurdity of the exit solution as a viable vehicle for shareholder protection would be even more amplified in corporate privacy cases, since granting corporations and their management a right to confidentiality and even secrecy defies the transparency that is needed for shareholders to decide whether or not to exit. While Justices Stevens and White have introduced a perspective that is informed by corporate theory and accounts for some of the complexities of the corporate form, the Court has yet to speak on the constitutionality of the shareholder protection rationale. The issue needs a more thorough and sophisticated treatment by the Court than the brief *dicta* in *Citizens United* and the holding in *Bellotti* offer so far. Also, a more in-depth corporate theory analysis of the doctrine of corporate personhood is necessary in the legal scholarship. This is particularly true since the Court

²⁵⁷ See, e.g., Ciepley, *supra* note 14, at 226; see also DAVID G. EPSTEIN, RICHARD D. FREER & MICHAEL J. ROBERTS, BUSINESS STRUCTURES 138–39 (2002).

²⁵⁸ Greenwood, *supra* note 11, at 1026.

²⁵⁹ *Id.* at 1032.

²⁶⁰ See FRIEDMAN, *supra* note 53, at 565.

²⁶¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 477–78 (2010) (Stephens, J., dissenting).

²⁶² Adam Winkler, *Beyond Bellotti*, 32 LOYOLA OF LOS ANGELES L. REV. 133, 201 (1998).

²⁶³ *Citizens United*, 558 U.S. at 477 (Stephens, J., dissenting).

in *Hobby Lobby* has again deferred disputes among owners to remedies under state corporate law.²⁶⁴ The insufficient nature of such remedies appears particularly stark in closed corporations where deadlock situations to the detriment of minority owners are common due to the lack of a readily available market for shares in closed corporations.²⁶⁵ State courts have increasingly extended fiduciary duties to be owed by majority shareholders to minority ones in closed corporations for that reason.²⁶⁶ The Supreme Court's reliance on the constitutional structure of the corporation and rule by majority under that structure in *Hobby Lobby*,²⁶⁷ is at odds with this well-established corporate law doctrine.

While this article aims to illustrate this need for a corporate-theory informed approach to corporate personhood and highlights the normative implications that such an approach would have, it recognizes that much more is to be said on the various corporate theory aspects pertaining to the doctrine of corporate personality, including on the shareholder protection rationale. However, this is beyond the scope of this article and remains open for future treatment in the scholarship.

Despite the fact that the Supreme Court's analysis on the corporate theory prerogatives of corporate personhood falls short at times, corporate theory is still deeply engrained in the methodological DNA of the Court as the relevant case law over the last century has shown. The ECHR on the other hand, has ignored corporate theory altogether in its jurisprudence dealing with corporate "human rights" under the Convention. The normative implication of this approach is that intra-corporate conflicts are not accounted for in the Court's analysis on corporate personhood and the scope of corporate fundamental rights, such as speech, privacy, and due process. This is particularly problematic in a European context, where derivative actions for shareholders to address grievances are not clearly articulated in legal practice.²⁶⁸

C. Europe's Missing "Corporate" Person

While the European Court of Human Rights, like the Supreme Court, has broadly extended the rights provisions under its jurisdiction to companies, with the exception of several rights that are considered applicable only to natural persons,²⁶⁹ there is one key difference that can be observed, namely the role of corporate theory or the lack thereof in the jurisprudence

²⁶⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2756 (2014).

²⁶⁵ See generally David G. Epstein et. al, *BUSINESS STRUCTURES* (2002).

²⁶⁶ *Id.*

²⁶⁷ *Hobby Lobby Stores, Inc.*, 134 S.Ct. at 2768.

²⁶⁸ See Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. Econ. Perspectives 117, 133–34 (2007).

²⁶⁹ See EMBERLAND, *supra* note 10, at 110.

of the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ). Even though the ECHR “settled on a surprisingly favourable view of the applicability of the rights and entitlements to corporate claimants,”²⁷⁰ the analysis of the Court often falls short and is primarily grounded in a pragmatist view with strong teleological considerations, while the corporate identity of the rights applicant is simply ignored. As in the United States, the right to speech (Article 10 of the Convention) and the right to privacy (Article 8 of the Convention) have been most heavily debated before the ECHR. It is in this context that the corporate identity of the applicant creates the most traction with regard to the rights protection in question.

In the discussion below, this article examines the absence of corporate theory in European judicial views about corporate speech and privacy rights under the Convention. Nor is there hardly any recognition of the competing interests of shareholder and other stakeholder of the firm in how the European Courts determine the scope of corporate under the Convention.

1. The Lack of Corporate Theory

It was not until 1980 that the ECHR first decided a case involving corporate speech. In *Sunday Times v. UK*, the ECHR granted speech protections to a newspaper company “without any discussion as to the relevance of its corporate nature of the underlying for-profit motivations.”²⁷¹ The ECHR was confronted with similar cases in the following years in *Markt Intern Verlag GmbH v. Germany* and *Groppera Radio AG*, where the ECHR again held that corporate applicants fell under the scope of Article 10 of the Convention.²⁷² However, in neither of those cases was the corporate element explicitly discussed by the ECHR. It was only in its decision in *Autronic AG v. Switzerland* that the ECHR conducted a more thorough analysis of the status of corporate speech under the Convention.²⁷³ For that reason, *Autronic* can be considered the ECHR’s watershed decision on corporate speech.²⁷⁴

In a series of case law, the ECHR arrived at a line of jurisprudence that considered the profit-making motive as irrelevant.²⁷⁵ The status as a “profit-making corporate bod[y]” was therefore not the controversial element in

²⁷⁰ *Id.* at 111.

²⁷¹ *Sunday Times v. UK*, 38 Eur. Ct. H. R. (ser. A) at ¶ 59(b) (1981)

²⁷² *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 25 (1989); *Groppera Radio and Others v. Switzerland*, 173 Eur. Ct. H. R. (ser. A) at ¶ 49 (1990).

²⁷³ *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 47(1), (2) (1990).

²⁷⁴ See EMBERLAND, *supra* note 10, at 129.

²⁷⁵ See *Casado Coca v. Spain*, 285 Eur. Ct. H. R. (ser. A) ¶ 35 (1994); *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 26 (1989); see also EMBERLAND, *supra* note 10, at 140.

Autronic.²⁷⁶ The ECHR kept its analysis brief and held that “neither Autronic AG’s legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of the freedom of expression can deprive Autronic AG of the protection of Art. 10.”²⁷⁷ However, the respondent government, Switzerland, argued that Article 10 of the Convention does not apply due to the purely transactional character of the speech that did not “attach . . . any importance to the content of the transmission . . . , since it was pursuing purely economic and technical interests.”²⁷⁸ Switzerland raised the concern that this would lead to the protection of mere business activity stating that “freedom of expression that was exercised . . . exclusively for pecuniary gain came under the head of economic freedom.”²⁷⁹ In *Autronic*, the ECHR eventually granted protection of freedom of expression that merely sought to demonstrate the functioning of a satellite dish to promote sales; the content of the speech was entirely irrelevant and no interests of a target audience were protected.²⁸⁰ In comparison, the U.S. Supreme Court strictly applies the “free marketplace of ideas”²⁸¹ concept to commercial speech, with the consequence that both the speech and the content of the speech are highly relevant. In that regard, the ECHR grants broader protection of corporate speech than the Supreme Court, which can be widely regarded as the leading protagonist promoting the commercial speech doctrine.²⁸²

The ECHR’s decision in *Autronic* is emblematic of an approach that focuses on the underlying values that the corporate claim might protect, such as speech as a function of democracy,²⁸³ rather than with an ontological analysis of whether the respective right can (by their nature and historical conception under the Convention) be extended to corporations, despite no explicit textual interpretative support.²⁸⁴ Thus, the ECHR has based its decision in *Autronic* on the importance of protecting the content of speech and the substance of ideas as a function of the right of the listeners, who have “the right to receive and impart information,” even if the latter is

²⁷⁶ See *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 47(1) (1990).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at ¶44.

²⁷⁹ *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 44(2) (1990).

²⁸⁰ *Id.*

²⁸¹ See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 330 (2010); *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008); *Pacific Gas & Electric v. Public Utilities Commission*, 475 U.S. 1, 8 (1986).

²⁸² See Eric Barendt, *FREEDOM OF SPEECH* 54 (1985).

²⁸³ *Handyside v. UK*, 24 Eur. Ct. H.R. (ser. A) at ¶ 49(2) (1979); see also *Hertel v. Switzerland*, 59 Eur. Ct. H.R. (ser. B) at ¶ 46 (1999).

²⁸⁴ The ECHR has at times made a textual argument to support the application of the Convention to corporations, stating that, according to the text of the Convention, the provisions apply “to ‘everyone,’ whether natural or legal persons.” See, e.g., *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 47(1) (1990).

commercial in nature.²⁸⁵ The ECHR’s approach is reminiscent of the Supreme Court’s alleged shift from “ontology to teleology” in its corporate constitutional rights jurisprudence, as discussed above.²⁸⁶

The interpretative approach of the ECHR is informed by the notion that the Convention is “an Instrument designed to maintain and promote the ideals and values of democratic society.”²⁸⁷ This results in an “objective” approach to human rights protection that focuses on how the applicant’s claim is conducive to promoting general values underlying the Convention, such as equal treatment, rule of law and democracy, rather than on the subjective rights position of the applicant.²⁸⁸ With this approach, the ECHR was able to avoid difficult questions of corporate theory and, even more importantly, questions pertaining to the role of corporations in society.

In its case law, the ECHR acknowledges that corporations can be involved in pure commercial speech (characterized by the intent to “incit[e] the public to purchase a particular product”)²⁸⁹ as well as political (in terms of non-commercial) speech.²⁹⁰ Political speech is present when the statements “participate in a debate affecting the general interest”²⁹¹ or concern “controversial opinions pertaining to modern society in general.”²⁹² It is irrelevant, according to the ECHR, if the statements are commercially motivated.²⁹³ Thus, some forms of corporate speech benefit from the stringent protections awarded to political speech that significantly reduces the “margin of appreciation” afforded to national authorities of the member states.²⁹⁴ Emberland has described this approach by the ECHR precisely, stating that “[p]olitical elements in the speech tend . . . to consume whatever commer-

²⁸⁵ *Id.* at ¶ 47.

²⁸⁶ John Hart Ely, *Flag Desecration: A Case Study*, 88 HAR. L. REV. 1482, 1496 (1975); see also EMBERLAND, *supra* note 10, at 136, 146.

²⁸⁷ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at ¶ 53(3) (1979).

²⁸⁸ See EMBERLAND, *supra* note 10, at 139–46.

²⁸⁹ *VgT Verein gegen Tierfabriken v. Switzerland*, 34 Eur. Ct. H. R. 4 at ¶57 (2001).

²⁹⁰ Compare *VgT Verein gegen Tierfabriken v. Switzerland*, 34 Eur. Ct. H. R. 4 at ¶57 (2001) (regarding commercial speech), *Mouvement Raelien Suisse v. Switzerland*, 16354/06 Eur. Ct. H.R. (2012) (commercial speech), and *Sigma Radio Television Ltd. V. Cyprus*, 32181/04 Eur. Ct. H.R. (2011) (commercial speech) with *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) (1989) (regarding political speech), *Sunday Times v. UK*, 38 Eur. Ct. H. R. (ser. A) at ¶ 59(b) (1981) (political speech), *Groppera Radio and Others v. Switzerland*, 173 Eur. Ct. H. R. (ser. A) (1990) (political speech), *TV Test AS v. Norway*, 21132/05 Eur. Ct. H.R. (2009) (political speech), and *Standard Verlagsgesellschaft MBH v. Austria*, 37464/02 Eur. Ct. H.R. (2007) (political speech).

²⁹¹ *Hertel v. Switzerland*, 59 Eur. Ct. H.R. (ser. B) at ¶ 1 (1999).

²⁹² *VgT Verein gegen Tierfabriken v. Switzerland*, 34 Eur. Ct. H. R. 4 at ¶70 (2001).

²⁹³ See *Hertel v. Switzerland*, 59 Eur. Ct. H.R. (ser. B) at ¶ 47 (1998).

²⁹⁴ *Id.* (holding that “[a] margin of appreciation is particularly essential in commercial matters . . . [i]t is however necessary to reduce the extent margin of the appreciation when what is at stake is not a given individual’s purely ‘commercial’ statements, but his participation in a debate affecting the general interest, for example over public health”)

cial motivation may have prompted the statement at the outset.”²⁹⁵

The extension by the ECHR to include corporate speech under the protections of the Convention has been opposed by national courts and governments of member states, especially in cases of commercial speech without a clear political nexus.²⁹⁶ In the face of such resistance and the increasing criticism of judicial activism,²⁹⁷ it seems surprising that the ECHR has not based its analysis on a general discussion of the nature of business organizations and the normative implications of bringing the latter under the ambit of the Convention.

The ECHR has extended Article 10 protections, without any detailed analysis, in cases of corporate speech that contributes to a debate of public interest. In cases of speech that are purely commercial, however, the ECHR explicitly examines the corporate identity of the speaker and whether it fits under the ambit of Article 10 of the Convention.²⁹⁸ Yet, even in those cases, the ECHR does not draw upon corporate theory and the question of the nature of the corporation or other forms of business organizations concerned, such as LLCs, partnerships, etc. As reflected in American scholarship on corporate personhood under the U.S. Constitution, corporate theory is deemed decisive, particularly in cases pertaining to corporate political speech and especially if the case concerns a for-profit (multi-shareholder) corporation.²⁹⁹ If a company/management engages in political speech, the diversity in shareholder values and beliefs becomes apparent and can lead to intra-corporate conflicts of interest that cannot be ignored in the corporate personhood debate.³⁰⁰ In contrast, cases concerning purely commercial speech, such as advertisements, show a commonality in interest that is prevalent among shareholders and other members of the corporate community³⁰¹ since there may be a “material connection with or effect upon their business.”³⁰² Corporate theory would help identify, account for, and avoid intra-corporate conflict with competing interests of corporate constituents, i.e., primarily shareholders but possibly also other stakeholders.

²⁹⁵ EMBERLAND, *supra* note 10, at 119.

²⁹⁶ Swiss government in *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 44(2) (1990); German government in: *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 12 Eur. Ct. H.R. (ser. A) 161 ¶ 25 (1989) (holding that the speech in question is “not intended to influence or mobilise public opinion, but to promote the economic interests of a given group of undertakings” and therefore “fell within the scope of the freedom to conduct business . . . , which is not protected by the Convention.”); *See also* Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] Dec. 12, 2000, BVerfGE 102, 347 (2000), 102 *Neue Juristische Wochenschrift* [NJW] 591, 2001 (Ger.).

²⁹⁷ *See* Jean-Paul Costa, *On the Legitimacy of the European Court of Human Rights’ Judgments*, 7 *EUR. CONST. L. REV.* 173, 174 (2011).

²⁹⁸ *See* EMBERLAND, *supra* note 10, at 119, 129.

²⁹⁹ *See* Neuborne, *supra* note 15, at 792.

³⁰⁰ *See* Daniel Greenwood, *supra* note 13, at 1093.

³⁰¹ Neuborne, *supra* note 15, at 792.

³⁰² *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 806 (1978) (White, J., dissenting).

Thus, the question arises why the ECHR has not considered corporate theory to inform its analysis about the applicability of the Convention to corporations. First, unlike in the United States, political speech cases in the commercial area are usually not concerned primarily with the legitimacy of corporate electioneering, since campaign financing by corporations plays only a limited role under the law and practice in Europe. Rather, the landmark cases before the ECHR on the issue of political speech in a commercial context have dealt with cases involving speech by business organizations or professionals in a commercial context (often with a competition-related significance) that contributes to a general public debate.³⁰³ This form of corporate speech is less directly related to the political processes, which might explain why the ECHR has not felt the need to discuss the problems pertaining to the commercial nature of the speech to the same extent that the U.S. Supreme Court has done. This does not mean, however, that corporate theory would not be relevant in the analysis of the ECHR, as has been argued before. It simply might provide an explanation why the ECHR has not focused much of its intellectual effort on questions pertaining to the corporate nature of the rights applicant.

Second, the ECHR has not had to decide yet a political speech case involving a publicly held business corporation with multiple shareholders. *Markt intern* involved a publishing firm that “seeks to defend the interests of small and medium-sized retail businesses against the competition of large-scale distribution companies.”³⁰⁴ Like in the United States, the media sector enjoys special protection under the European regime considering its critical function as a “public watchdog” in a democratic society.³⁰⁵ The other case before the ECHR that involved commercial speech contributing to a general public debate is *Hertel*. This case did not concern statements by a general for-profit corporation either. Rather, the case dealt with statements made by an individual researcher in the economic sphere and with a likely effect on fair competition.³⁰⁶

It is, however, to be expected that the ECHR will be confronted with cases of corporate speech involving a for-profit multi-shareholder corporation, especially in a competition-related context, in the near future. This is particularly true ever since the Lisbon Treaty integrated the European human rights regime even deeper into the EU legal system.³⁰⁷ Now that the European Convention on Human Rights is binding on EU institutions, com-

³⁰³ See *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 25 (1989); see also *Groppera Radio and Others v. Switzerland*, 173 Eur. Ct. H. R. (ser. A) (1990).

³⁰⁴ *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 9 (1989).

³⁰⁵ *Observer and Guardian v. UK*, 216 Eur. Ct. H. R. (ser. A) at ¶ 59 (b) (1992).

³⁰⁶ *Hertel v. Switzerland*, 59 Eur. Ct. H.R. (ser. B) at ¶ 32 (1999).

³⁰⁷ See generally Sionaidh Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, 11 HUM. RTS. L. REV. 654 (2011).

panies can rely directly on the protections under the Convention as a defense against antitrust investigations by the European Commission as the main enforcer of EU antitrust laws.

Major publicly traded companies invoked rights under the Convention in an EU antitrust context even before the Lisbon Treaty, and it is likely that we will see more rather than less cases like this in the future. Thus, the software giant Intel has raised due process concerns (based on Article 6(1) of the Convention) in EU antitrust proceedings challenging the broad investigatory powers of the EU Commission.³⁰⁸

Against this backdrop, the precedent of *Hertel* could easily translate into a case involving a large business corporation making statements on general issues of public debate as part of their marketing strategy with a possible effect on competition. A case before the German Constitutional Court (Bundesverfassungsgericht) involving Benetton, the major Italian fashion company, dealt with exactly that situation, namely a sharp focus on corporate *political* speech. The case concerned Benetton's controversial "shock" advertising campaign. The German Constitutional Court found the unfair competition ban on the advertisement to be unconstitutional since it was violating the company's freedom of expression. The Constitutional Court held that the use of "strong imagery to create associations with controversial issues for the purpose of marketing the firm's goods, even if the imagery/issue lacked a connection to the firm's goods or services."³⁰⁹ Under this judgment, corporations could use marketing tools to engage in public debates and raise awareness of general issues.

2. *The Missing Protection Rationale*

Aside from the ECHR's corporate speech jurisprudence, the lack of corporate theory in the Court's corporate personhood debate becomes abundantly clear in its case law dealing with the prerogatives of corporate privacy protection under Article 8 of the Convention.

The ECHR's decision in *Colas Est SA v. France*³¹⁰ constitutes a landmark case in the ECHR's jurisprudence pertaining to Article 8 protections in a corporate context. Unlike in its previous case law, the ECHR made the leap in *Colas* to endorse the concept of corporate personality, independent of any nexus of the business activity to a natural person.³¹¹ Based on the facts of the case, Colas Est SA, a French (for-profit) corporation, was sub-

³⁰⁸ See, Editorial, *Intel's Human Rights*, N.Y. TIMES (Aug. 17, 2009), <http://www.nytimes.com/2009/08/17/opinion/17mon2.html>.

³⁰⁹ Peer Zumbansen, *Federal Constitutional Court Rejects Ban on Benetton Shock Ads: Free Expression, Fair Competition and the Opaque Boundaries Between Political Message and Social Moral Standards*, GERMAN L. J. (citing BVerfGE 102, 347 (2000)).

³¹⁰ *Société Colas Est and Others v. France*, 2002-III Eur. Ct. H.R. 131 (2002).

³¹¹ See *id.* at ¶ 40; see also EMBERLAND, *supra* note 10, at 144.

ject to unwarranted searches and seizures on their corporate premises. The raids were conducted by the French competition authorities with the goal to secure evidence of anti-competitive practices.³¹² The ECHR had to decide whether corporate premises fall under the ambit of the “home” protection of Article 8 of the Convention.³¹³ Yet again, the ECHR’s analysis falls short of a sophisticated examination of the corporate identity of the rights applicant and the normative implications for the human members of the corporation, primarily its shareholders.³¹⁴

Referring to the principle of dynamic interpretation, the ECHR simply held that “the Convention is a living instrument which must be interpreted in the light of present-day conditions Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company’s registered office, branches or other business premises.”³¹⁵ While the ECHR relied on its previous precedents granting a corporate “home” protection under Article 8 of the Convention,³¹⁶ the respondent government as well as commentators have emphasized the important differences on the facts that set the case of *Colas* apart, thus making the ECHR’s analogous approach seem an imperfect fit.³¹⁷ The respondent government, here France, emphasized that that “although the Court had made clear [in its previous case law] that professional or business addresses were protected by Article 8, all the cases in which it had made that finding had concerned premises where a natural person had carried on an occupation.”³¹⁸ The case of *Colas*, however, lacked this individual nexus as the case concerned the “business premises of public limited companies.”³¹⁹ One could argue that the *Colas* court over-inflated the holding from its previous case law on the topic.

Also, the other precedent that the ECHR relies upon, namely *Chappell v. UK*,³²⁰ seems to be comparable to the situation presented in *Colas*, but in fact differs in one crucial respect. Like in the *Colas* case, *Chappell* involved searches and seizures on company premises. In the latter case, however, the company offices also served as the home of its only shareholder.³²¹ This made the corporate premises closely intertwined with the personal sphere of

³¹² *Société Colas Est and Others v. France*, 2002-III Eur. Ct. H.R. 131 at ¶ 9–11 (2002).

³¹³ *Id.* at ¶ 28.

³¹⁴ *See id.* at 41 (focusing on the “dynamic interpretation of the Convention” as a “living instrument” rather than the underlying question pertaining to the nature of the corporations and related theories of the firm).

³¹⁵ *Id.*

³¹⁶ *See id.* at ¶ 40.

³¹⁷ *See* EMBERLAND, *supra* note 10, at 14.

³¹⁸ *Id.* at ¶ 30.

³¹⁹ *Id.*

³²⁰ *Chappell v. UK*, 152 Eur. Ct. H. R. (ser. A) (1989).

³²¹ *Id.* at ¶ 26(b).

the owner of the corporation, Mr. Chappell. Thus, before *Colas*, all corporate Article 8 cases involved an “individual link” such that the corporate premises in question were located in the private “home” (and thus fall in the personal sphere) of a professional³²² or the only shareholder.³²³

It is fair to say that the ECHR took its holding in *Niemietz*³²⁴ and *Chappell* one step further with its decision in *Colas*. Like in all its previous jurisprudence dealing with corporate personhood issues, the ECHR did not discuss the nature of the corporation and the implications for protection under the Convention.³²⁵ But for the first time the ECHR endorsed, if only implicitly in *Colas*, the notion of the corporation as a real entity that is not reducible to its members. Emberland accurately describes this judicial development as follows: “The *Niemietz* Court was concerned with the risk of arbitrary under-inclusion of interests that pertain to the individual person. This approach is not necessarily transportable to the corporate context where an individual nexus is at best remotely present.”³²⁶

These examples vividly illustrate that corporate theory is severely under-accounted for in the jurisprudence of the ECHR, while it is indispensable for answering questions of corporate personhood under the Convention. Especially, since the European Commission of Human Rights³²⁷ found in *Church of Scientology of Paris v. France* that “Article 8 of the Convention has more an individual than a collective character,”³²⁸ the ECHR should recognize corporate personality as a “pragmatic metaphor for a complex set of . . . human . . . relationships” and thus ensure that its judicial decisions on corporate personhood “reflect a proper calibration of those human activities and relationship, both within the corporation[s] and between participants in the corporate enterprise and the outside world.”³²⁹ This approach would be entirely consistent with the ECHR’s interpretative methodology that is premised on pragmatic effectiveness according to which the “[c]onvention is intended to guarantee not rights that are theoretical or illusory but rights

³²² *Niemietz v. Germany*, 16 Eur. Ct. H.R. (ser. A) 97 ¶ 27 (1993).

³²³ *Chappell v. UK*, 152 Eur. Ct. H. R. (ser. A) (1989).

³²⁴ *Niemietz v. Germany*, 16 Eur. Ct. H.R. (ser. A) (1993).

³²⁵ See *Société Colas Est and Others v. France*, 2002-III Eur. Ct. H.R. 131 at ¶ 40–42 (2002).

³²⁶ EMBERLAND, *supra* note 10, at 140.

³²⁷ Until 1998, the European Commission on Human Rights (the Commission) assisted the European Court of Human Rights (ECHR); the Commission’s role was to decide on the admissibility of petitions to the ECHR. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 155, entry into force November 1, 1998) eliminated the Commission ceased to exist and subsumed its functions into the larger and permanent ECHR.

³²⁸ *Church of Scientology of Paris v. France*, App. No. 19509/92, (Eur. Comm’n on H.R. Jan. 9, 1995) (HUDOC: European Court of Human Rights, Case-Law, Decisions), available at <http://hudoc.echr.coe.int> (Until 1998, individual complaints under the European Convention on Human Rights had to be filed with the European Commission of Human Rights, which then decided on its admissibility before bringing the case before the ECHR.).

³²⁹ Neuborne, *supra* note 15, at 774.

that are practical and effective.”³³⁰ It would require an explicit discussion by the ECHR on the question about the nature of the corporation, involving the complex intra-corporate relationships tracing back to the separation of ownership and control in the corporate form. This would have important normative implications as intra-corporate conflict would be addressed.

IV. NORMATIVE IMPLICATIONS

A. Doctrinal Shift in Europe

Important doctrinal lessons on the role of corporate theory in the European debate on corporate personhood can be learned from American jurisprudence and scholarship.³³¹ It becomes patent that while in Europe the “corporate” in corporate personhood is ignored, in the United States it is sidestepped in recent U.S. Supreme Court cases. Still, the American approach is much more nuanced than the European one and thus provides an important benchmark to inform the corporate personhood jurisprudence by the European Courts.

European corporate personhood doctrine requires a significant doctrinal shift that would make corporate theory about the nature of the corporation and the theories of the firm part of the legal debate. Corporate theory would help balance clashing interests of a company’s shareholders and mitigate intra-corporate conflicts as a result of corporate personhood.

U.S. doctrine on the other hand, merely would require some more consistency and a sharper re-focus on the corporate theory underpinnings of the corporate personhood doctrine. In particular, the implications for the United States are: (1) to realize that corporate theory has not been abandoned in general from the legal analysis by the Courts; (2) to recognize normatively that corporate theory needs to be explicitly revitalized as an integral part of corporate personhood doctrine. Specifically, a more robust analysis of questions pertaining to shareholder and constituency protection in large business corporations by the courts’ majority (not merely in dissent, concurrences, or dicta) is required to further mitigate intra-corporate conflicts effectively. A look to Europe illustrates the unfavorable consequences when this is ignored.

Part 1 below examines how U.S. Supreme Court jurisprudence can help guide European Courts in unraveling intra-corporate relationships and then highlights some relevant European cases that merit a comparative analysis. The interests of shareholders and other stakeholders in the corporation are of primary concern here, as are shortcomings in the European ap-

³³⁰ *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at ¶ 24(2) (1980); *see also* *Comingersoll SA v. Portugal*, 31 Eur. Ct. H.R. 772 at ¶¶ 32(2), 28(2) (2001).

³³¹ *See* discussion *infra* Part III.B.

proach to corporate personhood. In Part 2, the tendency by the European Courts to reduce the regulatory power of the member states over corporations is contrasted with the regulatory frameworks erected under American law and confirmed by the Supreme Court. Understanding the true content of corporate personhood may explain such variance.

1. Shareholder and Constituency Protection

On several occasions, the ECHR has dealt with rights cases under the Convention involving publicly held corporations which are particularly prone to intra-corporate conflicts due to the diversity of interests of its broad shareholder base that can be in tension with the interests of management. Corporate theory can be considered highly relevant in corporate rights cases involving multi-shareholder corporations as it can help uncover and thus avoid intra-corporate conflicts produced by the Court's corporate personhood jurisprudence.³³² Corporate theory would therefore provide important guidance to the Court's corporate speech analysis in cases similar to *Autronic* that was dealing with a German AG ("Aktiengesellschaft," i.e., publicly held corporation under German law) and its speech protections. It is to be noted that in the specific case of *Autronic* the Court was concerned with strict transactional commercial speech rather than with a corporation's participation in a general public discourse or political speech. This makes intra-corporate conflicts between shareholders and management less likely since the nature of the speech is merely transactional in terms of promoting the company's products and services.³³³ However, it is just a matter of time until the European Courts will find before them a case involving corporate speech claims by a multi-shareholder corporation to protect the content of its speech (through its management) and thus its right to contribute to a general public debate issues important to the corporation's customer base, its management, or its controlling shareholders.

A look to the U.S. Supreme Court can guide the European way. The Supreme Court has yet again been wrestling with the question of the nature of the corporation, the relationship between managerial decision-making and the (non-commercial) interests of its shareholders and other stakeholders (here employees) and the normative implications for the understanding and scope of corporate constitutional rights in *Sebelius v. Hobby Lobby Stores*.³³⁴ By taking on the case, the Court signaled that the issue of diversi-

³³² See, e.g., *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131; *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990).

³³³ Especially in the specific case at hand, intra-corporate conflicts are not indicated since the speech that was sought to be protected here concerned merely the transmission of a satellite program for the purpose of demonstrating the functioning of hardware not however the content of the speech.

³³⁴ *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

ty of (non-commercial) shareholder and stakeholder interests and resulting intra-corporate conflicts in its corporate personhood jurisprudence is far from resolved, contrary to the common belief post-*Citizens United*.³³⁵ It is important to recognize that by holding that “the purpose of th[e] [corporate] fiction is to provide protection for human beings,”³³⁶ the Court dealt with a situation of reverse piercing of the corporate veil,³³⁷ while in its previous case law the Court assessed shareholder interests as compelling interests that might limit the regulatory reach of the government. Yet, the common thread of possible intra-corporate conflicts remains the same in all relevant cases—in *Hobby Lobby* with competing employee interests while in *Bellotti* and *Citizens United* with competing shareholder interests.

Unlike their American counterpart, the European courts are not even engaging in the debate on how our understanding of the nature of the corporation (with an eye to its respective constituents) informs questions about corporate rights under the Convention as a function of the doctrine of corporate personhood. It is imperative that the ECHR and the ECJ realize that corporate theory is not merely a theoretical wrinkle to the corporate personhood analysis, but it has far-reaching functional implications for the role of corporations as participants in modern society, as the case of *Hobby Lobby* vividly illustrates where “a for-profit corporation [denies] its employees the health coverage of contraceptives . . . , based on the religious objections of the corporation’s owners.”³³⁸

The case of *Colas* out of the ECHR further illustrates vividly how corporate theory would contribute to a much more nuanced corporate personhood doctrine in the European Courts. Deciding whether unwarranted searches and seizures on their corporate premises were permissible or whether they would constitute a violation of the protections under Article 8 of the Convention, the ECHR lacked any discussion of the interest of *Colas Est SA*’s (“Société Anonyme,” equivalent to a public limited company under common law) shareholders.³³⁹ By ignoring corporate theory the Court runs the risk of reaching results that might be counter to the interests of the corporate applicant’s constituents, primarily its shareholders but also its other stakeholders. It is imperative for European Courts to include a discussion of the nature of the corporation (and underlying legal theories of the firm) in their analysis as corporate theory would help identify and mitigate intra-corporate conflicts. Thus, in the case of *Colas*, the interest of the corporation to protect its internal information from disclosure can be consid-

³³⁵ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 310 (2010).

³³⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

³³⁷ Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 34 (1990).

³³⁸ *Petition for Writ of Certiorari, Hobby Lobby Stores, Inc. v. Sebelius*, 134 S. Ct. 678 (No. 13-354).

³³⁹ *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131 at ¶ 40–42.

ered in conflict with the competing interests of its shareholders in transparency in order to shield the (corporate) entity from liabilities arising from unlawful and/or anti-competitive behavior. As mentioned earlier, these competing rights might not necessarily constitute a “compelling interest” (to use the terminology of the U.S. Supreme Court) that would justify statutory restrictions on corporate privacy. Or in terms of the ECHR’s terminology, the restrictive measure might still be proportionate provided that effective remedies would be available to shareholders on a statutory basis or within the corporate governance structure.³⁴⁰ It is up to the ECHR to examine whether it considers those secondary remedies in the respective member state sufficient to dismiss a shareholder protection rationale.

As Neuborne has hinted with regard to the American debate, this model also could be extended to account for conflicts with corporate constituencies other than shareholders³⁴¹ depending on the corporate objective and governance model prescribed under the respective legal system. While, like in the United States, the shareholder-centric model is still prevalent in Europe, there are a number of European civil law systems that feature a corporate governance model that is sensitive to stakeholder interests, such as Germany, France, and most recently the UK.³⁴²

However, the ECHR has not only ignored important questions pertaining to the characteristics and underlying relationship of the corporate form, but it has under-accounted for the question about the nature of the corporation in general.³⁴³ Considering that privacy is conceived as a human dignity right according to European legal culture,³⁴⁴ it seems surprising that the ECHR has not felt the need to discuss the nature of the corporation, particularly in this context. The ECHR in fact passed up the opportunity to comment on the applicants’ contention in *Colas* that the corporate premises should derive protection under the Convention from the rights of its employees, since the business documents seized also included private infor-

³⁴⁰ See PAUL CRAIG, EU LAW 168–69 (2011).

³⁴¹ Neuborne, *supra* note 15, at 774 (“[The legal doctrine of] corporate personality should reflect a proper calibration of those human activities and relationships, both within the corporation and between participants in the corporate enterprise and the *outside world*.”) (emphasis added.).

³⁴² See Kerr et al., *supra* note 18, at 113. For example, Germany and France provide for a two-tier board structure representing stakeholder interests in a supervisory function over management. The UK has amended its Company Code in 2006 to the effect of an extended corporate objective under the law that requires directors to act so as to “promote the success of the company for the benefit of its members as a whole,” including “the interests of the company’s employees, the need to foster the company’s business relationships with suppliers, customers and others, and the impact of the company’s operations on the community and the environment.”

³⁴³ See *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131 at ¶ 9–11; see also *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990). For a good overview of the different theories of the corporation, see Millon, *supra* note 53.

³⁴⁴ See Whitman, *supra* note 191, at 1161.

mation of such staff.³⁴⁵ It appears that the ECHR is avoiding the hard questions regarding the nature of the corporate rights applicants despite the reality that an explicit discussion of the issue would be logical as the ECHR faces mounting criticism of judicial activism.

2. *The Regulatory State within Corporate Personhood*

The lack of corporate theory in the ECHR’s jurisprudence also manifests itself in the failure to assess fundamental rights guarantees for corporations as a structural limitation on the government.³⁴⁶ Much of the jurisprudence and language of the Supreme Court has focused on this exact dimension of corporate guarantees³⁴⁷ under the Constitution since it gives important guidance on the regulatory implications of corporate rights decisions.

Unlike the ECHR, the Supreme Court has not yet decided about non-election related political speech of for-profit corporations. The Supreme Court was confronted with this question in *Nike v. Kasky*, but the Court eventually dismissed the previously granted writ of certiorari as improvidently granted without deciding on the merits.³⁴⁸ Some scholars and commentators have argued that the Supreme Court’s sudden dismissal of the case might have been due to concerns that “recognizing a broad right of corporations to speak about matters of public concern might have [the] unfortunate effect” of undermining federal securities laws especially when the speech is exercised in the form of communications to prospective investors and proxy solicitations.³⁴⁹

The ECHR, however, has held in more than one instance that in such cases the “margin of appreciation” (i.e., discretion) of national authorities³⁵⁰ was reduced regardless of the potential implications on unfair competition laws in cases of commercial speech that include a non-commercial element in terms of contributing to a public debate.³⁵¹ Thus, the ECHR expands fun-

³⁴⁵ See *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131 ¶ 38.

³⁴⁶ See Millon, *supra* note 53, at 201.

³⁴⁷ See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Hale v. Henkel*, 201 U.S. 43, 74–76 (1906).

³⁴⁸ *Nike Inc. v. Kasky*, 539 U.S. 654 (2003).

³⁴⁹ Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 871 (2007); see also SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION*, ch. 5 (2004) (commenting on the apprehension of the U.S. Supreme Court with regard to mixed commercial speech entailing elements of political content).

³⁵⁰ When assessing the necessity of government interference, the state enjoys a certain ‘margin of appreciation,’ which is usually greater with regard to commercial matters. *Markt Intern Verlag GmbH v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 33 (1989).

³⁵¹ See *Hertel v. Switzerland* 59 Eur. Ct. H.R. (ser. B) at ¶ 47 (1998) (holding that “[t]he Swiss authorities . . . had some margin of appreciation to decide whether there was a . . . need to impose the injunction in question . . . [s]uch a margin of appreciation is particularly essential in commercial mat-

damental rights protections of corporations in a way that is less sensitive to the existing regulatory regimes than seems to be the case in the United States. An informed discussion about the nature of the corporation, as a fictional person, and its relationship to the state would shed light on important implications of the line of jurisprudence of the ECHR with regard to corporate fundamental guarantees.

B. Institutional Payout

Aside from this normative payout in the form of doctrinal shifts, putting corporate theory back into the corporate personhood analysis has important institutional payouts for Europe that would help resolve the emerging divergence between the ECJ and ECHR on the issue. While pre-Lisbon case law of the ECJ signals a strong deference to regulatory authority of EU institutions over corporations (thus diminishing the rights of corporations within the EU legal regime),³⁵² the ECHR has granted broad protections to corporations.³⁵³

There is clearly a demand in Europe for resolving this issue in the two European courts, demand coming from national legal systems themselves. A transatlantic answer to this dilemma can be found in U.S. jurisprudence. This approach would bring the ECHR in line with the national legal systems of the member states that have urged the ECHR on several occasions to deal with the corporate nature of applicants and not simply equate corporations with persons under the Convention without any further analysis.³⁵⁴ A corporate theory-informed methodology would significantly improve the interaction of the European courts with national legal systems and further advance the Convention law as an approximation of national laws of member states.³⁵⁵

The discussion in Part 1 below briefly touches on European collectivism and the protection of group rights in national law as well as the contrasting American tradition of individualism. Part 2 examines the evolving

ters, especially in an area as complex and fluctuating as that of unfair competition . . . It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest, for example, over public health."); *see also* VgT Verein gegen Tierfabriken v. Switzerland, 34 Eur. Ct. H.R. 4 ¶¶ 69–71 (2001) ("[I]n the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely 'commercial' interests, but his participation in a debate affecting the general interest.").

³⁵² *See* Case 136/79, Nat'l Panasonic (UK) Ltd. v. Comm'n, 1990 E.C.R. 2033; *see also* Joined Cases 46/87 & 227/88, Hoechst AG v. Comm'n, 1989 E.C.R. 2859.

³⁵³ *See* EMBERLAND, *supra* note 10, at 234–35 (elaborating on the "pioneering role" of the ECHR with regard to corporate rights under the Convention).

³⁵⁴ *See* Germany, France, Switzerland.

³⁵⁵ *See generally* Jaanika Erne, *Discourse upon the Constituent Human Rights Development in the European Union*, 12 JURIDICA 80 (2007).

convergence of the European Union’s regulatory system and the ECHR’s human rights regime and how their differing methodologies can lead to serious incoherencies in the European legal system. A coherent understanding of corporate personhood would help overcome those contradictions.

1. Reconciling the ECHR and Member State Courts Regarding Group Rights

While this article does not attempt to conduct a comprehensive investigation into the plausible reasons for the lack of corporate theory in European jurisprudence dealing with corporate personhood, the following section introduces one consideration—European collectivism—that seems to shed some light on the current legal reality in Europe.

European culture has been influenced significantly by collectivism, what has translated into a strong protection of group rights. Germany’s Basic Law [i.e., the German Constitution] provides for an explicit protection of group rights in Article 19 III.³⁵⁶ It might therefore be surprising why European member states, which were respondents in corporate rights cases before the ECHR, were resistant to include corporations as legal persons under the ambit of the Convention.³⁵⁷ Looking at the comments of the respondent governments in the *Markt Intern*, the *Colas*, *Niemietz*, and *Autronic* cases, it becomes apparent that the issue is not the nature of the corporation as an association or group, but rather the commercial nature of the activity and the purely economic interests that would bar an application of Convention rights.³⁵⁸ It might be exactly this legal culture in the member states and the experienced resistance by respondent states so far that has motivated the ECHR to avoid an explicit discussion of the corporate identity of the rights applicant and related issues pertaining to corporate theory. Yet, it does not resolve the issue and further puts in jeopardy the collaboration between the ECHR and member state courts.

American ideology, on the other hand, is deeply grounded in individualism,³⁵⁹ of which corporate activity can be considered a function. The alleged pro-business jurisprudence of the U.S. Supreme Court appears like a product of the tenets underlying American society. While certainly not claiming to provide a comprehensive reasoning, this difference in ideology in the United States and Europe can provide some insights into the possible

³⁵⁶ Note that the U.S. Constitution lacks a similar provision.

³⁵⁷ See, e.g., *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131 ¶ 30; *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 44(2) (1990); *Markt Intern Verlag GmbH v. Germany*, 165 Eur. Ct. H.R. (ser. A) ¶ 25(1) (1989).

³⁵⁸ See *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131 at ¶ 30; *Niemietz v. Germany*, 16 Eur. Ct. H.R. (ser. A) 97 ¶ 30(2) (1993); *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at ¶ 44 (1990); *Markt Intern Verlag GmbH v. Germany*, 12 Eur. Ct. H.R. (ser. A) 161 ¶ 25(1) (1989).

³⁵⁹ SEYMOUR LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 33 (1996).

reasons for the discrepancy between the corporate personhood jurisprudence of the Supreme Court and the ECHR.

2. Mitigating Post-Lisbon Tensions in Overlapping Jurisdiction between the ECHR and ECJ

The regulatory perspective on corporate personhood is particularly important post-Lisbon due to the convergence between the EU's regulatory system and the European human rights regime. The Lisbon Treaty requires the EU to accede to the Convention, which will have the consequence that EU institutions are also (directly) bound by the human rights protections under the Convention.³⁶⁰

The Council of Europe has stated the reasons for the changes in the EU legal structure as follows:

The EU has developed a separate legal order, with the Court of Justice of the European Union in Luxembourg as its highest court. Whereas all EU member states are also parties to the ECHR, the EU itself is currently not. Even though the EU is founded on the respect for fundamental rights, the observance of which is ensured by the Court of Justice of the European Union, the ECHR and its judicial mechanism do not formally apply to EU acts. On the other hand, all member states of the EU, as parties to the Convention, have an obligation to respect the ECHR even when they are applying or implementing EU law. This divergence may be rectified by the EU, as such, becoming a party to the Convention.³⁶¹

The EU's antitrust proceedings have long been criticized by commentators as lacking the necessary procedural safeguards that would be indicated in light of the quasi-criminal nature of the proceedings. Under the existing Commission rules, for example, "dawn raids" on corporate offices are often conducted by the EU Commission.³⁶² This practice by the EU Commission has been upheld by the ECJ as being in conformity with the European Convention on Human Rights. The ECJ held that the surprise raids as part of EU competition law enforcement do not violate the 'home' protection under Article 8 of the Convention.³⁶³ This holding flies in the face of the ECHR's long jurisprudence broadly construing the "home" protection

³⁶⁰ See PAUL CRAIG, EU LAW 362–63 (2011).

³⁶¹ *European Convention on Human Rights: Accession of the EU*, COUNCIL OF EUROPE, <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention> (last visited March 15, 2014).

³⁶² See Anne MacGregor & Bogdan Gecic, *Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings*, 3 J. EUR. COMPETITION L. & PRAC. 425, 425 (2012); see also Alan Riley, *Do Companies Have Human Rights: EU antitrust law may violate due process rules*, WALL ST. J. (July 28, 2009), <http://www.wsj.com/articles/SB10001424052970203609204574314333538014034>.

³⁶³ See Case 136/79, *Nat'l Panasonic (UK) Ltd. v. Comm'n*, 1990 E.C.R. 2033.

under Article 8 of the Convention to include unwarranted searches and seizures on corporate premises.³⁶⁴

The ECJ also has confirmed other practices that are part of the Commission's broad investigatory powers as constitutional. Thus, it held that the EU could request documents without specifically identifying them and impose penalties on a company for refusing to submit to the investigation.³⁶⁵ It remains to be seen how these broad investigatory powers of the Commission will be judged by the ECHR, which has concurrent jurisdiction on the matter post-Lisbon.

However, in an attempt to counter-balance the extensive investigatory powers of the Commission, the ECJ granted corporations some other rights that go beyond the scope of protections awarded under the European Convention on Human Rights. While the ECJ was not able to find a right against self-incrimination in the law of the Member States or under the European Convention on Human Rights, the Court still held that it "[i]t is necessary, however, to consider whether certain limitations on the Commission's powers of investigation are implied by the need to safeguard the rights of the defence which the Court has held to be a fundamental principle of the Community legal order."³⁶⁶ What these limitations entail, and what body of law they are grounded in, remains to be clarified by the ECJ.

The methodology that the ECJ applies to questions pertaining to corporate fundamental rights protections is primarily guided by the regulatory state of the EU bureaucracy. In contrast, the approach by the ECHR regarding corporate rights extensions under the Convention is informed by pragmatic teleology of the underlying Convention values. This difference in methodology has the potential to create serious incoherencies in the European legal system, especially since the ECJ and ECHR will have overlapping jurisdiction on the matter. A systemic and coherent approach to the questions pertaining to corporate personhood is required that cannot be conducted in the abstract, but rather needs to be informed by corporate theory for the reasons laid out in this article. In practice, this clash between investigatory discretion of the EU Commission, as confirmed by the ECJ, and corporate "human" rights protection as promoted by the ECHR will likely become more pronounced and might create legal insecurity with regard to corporate rights guarantees in Europe. Finally, it remains to be seen if the "freedom to conduct business,"³⁶⁷ which is codified in the Charter of Fundamental Rights of the EU (that is binding primary EU law since Lisbon),

³⁶⁴ See *Société Colas Est v. France*, 2002-III Eur. Ct. H.R. 131; *Niemietz v. Germany*, 16 Eur. Ct. H.R. (ser. A) 97 (1993).

³⁶⁵ *Joined Cases 46/87 & 227/88, Hoechst AG v. Comm'n*, 1989 E.C.R. 2859.

³⁶⁶ *Case 74/87, Orkem SA v. Comm'n*, 1989 E.C.R. 3283 ¶ 32.

³⁶⁷ European Union (EU): Charter of Fundamental Rights of the European Union, December 7, 2000, 40 I.L.M. 266, 268 (2001) ("Freedom to conduct a business: The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.")

might further exacerbate the divergence between the highest EU Court in Strasbourg and Europe's human rights court in Luxembourg.

CONCLUSION

The changes in Europe's fundamental and human rights system in tandem with the alleged overreach of EU institutions, most prominently in an antitrust context, have put the doctrine of corporate personhood at the forefront of the legal debate. Making corporate theory an important factor in the analysis ensures that the diversity of shareholder interests is acknowledged and effectively protected. After all, investor protection has become a key objective of European governments and the European Union alike.³⁶⁸ Drawing upon corporate theory to address open questions of corporate personhood and related issues of corporate fundamental and human rights will further promote this objective. Aside from such a normative payout in the form of corporate legal doctrine, this approach also would bring the ECHR in line with the national legal systems of the member states that have urged the ECHR on several occasions to deal with the corporate nature of applicants and not simply equate corporations with persons under the Convention. A corporate theory-informed methodology would significantly improve the interaction of the European Courts with national legal systems and further advance the Convention law as an approximation of national laws of member states.³⁶⁹

While the American approach to corporate personhood has proven to be much more nuanced with regard to accounting for the corporate nature of the rights claimant, a more robust analysis of questions pertaining to shareholder protection in large business corporations by the courts' majority (not merely in dissent or dicta) is required to mitigate intra-corporate conflicts effectively. After all, as Justice Stevens has put it, "[c]orporations 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."³⁷⁰ But their shareholders and stakeholders are the "People," as the Supreme Court has reinforced in *Hobby Lobby* where the majority emphasized that "it is important to keep in mind that the purpose of th[e] [corporate] fiction is to provide protection . . . for the people (including shareholders, officers, and employees) who are associated with the corporation."³⁷¹ The premise that shareholders have common interests,

³⁶⁸ See *Financial Services: Commission Acts to Improve Investor Protection and Efficiency in the EU Investment Fund Market*, EUR. COMM'N, IP/10/869 (July 1, 2010), http://europa.eu/rapid/press-release_IP-10-869_en.htm.

³⁶⁹ See Sweet & Keller, *supra* note 87.

³⁷⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting).

³⁷¹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

might well hold in the realm of business activity of the firm, but one is hard pressed to find the same alignment in interest with regard to non-commercial activity, such as political speech or corporate secrecy. In fact, the interests of shareholders are highly diversified and divergent in the modern corporation.³⁷²

It is time to account for this reality in the corporate personhood debate rather than conducting the debate in a fictional vacuum. We need to put the “corporate” back into corporate personhood by addressing the possible intra-corporate tensions as a function of modern corporate governance structures. Recourse to corporate theory can help untangle the oxymoron that has emerged from much of the existing debate on corporate personhood, namely the fiction that corporations are people and thus bearers of the same rights as individuals. If the European Courts endorse the concept of corporate *human* rights, this discussion needs to be tied more closely to the interests of a corporation’s human constituents, namely, its shareholders and—depending on the prevailing corporate theory in a national context—its other stakeholders.

³⁷² See Anabtawi, *supra* note 154, at 577–93 (showing the divergent interests of shareholders in terms of long-term versus short-term holdings, diversified versus undiversified portfolios, insider versus outsider equity ownership, and hedged versus unhedged holders).