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# Beyond Public/Private: Understanding Excessive Corporate Prerogative

*john a. powell and Stephen Menendian<sup>1</sup>*

## INTRODUCTION

In a televised Republican presidential debate in June, 2011, CNN anchor John King presented a series of questions to the candidates concerning the role of government, especially the federal government.<sup>2</sup> In particular, he probed the candidates' views on the role of the federal government with respect to food safety, the foreclosure crisis, the housing market, space exploration, and disaster relief.<sup>3</sup> In the wake of unusually severe natural disasters, flooding, tornadoes, and storms that swept across the plains states, upper South, and Mississippi valley in the first half of 2011, the CNN anchor asked former governor and businessman, Mitt Romney, whether the states should play a larger role in disaster relief.<sup>4</sup> Candidate Romney replied, "[e]very time you have an occasion to take something from the federal government and send it back to the states, that's the right direction. And if you can go even further and send it back to the private sector, that's even better."<sup>5</sup>

At first blush, Governor Romney's answer resembles the traditional conservative refrain of federalism and states' rights. Upon closer inspection, Romney is not merely endorsing devolution of governmental responsibility to states and local government, but to private business wherever possible.

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<sup>2</sup> *CNN Live Republican Debate* (CNN television broadcast June 13, 2011). A transcript of the debate is available at <http://transcripts.cnn.com/TRANSCRIPTS/110613/se.02.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* ("You've been a chief executive of a state. I was just in Joplin, Missouri. I've been in Mississippi and Louisiana and Tennessee and other communities dealing with whether it's the tornadoes, the flooding, and worse. FEMA is about to run out of money, and there are some people who say do it on a case-by-case basis and some people who say, you know, maybe we're learning a lesson here that the states should take on more of this role. How do you deal with something like that?").

<sup>5</sup> *Id.*

What is notable, and perhaps inventive, about candidate Romney's reply is how it blends federalism with an ideology of privatization, even suggesting a continuum between the two, with progressively desirable loci of control.<sup>6</sup> The ideology of privatization stretches beyond traditional federalism with its states' rights emphasis, and calls for the privatization of government functions and diminution of public space.<sup>7</sup> It is reminiscent of the pre-New Deal, Jim Crow and *Lochner* era, which severely curtailed the power of the federal government *and* states to regulate the economy.

The ideology of privatization, including the delegation of public functions, such as food safety inspection, to private entities, is part of a broader philosophy of market fundamentalism, of deregulation and governmental non-interference in the market.<sup>8</sup> These ideologies have been erected upon a sharp categorical distinction between public and private spheres.<sup>9</sup> In this article, we suggest that an unreflective public/private discourse in law and popular culture has smuggled through excessive corporate prerogatives. We illustrate how the public/private distinction has been used as a sword to create and expand corporate power and influence, and as a shield to

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6 Rather than a dichotomous federalism, he is suggesting a public/private spectrum that runs from the federal government to the private sector. The continuum or spectrum metaphor is implied when Governor Romney said "go even further," implying that private hands lay beyond state control in relation to the federal government, and that there is a directional mapping that relates these various loci of control. *Id.*

7 This is true quite literally, in fact. During the debate, the candidates quarreled over the space program, and whether that was an appropriate government venture, at least going forward. *Id.* Newt Gingrich remarked:

If you take all the money we've spent at NASA since we landed on the moon and you had applied that money for incentives to the private sector, we would today probably have a permanent station on the moon, three or four permanent stations in space, a new generation of lift vehicles.

*Id.*

8 Fareed Zakaria ascribes this idea of "governmental non-interference in the economy" as a "cardinal tenant" of the "New Conservatism." Fareed Zakaria, *How Today's Conservatism Lost Touch with Reality*, TIME.COM (June 16, 2011), <http://www.time.com/time/nation/article/0,8599,2077943,00.html> ("[R]ight now any discussion of government involvement in the economy — even to build vital infrastructure — is impossible because it is a cardinal tenet of the new conservatism that such involvement is always and forever bad."). This position is reminiscent of the *Lochner* era, which severely curtailed the power of the federal government *and* states to regulate the economy. See *Lochner v. New York*, 198 U.S. 45, 56 (1905). Additionally, many conservatives and libertarians view the term "investment" as a code word for potentially "wasteful government spending." Kendra Marr, *Santorum tears into Obama's SOTU*, POLITICO.COM (January 28, 2011, 8:58 AM), <http://www.politico.com/news/stories/0111/48294.html>. This debate over investment and government expenditures was particularly focused in during the stimulus debates. For a more nuanced view of the debate over investment and government expenditures, see Will Cain, *Let's Make a Deal on U.S. Debt — in 15 Minutes*, CNN.COM (June 22, 2011, 12:45 PM), <http://edition.cnn.com/2011/OPINION/06/21/cain.gang.of.six>.

9 Just as federalism depends on dichotomous federal and state spheres, the ideology of privatization and market fundamentalism depends on dichotomous public and private spheres.

protect corporate prerogatives from government regulation by disclaiming or circumscribing an appropriate government role in the market at all.

This article makes the case against excessive corporate prerogative by revealing ways in which the exercise of corporate power to protect and relentlessly pursue corporate interests subverts our democracy with harmful consequences for democratic accountability, civil rights, human rights, the economy, the environment, privacy, individual freedom and the nation's welfare. This behavior is not only inimical to the broadest public interest, but a threat to individual liberty as well, a danger the founders of the Republic foresaw. The concentration of wealth and influence in corporate form is an increasingly evident structural distortion in our economy and our politics.

Although the role of corporations is often framed by the public and private dichotomy, we contend that this is a mistake. The public/private distinction papers over meaningful differences between real people and major corporations. Entrepreneurs, small business owners, farmers, workers and multi-national corporations are all swept up into the "private sphere." Consequently, regulations intended to curb the excesses of corporate behavior wrongly appear equally hostile to "mom and pop" small business or private citizens, and are viewed as an attack on individual liberty. Yet the structural features of excessive corporate prerogative, which concentrate power and influence and result in 'too big to fail,' raise special concerns that are otherwise invisible through the lens of public/private. We suggest that a more appropriate way to understand this space is not in terms of two domains, public and private, but four: public, private, non-public/non-private, and corporate.

Our case is not a broad attack on corporations per se, but rather a critique of excessive corporate prerogatives. Nor is it a narrow technical attack, focusing predominantly on any particular basis of corporate prerogative, such as of the doctrine of corporate personhood. Our goal is that the reader develop a more perceptive view of the role of corporations in our democracy. The case against excessive corporate prerogative is not anti-corporate or anti-capital, but signifies a misalignment with respect to the role of corporations in the United States and globally. Corporations made good servants, but bad masters. In particular, we wish to show why racial and social justice cannot be achieved without a realignment.<sup>10</sup> As we survey the bases of excessive corporate prerogative, a conjoined linkage with race jurisprudence emerges.

In Part I, we identify the grounds for the exercise of excessive corporate prerogatives as well as their manifestations. Although our argument reaches beyond law, our focus in this section is the development and emergence of specific legal doctrines, such as corporate personhood, state action, and

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<sup>10</sup> See DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* xv–xvii (2007) (describing the agnostic position on of markets and on fairness or justice).

commercial speech, among others, which underlay corporate power. These doctrines are rooted in the public/private distinction or derive from it.

As we trace the use of the public/private distinction as a conduit of corporate prerogative, we underscore the relationship between excessive corporate prerogative and civil rights. In particular, we will explore how the public/private distinction has served in the post-Reconstruction, *Lochner*, and modern eras to protect excessive corporate prerogative while simultaneously circumscribing protection for “discrete and insular minorities.”<sup>11</sup> While most lawyers have studied the *Lochner* era, a seminal period in defining and expanding corporate prerogatives, this era is the height of Jim Crow, which eviscerated civil rights protections. Yet, the connection between the two is seldom made. There remains an implicit understanding that expanding corporate prerogative is inconsistent with robust civil rights.

In Part II, we shift our focus from the development and exercise of excessive corporate prerogatives to the re-articulation of the public/private distinction which undergirds these prerogatives. Initially, we will assert that the public/private distinction has been fundamentally misconceived. The ideology of privatization and governmental non-interference in the economy assumes a conceptually clear public/private distinction. Building on the insights of critical legal scholars, we will argue not only that this distinction is empirically amorphous and conceptually flawed, but that a very different set of domains has been constructed.

Rather than simply public/private spheres, we suggest that there are in fact four domains, public, private, non-public/non-private, and corporate, that have been erected in law and practice. These domains are not static and fixed, but exist in a dynamic relationship. The binary public/private dichotomy, either as a legal distinction or popular heuristic, generates a blind spot that obscures the ways in which corporate behavior is distorting democratic processes and accumulating upon itself further prerogatives. We offer a re-articulation of this space as a way of better observing these dynamics.

The corporate sphere is roughly captured by the phrase “private sector” in Governor Romney’s remarks, which is not really “private” in the traditional sense at all. In addition, there is a sphere that is neither private nor public nor a domain of corporate power, although excessive corporate prerogatives may be exercised within it. We call that sphere “non-public/non-private.” Individuals that inhabit this sphere enjoy neither the rights of the public in the public sphere, nor the individual liberties associated with the private sphere. This sphere is inhabited by many “discrete and insular minorities” and other marginalized groups. We will show how the exercise of excessive corporate prerogative is a threat to the private sphere

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<sup>11</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

as well as the public and non–public/non–private.

In Part III, we call for a realignment of corporate space in relation to democracy and the public good. In a sense, we flip the question posed by John King: “what is the role of government in United States?” by asking: “what is the role of the private sector?” To help envision a realignment of corporate space in the United States, we turn to the eminent twentieth century philosopher John Rawls. Rawls distinguished between a capitalist welfare state and a property–owning democracy as two societal arrangements with different roles for corporate institutions.<sup>12</sup> The contrast illuminates current arrangements with imagined alternatives. We also explore the manifestations of excessive corporate prerogative, particularly as the forces of globalization have matured. In a globalized market context, the profit–motivating interests of major corporations may no longer align with the best interests of workers, the nation or even the economy. In order to facilitate a realignment of the role of corporations, we explore the potentially countervailing forces of popular democracy, organized labor, the regulatory state, expanded human and civil rights, and an appropriately constituted corporation.

### I. EXCESSIVE CORPORATE PREROGATIVE: EMERGENCE AND DEVELOPMENT

In 2010, the Supreme Court issued a landmark ruling striking down a key provision of the McCain–Feingold sponsored Bipartisan Campaign Reform Act of 2002.<sup>13</sup> The Act was designed to curb the potentially distorting and corrupting influence of money in politics.<sup>14</sup> In *Citizens United v. FEC*, the Court held that corporations enjoy First Amendment

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<sup>12</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 258–84 (1971) (describing justice in a property–owning democracy); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 135–140 (2001) (comparing the differing relationships that the property–owning democracy and the capitalist welfare state have with social institutions).

<sup>13</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

<sup>14</sup> See Brief of Amici Curiae Senator John McCain et al. in Support of Appellee at 1, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08–205), 2006 WL 369341, at \*1. According to Senator McCain and the other principal sponsors of the Bipartisan Campaign Reform Act of 2002,

There is no basis for suggesting that concerns about the potential overwhelming, distorting, and corrupting influence of unleashing massive corporate and union war chests for use in unfettered express candidate advocacy are no longer compelling. That our electoral process would soon be dominated by corporate and union spending if the Court were to use this case as the occasion to roll back the longstanding prohibition on express advocacy by business corporations and unions is beyond serious question.

*Id.* at 9. See also JOHN MCCAIN WITH MARK SALTER, *WORTH THE FIGHTING FOR: A MEMOIR* 337 (2002) (“By the time I became a leading advocate of campaign finance reform, I had come to appreciate that the public’s suspicions were not always mistaken. Money does buy access in Washington, and access increases influence that often results in benefiting the few at the expense of the many.”).

rights to spend money on political campaigns.<sup>15</sup> This decision represents more than several decades of expansion of corporate speech rights, and the culmination of nearly two centuries of jurisprudence. The growth of corporate power began in the early years of the republic. In this part of the article, we will survey its expansion and highlight critical developments, beginning with the doctrine of corporate personhood.<sup>16</sup>

### A. *Corporate Individualism and the Doctrine of Corporate Personhood*

A product of the Enlightenment and Reformation, classical liberalism was the prevailing ideology of American society in the early years of the American republic.<sup>17</sup> A central tenant of classical liberalism was distrust of centralized power.<sup>18</sup> This expression of classical liberalism is visible not only in the language of the Declaration of Independence, but also in the design of the Constitution, with its federal system, limited government, and balance of powers.<sup>19</sup> This was a political system designed in contrast to the centralized political authority embodied in monarchism from which Enlightenment thought, and the American colonists, rebelled.<sup>20</sup>

Influenced by the writings of Adam Smith and John Locke, America's colonial leaders were not merely wary of the concentration of political power, they were also concerned with the concentration of economic power.<sup>21</sup> Thomas Jefferson firmly believed that economic independence was a foundation of individual freedom, expressed in the ideal of the independent farmer.<sup>22</sup> As American capitalism took root, he feared the

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<sup>15</sup> *Citizens United*, 130 S. Ct. at 913.

<sup>16</sup> For a discussion focused more on the issue of corporate prerogative under the Fourteenth Amendment, see John A. Powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment*, 32 *CARDOZO L. REV.* 885 (2011).

<sup>17</sup> SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* 5-7 (1996).

<sup>18</sup> *Id.* at 6.

<sup>19</sup> See John A. Powell & Stephen Menendian, *Remaking Law: Moving Beyond Enlightenment Jurisprudence*, 54 *ST. LOUIS U. L.J.* 1035, 1053-58 (2010).

<sup>20</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

*Id.*

<sup>21</sup> BOWMAN, *supra* note 17, at 5-10. Importantly, to this generation of political leaders, corporations were associated with monopolies, which necessarily concentrated economic advantage. The antimonopoly sentiment of the enlightenment generation was prevalent. *Id.* at 8-9.

<sup>22</sup> ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 21 (1998) ("Jefferson's lifelong friend and colleague, James Madison, agreed that the small, independent farmer constituted the 'best basis of public liberty.'").

concentration of wealth in corporate form, particularly banks, which threatened the independence of workers and farmers.<sup>23</sup>

Adam Smith, one of the leading figures in the Scottish Enlightenment, which was especially influential in the early American Republic, voiced similar concerns in his critique of mercantilism.<sup>24</sup>

Smith [had a] genuine fear of institutions, as shown in his critique of the system of mercantilism, of monopolies, and of political or economic institutions that favor some individuals over others. Smith questions the existence of “joint-stock companies” (corporations), except in exceptional circumstances, because the institutionalization of management power separated from ownership creates institutional management power cut loose from responsibility. Smith’s fear is that such institutions might become personified, so that one would regard them as real entities and hence treat them as incapable of being dismantled.<sup>25</sup>

With these concerns in mind, in early United State history corporations were created exclusively through state charters and held under the direct control of the state.<sup>26</sup> In the colonial era, corporations were chartered by the Crown. In each case, corporations were chartered to serve the public:

The first corporations were chartered to enlist private capital for such public facilities as bridges, turnpikes, and urban water systems, with investors deriving their profits from tolls and user fees. Their public purpose also justified legislatures in granting them monopoly privileges as to route and location, as well as the right to seize private property under the state’s power of eminent domain.<sup>27</sup>

Corporations were public entities, operating to serve the public and the interests of the state. As a public institution, the legal theory of the corporation was that of an artificial entity. Chief Justice Marshall articulated this theory for the Supreme Court, explaining: “A corporation is an artificial

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23 See John F. Manley, *American Liberalism and the Democratic Dream: Transcending the American Dream*, 10 POL’Y STUD. REV., no. 1, 1990 at 89, 97 (“In 1817 [Jefferson] complained that the banks’ mania ‘is raising up a monied aristocracy in our country which has already set the government at defiance’ . . . . A year earlier he said he hoped the United States would reject the British example and ‘crush in it’s [sic] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.’ (citations omitted)).

24 See Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 65, 70–73 (1987). For more on the influence of Enlightenment thought on both the framers of the United States and contemporary law, see Powell & Mendelian, *supra* note 19, at 1039–83.

25 PATRICIA H. WERHANE, *ADAM SMITH AND HIS LEGACY FOR MODERN CAPITALISM* 125 (1991) (footnote omitted).

26 “Only seven private business corporations were chartered under the colonial regime, whereas the number climbed to forty in the first decade after the Revolution and passed three hundred during the commercial boom of the 1790s.” CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815 – 1845*, at 44–45 (1991).

27 *Id.* at 45.



being, invisible, intangible, and existing only in contemplation of law.”<sup>28</sup> The artificial entity theory drew upon the British common law view that “the corporation as nothing more than an artificial creature of the state, subject to government imposed limitations and restrictions.”<sup>29</sup> Because the state creates the corporation, the corporation is expected to serve the state in performing some public function, and cannot assert rights against the state.<sup>30</sup> In this view, corporations are part of a larger scheme of public service. Indeed, Chief Justice Marshall explained that “[t]he objects for which a corporation is created are universally such as the government wishes to promote.”<sup>31</sup> Corporations were not merely creatures of the state, they were public entities.

Today, we may think of certain state subsidized monopolies, such as utility companies, in this way. The state grants a charter or exclusive rights to the corporation to perform services for the community. In turn, the corporation enjoys business privileges, even monopoly service rights, but must abide by certain regulations. This understanding is incommensurate to the early republican conception of a corporation. Corporations were not merely public servants, they were public institutions. To illustrate this point, as a corollary to the power to create corporations through charter, states could revoke the charter of corporations and thus terminate them. In fact, even as late as the 1880s, *quo warranto* proceedings to revoke the charters of corporations that engaged in behavior contrary to the public interest were common.<sup>32</sup>

One of the first steps in the emancipation of the corporate form from state control was the landmark decision of *Dartmouth College v. Woodward*.<sup>33</sup> In *Dartmouth College*, the Supreme Court confronted the question of whether Dartmouth was a private institution or subject to the control of the state legislature.<sup>34</sup> The specific issue before the Court was whether

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28 Tts. of *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, at 636 (1819).

29 Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580 (1990).

30 *Id.*

31 *Dartmouth College*, 17 U.S. (4 Wheat.) at 637. He goes on to say: “They [referring to corporations] are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.” *Id.* However, it is important to note that Chief Justice Marshall goes on to say that the fact that a charter of incorporation has been granted will not change “the character of [the] institution” from a private one to a public one. *Id.* at 638–39. “The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created.” *Id.* at 638.

32 Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 248 (1999). In fact, it was a *quo warranto* petition that began the legal proceedings against Standard Oil, after the initial failure of federal authorities to do so under the Sherman Antitrust Act. RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 331 (1998).

33 *Dartmouth College*, 17 U.S. (4 Wheat.) at 518.

34 *Id.*

the New Hampshire Legislature's attempt to replace the President of the University violated the Contract Clause of the Constitution.<sup>35</sup> To make that determination, the Court confronted the further question, disputed by the parties, whether the 1769 charter was a "grant of political power . . . creat[ing] . . . a civil institution,"<sup>36</sup> for the benefit of the province, or whether the charter created a private institution intended to benefit the "bounty of the donors."<sup>37</sup>

Each of the pre-revolutionary colleges were royally chartered, but at the request of the colonies rather than the initiative of the Crown.<sup>38</sup> Consequently, charters to establish colleges were granted, one per colony, with each institution representing that colony.<sup>39</sup> These colleges were understood to be "emanat[ion]s of the polity."<sup>40</sup> While many of these elite institutions, such as Harvard, Yale and Princeton are regarded as private, this has not always been the case. They were founded by and to serve specific needs of the colonies, in particular, to train and prepare clergy for the colony's parishioners.<sup>41</sup> For example, Harvard College was founded in 1636 to educate ministers in the new world to ensure the continuity of religious practice and teaching.<sup>42</sup> In *New England's First Fruits*, the motivating concern behind Harvard's founding was described as fear of an "illiterate [ministry]" once the current crop of ministers retired or "lie in the dust."<sup>43</sup> Although the subsequently founded colonial colleges may have

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35 *Id.* at 626–27.

36 *Id.* at 629.

37 *Id.* at 640.

38 See JURGEN HERBST, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT, 1636–1819, at 1 (1982).

39 The colonies and their respective institutions are as follows: Massachusetts – Harvard University; Virginia – College of William & Mary; Connecticut – Yale University; New Jersey – Princeton University; New York – Columbia University; Pennsylvania – University of Pennsylvania; Rhode Island – Brown University; New Hampshire – Dartmouth University. *Id.* app. A at 244–46. For a list of institutions of higher education chartered between 1636–1820, see *id.* app. A at 244–53. The fact that only one college was founded per colony further suggests that these institutions were much like other state monopolies, granted to serve particular public purposes.

40 Roger L. Geiger, *Ten Generations of Higher American Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 38, 38–39 (Phillip Altbach et al. eds., 2d ed. 2005). In particular, Harvard, the College of William and Mary, Yale, Princeton, Columbia, the University of Pennsylvania, Brown, Dartmouth, and Rutgers were the 9 colleges created before the Revolutionary War, and each represented a different colony. See HERBST, *supra* note 38, app. A at 244–46; see also Lester F. Goodchild, *History of Higher Education in the United States*, in 1 HIGHER EDUCATION IN THE UNITED STATES: AN ENCYCLOPEDIA 319–21 (James JF Forest & Kevin Kinser eds., 2002).

41 Geiger, *supra* note 40, at 40–41 ("The founding documents of [Harvard, Yale, and William and Mary] speak to the aim of educating ministers. . . . [T]he founders of Yale intended to provide education 'for Publick [sic] employment both in Church & Civil State.'").

42 HERBST, *supra* note 38, at 5.

43 NEW ENGLAND'S FIRST FRUITS: WITH DIVERS OTHER SPECIAL MATTERS CONCERNING

increasingly emphasized secular concerns, particularly the new natural philosophy of the scientific revolution and the enlightenment, their aims were no less public.<sup>44</sup> These colleges not only prepared clerical leaders but also educated the future colonial leaders in the classics and political theory.<sup>45</sup>

Throughout the colonial era, these institutions were understood to be public or at least quasi-public institutions serving particular public needs for the public good.<sup>46</sup> They were given generous tax abatements,<sup>47</sup> land grants, subsidies, and other forms of public support in light of these purposes.<sup>48</sup> In *Dartmouth College*, the jury noted that the college had been endowed by two states, Vermont and New Hampshire, with “lands of great value.”<sup>49</sup> In addition, according to Judge Henry Friendly, at the time of the decision, Dartmouth College was “exempted from New Hampshire taxation, confer[red] degrees . . . essential to the obtaining of governmental licenses, and now secures a fourth of its income from the United States . . .”<sup>50</sup> In spite of the generous public investment and subsidy and a clear public purpose, Chief Justice Marshall, writing on behalf of the Court in 1819, decided that Dartmouth was a private institution. In his view, the attempt by the legislature to replace the governing body, a right it had long enjoyed, violated the Constitution.<sup>51</sup> According to the lore, the Chief Justice was ultimately swayed by Dartmouth Alumnus, Senator Daniel Webster’s emotional oral argument.<sup>52</sup>

The decision laid the foundation for the “privatization” of most of the colonial (Ivy League) colleges during the nineteenth century.<sup>53</sup> To illustrate the ambivalence around the issue, the privatization of the colonial

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THAT COUNTRY 23 (Joseph Sabin ed. 1865) (1643).

44 See Geiger, *supra* note 40, at 42–43.

45 See *id.*

46 See *id.* at 43–44; see also HERBST, *supra* note 38, at 8.

47 See HERBST, *supra* note 38, at 11.

48 See *id.* at 8. Harvard College was given a permanent tax abatement and land subsidy. *Id.* at 8, 11.

49 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 518, 538 (1819).

50 HENRY J. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 10 (1969).

51 *Id.* at 633–34, 654.

52 CRAIG R. SMITH, *DANIEL WEBSTER AND THE ORATORY OF CIVIL RELIGION* 47 (2005). Webster proclaimed:

Sir, you may destroy this little institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But if you do, you must carry through your work! You must extinguish, one after another, all those great lights of science which, for more than a century, have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet, there are those who love it.

*Id.*

53 See Geiger, *supra* note 40, at 47.

colleges occurred very gradually.<sup>54</sup> For example, Harvard College did not become officially private until 1865.<sup>55</sup> By deciding that Dartmouth was a private institution, not a public one, Justice Marshall not only laid the foundation for the future program of colleges and universities around the country, which were largely private in form, but also for the “rise of the American business corporation.”<sup>56</sup> Marshall participated in an effort to free corporations from the control of the state.

Ultimately, the progressive release of corporate charters from the control of the state and concomitant expansion of corporate rights was a product of the work of lawyers and judges removed or safely insulated from democratic processes. “[B]y the end of the War of 1812 . . . corporations were only beginning to win two of their cardinal privileges: limited liability of stockholders for corporate debts and corporate freedom from interference by the state. These privileges were won not in legislative halls but in the courts.”<sup>57</sup> The *Dartmouth* decision was merely the beginning.

Americans in the antebellum period shared the founding generation’s mistrust of concentrated political and economic power. It was in this context that the nation’s political leaders contested the merits and constitutionality of the First Bank of the United States, culminating in a debate whether to renew the charter of the Second Bank of the United States in 1816.<sup>58</sup> The pro-charter movement used the *Dartmouth* decision to cast the corporate form as a private individual, to distance the widespread association of the corporate form with state-chartered monopolies, and to alleviate fear over the concentration of wealthy interests.<sup>59</sup> Several states adopted general incorporation acts, further severing the connection between the corporate form and the state.<sup>60</sup> General incorporation acts also broke the close connection between public purpose and corporate organization. As this

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54 *Id.*

55 See RONALD STORY, *THE FORGING OF AN ARISTOCRACY: HARVARD & THE BOSTON UPPER CLASS, 1800–1870*, at 158–59 (1980). For an in-depth analysis of the privatization of the early public institutions of higher learning, see JOHN S. WHITEHEAD, *THE SEPARATION OF COLLEGE AND STATE: COLUMBIA, DARTMOUTH, HARVARD AND YALE, 1776–1876*, at 191–240 (1973).

56 R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 245 (2001).

57 SELLERS, *supra* note 26, at 46–47.

58 *Id.* at 62–63, 68–69, 71–72. It was also a major question to determine whether the Bank was a private or public entity. See Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 *LAW & SOC’Y. REV.* 801, 811 (1988) (discussing *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824)). For a discussion of the private/public distinction, see *infra* Part II.

59 BOWMAN, *supra* note 17, at 50 (“In this fashion, the legal fiction acquired ideological significance. As the corporate individual became identified with the entrepreneur, the business corporation lost its negative association with the privileged few – the commercial and financial interests aligned with the Bank of the United States and the old guard of the Federalist Party.”).

60 *Id.* at 51.

process occurred, the corporate form increasingly acquired a private cast.

As a consequence of these accommodations, corporations uneasily occupied the public/private framework. As artificial entities chartered by the state, corporations were quasi-public entities, subject to state control.<sup>61</sup> However, since they were operated in many cases by private citizens and generated revenues for private investors, they were not entirely public entities either. The Supreme Court would attempt to clarify the issue, but ended up complicating matters. On account of the growing use of the corporate form of organization, and the increasingly uncertain character of the corporation, questions arose whether and to what extent corporations could sue or be sued under the Constitution.<sup>62</sup> Were they persons under the Constitution? More critically, were they citizens?

In 1839, the Supreme Court, with Chief Justice Taney delivering the opinion, rejected Daniel Webster's argument that a corporation was a "citizen" within the meaning and protection of the privileges and immunities clause<sup>63</sup> of Article IV, Section 2 of the U.S. Constitution.<sup>64</sup> However, just five years later, in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* the Court upheld a claim that corporations were "citizens" within the meaning of the Diversity of Citizenship Clause of Article III, Section 2.<sup>65</sup> Those are the only two instances of the word 'citizen' in the original Constitution. Taking both holdings together, corporations were citizens under the Constitution in one context, for the purpose of suing and being sued in federal court, but not a citizen for the purpose of enjoying the privileges and immunities of citizenship.<sup>66</sup> Corporations had been extended a quasi-citizenship status for jurisdictional purposes under the Diversity of Citizenship Clause. Politicians and jurists wondered whether, as a logical corollary, such a conclusion – citizenship with respect to diversity citizenship (for standing purposes), but not privileges and immunities – extended to other groups, such as free blacks.

The *Letson* decision, granting corporations standing under the Diversity

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61 See, e.g., OSCAR HANDLIN AND MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY* 106, 112, 120. (2d ed. 1969).

62 DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 72 (1978).

63 U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). The privileges *and* immunities clause is not to be confused with the privileges *or* immunities clause of Section 1 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1.

64 *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-87 (1839).

65 *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). The Court continued to assert the artificial entity theory. *Id.*

66 *Id.* at 555 ("A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.").

of Citizenship Clause, was a major step towards corporate personhood and expanded corporate power and prerogative. Since corporations could “sue and be sued,” these cases extended federal judicial protection to corporations against the states and even Congress. Legal standing to sue meant that corporations were “capable of entering into contractual relations in a market economy,” and could enforce those rights in courts of law.<sup>67</sup>

The logic behind granting diversity citizenship to corporations while denying that status in the context of the privileges and immunities clause was the premise that a corporation’s “rights began and ended with the [corporate] charter.”<sup>68</sup> However, free blacks, especially those who might have enjoyed access to federal court through diversity jurisdiction, were not similarly prescribed. Natural persons are not bound by charters. Therefore, the corporate charter argument was not available as a ground for precluding free blacks from enjoying access to federal courts under the privileges and immunities clause. This was a major concern for southern slaveholders and southern political elites.

Article IV affords national citizens the “privileges and immunities of citizens in the other states.”<sup>69</sup> If blacks were federal citizens in one state, they might invoke Article IV protections against discriminatory laws in other states. This not only would have disturbed southern states with more stringent racial codes, but would have also threatened Southern attempts to protect and fortify slavery as an institution. The freedoms blacks enjoyed in Northern states could be theoretically exercised in the South.<sup>70</sup> Not only would such a conclusion potentially subject every southern race code to federal judicial review, but it would also stymie efforts to strengthen fugitive slave laws, which southerners believed were necessary to quell abolitionist agitation. To resolve this dilemma, several Supreme Court Justices seemed open to reversing the Court’s nascent corporate personhood doctrine under the Diversity of Citizenship Clause, rather than admit the possibility that blacks might also enjoy the same citizenship rights and, therefore, enjoy the privileges and immunities of citizenship as well.<sup>71</sup>

In fact, many free blacks were citizens of their respective states and

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67 BOWMAN, *supra* note 17, at 52–53.

68 AUSTIN ALLEN, *ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837–1857*, at 131 (2006).

69 U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

70 See ALLEN, *supra* note 68, at 132.

71 See ALLEN, *supra* note 68, at 131. Justices Campbell, Catron, and Daniel wished to shut corporations out of diversity jurisdiction rather than admit that southern racial policies might be open to challenge in federal courts under the Privileges and Immunities Clause. *Id.* This bloc led to a polarized Court, as the other justices felt that this position was too extreme. But the remaining members of the Court were unwilling to allow even the slightest possibility that free blacks might enjoy quasi-citizenship rights, and if this meant doing the same for corporations, so be it. *Id.* at 132.

enjoyed access to their state courts, just as corporations did within their state of incorporation.<sup>72</sup> Therefore, did free blacks who were citizens of their respective states, then, also count as *federal* citizens under the Diversity of Citizenship Clause for the same jurisdictional purpose: to sue and be sued? If so, the answer would parallel the logic of the Supreme Court in creating corporate diversity citizenship. That is precisely why federal circuit Judge Wells reached that conclusion in 1854 in the initial federal iteration of the Dred Scott case, *Scott v. Sandford*.<sup>73</sup> Judge Wells held that Scott was “enough of a citizen to be covered by the diverse-citizenship clause,” but carefully limited his holding to Article III, Section 2.<sup>74</sup> In reversing Judge Wells, by infamously holding that no black person, free or slave, were citizens under the United States Constitution, under either Article III or Article IV, Chief Justice Taney’s opinion on behalf of the Supreme Court risked closing off Article III access to federal corporate litigants.<sup>75</sup>

The accommodation by which Chief Justice Taney preserved his Court’s rulings on corporate standing, while barring access to federal courts for blacks, was the solution of anti-black federal citizenship. Chief Justice Taney structured the *Dred Scott* holding on a racial basis, and did so by creating an extraordinary subcategory for blacks.<sup>76</sup> He singled out blacks as uniquely excepted from federal citizenship, holding that persons of African descent were not, and could never become, citizens of the United States.<sup>77</sup> Taney deployed the “history of enslavement and subsequent degradation within American legal culture” as the basis for this unequal standing.<sup>78</sup> In this way, he preserved access to federal courts for quasi-citizens, and did not disturb the citizenship rights of other “subaltern segments of the population, such as white women and minors and other nonwhites in general.”<sup>79</sup> Only blacks were excluded from the rights of citizenship under the Federal Constitution and, therefore, federal standing. The Reconstruction Amendments reversed the Taney theory of anti-black federal citizenship, but they inadvertently provided a stronger vehicle for

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72 See FEHRENBACHER, *supra* note 62, at 277.

73 See *id.* at 277–78. This holding mirrored the Taney court’s handling of corporate citizenship: counting for diversity purposes, but not privileges and immunities purposes. In virtually every case in which free blacks tried to make citizenship claims under Article IV, they were rebuffed. *Id.* at 68.

74 *Id.* at 277 (emphasis removed).

75 ALLEN, *supra* note 68, at 161; see also *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (“They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”).

76 See *Scott*, 60 U.S. (19 How.) at 422; see also *supra* text accompanying notes 68–75.

77 *Scott*, 60 U.S. (19 How.) at 422.

78 ALLEN, *supra* note 68, at 163.

79 *Id.* at 162.

federal corporate personhood.

The natural entity theory, formulated by Otto Gierke, began to eclipse the artificial entity theory of corporate personhood.<sup>80</sup> This theory asserts that corporations are wholly distinct juridical entities with rights separate from those of its creator.<sup>81</sup> The radical change in corporate theory undergirded a shift in Supreme Court jurisprudence. Under natural entity theory, a corporation may assert constitutional rights, enjoying standing to sue and be sued, and govern itself.<sup>82</sup> Following the persistence of corporate attorneys and justices such as Justice Field, courts slowly adopted the natural entity theory.<sup>83</sup> Justice Field advocated a reading of the Fourteenth Amendment that would advance robust corporate personhood.<sup>84</sup> The Fourteenth Amendment extended its protections to “citizens” and “persons.”<sup>85</sup> This language offered ample room to extend corporations constitutional protections regardless of whether they were citizens, clothing them in equal protection and due process rights.

Although an omnibus measure, one of the primary objectives of the Fourteenth Amendment was to extend federal citizenship rights denied in *Dred Scott* and end the super-subordinate status of blacks. In the *Slaughter-House Cases*, the first instance of a case coming before the Supreme Court under the Fourteenth Amendment, the Court affirmed that the “one pervading purpose” behind the Amendment was the citizenship guarantee for former slaves and the protection of that status.<sup>86</sup> The case concerned a Louisiana statute granting a corporate monopoly to a New Orleans slaughterhouse for butchering livestock. The aggrieved butchers of New Orleans parish filed suit, claiming a violation of their privileges and immunities rights, among other grounds, under the Fourteenth Amendment.<sup>87</sup> The Supreme Court upheld the statute under the

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80 See OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 67–69 (E.W. Maitland trans., 1900); see also MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 66–71 (1992) (detailing the introduction of the natural entity theory into American jurisprudence).

81 Frederic William Maitland, *Introduction to OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE* 67–69 (E.W. Maitland trans., 1900), at xxxviii; HOROWITZ, *supra* note 80, at 75–77.

82 HOROWITZ, *supra* note 80, at 100–01.

83 HOROWITZ, *supra* note 80, at 69–70; see, e.g., *Cnty. of Santa Clara v. S. Pac. R. Co.*, 18 F. 385, 403 (C.C.D. Cal. 1883).

84 HOROWITZ, *supra* note 80, at 69–70.

85 U.S. CONST. amend. XIV, § 1.

86 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872) (“[O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”).

87 *Id.* at 57–58.



Constitution, but “set in motion a monumental debate on the Court.”<sup>88</sup>

The *Slaughterhouse Cases* addressed the question of federal citizenship rights, including the right to work for whites, and the interpretation of the Fourteenth Amendment for blacks. The butchers of New Orleans asserted that being forced to work for a corporate monopoly was not only a violation of the Fourteenth Amendment’s protections, including the privileges and immunities of federal citizenship, but also a badge and incident of slavery in violation of the Thirteenth Amendment.<sup>89</sup> In denying those claims, the Court distinguished between the privileges and immunities of state and federal citizenship. In doing so, the Court reduced the rights of federal citizenship to a pittance, trivial concerns or those that had pre-existed the enactment. In a single decision, the Supreme Court limited the rights of blacks and white workers and expanded the reach of corporations. It is a decision that remains good law, and stands as a powerful example of the interaction between race/class and corporate power.

Ultimately, however, it was the dissenting Justices in *Slaughterhouse* that took up the reigns of the Marshall Court to expand corporate prerogative. The composition of the Supreme Court dramatically shifted between 1877 and 1882, and Justice Field’s arguments for corporate Constitutional rights quickly gained traction. In 1878, Justice Field bitterly dissented in the *Sinking Funds Cases*,<sup>90</sup> in which the Court found no constitutional objection to a charter that required a railroad to keep a portion of its income to meet certain debts.<sup>91</sup> By the early 1880s, Justice Field and a more business-friendly Court initiated a dramatic expansion of corporate Constitutional rights.<sup>92</sup> As a first step, they seemed determined to strike down state regulations of railroad rates.<sup>93</sup> While the freedmen would be denied the protection of hostile and oppressive states, corporations would be protected.

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88 BOWMAN, *supra* note 17, at 55.

89 This was not a farfetched legal theory. The Republican Party had marshaled its rhetoric around the idea of free soil and free labor. *See generally* ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970). The assertion that having to work for corporation was a form of slavery would be asserted by white worker as well as the Party in the early period of industrialization. *See, e.g.*, DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 65 (1991). During this period there was a strong sense that corporation was a serious challenge to freedom and not just another public or private entity. *See* FONER, *supra*, at 22–23.

90 *Sinking-Fund Cases*, 99 U.S. 700, 731–44 (1878) (Field, J., dissenting).

91 *Id.* at 726.

92 DAVID H. GANS & DOUGLAS T. KENDALL, *CONSTITUTIONAL ACCOUNTABILITY CENTER, A CAPITALIST JOKER: THE STRANGE ORIGINS, DISTURBING PAST AND UNCERTAIN FUTURE OF CORPORATE PERSONHOOD IN AMERICAN LAW* 22–28 (2010), [http://www.theusconstitution.org/upload/fck/file/File\\_storage/A%20Capitalist%20Joker\(1\).pdf](http://www.theusconstitution.org/upload/fck/file/File_storage/A%20Capitalist%20Joker(1).pdf). One of the new entrants on the court was Chief Justice Melville W. Fuller, a former corporate lawyer. BOWMAN, *supra* note 17, at 56.

93 *Id.* at 36.

In 1886, the Court heard *Santa Clara County v. Southern Pacific Railroad Co.*, concerning whether state and county taxes assessed to a railroad, particularly for the value of fences, were constitutional.<sup>94</sup> The State of California imposed taxes on the value of property, but distinguished between natural persons and “railroad[s] and other quasi public corporations” in making property valuations.<sup>95</sup> The importance of the case is not its holding, but the extraordinary insertion into the court syllabus, ostensibly in the name of Chief Justice Waite, stating:

The Court does not wish to hear argument on the question whether the provision of the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of laws, applies to these corporations. We are all of the opinion that it does.<sup>96</sup>

Thus, in the syllabus to the *Santa Clara* decision, the Court asserted that corporations unequivocally were people under the Fourteenth Amendment.<sup>97</sup> The question of corporate personhood had not been argued or briefed in the case, nor did the Court’s opinion explain this mysterious dictum. According to some accounts, this statement may have been inserted by a zealous court reporter, and was not in fact a remark of the Chief Justice despite its attribution.<sup>98</sup> The syllabus does not have any legal force, but regardless of its origin, *Santa Clara*’s infamous dictum became accepted law.<sup>99</sup> Under the Fourteenth Amendment, and in view of the Constitution, corporations were now “people.” This represented a dramatic break from previous legal theory, and laid the foundation for a series of decisions expanding corporate power that continues to this day.<sup>100</sup>

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94 *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 397 (1886).

95 *Id.* at 404. In particular, the state required that the property be taxed according to its value. *Id.* However, it said that the value of a security against a debt could be deducted from the valuation, “except as to railroad and other quasi public corporations.” *Id.* On this ground, the plaintiffs said that this imposed an unequal burden on railroads, and denied them equal protection of laws. *Id.* at 410. From our perspective, these sorts of distinctions – between corporate persons and natural persons – are well founded. After all, a corporation can accumulate much greater debt or hold much greater debt than a natural person.

96 *Id.* at 396.

97 *See id.*

98 GANS & KENDALL, *supra* note 92, at 26.

Whatever was said at oral argument, the Court never actually reached the constitutional questions in its final opinion, much to the disappointment of Justice Field. . . . Undeterred, the court reporter – who was once the President of the Board of a New York railroad corporation himself – included the report of oral argument, even after Chief Justice Waite noted to the reporter that “we avoided meeting the constitutional question in the decision.”

*Id.*

99 *Id.*

100 It is noteworthy that the Court has clothed corporations with Fourth Amendment rights to be free from random inspection. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978); *See v. City of Seattle*, 387 U.S. 541 (1967). This topic, however, is beyond the scope of this article.

The expansion of corporate constitutional protections in the Reconstruction and post-Reconstruction periods coincided with momentous changes in state law. By 1870, most states had passed laws permitting “incorporation as a general right rather than a special legislative grant.”<sup>101</sup> In 1889, New Jersey offered interstate corporations a way of avoiding quo warranto proceedings in exchange for franchise taxes.<sup>102</sup> This was the first race to the bottom, a state-by-state progression of releasing corporations from state regulatory controls over their former creations.<sup>103</sup> Additionally, New Jersey revised its general incorporation statute to allow one corporation to hold stock in another, “ignit[ing] a revolution in corporation law that has yet to run its course.”<sup>104</sup> These laws provided a critical escape hatch for embattled trusts, following the Sherman Antitrust Act. Instead of operating as a trust, companies like Standard Oil could reorganize as holding companies and operate nationwide.<sup>105</sup>

The average American may have been wary of the expansion of corporate power and prerogatives, given their long association with concentrated economic power and wealthy interests, particularly during the onset of industrialization and the emergence of the gilded era. Consequently, much of the expansion of corporate power occurred through undemocratic processes: courts rather than legislatures. American jurists played a pivotal role in the development and expansion of corporate power, “[a]rmed with little precedent, but gifted with considerable ingenuity.”<sup>106</sup>

Lawyers were the shock troops of capitalism. The bar mushroomed as the market proliferated contractual relationships.

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...[L]awyers’ decisive contribution to the expanding market was accomplished outside the limelight of electoral politics and legislation.... With impressive creativity and speed, the legal profession supplied a new law.

Not even the wiliest lawyer/politicians could have extracted the law required by expansive capital from legislatures vulnerable to a broad electorate still imbued with premarket values. But in the courts the lawyers’ technical expertise could not be democratically challenged. By taking control of the state courts and asserting through them their right to shape the law to entrepreneurial ends, lawyer/judges during the first half of the nineteenth century fashioned a legal revolution.<sup>107</sup>

This revolution – the development of the doctrine of corporate personhood, the fiction that corporations are people under law – originated from the same Court that sanctioned “separate but equal” in *Plessy v.*

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<sup>101</sup> BOWMAN, *supra* note 17, at 37.

<sup>102</sup> Rowe, *supra* note 32, at 248.

<sup>103</sup> BOWMAN, *supra* note 17, at 37.

<sup>104</sup> *Id.* at 60.

<sup>105</sup> CHERNOW, *supra* note 32, at 332.

<sup>106</sup> BOWMAN, *supra* note 17, at 36.

<sup>107</sup> SELLERS, *supra* note 26, at 47–48.

*Ferguson*.<sup>108</sup> Both doctrines were fashioned from the same cloth: the same judicial actors, the same judicial philosophy, and the same textual provisions.<sup>109</sup> The evisceration of the Fourteenth Amendment's protections for freedmen, begun in *Slaughter-House*,<sup>110</sup> culminated in the *Plessy*<sup>111</sup> decision in 1896.<sup>112</sup>

The post-Reconstruction Court not only interpreted the Fourteenth Amendment to create and protect corporate prerogatives while undermining the protections for freedmen and their progeny, it applied these provisions narrowly to other previously subaltern groups. How would the clarified federal and state citizenship status and concomitant citizenship and personhood rights for women be applied?

Just one year after *Slaughterhouse*, the Court affirmed its narrow reading of the Privileges and Immunities Clause in *Bradwell v. Illinois*.<sup>113</sup> In *Bradwell*, the Court denied the argument that a state's refusal to grant a license to practice law to women violated the Fourteenth Amendment.<sup>114</sup> Although the ground of this decision was the Privileges and Immunities Clause,<sup>115</sup> the opinion cast doubt on the degree to which women would enjoy other Fourteenth Amendment protections. The early women's rights movement had grown out of the abolitionist movement, and called for not simply the abolition of slavery, but for equal rights for both blacks and women.<sup>116</sup> Women's organizations played a critical role in the Amendment's passage.<sup>117</sup> How would clarified state and federal citizenship rights and

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108 *Plessy v. Ferguson*, 163 U.S. 537, 541–542, 549 (1896) (determining that Louisiana statute requiring railroads to provide “equal but separate accommodations for the white, and colored races” was not unconstitutional under the Thirteenth and Fourteenth Amendments), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954); *see also* powell & Watt, *supra* note 16, at 888.

109 Justice Field not only joined the majority in *Plessy*, but he also dissented in *Strauder v. West Virginia*, which held that a West Virginia statute discriminated in the selection of jurors was “a denial of the equal protection of the laws to a colored man . . .” *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879); *see* powell & Watt, *supra* note 16, at 888. He was also personally opposed to the Equal Protection Clause. powell & Watt, *supra* note 16, at 888 (citing HOWARD JAY GRAHAM, *EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE “CONSPIRACY THEORY,” AND AMERICAN CONSTITUTIONALISM* 195 (1968)).

110 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

111 *Plessy*, 163 U.S. at 537.

112 *See* powell & Watt, *supra* note 16, at 887–90.

113 *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

114 *Id.* at 138–39.

115 *Id.* at 140–41.

116 VALERIE BRYSON, *FEMINIST POLITICAL THEORY* 38–39, 47, 90 (1992).

117 Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89, 102, 110 (1994). Women's rights activists Susan B. Anthony and Elizabeth Cady Stanton also demanded in their petitions for ratification of the Fourteenth Amendment that woman suffrage be included in the text of the Amendment. *Id.* at 110.

other Fourteenth Amendment protections be applied to women? It was reasonable to expect that women would enjoy equal protection rights under the Fourteenth Amendment. However, as the Court solidified corporate standing and other corporate rights under that charter, it denied the claims of women and freed slaves.<sup>118</sup>

In their infancy in America, corporations were creatures of the state, and subordinate to the state. Moreover, corporations were public institutions, chartered to serve the public good. Corporations were defined by their charter and could not act beyond the charter. As corporations gained standing rights, personhood, and eventually acquired constitutional protections and rights, they were gradually emancipated from state controls and restrictive charters. With this freedom they began to lobby legislatures and to influence political and policy outcomes. No longer a pawn, they were now a major player.

### B. State Action Doctrine

During the early summer of 2010, as the midterm campaign was gearing up, Rand Paul uncomfortably admitted his opposition to parts of the Civil Rights Act of 1964.<sup>119</sup> Avowing personal opposition to racial discrimination, he disclaimed a role for government in monitoring private discrimination.<sup>120</sup> In his view, the Civil Rights Act of 1964, and by implication, the bulk of the Fair Housing Act of 1968, impermissibly reach beyond the sphere of state action and into private conduct.<sup>121</sup> His arguments are not only reminiscent of the Southern opposition to the civil rights movement, but more critically, of the *Plessy* era Supreme Court. His arguments belie a post-Reconstruction jurisprudence that remains curiously intact, despite the rehabilitation of Justice John Harlan, and his famous dissents. In this part, we will explore the origin of the state action doctrine, in contradistinction

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<sup>118</sup> In *Connecticut General Life Insurance Co. v. Johnson*, Justice Hugo Black expressed frustration with the Court's extensive use of the Fourteenth Amendment to define corporate rights. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 89–90 (1938) (Black, J., dissenting). According to Justice Black,

This amendment sought to prevent discrimination by the states against classes or races. . . . Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent. invoked it in protection of the negro race, and more than 50 per cent. asked that its benefits be extended to corporations.

*Id.*

<sup>119</sup> See James Joyner, *Rand Paul, the Civil Rights Act, and Private Discrimination*, OUTSIDE THE BELTWAY (May 20, 2010), [http://www.outsidethebeltway.com/rand\\_paul\\_the\\_civil\\_rights\\_act\\_and\\_private\\_discrimination/](http://www.outsidethebeltway.com/rand_paul_the_civil_rights_act_and_private_discrimination/); David Weigel, *Rand Paul, Telling the Truth*, RIGHT NOW (May 20, 2010, 8:50 AM), [http://voices.washingtonpost.com/right-now/2010/05/rand\\_paul\\_telling\\_the\\_truth.html](http://voices.washingtonpost.com/right-now/2010/05/rand_paul_telling_the_truth.html).

<sup>120</sup> See Joyner, *supra* note 119; Weigel, *supra* note 119.

<sup>121</sup> See Joyner, *supra* note 119; Weigel, *supra* note 119.

to the jurisprudence of Justice Harlan, and this doctrine's foundational premise of the distinction between private and public spheres.

In 1883, the Supreme Court considered the constitutionality of the Civil Rights Act of 1875.<sup>122</sup> The Civil Rights Act of 1875 marked the zenith of Reconstruction legislative activity. The Act guaranteed that everyone, regardless of race, color, or previous condition of servitude, was entitled to the same treatment in “public accommodations” (i.e. inns, public conveyances on land or water, theaters, and other places of public amusement).<sup>123</sup> It was the precursor to the Civil Rights Acts of the 1960s.

The Civil Rights Act of 1875 had died in the House the previous year, even after passing the Senate.<sup>124</sup> President Grant publicly endorsed the Bill in his second inaugural address.<sup>125</sup> Nonetheless, the bill only survived in the Senate thanks to the “tireless advocacy” of an ailing Charles Sumner.<sup>126</sup> The Democratic landslide in the 43rd Congress ensured that this would be the last time for a decade that Republicans would control both the White House and the Congress.<sup>127</sup> With violence erupting in the South again, and their party's control of the federal government about to expire, the so-called “radical Republicans” devised a program to safeguard what remained of Reconstruction with the Civil Rights Act of 1875 as their centerpiece.<sup>128</sup> The bill became law only after President Grant intervened in disputed southern elections, ordered troops to suppress an insurrection of confederates and white supremacists in New Orleans, and the provision mandating integrated education was removed, stricken at the last moment.<sup>129</sup>

Seldom enforced, it took only eight years for the Supreme Court to overturn the Civil Rights Act of 1875.<sup>130</sup> The Supreme Court argued that the Fourteenth Amendment, upon which the Act had been based, only prohibited state action in violation of its provisions, and did not contemplate relief against “[i]ndividual invasion of individual rights.”<sup>131</sup> The Court feared that such a law would “establish a code of municipal law regulative of all private rights between man and man in society.”<sup>132</sup> The Court continued:

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<sup>122</sup> The Civil Rights Cases, 109 U.S. 3, 4 (1883).

<sup>123</sup> Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336. Justice Harlan would ground this right to “public accommodations” in both the Thirteenth and Fourteenth Amendments.

<sup>124</sup> ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION, 1863–1877*, at 226–27 (1990).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 233.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 233–34.

<sup>130</sup> The Civil Rights Cases, 109 U.S. 3, 3 (1883).

<sup>131</sup> *Id.* at 11.

<sup>132</sup> *Id.* at 13.

[C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual . . . .<sup>133</sup>

Justice Harlan, inaugurating a generation of great dissents, vigorously disagreed.<sup>134</sup> In his opinion, the Fourteenth Amendment was not simply prohibitory in character, as the majority asserted, but was of a “distinctly affirmative character.”<sup>135</sup> Specifically, the citizenship clause constituted the nation itself by defining and granting federal citizenship in affirmative terms. This affirmative measure was enforceable under Section 5 of that Amendment, and was not constricted by prohibitory language found in the second sentence of Section 1.<sup>136</sup>

To highlight the unduly constricted reading of the Fourteenth Amendment now being advanced, Harlan emphasized that Congressional authority to guarantee the freedoms and rights enumerated within the Reconstruction Amendments must be commensurate with its earlier power to protect slavery.<sup>137</sup> Harlan observed an ironic incongruence between the Court’s broad reading of Congressional authority to protect slavery and enforce fugitive slave laws, and the narrow reading of Congressional authority to pass legislation under the Fourteenth Amendment.<sup>138</sup>

By advancing these arguments, Justice Harlan rejected an overly simplistic sharp public/private divide. The right of freedmen to equal access to public accommodations, often controlled or operated by private individuals or business, was at stake. The characterization of such accommodations as public or private was a decisive legal question. Justice Harlan asserted that although the owners may be private, they are nonetheless public entities:

[R]ailroads are public highways, established, by authority of the state,

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<sup>133</sup> *Id.* at 17.

<sup>134</sup> *Id.* at 33–62 (Harlan, J., dissenting). Goodwin Liu suggests that the first Justice Harlan, not Justice Holmes, really began the tradition of the “great dissent.” See Goodwin Liu, Remark, *The First Justice Harlan*, 96 CAL. L. REV. 1383, 1385 (2008).

<sup>135</sup> *Civil Rights Cases*, 109 U.S. at 46 (Harlan, J., dissenting).

<sup>136</sup> For further development of this argument, see Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006) (arguing that the Citizenship Clause and the Enforcement Clause of the Fourteenth Amendment imbue Congress with an affirmative font of authority).

<sup>137</sup> *Civil Rights Cases*, 109 U.S. at 30 (1883) (Harlan, J., dissenting) (citing *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858)). In *Ableman*, the Supreme Court upheld the Fugitive Slave Law from a challenge by the State Supreme Court of Wisconsin, stating that “the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States . . . .” *Ableman*, 62 U.S. (21 How.) at 526.

<sup>138</sup> *Civil Rights Cases*, 109 U.S. at 28–30 (Harlan, J., dissenting).

for the public use . . . [even though they are] controlled and owned by private corporations . . . it is a part of the function of government to make and maintain highways for the conveyance of the public . . . no matter who is the agent, and what is the agency, the function performed is *that of the state*; that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used.<sup>139</sup>

Mirroring the approach of his brethren fifty years later in *Marsh v. Alabama*,<sup>140</sup> Justice Harlan adopted a functional approach to the question of state action. Furthermore, Justice Harlan would have also argued that a denial of public accommodations was a ‘badge or incident’ of slavery violative of the Thirteenth Amendment, which lacks a state action requirement.<sup>141</sup>

Despite Justice Harlan’s persuasive dissent in *The Civil Rights Cases*, a dissent which he personally cherished even more than his most famous dissent in *Plessy*,<sup>142</sup> it was nearly a century before discrimination in public accommodations was once again prohibited.<sup>143</sup> Despite the accomplished fact of the Civil Rights Act of 1964, the characterization of the Fourteenth Amendment described by the majority in *The Civil Rights Cases* remains curiously intact.<sup>144</sup> Not only is the Fourteenth Amendment an enforcement mechanism cramped via the state action doctrine, but only one of the post–Reconstruction opinions, *Plessy*, has been formally overturned.<sup>145</sup> Both *Slaughter–House* and *The Civil Rights Cases* remain good law, even though they were cut from the same cloth as *Plessy*.<sup>146</sup>

Subsequent cases addressing pervasive forms of private discrimination

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139 *Id.* at 38 (Harlan, J., dissenting) (citing *Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678 (1872)).

140 *Marsh v. Alabama*, 326 U.S. 501, 506–08 (1946). For an extended discussion of *Marsh*, see *supra* note 353 and accompanying text.

141 See *The Civil Rights Cases*, 109 U.S. at 36–37; see also Darrell A. H. Miller, *White Cartels, The Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1001–02 (2008) (examining the link between the economic argument and the statutory arguments for antidiscrimination laws, especially through the Thirteenth Amendment).

142 Liu, *supra* note 134, at 1389.

143 Civil Rights Act of 1964, Pub. L. No. 88–352, § 201, 78 Stat. 241, 243.

144 ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 507–09 (3d ed. 2006). The precedential value of the state action doctrine has been subject to consistent scholarly criticism. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 *NW. U. L. REV.* 503, 504–05 (1985); Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 *HARV. L. REV.* 69, 95 (1967) (criticizing state action as a “conceptual disaster area”).

145 *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

146 One might also include *United States v. Harris* in the list of cases where the Fourteenth Amendment’s application is excessively restricted by the state action doctrine. *United States v. Harris*, 106 U.S. 629 (1883) (applying the state action doctrine to declare a statute, which punished private citizens “for conspiring to deprive any one of the equal protection of the laws enacted by the state,” unconstitutional under the Fourteenth Amendment).



struggled with this fundamental dichotomy. The resolution of cases like *Shelley v. Kraemer*, which prohibited enforcement of racially restrictive covenants, uncomfortably reflect the state action assumptions announced in the *Civil Rights Cases*.<sup>147</sup> In *Shelley*, the Court found no defect in private racially restrictive covenants.<sup>148</sup> Instead, the state actor happened to be courts, which may not enforce such covenants in contravention of the Fourteenth Amendment.<sup>149</sup>

As a legal doctrine, the state action doctrine is premised upon distinctive public and private spheres. However, it may be more accurate to say that the state action doctrine, as it was being formulated, helped *constitute* the public and private spheres, generating and affirming sharp legal and cultural distinctions out of the text of the Fourteenth Amendment within a reactionary political environment hostile to civil rights. Rand Paul's argument<sup>150</sup> is a familiar one because it is reminiscent of southern white hostility to integration and the dismantling of Jim Crow. These spheres, as constituted by the Court, were then used to restrict and limit governmental regulation of private behavior, especially discriminatory behavior in the market. The eviscerated protections for racial and ethnic groups and other groups inured to the benefit of corporations, which deploy the doctrine as a shield against legislative activity more generally.

### C. *Substantive Due Process and Interstate Commerce*

From the late 1880s until 1937, the Supreme Court enforced a form of laissez-faire market fundamentalism, which severely curtailed the power of the federal government *and* states to regulate the economy for the benefit of the public. This judicial market fundamentalism occurred against a backdrop of public outrage over the excesses of the gilded era. The Populist and Progressive movements had made corporate power a major political issue. The Sherman Antitrust Act of 1890 and the Interstate Commerce Act of 1887 were enacted to more vigorously protect the national economy against corporate excesses.<sup>151</sup>

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<sup>147</sup> *Shelley v. Kraemer*, 334 U.S. 1, 13-14 (1948).

<sup>148</sup> *Id.* at 13.

<sup>149</sup> *Id.* at 14.

<sup>150</sup> See *supra* notes 119-21 and accompanying text.

<sup>151</sup> DONALD DEWEY, *THE ANTITRUST EXPERIMENT IN AMERICA* 4 (1990). Darrell A. H. Miller persuasively argues that the Thirteenth Amendment's "power to govern private economic relationships," as well as the experience and rhetoric of the Civil War and Reconstruction politics provided a grounding and "intellectual credence" to the antitrust movement. See Miller, *supra* note 141, at 999-1000. In particular, many of the architects of the Sherman Act were veterans of the Reconstruction era legislative battles. Senator John Sherman was a member of the Reconstruction Congress, and Senators George Edmunds and George Frisbie Hoar, drafters of the Antitrust Act, were as well. *Id.* at 1037. Miller does not mention this, but Senator John Sherman was the brother of the great Civil War General William Tecumseh

The concentration of wealth through the great trusts and monopolies of the era sparked widespread fears of corporate power corrupting state and federal governments. The Populist leader William Jennings Bryan endorsed a constitutional amendment making the election of U.S. Senators occur through direct vote, a procedure designed to prevent corporations from manipulating the appointment of Senators in state legislatures.<sup>152</sup> The Populists also enacted a federal income tax bill, which provided for a two percent flat tax on corporations.<sup>153</sup> And although a Court led by Justice Field overturned the law in *Pollack*,<sup>154</sup> the American people would overrule that decision with a constitutional amendment.<sup>155</sup>

In theory, federalism is a democratizing force.<sup>156</sup> The more authority and control is localized, the more democratic laws may be. However, lowering decision-making authority to the state level means, in many instances, transferring it to corporate authority beyond the reach of private citizens and the state.<sup>157</sup> This is because “even middle-sized corporations can influence state governments and play one state’s workforce off against another’s by threatening to move production elsewhere unless they get better tax breaks and so on.”<sup>158</sup> With the states increasingly dominated by corporate interests and simultaneously liberalizing corporate laws, the Progressives turned to the federal government to reign in corporations.

The regulation of corporate power became a major issue in President Theodore Roosevelt’s administration. To more effectively investigate the trusts, President Roosevelt created a special Bureau of Corporations.<sup>159</sup> This Bureau was viewed as essential to antitrust enforcement since the Justice Department was composed of just eighteen lawyers, and the federal government was “too small” to tackle them on an equal basis.<sup>160</sup> In 1905, President Roosevelt warned Congress that:

The fortunes amassed through corporate organization are now so large,

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Sherman. CHERNOW, *supra* note 32, at 298. It is important to mention that the Sherman Act was largely unenforced in the early years of the Act. The law was “vague in meaning” and “so riddled with loopholes that it was popularly derided as the Swiss Cheese Act.” *Id.* It was not until Teddy Roosevelt’s administration that enforcement became more vigorous, including the case lodged against Rockefeller’s Standard Oil. *Id.* at 432, 537–42. A contemporary journalist, Henry Demarest Lloyd, referred to it as “The Anti-Trades Union Law,” given the fact that it was used for union busting as much as monopoly busting in the early years. *Id.* at 339–40.

152 GANS & KENDALL, *supra* note 92, at 30–31.

153 *Id.* at 31.

154 *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 607–08 (1895).

155 U.S. CONST. amend. XVI.

156 NOAM CHOMSKY, UNDERSTANDING POWER: THE INDISPENSABLE CHOMSKY 345 (Peter R. Mitchell & John Schoeffel eds., 2002).

157 *Id.*

158 *Id.*

159 CHERNOW, *supra* note 32, at 434.

160 *Id.*

and vest such power in those that wield them . . . that it is useless to try to get any adequate regulation and supervision of these great corporations by State action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations – that is by the National Government.”<sup>161</sup>

President Roosevelt and other Progressives enacted a number of federal laws regulating corporations. Prominent among them was the Tillman Act, which prohibited corporations from making political contributions to candidates for federal office.<sup>162</sup> The basis for the Act was concern that corporations should not be permitted to use their enormous wealth and influence to corrupt the political system.<sup>163</sup> Congress also created the Federal Trade Commission and enacted a new federal corporate tax.<sup>164</sup> While the public and the political leaders of the nation were reigning in corporate power, the Courts were quick to reverse many of these gains.

Although the Fourteenth Amendment had been passed to protect the rights of freed slaves, between 1890 and 1910, just nineteen cases brought under it dealt with descendants of slaves, whereas 288 dealt with corporations.<sup>165</sup> More pointedly, Justice Hugo Black noted in 1938 that of the cases in which the Supreme Court applied the Fourteenth Amendment since *Santa Clara*, “less than one-half of 1 per cent[ ] invoked in it protection of the negro race, and more than 50 per cent[ ] asked that its benefits be extended to corporations.”<sup>166</sup> One of the principal mechanisms for using the Constitution to protect excessive corporate prerogative was the Due Process Clause.

Since corporations were safely adjudged to be “persons” under the Fourteenth Amendment in *Santa Clara*’s progeny, it followed that they enjoyed personhood rights provided in that provision. The Court began to vigorously deploy the Due Process Clause to strike down labor laws, minimum wage laws, and economic regulations.<sup>167</sup> From 1905 to 1935, nearly two hundred state laws regulating prices, labor, or labor conditions were struck down as violating the Due Process Clause of the Fourteenth Amendment.<sup>168</sup> The so-called “Substantive Due Process” doctrine was thus a mechanism for shielding excessive corporate prerogative from the

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<sup>161</sup> Theodore Roosevelt, President of the U.S., Fifth Annual Message (Dec. 5, 1905), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29546#axzz1VcSCEtZk>.

<sup>162</sup> Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864, 864-65; see also GANS & KENDALL, *supra* note 92, at 33.

<sup>163</sup> GANS & KENDALL, *supra* note 92, at 33.

<sup>164</sup> *Id.*

<sup>165</sup> HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES, 1492-PRESENT 255 (HarperPerennial rev. & updated ed. 1995).

<sup>166</sup> Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938).

<sup>167</sup> ANDREW P. NAPOLITANO, THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND 111 (2006).

<sup>168</sup> *Id.*

interference of state regulations.<sup>169</sup>

The case that symbolizes this doctrine, the use of the Due Process Clause to curtail state authority to regulate economic activity, is *Lochner v. New York*.<sup>170</sup> In *Lochner*, the Supreme Court overturned a New York law regulating sanitary and labor conditions in bakeries, including the number of hours a baker could work per day.<sup>171</sup> Although Justice Holmes's dissent is more famous,<sup>172</sup> Justice Harlan registered another notable dissenting opinion, in which he observed that the New York statute probably "had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing."<sup>173</sup> Justice Harlan rejected the false formal symmetry assumed by the majority that corporations, although legally "people," were on equal economic footing as natural people.<sup>174</sup>

Notably, the Court deviated briefly from the principles of *Lochner* in the 1908 decision in *Muller v. Oregon*, affirming a denial of women's rights under the Fourteenth Amendment.<sup>175</sup> In *Muller*, the Court upheld a state law limiting factory work by women to ten hours a day.<sup>176</sup> While the Court acknowledged that *Lochner* overturned a similar maximum hour law statute for men, the Court nonetheless upheld the law on grounds that differences between the sexes justified differential treatment.<sup>177</sup> In doing so, the

<sup>169</sup> *Id.*

<sup>170</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>171</sup> *Id.* at 64.

<sup>172</sup> *See id.* at 75. (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.")

<sup>173</sup> *Id.* at 69.

<sup>174</sup> *Id.*; *see also* Steven L. Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 554 (2009). Winter makes this point as well, and connects this false formalism with *Plessy*:

Thus, in *Lochner*, it is the formal individual – that is, the one endowed with the same legal rights as every other – who is free to contract as he or she sees fit regardless of the economic realities. So, too, in *Plessy*, the meaning of segregation is not a social or cultural fact, but a matter of interpretation which individuals are free to determine for themselves. Indeed, it is only in this formalized world of individuals abstracted from their social contexts that it is possible simultaneously to acknowledge that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs and yet insist that the resulting differences in white and black participation in the relevant market is nevertheless a matter of entrepreneurial choices.

*Id.* at 555 (citations omitted) (internal quotation marks omitted).

<sup>175</sup> *Muller v. Oregon*, 208 U.S. 412, 423 (1908) ("[W]ithout questioning in any respect the decision in *Lochner v. New York*, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution. . . .").

<sup>176</sup> *Id.* at 423.

<sup>177</sup> *Id.* at 421. The Court was persuaded that the public had an interest in the work hours of a woman such that Oregon statute did not conflict with the United States Constitution, because

[T]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are

Court was careful to explain that this was a narrow exception to its *Lochner* doctrine, and not a breach of its principles.<sup>178</sup> It is ironic that the Court's refusal to extend equal protection rights to women would prompt it to go so far as to briefly abrogate the corporate prerogatives it had worked so hard to fashion.<sup>179</sup> It would not be until 1971, in *Reed v. Reed*, that the Court would hold that sex discrimination was violative of the Equal Protection Clause.<sup>180</sup>

The *Lochner* doctrine was only half of a judicial formula circumscribing governmental interference in the market. While the Court was busy striking down state laws regulating labor and business conditions, it was also busy blocking federal activity designed to regulate the national economy. The Progressives relied on the Commerce Clause to enact laws aimed at abuses of corporate power. Accordingly, the Supreme Court routinely struck down congressional legislation as exceeding the scope of Congress's Commerce Clause authority as the parallel mechanism for protecting corporate prerogatives at the federal level.

Following the onset of the Great Depression and New Deal legislative activity, the Court's Commerce Clause rulings became a focal point of national attention. In the 1930s, New Deal legislation was passed to improve the condition of workers and the economy. This was viewed in some quarters as trampling on the rights of corporations. In a series of cases, the Supreme Court overturned many of these laws. The Court struck down the 1933 Agricultural Adjustment Act in 1936.<sup>181</sup> In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court struck down a portion of the National Industrial Recovery Act as unconstitutional.<sup>182</sup> Then a year later, in 1936, the Court struck down the Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.*<sup>183</sup>

Although many of these decisions were generated by a deeply divided

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not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

*Id.* at 421, 423.

<sup>178</sup> *Id.* at 423.

<sup>179</sup> Recall that the Court was confronted with a similar situation prior to *Dred Scott*, where its corporate standing doctrine threatened to open federal courts to blacks under Privileges and Immunities claims. Some jurists seriously considered curtailing corporate standing rights to ensure the exclusion of blacks. *See supra* notes 72-75 and accompanying text.

<sup>180</sup> *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

<sup>181</sup> *United States v. Butler*, 297 U.S. 1, 74-75 (1936) (declaring unconstitutional the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31).

<sup>182</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (declaring unconstitutional the National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933)).

<sup>183</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (declaring unconstitutional the Bituminous Coal Conservation Act of 1935, Pub. L. No. 74-402, 49 Stat. 991).

Court, President Roosevelt proposed a measure to overcome the judicial gridlock that would have authorized him to appoint additional Justices to the Court, if a sitting one continued to serve six months beyond his seventieth birthday.<sup>184</sup> In effect, it would have allowed the President to appoint up to six new Justices to the Court. Not coincidentally, one of the key swing votes on the Court, Justice Owen J. Roberts, switched his vote in *West Coast Hotel Co. v. Parrish*, in which the Court upheld Washington State's minimum wage law,<sup>185</sup> just two months after the President announced his plan.<sup>186</sup> Thus began the unraveling of the *Lochner* era.

In *United States v. Carolene Products Co.*, the Court declared that the government could regulate economic activity more broadly than was previously recognized.<sup>187</sup> In *Carolene Products*, the Court upheld a federal law regulating the contents of milk.<sup>188</sup> The importance of the decision was not simply its precedential value, but the new rule, announced by the Court, regarding economic regulation. The Court said that economic legislation was subject to a rational basis review, and would be upheld so long as it was “reasonabl[e].”<sup>189</sup> The case generally created a presumption in favor of economic regulations, implicitly overruling *Lochner*.<sup>190</sup>

While some might view *Carolene Products* as a practical response to a dire economic reality, the full significance of the decision lies in its famous footnote. In footnote four, *Carolene Products* offered a sweeping roadmap for Constitutional jurisprudence. Cited as one of the most famous footnotes in Constitutional history,<sup>191</sup> footnote four establishes tiered guidelines for scrutinizing various types of legislative activity.<sup>192</sup> In particular, the Court singled out for special protection laws that seem to fall within the text of the Bill of Rights, that restrict political processes, or that target “discrete and insular minorities.”<sup>193</sup> Footnote four is the precursor to contemporary

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184 CHEMERINSKY, *supra* note 144, at 255–56.

185 *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–400. (1937).

186 Hence, this decision is often called the “switch in time that saved nine.” CHEMERINSKY, *supra* note 144, at 256; *see also Parrish*, 300 U.S. at 398–400 (1937).

187 *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *see also infra* Part I.D.

188 *Id.* at 148.

189 *Id.* at 147.

190 CHEMERINSKY, *supra* note 144, at 623–625. The implications of this shift by the Court also suggested a shift in the public/private doctrine, but this later implication remains largely underdeveloped.

191 *See, e.g., id.* at 539, 624; Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165 (2004).

192 *Carolene Prods.*, 304 U.S. at 152 n.4.

193 *Id.*

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Supreme Court doctrine concerning the standards of review applicable under the Fourteenth Amendment.<sup>194</sup>

Throughout much of our history there has been a strong linkage between the issues of corporate prerogative, civil rights, and democratic values. In part, this is simply because there is a strong relation between corporate prerogatives, and the rights of workers, citizenship and civil rights. It is the issue of racial and civil rights that is the least intuitive. Yet, time and again, through the courts and in larger political culture, this relationship is clear. As a vehicle for expanding and protecting the rights of freed slaves, the Fourteenth Amendment was ultimately commandeered to shield corporate prerogatives. In *Carolene Products*, the Court reversed course on race and corporations: rolling back protections for corporations, while acknowledging special protection should be given to “discrete and insular minorities.”<sup>195</sup> This was not only a repudiation of *Lochner*, but of Jim Crow (and by extension *Plessy*), and would provide the basis for its eventual overthrow.

The new paradigm that appeared in footnote four of *Carolene Products* was a “mirror image” of the *Lochner* period: “judicial deference in areas of economic regulation and judicial protection of civil rights and liberties.”<sup>196</sup> To describe the magnitude of this transformation, Steven Winter compares it to a Kuhnian paradigm shift.<sup>197</sup> More dramatically, Cass Sunstein refers to it as the “Revolution of 1937.”<sup>198</sup> Regardless, *West Coast Hotel* and *Carolene Products* represent a jurisprudential break, and signaled a return to the values embodied in the Reconstruction Amendments.

Today, both the *Lochner* era Substantive Due Process doctrine and the narrower Commerce Clause reading have been paraded as the “Constitution in Exile” by many contemporary legal commentators, who call for a return to its principles.<sup>199</sup> In the mid-1990s, a more limited Commerce Clause

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Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious ... or national ... or racial minorities ... : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

<sup>194</sup> See CHEMERINSKY, *supra* note 144, at 540–543.

<sup>195</sup> *Id.*

<sup>196</sup> Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1462 (1990) (footnote omitted).

<sup>197</sup> *Id.* at 1453, 1462.

<sup>198</sup> CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 40–67 (1993).

<sup>199</sup> See, e.g., NAPOLITANO, *supra* note 167, at 111–160. “During the *Lochner* era, these doctrines were the Court’s principal source of defense guarding individual rights against governmental encroachment.” *Id.* at 111. Napolitano continues: “[h]opefully, the Supreme Court will continue the recent trend initiated by *Lopez*, *Morrison*, and *Jones* will uphold the true intent of the Constitution.” *Id.* at 159. The term “Constitution in Exile” was coined by Jeffery Rosen to describe those “who believe that the Supreme Court went awry in 1937 when it began

reading seemed poised to emerge. In *Lopez*, the Supreme Court struck down the federal Gun-Free School Zones Act as beyond Congressional authority under the Commerce Clause.<sup>200</sup> In *Morrison v. United States*, the Court overturned the Violence Against Women Act under the Commerce Clause as non-economic activity.<sup>201</sup> These decisions proved to be a mirage for believers in a pre-New Deal Commerce Clause jurisprudence. In *Gonzalez v. Raich*, six Justices upheld enforcement of the Controlled Substances Act, affirming that purely intrastate commerce may affect interstate economic activity.<sup>202</sup> As Jeffery Toobin put it, “[t]he pre-1995 status quo had returned.”<sup>203</sup>

As with the state action doctrine, the Court has at times narrowly read the Commerce Clause to limit regulation by government and expansively applied the Due Process Clause as mechanisms of corporate prerogative, shielding corporations not only from federal government regulation, but from state interference as well. Despite the persistent advocacy of the “constitution-in-exile” advocates, and even one clear vote on the Court,<sup>204</sup> neither a pre-New Deal reading of the Commerce Clause nor a *Lochner*-esque Substantive Due Process revival seems imminent. The legacy of these doctrines lies in the role they played historically, imbuing federal-state and public-private distinctions with cultural and political significance long past their doctrinal applicability.<sup>205</sup>

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to permit regulation of economic activity.” Mark Schmitt, *The Legend of the Powell Memo*, AM PROSPECT (April 27, 2005), <http://prospect.org/cs/articles?articleId=9606>. It should be noted that while offered as a defense of natural law and individual liberty, Napolitano’s book is eerily silent with respect to the concerns that animated early American liberalism, especially those regarding the “tyranny of the private sector” and concentrated wealthy interests.

200 *United States v. Lopez*, 514 U.S. 549, 567 (1995).

201 *United States v. Morrison*, 529 U.S. 598, 617–19 (2000).

202 *Gonzales v. Raich*, 545 U.S. 1, 17–18 (2005).

203 JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 302 (2007).

204 Jeffrey Rosin, *The Unregulated Offense*, N.Y. TIMES, April 17, 2005, available at <http://www.nytimes.com/2005/04/17/magazine/17CONSTITUTION.html> (examining the influences of the Constitution-in-exile movement upon Justice Thomas opinions); see also *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (“I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.”).

205 Laurence Tribe notes that the *Slaughter-House Cases* may have paved the way for the substantive due process doctrine by “affirm[ing] the duty of the Supreme Court to safeguard the autonomy of the federal and state governments within their respective spheres of power.” I LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1311 (3d ed. 2000). He goes on to say that:

[T]he Justices of the 1890–1937 era, likewise imbued with Miller’s sense of the state and federal spheres and persuaded of the need to protect their sanctity, discerned yet a third sphere – that of the citizen, whose autonomy both required federal protection and could be defended without federal suffocation of the states. . . . The Court thus came to perceive a perfect complementarity between the citi-



Although the influence of *Lochner* diminished by the 1970s, largely discredited as an anachronistic byproduct of an ideological Court, creative jurists were already searching for innovative ways to protect corporate actors from government regulation while expanding their prerogative.<sup>206</sup> If corporations could not defend themselves from economic regulation in the courts, perhaps another avenue would be more profitable. Given the strict regulation of campaign financing, and rules on lobbying, how might corporations achieve greater political influence?

#### D. Commercial Speech and Beyond

Following the logic of *Carolene Products*, the Supreme Court held that commercial speech was undeserving of any special First Amendment protections in *Valentine v. Christensen*.<sup>207</sup> Since commercial speech was considered economic activity, laws regulating economic activity were subject to rational basis review.

In 1975, the Supreme Court reversed course, reviving shades of *Lochner*. In that year, the U.S. Supreme Court decided *Bigelow v. Virginia*,<sup>208</sup> which pertained to advertisements for abortion services in newspapers. Writing on behalf of the Court, Justice Powell struck down a state law that had been used to prevent the publication of such advertisements, holding that “speech is not stripped of First Amendment protection merely because it” is a commercial advertisement.<sup>209</sup> Just one year later, the Court handed down *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>210</sup> in which it clarified *Bigelow*. The Court determined, according to Erwin Chemerinsky, “that the economic interests of the speaker

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zens’ right to “life, liberty, and property” and the state’s authority to preserve such life, liberty, and property through the exercise of its implied powers within settled common law standards. This complementarity permitted the turn-of-the-century Court to believe that the federal judiciary could protect citizen autonomy without intruding upon the state’s sphere – because any state action that *invaded* the liberty or property of its citizens was, by definition, *beyond* the state’s sphere.

*Id.* at 1311–12. In a sense, Tribe sees a parallel scheme between state/federal, public/private, and really, we might suggest, civil rights/corporate rights. *See id.*

<sup>206</sup> This should not be perceived as simply leaving the market alone, a form of market fundamentalism. *See supra* notes 8–9 and accompanying text. As Sunstein has shown, the market is fundamentally dependent on government and legal rules. *See* SUNSTEIN, *supra* note 198, at 72. Many market relations are conditioned by and dependent upon the existing system of legal rules, including property, tort, and contract law. *See id.*; *see also* BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS* (2011) (arguing that there is no such thing as a ‘free market,’ in the sense that every market operates by certain rules or social norms). The question is not whether a market should be regulated, but how. *Id.* At 242.

<sup>207</sup> *Valentine v. Christensen*, 316 U.S. 52, 54–55 (1942).

<sup>208</sup> *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>209</sup> *Id.* at 818 (citing *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. 376, 384 (1973); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

<sup>210</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

should not matter in deciding whether speech is protected by the First Amendment.”<sup>211</sup> The Court emphasized the importance of commercial speech in a democracy that depends on the free flow of information. As long as commercial information is not false or misleading, the Court said, the First Amendment protects it.<sup>212</sup> These decisions called into question the long-standing distinction between commercial speech and core political speech. The implication of extending greater First Amendment protections to corporations quickly manifested.

In the 1977 *Bellotti* decision, also authored by Justice Powell, the Court held that the First Amendment protects corporate expenditures in support or opposition to ballot initiatives.<sup>213</sup> Massachusetts sought to criminalize banks or business corporations from making contributions or expenditures designed to influence certain ballot initiative campaigns. In overturning the statute, Justice Powell announced the principle that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>214</sup>

The dissenting Justices foresaw the consequences of extending corporations the same First Amendment rights as natural persons. Then-Justice Rehnquist, in dissent, warned that “the blessings of potentially perpetual life and limited liability . . . so beneficial in the economic sphere, pose special dangers in the political sphere.”<sup>215</sup> Those dangers were expressed by Justice White, joined by Justices Brennan and Marshall:

It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. . . . The State need not permit its own creation to consume it.<sup>216</sup>

Already, the Court’s members realized that heightened protection for commercial speech was one step removed from protecting corporate speech in political campaigns. Although Justice Powell’s majority opinion distinguished between cases involving candidates for public office and referenda on issues or ballot initiatives such as those at issue in *Bellotti*, it was not clear that the principle he announced in support of his decision would be easily cabined. Justice Powell asserted that the “risk of corruption perceived in cases involving candidate elections . . . simply is not present

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211 CHEMERINSKY, *supra* note 144, at 1085.

212 *See id.* at 1086.

213 *See* First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 775, 802 (1978).

214 *Id.* at 777.

215 *Id.* at 825–26 (Rehnquist, J., dissenting).

216 *Id.* at 809 (White, J., dissenting). In addition to those rights listed by Justice White, we would also add civil and environmental rights.

in a popular vote on a public issue.”<sup>217</sup> However, more recent cases, such as *Citizens United v. FEC*,<sup>218</sup> erected on foundation constructed by Justice Powell, have justified those dissenting concerns.

In *Citizens United v. FEC*, the Supreme Court held that corporations’ independent expenditures on political campaigns enjoy First Amendment protection.<sup>219</sup> In its most recent commercial speech case, *Sorrell v. IMS Health Inc.*,<sup>220</sup> a majority of the Court appeared to apply a stricter form of scrutiny protective of corporate speech rights from a state patient confidentiality law that, in the words of Justice Breyer and the other dissenters, harkens back to the *Lochner* era, in which the Court regularly substituted its own judgment for that of legislatures in matters of ordinary economic legislation.<sup>221</sup>

Justice Lewis Powell was more than the author of the Supreme Court’s 1970s commercial speech decisions, he was also their architect. Powell was a corporate lawyer from Virginia and sat on the board of eleven major corporations.<sup>222</sup> Just prior to his nomination to the Court, Powell devised a comprehensive and farsighted strategy to expand corporate prerogative, one that might extend corporate power into every facet of American democracy.

Known as “The Powell Memo” or the “Powell Manifesto,” Lewis Powell’s 6,000-word confidential memorandum to the Director of the Chamber of Commerce was a blueprint for expanding corporate power.<sup>223</sup> The memo begins by asserting that America’s free enterprise system is under “broad attack.”<sup>224</sup> He identifies the sources of the attack, the tone and expression of the attack, and sets about a systematic defense. He criticizes the “apathy” of business to engage in politics and political debate.<sup>225</sup> He calls for the development of sustained political organization by corporate elites, with specific objectives for universities and colleges, media, scholarly research, political engagement, and most importantly, the

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217 *Id.* at 790.

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

219 *Citizens United*, 130 S. Ct. at 896 (2010).

220 *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

221 *Id.* at 2685 (Breyer, J., dissenting).

222 *The Powell Memo (also known as the Powell Manifesto)*, RECLAIMDEMOCRACY.ORG (Apr. 3, 2004), [http://reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html) [hereinafter *Introduction to The Powell Memo*].

223 *Id.* For a history of the memo, see KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN 156–165* (2009).

224 Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman of the Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), available at [http://reclaimdemocracy.org/corporate\\_accountability/powell\\_memo\\_lewis.html](http://reclaimdemocracy.org/corporate_accountability/powell_memo_lewis.html) [hereinafter *The Powell Memo*].

225 *Id.*

courts.<sup>226</sup>

Some have described the Powell Memorandum as the “[a]ttack [m]emo [that] [c]hanged America.”<sup>227</sup> Some see in its recommendations the inspiration for the institutions and organizations that have arisen since, such as conservative think tanks.<sup>228</sup> Ultimately, it is probably accurate to say that the memo prompted major corporate leaders, and by extension, corporations themselves, to become more politically active.<sup>229</sup>

Although the degree of influence and reach of the memo’s ideas has been contested,<sup>230</sup> it remains undisputed that Lewis Powell himself possessed considerable influence over our nation and its law. Just a few months after drafting the memo, he was nominated to the U.S. Supreme Court by President Richard Nixon.<sup>231</sup> It should come as little surprise, therefore, that Powell identified the judiciary as an agent of change:

American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change. . . . Labor unions, civil rights groups and now the public interest law firms are extremely active in the judicial arena. Their success, often at business’s expense, has not been inconsequential.<sup>232</sup>

It is important to note that Justice Powell saw corporate interests as antithetical, or at least in tension, with the interests’ civil rights groups, labor unions, and public law interests groups. This is no small matter. Powell explicitly articulated a strategy that supporters of expanded corporate prerogative had now employed for decades.<sup>233</sup> The expansion of excessive corporate prerogative is checked not only by the state, through regulation, but also by organized labor and other public interest groups, which call upon the apparatus of the state to enforce law and promote the public good. As a school board member, and in fact, chairman of the Richmond School Board from 1952 to 1961,<sup>234</sup> Justice Powell would have been intimately familiar with the NAACP legal strategy to dismantle segregation and the

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<sup>226</sup> *Id.*

<sup>227</sup> Jerry Landay, *The Powell Manifesto: How a Prominent Lawyer’s Attack Memo Changed America*, MEDIA TRANSPARENCY (Aug. 20, 2002), <http://old.mediatransparency.org/story.php?storyID=21>.

<sup>228</sup> See *Introduction to The Powell Memo*, *supra* note 222.

<sup>229</sup> See JOHN B. JUDIS, *THE PARADOX OF AMERICAN DEMOCRACY: ELITES, SPECIAL INTERESTS, AND THE BETRAYAL OF PUBLIC TRUST* 117 (2000).

<sup>230</sup> See Schmitt, *supra* note 199.

<sup>231</sup> Importantly, Powell sailed through confirmation hearings without his essay coming into the light. See Landay, *supra* note 227.

<sup>232</sup> *The Powell Memo*, *supra* note 224.

<sup>233</sup> See *Introduction to The Powell Memo*, *supra* note 222.

<sup>234</sup> Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 438 (2000).

efficacy of that strategy. He was also a partner at a firm that was hired by Virginia to fight the *Brown* decision, although he personally took no role in the case in that capacity.<sup>235</sup>

Given his strategic vision, it cannot be a coincidence that Justice Powell was so influential in expanding protection for corporate speech, with important implications for our democracy. Justice Powell was the instrumental author of cases that dramatically expanded corporate speech protections.<sup>236</sup> Since *Carolene Products* imposed rational basis review on laws regulating economic activity, Justice Powell adopted the argument that commercial speech was more than just economic activity. Protecting commercial speech was one step removed from protecting corporate political involvement, as illustrated in cases like *Citizens United*. This allowed Justice Powell to undermine *Carolene Products* from within; to affirm its essential premise while undermining its significance. Although corporations may be subject to economic regulation, they could still help elect business-friendly legislators.

While Powell was enacting his vision of corporate power, he was also eviscerating the rights of marginalized populations under footnote four of *Carolene Products* in which it was asserted that heightened review should be reserved for legislation that disadvantages “discrete and insular minorities.” It was Powell’s opinion in *Bakke* that upended this long established framework:

[P]etitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a “discrete and insular minority” requiring extraordinary protection from the majoritarian political process. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of “suspect” categories or whether a particular classification survives close examination.<sup>237</sup>

In throwing out the *Carolene Products* approach for heightened protection for discrete and insular minorities, Justice Powell was the first to enact a new form of colorblindness and instantiate the anti-classification principle as a general principle of law applicable to both invidious discrimination and “benign,” compensatory, and remedial approaches.<sup>238</sup> In

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235 *Id.*; see also John A. Powell & Stephen Menendian, *Parents Involved: The Mantle of Brown, the Shadow of Plessy*, 46 U. LOUISVILLE L. REV. 631, 700–701 (2008).

236 *See Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 4 (1986); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 532 (1980); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 558 (1980); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 767 (1977).

237 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (footnotes omitted) (citations omitted).

238 *See* Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Col-*

so doing, strict scrutiny became the applicable standard of review for all racial classifications.<sup>239</sup> In authoring *Bakke*, Powell was well aware of what was happening with civil rights, having observed it at both the local and national level. Given the strong link between corporate prerogative and limited rights for people, it should not be surprising that Powell addressed both of these areas during his tenure.

Justice Powell's memo sketched a strategic vision to reinvigorate corporate standing and expand corporate power and influence in the United States. He advanced a plan that would be partially implemented through courts<sup>240</sup> because, as Landay suggests, Powell knew "that changes in policy that could not readily be achieved by legislative or bureaucratic means might more easily be won in court."<sup>241</sup> Following his nomination to the Court, nearly everything he proposed has been implemented, whether by design or not.<sup>242</sup> It is not coincidental that he undermined *Carolene Products* in other ways as well. In his opinion in *Bakke*, Justice Powell eviscerated the court's role in protecting discrete and insular minorities: again, expanding excessive corporate prerogative while limiting the rights of marginalized communities. Justice Powell may not have reversed the Revolution of 1937, but he engineered an end run around it that would limit the rights of marginalized groups and promote the expansion of corporate prerogative.

## II. BEYOND PUBLIC/PRIVATE

In *Kelo v. City of New London*, the Supreme Court reviewed the constitutionality of the condemnation of a stretch of riverfront homes when the admitted purpose of the governmental taking was to enable

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orblindness, 59 STAN. L. REV. 985, 1039 (2007).

<sup>239</sup> Prior to the 1989 decision *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), all racial classifications were not subject to strict scrutiny review. Cf. CHEMERINSKY, *supra* note 144, at 694 n.24 and accompanying text (indicating that the Court determined that all racial classifications are subject to strict scrutiny following the Court's decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *Palmore v. Sidoti*, 466 U.S. 429 (1984)). The Court distinguished between classifications that were intended to improve opportunities for traditionally disadvantaged groups and classifications designed to harm discrete and insulate minorities. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980). Consequently, "benign" racial classifications would be subject to intermediate or a lesser standard of review, while intentionally discriminatory classifications would be subject to strict scrutiny review. *See id.* In *Croson*, however, a majority of the Court asserted all state-based racial classifications were subject to strict scrutiny view. *Croson*, 488 U.S. at 493. Furthermore, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), the Court asserted that that this was true for federally imposed racial classifications as well. Since then, all state-imposed racial classifications, whether by the federal government or state and local municipalities, are subject to strict scrutiny review. *See* CHEMERINSKY, *supra* note 144, at 695 n.26 and accompanying text.

<sup>240</sup> *The Powell Memo*, *supra* note 224.

<sup>241</sup> Landay, *supra* note 227.

<sup>242</sup> *See* Schmitt, *supra* note 199.

private redevelopment by the pharmaceutical giant Pfizer, Inc.<sup>243</sup> The Fifth Amendment guarantees that “private property [shall not] be taken for public use, without just compensation.”<sup>244</sup> The Court has expansively interpreted the public use requirement to encompass any “public purpose.”<sup>245</sup> Ultimately, the Court held that the condemnation did not violate the public use requirement; a public taking for private use on behalf of a multi-national corporation constituted a “public purpose.”<sup>246</sup> The *Kelo* decision illustrates the fluidity of public/private distinctions, and the difficulty in drawing sharp lines between them in terms of either means or ends.

Recalling Justice Harlan’s reading of the Fourteenth Amendment,<sup>247</sup> if a government taking on behalf of a private corporation constitutes a public purpose, why is government intervention in the market on behalf of civil rights considered private interference, and beyond the bounds of government authority to redress? We are not suggesting that Fifth Amendment jurisprudence calls into question the validity of the state action doctrine, but that something else may be at work. These domains serve power functions, and operate to protect the prerogatives of corporations and white space respectively. Perhaps what is involved is not public or private, but corporate. These domains have been wrongly conflated. Privatization is not a shift from the public sphere, meaning government, to private individuals, but more frequently a shift from public to corporate space. In *Kelo*, the Court insisted that the public nature of the taking was maintained despite being for private corporations.<sup>248</sup>

In this part of the article we assert that the public/private distinction has been fundamentally misconceived. The ideology of privatization and governmental non-interference in the economy is based on the view that there is a clear and conceptually coherent public/private distinction. Building on the insights of critical legal scholars, we will argue not only that this distinction is empirically amorphous and conceptually flawed, but also that a very different set of domains has been constructed. Even if there were a coherent distinction between public and private, it is our assertion that corporations do not fall easily into either. The aggressive assertion of corporate prerogatives is better characterized in other ways. Such a perspective renders more clearly the threats that corporate space poses to both public and private.

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243 *Kelo v. New London*, 545 U.S. 469, 472–75 (2005). Note that this land was not blighted, but valuable riverfront property. *Id.* at 474–75.

244 U.S. CONST. amend. V.

245 *Kelo*, 545 U.S. at 479–80 (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896)).

246 *Id.* at 489–90.

247 See *supra* note 134–41 and accompanying text.

248 *Kelo*, 545 U.S. at 486.

A. *Public/Private: A Flawed Distinction*

In political theory, the public/private distinction emerged and acquired significance during the Reformation and Enlightenment.<sup>249</sup> The Protestant Reformation from Luther on emphasized individual conscience and individual – or private – moral space, based on direct communion with God, unmediated by clerical authority.<sup>250</sup> In that respect, the Protestant Reformation brought into politics and religion a private domain based in part on a “private consciousness.” Enlightenment thinkers sought to insulate this domain from both intrusive political and clerical authority with First Amendment guarantees such as freedom of religion and the Establishment Clause.<sup>251</sup>

These origins inform our understanding of private space today. We associate “private” space with our home or other domains perceived to be free from government surveillance, where there is maximal freedom, privacy, and minimal governmental regulation.<sup>252</sup> This space retains a sacred aura. In contrast, we associate “public” space with government activity or space where everyone is welcome. We think of public libraries, parks, roads and waterways, and public services, such as police, fire, and educational provisions, which are available to all citizens. Unlike the “private” space, the “public” space is earthly and secular.

Although the public/private distinction arose earlier, it only became central to *legal* thought and discourse – as distinguished from political and theological – during the nineteenth century. This distinction became cemented as a project of nineteenth-century jurisprudence. In fact, “[o]ne of the central goals of nineteenth-century legal thought was to create a clear separation between constitutional, criminal, and regulatory law – public law – and the law of private transactions – torts, contracts, property, and commercial law.”<sup>253</sup> This objective emerges early in the nineteenth century.

A landmark case that connects corporate power and inscribes the public/private distinction is the *Dartmouth College v. Woodward* case of 1819.<sup>254</sup> The *Dartmouth* decision constitutionalized the tendency to define corporations

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249 See Powell & Menendian, *supra* note 19, at 1051.

250 *Id.* at 1040–41.

251 U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”).

252 See *infra* note 332 and accompanying text.

253 Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982).

254 *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); see also *supra* notes 33–59 and accompanying text (discussing the effect of the *Dartmouth College* decision in emancipating corporations from state control).



in terms of “dichotomous public and private spheres.”<sup>255</sup> Throughout the nineteenth century and well into the twentieth century, many of the bases of excessive corporate prerogative were developed through a discourse and jurisprudence of the public/private. As we examined in Part I, corporations were formed as quasi-public entities, and through an ideological struggle became quasi-private.<sup>256</sup> Each of the bases of excessive corporate prerogative surveyed in Part I is premised on the public/private distinction. In each case, the Court is helping to generate legal categories that depend upon and shape pre-existing cultural categories. The public/private distinction becomes a major project of nineteenth-century law because it resolves difficult and thorny legal issues in ways that expand corporate prerogative while shielding private discrimination from state regulation.

By generating legal rules that depend upon this distinction, the question of whether activity is public or private is an issue of great importance. Private activity or behavior under current jurisprudence generally does not trigger constitutional protection.<sup>257</sup> Elaborate doctrines have developed to determine whether something is “state action” or not.<sup>258</sup> In contrast, public

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255 Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 240 (1985) (reviewing HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW (1983)). Not only was this the effect of Chief Justice Marshall’s opinion on behalf of the Court, but the concurring opinion of Justice Story does so even more pointedly:

Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and I many respects, they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, public corporation. So, an [sic] hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much so, indeed, as if the franchises were vested in a single person.

*Dartmouth College*, 17 U.S. at 668–69 (1819) (Story, J., concurring).

256 See *supra* Part I.A.

257 The Thirteenth Amendment is the notable exception. U.S. CONST. amend. XIII; see also *supra* note 141 and accompanying text (describing the application of the Thirteenth Amendment).

258 These doctrines originate in the *Civil Rights Cases*. See Part I.B. “[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials.” *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (holding that the enforcement of racially restrictive covenants by the state judicial officers is state action). For an elaboration of theories applying to “hard cases” – public function theory and nexus theory, see Daphne Barak-Erez, *A State Action for an Age of Privatization*, 45 SYRA-

actors pursuing matters in the course of their official duties sometimes enjoy immunity or qualified immunity from prosecution.<sup>259</sup> Public defendants, whether persons or institutions, are subject to statutes, rules, regulations and codes of conduct that do not apply to private defendants.<sup>260</sup>

The relevant legal categories fashioned and applied by the Court constrain the range of possible outcomes.<sup>261</sup> Because the Court operates from a precedential methodology, prior case law “will have already demarcated the arguments and counterarguments” that will be recognized as persuasive.<sup>262</sup> Cases such as *Dartmouth College* were, in one sense, decided at the epistemic level rather than on the basis of a legal rule.<sup>263</sup> If *Dartmouth* was determined to be a private institution, then the New Hampshire legislature’s attempt to replace the trustees violated the Contract Clause. But if *Dartmouth* was a public institution, then the legislature’s efforts were valid. Similarly, if a law passed under the Fourteenth Amendment targets private conduct and not state action, then it may be held invalid. In that respect, these cases depend in some measure on pre-existing, extra-legal or cultural meanings.

At the same time, these legal determinations in turn reinforce or have the power to change cultural meanings that affect political discourse, as we saw from the ways in which the *Dartmouth College* decision influenced the debates over the Second Bank of the United States.<sup>264</sup> Justice Harlan’s jurisprudence not only rejects a sharp public/private distinction in interpreting the Fourteenth Amendment, he reconfigures the meaning of citizenship in robust terms that have long since evaporated in the wake of *Slaughter-House* and *The Civil Rights Cases*.<sup>265</sup> Had his constitutional understanding prevailed, the salience of the public/private distinction as a decisive legal category would be greatly diminished.

While we find Justice Harlan’s interpretation of the Fourteenth Amendment and his expansive Constitutional vision persuasive, there is a deeper issue at stake. While one cannot deny that the public/private distinction is a meaningful legal distinction, there is a separate question of whether it is a coherent legal distinction. Some scholars complain that this dichotomy has “lost its ability to distinguish.”<sup>266</sup> Even Chief Justice

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CUSE L. REV. 1169, 1174–83 (1995).

<sup>259</sup> See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 417–420 (1976) (discussing the Court’s qualified immunity jurisprudence).

<sup>260</sup> *Id.*

<sup>261</sup> See *Winter*, *supra* note 196, at 1452, 1475–76.

<sup>262</sup> *Id.* at 1453.

<sup>263</sup> See *id.* at 1452.

<sup>264</sup> See *supra* note 58 and accompanying text.

<sup>265</sup> See *supra* notes 134–41 and accompanying text (discussing Justice Harlan’s dissent in the *Civil Rights Cases*, 109 U.S. 3, 26 (1883)).

<sup>266</sup> Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*,

Warren, in *Curtis Publishing Co. v. Butts*, wrote that “the distinctions between governmental and private sectors are [increasingly] blurred.”<sup>267</sup>

In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court struck down two voluntary integration plans in Seattle, Washington and Louisville, Kentucky.<sup>268</sup> These plans employed a variety of assignment mechanisms to ensure that no school was racially imbalanced within a wide range, usually plus or minus fifteen percent of the district as a whole. These plans were intended not only to sustain the hard won gains of integration, but also to ensure that no student was racially isolated, despite patterns of residential segregation. Over the past few decades, and most visibly in *Milliken v. Bradley*, the courts have drawn a distinction between state sponsored segregation,<sup>269</sup> the sort found in the *Brown* cases, and *de facto* segregation that is described by Justice Thomas as the “result . . . of innocent private decisions.”<sup>270</sup>

Although Justice Kennedy voted to strike down the plans at issue, he upheld the legal principle that promoting racial diversity and ameliorating the harms of racial isolation were compelling governmental interests. In doing so Justice Kennedy rejected the argument that government may only remedy *de jure* segregation in seeking to achieve the elusive objective of equal educational opportunity. He said that “[t]he distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. *Laws arise from a culture and vice versa*. Neither can assign to the other all responsibility for persisting injustices.”<sup>271</sup>

We agree. A generation earlier, Justice Powell went even further. Justice Powell rejected the *de jure/de facto* distinction as one that “no longer can be justified on a principled basis.”<sup>272</sup> In his view, “[p]ublic schools are creatures of the State, and whether the segregation is state-created

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2008 UTAH L. REV. 635, 636 (2008).

267 *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring)

268 *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–10 (2007).

269 *Milliken v. Bradley*, 418 U.S. 717, 721–22, 752–53 (1974).

270 *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring).

271 *Id.* at 795 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). Justice Kennedy, repeating the holding of *Crosan*, insisted that the school districts effort in *Parents Involved* failed to structure its student assignment plan in a way that would survive strict scrutiny. *Id.* at 783–84, 787. As discussed earlier, this approach is traced back to footnote four of *Carolene Products*. See *supra* notes 187–95 and accompanying text. The position adopted by Justice Kennedy in *Parents Involved* is distinct from Justice Powell's position in *Bakke*, which radically changed the meaning of footnote four. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978) (Powell, J.) (stating that the protections of the Fourteenth Amendment should not be applied to one specific racial minority because “the United States had become a Nation of minorities”); see also *supra* note 237 and accompanying text (discussing Justice Powell's misapplication of *Carolene Products*' footnote four).

272 *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 224 (1973) (Powell, J., concurring in part and dissenting in part).

or state–assisted or merely state–perpetuated should be irrelevant to constitutional principle.”<sup>273</sup> Justice Powell developed this view in light of his long experience as a school board member.<sup>274</sup>

In Rand Paul’s view,<sup>275</sup> the “intent of the [Civil Rights Act] was to stop discrimination in the public sphere and halt the abhorrent practice of segregation and Jim Crow laws.”<sup>276</sup> The Civil Rights Act, however, was not simply targeting state sponsored behavior. The reason for this is the reason that Justice Kennedy articulated in *Parents Involved*. Jim Crow laws and the public segregation and discrimination embodied in them were a manifestation of the values of the society, of the extant social norms and mores, and the individuals within it. Those values were also present in the north, except that northern segregation was more a matter of practice and custom than state legislation. Without question, the Civil Rights Act targeted laws, but it also targeted the more general practices, values, norms, and prejudices from which those institutional forms of discrimination were an expression. It encompassed the North, not simply the South. To suggest otherwise is to misunderstand not only the intended scope of the Act, but the cultural significance of it as well. Rand Paul and others rewrite history by suggesting that the Civil Rights Acts were merely targeting the institutionalized expression of these values. Although it was passed in part, under Section 2 of the Thirteenth Amendment, the Fair Housing Act (Title VIII of the Civil Rights Act of 1968),<sup>277</sup> which explicitly targets private housing discrimination, belies this point.

There is perhaps no better example of the hydraulic relationship between culture and law than the infamous *Dred Scott* decision.<sup>278</sup> Chief Justice Taney held that persons of African descent were not—and could never be—citizens of the United States because white folks, *not simply white governments*, regarded them as inferior.<sup>279</sup> It was the way in which white people in their *private* pursuits regarded black folk, not simply how

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273 *Id.* at 227 (Powell, J., concurring in part and dissenting in part).

274 See Powell & Menendian, *supra* note 235, at 700 n.328.

275 Much of the subsequent criticism of Rand Paul’s view of the Civil Rights Act that occurs between notes 275 and 288 is directly quoted from an essay by the co–author. Quotation marks and indications of alteration have been omitted for purposes of clarity and readability. Citations are made to the original sources. Stephen Menendian, *Why Libertarians (and Rand Paul) Are Wrong About the Civil Rights Act*, HUFFPOST POLITICS (May 27, 2010, 9:44 AM), [http://www.huffingtonpost.com/stephen-menendian/why-libertarians-and-rand\\_b\\_591682.html](http://www.huffingtonpost.com/stephen-menendian/why-libertarians-and-rand_b_591682.html). Further citations to this source are omitted for purposes of readability. Cf. Joyner, *supra* note 119; and Weigel, *supra* note 119.

276 Stephanie Condon, *Rand Paul: I Support the Civil Rights Act*, POLITICAL HOTSHEET (May 25, 2010, 2:35 PM), [http://www.cbsnews.com/8301-503544\\_162-20005512-503544.html](http://www.cbsnews.com/8301-503544_162-20005512-503544.html).

277 Civil Rights Act of 1968 §§ 804–805, 42 U.S.C. §§ 3604–3605 (2006).

278 *Scott v. Sandford*, 60 U.S. 393 (1856).

279 *Id.* at 404–05.

states and white governments regarded them that proved legally decisive:

[Persons of African descent] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in *social or* political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. *This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics*, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in *their private pursuits*, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.<sup>280</sup>

Because blacks were regarded as inferior, both in “morals as well as in politics,” Chief Justice Taney reasoned that they could not possibly have been part of the political community that formed the nation, and therefore could not be full and equal citizens of that nation.<sup>281</sup> It was the prejudices of white people, *not* the discrimination and prejudices of the states, which ultimately led the Chief Justice to inscribe a race line into the heart of American citizenship. The Fourteenth Amendment, the Reconstruction Amendment that underpins the Civil Rights Acts, was passed specifically for the purpose of overturning Chief Justice Taney’s legal holding.<sup>282</sup> It did precisely that, first and foremost, by extending the status of national citizenship to all persons born or naturalized here, not simply white persons.<sup>283</sup> And it was passed over the objection of President Johnson, who vetoed the precursor Civil Rights Act of 1866 precisely because he believed it went too far, reaching beyond state action and into private conduct, and was therefore constitutionally objectionable.<sup>284</sup> In fact, the Fourteenth Amendment was passed to override such objections, and put them to rest forever.

The distinction that Rand Paul is making between public and private discrimination, between state-sponsored segregation like Jim Crow and private exclusion, is both seductive and false. Not only are laws a product of private values, but laws also shape and influence private attitudes. A history of race in North America makes clear that racial attitudes and racial prejudices were, in large measure, a product of colonial laws, such as colonial

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<sup>280</sup> *Id.* at 407 (emphasis added).

<sup>281</sup> *Id.*

<sup>282</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73–74 (1872).

<sup>283</sup> *Id.*; see also *supra* note 86.

<sup>284</sup> Veto Message from Andrew Johnson, President of the U.S., to the Senate of the U.S., (Mar. 27, 1866) in 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, § 2: ANDREW JOHNSON, APRIL 15, 1865 – MARCH 4, 1869, at 72–80 (1902), available at <http://onlinebooks.library.upenn.edu/webbin/gutbook/lookup?num=12755>. His veto message in style and substance foreshadows both the states’ rights and state action doctrines as mechanisms of white racial prerogative.

anti-miscegenation statutes, which accelerated the understanding of racial difference.<sup>285</sup> In fact, colonial elites (the colonies were not democracies) passed the first anti-miscegenation law in 1662, and did so specifically to keep the races apart as a way of racializing and color-coding labor, a process instrumental to the development and promotion of racial prejudice that would accompany and come to justify full blown racial slavery.<sup>286</sup> As Steve Martinot points out, if there had been “general antipathy to mixed marriage, its occurrence would have been minimal, requiring little or no official prohibition.”<sup>287</sup> As a result, these colonial statutes, and others serving similar ends, were a precondition to the full development of a racial worldview, and the racial prejudice that it engendered. In other words, these public acts were designed to promote private prejudices, and succeeded in accomplishing that end.

Private attitudes and private market decisions are often a product of or influenced by state action, and state action is often a product of or influenced by private attitudes and private conduct. Private actions and inactions have public consequences and vice versa.<sup>288</sup> To take one example, the Court has recognized the ways in which public inaction can perpetuate private discrimination. In *Crosan v. City of Richmond*, Justice O'Connor affirmed the idea that local governments may take action to redress private discrimination occurring within their jurisdictions.<sup>289</sup> Moreover, she went on to say that cities and localities need not sit by idly if they become a “passive participant” in a system of exclusion.<sup>290</sup>

The relationship between public and private is neither clearly demarcated nor easily confined in its immediate consequences. The error of the *Dartmouth College* decision was not simply deciding that Dartmouth was a private institute (which it clearly was not, at least, not exclusively),

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285 STEVE MARTINOT, *THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE* 54–57 (2003). There is often described a chicken-or-egg quality to slavery and racial prejudice. Whichever came first, they clearly supported each other.

286 *Id.* at 56–57.

287 *Id.* at 55.

288 See Richard Stengel, *One Document, Under Siege*, *TIME*, July 4, 2011, at 30, 40 (“But what happens when that healthy, young uninsured woman goes skiing and tears her anterior cruciate ligament and has to have emergency surgery? She can’t afford to pay the full fee, and the hospital absorbs much of the cost. That’s basically a tax on everyone who does have health insurance, and it ultimately raises the cost of hospital care and insurance premiums. . . . [D]oing nothing can be a private decision with public consequences..”).

289 *City of Richmond v. J.A. Crosan Co.*, 488 U.S. 469, 491–92 (1989) (“It would seem equally clear, however, that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction.”).

290 *Id.* at 492 (“[I]f the city could show that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.”).

but the failure to recognize its public features.<sup>291</sup> As Judge Henry Friendly put it, “[t]he error of the Marshall court lay in assuming a complete dichotomy between public and private; it failed to realize that what seems to be a private corporation may be public as well.”<sup>292</sup> Broadly speaking, the *Dartmouth* decision instantiated a shift in the political culture that would reverberate throughout the nineteenth century, from the debate over the Bank of the United States through the Reconstruction period.<sup>293</sup> The public/private distinction acquired critical legal significance, and the impulse to sort actors, institutions, and functions into one of these dichotomous categories was validated – obscuring the dynamic relationship across each domain.<sup>294</sup> Justice Harlan’s dissenting opinion in the *Civil Rights Cases* underscores this point.<sup>295</sup> It is not simply that the Civil Rights Acts and the Reconstruction Amendments target both private and public conduct, and that the distinction between the two should not be a determinative basis for legislative or judicial reasoning, but that the private market and state action is not as neatly divisible as we currently presume.

There is a complex and dynamic relationship between public and private institutions, and public and private actors.<sup>296</sup> Neither the identity of the actor, the source of funding, nor the function of the activity can serve as a sole criterion for delineating the question of whether the actor, institution, or function is public or private.<sup>297</sup>

In our political culture, it is typical to think of housing as a largely private good. Yet, consider the government actions that both precondition and promote homeownership. As a result of the Selective Service Readjustment Act (the G.I. Bill),<sup>298</sup> more Americans were able to buy a home rather than rent, for the first time in United States history.<sup>299</sup> It did so by capping interest rates, waiving down payments, and providing a thirty-year loan.<sup>300</sup> Consequently, between 1945 and 1954, 13 million new homes were built in

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291 See *supra* notes 46–52 and accompanying text.

292 FRIENDLY, *supra* note 50, at 10.

293 See *supra* notes 53–60 and accompanying text.

294 See *supra* notes 260–65 and accompanying text.

295 For a discussion of Justice Harlan’s dissent in the *Civil Rights Cases*, 109 U.S. 3, 33–62 (1883), see *supra* notes 134–41 and accompanying text.

296 Beyond the origins of the public–private distinction, we find many ways in which this distinction bleeds or is not nearly as clear as one might think.

297 See Barak–Erez, *supra* note 258, at 1191–92 (1995) (arguing that inadequate protection of constitutional rights may result from a more limited recognition of state function because of the shift of state services into the hands of private entities).

298 Servicemen’s Readjustment Act of 1944, Pub. L. No. 78–346, 58 Stat. 284 [hereinafter the G.I. Bill].

299 See George Steven Swan, *The Law and Economics of Affirmative Action in Housing: The Diversity Impulse*, 15 U. MIAMI BUS. L. REV. 133, 160 (2006).

300 *Id.*

the United States.<sup>301</sup> From 1946 to 1947, Veterans Administration mortgages comprised more than forty percent of the total mortgages on the market.<sup>302</sup> Federal policy enabled broad homeownership.

The Federal–Aid Highway Act of 1956,<sup>303</sup> signed by President Eisenhower on June 29, 1956, launched the construction of the interstate highway system, the largest public works project up to that point in American history.<sup>304</sup> As President Eisenhower later recounted:

More than any single action by the government since the end of the war, this one would change the face of America . . . Its impact on the American economy – the jobs it would produce in manufacturing and construction, the rural areas it would open up – was beyond calculation.<sup>305</sup>

The expansion of credit and transportation networks facilitated the creation of suburbs, and drove many upper– and middle–class families to abandon the central cities in favor of suburban life.<sup>306</sup> At the same time, it meant many new developments and increasing private homeownership. The Federal Housing Administration and the G.I. Bill each played a vital role in this process.<sup>307</sup>

Private housing markets, private developments, and private modes of transportation may all appear to be market decisions, but they are equally the product of public policy decisions.<sup>308</sup> This may seem obvious in the case of transportation decisions that favor the construction of roads and highways over the development of public transit networks, but it is no less the case for private housing markets and even private developments. Even though Fair Housing Authority’s (FHA) underwriting manuals no longer contain racist language, FHA policy has continued to influence the development of private space.<sup>309</sup> For example, in 1964, the FHA recommended a development plan promoting the control of recreation centers and parks by private homeowner associations.<sup>310</sup> This recommendation arrived just as

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Federal–Aid Highway Act of 1956, Pub. L. No. 84–627, 70 Stat. 374.

<sup>304</sup> DWIGHT D. EISENHOWER, MANDATE FOR CHANGE, 1953–1956, at 548 (1963).

<sup>305</sup> *Id.* at 548–49.

<sup>306</sup> See Chad D. Emerson, *All Sprawled Out: How the Federal Regulatory System Has Driven Unsustainable Growth*, 75 TENN. L. REV. 411, 421–22 (2008).

<sup>307</sup> See Swan, *supra* note 299, at 135, 155, 197; see also GEORGE LIPSITZ, HOW RACISM TAKES PLACE 27–28 (2011).

<sup>308</sup> See LIPSITZ, *supra* note 307, at 31.

<sup>309</sup> See LIPSITZ, *supra* note 307, at 31, 34.

<sup>310</sup> *Id.* at 31. It is no coincidence that this occurred “at the peak of the civil rights movement’s mobilizations.” *Id.* As this article highlights, as public space becomes more inclusive, it is deliberately shrunk to accommodate previously impermissible separation. Relatedly, there is a trend of public incorporation but private separation, and the rhetoric of privatization is deployed to justify these arrangements. The civil rights movement, for this reason, aimed at



public space was being desegregated.

Fannie Mae and Freddie Mac are the biggest players in the secondary mortgage market, buying, pooling, and securitizing mortgages to increase the supply of money available for mortgage lending and increase the money available for new home purchases.<sup>311</sup> Consequently, both entities set much of the standards for the entire mortgage market.<sup>312</sup> Both companies were government chartered, but became private corporations in 1968 and 1970, and were subsequently traded on the NYSE.<sup>313</sup> Massive losses in recent years and fears of instability in the housing market prompted the federal government to put both companies under “conservatorship” in 2008 and to infuse them with capital from the Treasury Department.<sup>314</sup> As much as 90–95% of the mortgage market is directly or indirectly affected by the activity of these two government-sponsored, but not controlled, enterprises.<sup>315</sup> They provide liquidity into the market, making it possible to buy and sell mortgages more efficiently, and their practices help structure the market itself. Even when these were private corporations, the line between private and public was blurry at best.

More generally, we are now confronted with an array of complex public-private relations that make categorization even more perilous and the distinction less certain or useful as a meaningful legal category.<sup>316</sup> Although privatization is typically understood as dissolving public space or government withdrawal from an area or activity, in practice privatization typically involves delegation of public functions or delivery of government services by private actors, producing a hybrid public-private authority of

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both public and private incorporation. Orlando Patterson, *Equality*, DEMOCRACY, Winter 2009, at 13, available at <http://www.democracyjournal.org/pdf/11/Patterson.pdf>. Rand Paul’s opposition to private integration illustrates the limits of their success.

311 See Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 AM. U. L. REV. 1489, 1505–08.

312 See *id.* at 1509–12 (demonstrating how Fannie Mae and Freddie Mac “had helped to create the modern mortgage market system of secondary purchases of loans, which were pooled, securitized and sold as investments”).

313 Quintin Johnstone, *Private Mortgage Insurance*, 39 WAKE FOREST L. REV. 783, 827 (2004).

314 Janice Kay McClendon, *The Perfect Storm: How Mortgage-Backed Securities, Federal Deregulation, and Corporate Greed Provide a Wake-up Call for Reforming Executive Compensation*, 12 U. PA. J. BUS. L. 131, 149 (2009).

315 Symposium, *Regulatory Reform and the Future of the U.S. Financial System: An Examination of the Dodd-Frank Regulation: Panel 3: The Future of Fannie Mae & Freddie Mac*, 7 N.Y.U. J. L. & BUS. 531, 538 (2011).

316 Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635, 642–43 (2008); see also Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1376–94 (2003) (examining four notable examples of privatization – Medicare and Medicaid, welfare programs, public education, and prisons – to demonstrate the contemporary trend towards greater privatization and how it impacts government programs, further diluting public-private categorization).

shared responsibilities.<sup>317</sup>

In fact, this distinction actually makes it increasingly difficult to devise and implement policy solutions to current problems.<sup>318</sup> Industrial policy is anathema because it implies a command and control economy, but the reality has always been that the public and private sectors have come together in important ways to stimulate economic growth.<sup>319</sup> From the beginning of the country to the intercontinental railroad to the industrial expansion during World War II, the United States has always fostered strategic relationships between public and private sectors.<sup>320</sup> Some argue that massive United States investment in infrastructure, science and technology, state universities, and infant industries, from 1950–1980,

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317 See Metzger, *supra* note 316, at 1395.

318 Instead, we tend to cling to the fiction that there is a clean distinction between state action and private action, ignoring the ways in which private and public are hopelessly interconnected. Matt Taibbi makes the point:

Parson's entire theory of the economy is the same simple idea that Bachmann and all the other Tea Partiers believe in: that the economy is self-correcting, provided that commerce and government are fully separated. The fact that this is objectively impossible, that the private economy is now and always will be hopelessly interconnected not only with mountains of domestic regulations . . . but with the regulations of other countries is totally lost on the Tea Party, which still wants to believe in the pure capitalist ideal.

MATT TAIBBI, *GRIFTOPIA: BUBBLE MACHINES, VAMPIRE SQUIDS, AND THE LONG CON THAT IS BREAKING AMERICA* 16 (2010). There is another argument, advanced by scholars such as Cass Sunstein, which illustrates how private transactions are indirectly regulated by the state and, therefore, are not entirely “private.” See SUNSTEIN, *supra* note 198. For example, employment relations or agreements to provide goods or services cannot be thought of as wholly “private,” since they are conditioned by and dependent upon the existing system of legal rules, including property, tort, and contract law. See *id.* at 71–75; see also HARCOURT, *supra* note 206.

319 Germany provides one such example. See Rana Foroohar, *Don't Hold Your Breath*, TIME, June 20, 2011, at 26 (“The lesson of Germany is a good one. Back in 2000, the Germans were facing an economic rebalancing not unlike what the U.S. is experiencing. East and West Germany had unified, creating a huge wealth gap and high unemployment at a time when German jobs were moving to central Europe. The country didn't try to explain away the problem in quarterly blips but rather stared it directly in the face. CEOs sat down with labor leaders as partners; union reps sit on management boards in Germany. The government offered firms temporary subsidies to forestall outsourcing. Corporate leaders worked with educators to churn out a labor force with the right skills. It worked. Today Germany has not only higher levels of growth but also lower levels of unemployment than it did prerecession.”).

320 The most important thought here is that the idea that government and private business are totally separate or can be kept hermetically sealed from each other is false. One of Ron Paul's responses to the CNN Live Republican Debate indicates he holds a contrary opinion. Transcript of CNN Live Republican Debate, *supra* note 2 (“There shouldn't be any government assistance to private enterprise. It's not morally correct, it's [il]legal, it's bad economics.”). The point is that government and private enterprise have always had a symbiotic relationship. The existence of railroads, roads, canals and shipping lanes, not to mention other forms of infrastructure, are the basis for private business developments. One could not develop and sell the automobile without a network of roads for them to operate. Similarly, Internet and communications businesses require infrastructure already running into consumers' homes. Paul and others posit a wholly separate existence, which is contrary to factual reality.

“triggered [the] two generations of economic growth” that have made the United States the leader in the “world of technology and innovation.”<sup>321</sup>

The public/private divide, as a conceptual category and a popular heuristic, creates a blind spot and inhibits the development of economic solutions that do not rely solely on either private sector growth or fiscal stimulus, but rather on a coordinated and targeted policy.<sup>322</sup> In fact, the fastest growing economies in the world do not take a sharp public/private view, but understand that “strategic actions by the government can act as catalysts for free-market growth.”<sup>323</sup>

The 1960s Civil Rights Acts were targeted at racial discrimination broadly, both at the racist attitudes and private discrimination that continues to negatively affect so many in our society, and at the legislation that embodied those attitudes. What Rand Paul sees as government overreach and interference in private markets is nothing less than a moral imperative to ensure a fair and just society, to guarantee that no one is denied a job, a promotion or other opportunities to succeed in life because of their race, sex, religion, familial status, or disability. The distinction Paul relies on may not exist or may be far more permeable than he thinks. The sharp public/private distinction, both as a heuristic and a legal principle, obscures the thoroughly dynamic relationship between private conduct and public responsibility. Many functions in society shift from what is thought of public to private and back. In the contemporary political culture, the move is often in the direction of public to private. While Paul insists he supports civil rights, he would limit their reach in favor of a notion of an expanding “private” space that is fact corporate.<sup>324</sup>

### *B. Non-Public/Non-Private Space*

The central argument of this article is that excessive corporate prerogatives have been smuggled through and masked by a discourse of public/private. The public/private distinction is both a sword and shield. It is a source of corporate prerogatives and a defense against government interference and regulation. The public/private distinction further masks these prerogatives as natural and individual rights. The arguments for deregulation and governmental non-interference are framed as a defense

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321 Fareed Zakaria, *The GOP's Abstract Professors*, TIME, June 27, 2011, at 23.

322 See Tamara Lothian & Roberto Mangabeira Unger, *Crisis, Slump, Superstition and Recovery: Thinking and Acting Beyond Vulgar Keynesianism* 20–24 (Ctr. for Law & Econ. Studies, Columbia Univ. Sch. of Law, Working Paper No. 394, 2011), available at <http://ssrn.com/abstract=1780454> (outlining an example of a coordinated program for economic recovery).

323 Zakaria, *supra* note 321, at 23 (“From Singapore to South Korea to Germany to Canada, evidence abounds that some strategic actions by the government can act as catalysts for free-market growth.”).

324 For a discussion of private/corporate spaces, see *infra* Part II.B.

of individual liberty and personal freedom.<sup>325</sup>

The underlying structure of our claim, including the critique of the public/private distinction, is hardly novel. Feminists and critical legal scholars have long recognized the lack of conceptually clear dichotomous public/private spheres.<sup>326</sup> Moreover, they are attentive to the work such categories perform. Feminists have long argued that the private/public dichotomy is a gendered dichotomy, masking and insulating male privileges.<sup>327</sup> They assert that the private is political and, further, that private space is no less socially and legally constructed than public space.<sup>328</sup> From this perspective, the public/private dichotomy is less an analytical tool than a heuristic device or political rhetoric for making value choices.<sup>329</sup> While we agree with this critical insight, we go further, and posit the construction of very different conceptual spaces.

Recall the formulation of public and private space articulated in Part II.A.<sup>330</sup> Implicit in the agitation of first wave feminists and abolitionists

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<sup>325</sup> See NAPOLITANO, *supra* note 167, at 239–41 (arguing that federal interference and overregulation have “sent [our Constitution] into exile”).

<sup>326</sup> BRYSON, *supra* note 117, at 35, 230. Critical legal scholars, led by Duncan Kennedy, developed a strong critique in the early 1980s. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350–57 (1982) (using the public/private distinction to illustrate the stages of decline of the liberal distinctions as they “pass[] from robust good health to utter decrepitude” and arguing that the public/private distinction can no longer be taken seriously as a description, explanation, or justification of anything); Henry J. Friendly, *The Public–Private Penumbra – Fourteen Years Later*, 130 U. PA. L. REV. 1289 (1982). See also *supra* note 144 and accompanying text (outlining the scholarly criticism of the “state action” trigger for applying the Fourteenth Amendment).

<sup>327</sup> RICHARD COLLIER, *MASCULINITY, LAW AND THE FAMILY* 61–62 (1995).

<sup>328</sup> See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 124–25 (1989) (“[T]he personal sphere of sexuality, of housework, of child care and family life *is* political.”); see also *supra* note 318. See pp. 124–133 for the development of four critiques of the public/private distinction. Okin also notes that: “[t]he public and the domestic are in many ways not distinct at all. The perception of a sharp dichotomy between them depends on the view of society from a traditional male perspective. *Id.* at 133.

<sup>329</sup> See *supra* note 89 and accompanying text.

<sup>330</sup> See *supra* Part II.A. This idea of privacy is not just a cultural notion, but a legal one as well. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.”) Justice Brandeis’ position became law in 1967 when *Olmstead* was overruled in *Katz v. United States*, 389 U.S. 347, 352–362 (1967). See also *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, Justice Douglas wrote for the Court in striking down a Connecticut statute that made the use of contraceptives a criminal offense as an unconstitutional invasion of the right to privacy of married persons, providing the following:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the

was the inherently political nature of private arrangements.<sup>331</sup> For women, “private” space was hardly so. Upon marriage, the common law essentially denied women standing rights.<sup>332</sup> Her property became her husband’s. In the home, women were often dominated by men, and even considered his property, including her body.<sup>333</sup> Although the situation was starker for slaves, it was no less the case that as “private property” slaves were subject to abuse, rape, humiliation, and reprisal from owners, with virtually no recourse to courts.<sup>334</sup> Neither the plantation nor the home was a space of privacy or liberty for women or slaves. The *state* may not have played an active role, but these spaces were not free from surveillance or regulation. Feminists and abolitionists sought to illuminate the immorality of those arrangements, and to mobilize popular opinion against them.<sup>335</sup>

Public space is a place of power for citizens, yet women and slaves were denied access to the public square. Women could not vote, serve on juries, or be elected as representatives in the legislature.<sup>336</sup> Women enjoyed neither public freedom nor private freedom. In many respects, they were

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consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

The Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions “of the sanctity of a man’s home and the privacies of life.” We recently referred in *Mapp v. Ohio* to the Fourth Amendment as creating a “right to privacy, no less important than any other right carefully and particularly reserved to the people.”

We have had many controversies over these penumbral rights of “privacy and repose.” These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

*Id.* at 484–85 (footnote omitted) (citations omitted).

331 See OKIN, *supra* note 328, at 124–25 (“[M]any of those who fought in the nineteenth and early twentieth centuries for suffrage and for the abolition of the oppressive legal status of wives were well aware of the connections between women’s political and personal dominations by men.”).

332 *Id.* at 129.

333 *Id.* at 129–30 (notes that very few states recognized marital rape).

334 Scott W. Howe, *Slavery As Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1006–07 (2009).

335 See BRYSON, *supra* note 117, at 38–40. To the extent that the non-public or private sphere is defined as beyond the bounds of the public interest, the task of the abolitionists and feminists was to highlight, and thereby politicize, the private or non-public. One of the ways in which feminists have articulated this position is to suggest that “the ‘separate’ liberal worlds of private and public are actually interrelated, connected by a patriarchal structure.” BRYSON, *supra* note 117, at 175.

336 JOEL OLSON, *THE ABOLITION OF WHITE DEMOCRACY* 54 (2004) (discussing the legal practice of “coverture,” imported from English common law, under which a woman’s civic identity was transferred to her husband at marriage, resulting in her husband effectively “becom[ing] a surrogate for the state” in the woman’s legal life); see also Scott v. Sandford, 60 U.S. 393, 421–22 (1857).

considered property under law, although unlike slaves they were also nominal citizens.<sup>337</sup> Similarly, slaves were not permitted in the public space, nor was there a place where they could claim privacy rights or liberties free from the master's surveillance.<sup>338</sup> Slaves were barred from even testifying in many states.<sup>339</sup> They had limited standing rights and virtually no recourse for private wrongs.<sup>340</sup> Their life experience was neither public nor private: it was non-public/non-private. In a sense, the *Dred Scott* decision, and others, constituted this space in racial terms by deciding that persons of African descent inhabited this space and were denied public standing.

The idea of non-public space is archaic and precedes the conceptualization of private space defined by individual and moral features.<sup>341</sup> Despite the incorporation of women and freed slaves into the political sphere and the concomitant expansion of standing rights to secure private liberties, we suggest that non-public/non-private space continues to exist as a place inhabited by groups that are excluded from or marginalized within public space and which enjoy limited or minimal access to private space. Today, many marginalized groups, including racial minorities living in concentrated poverty, undocumented immigrants, the incarcerated, and the formerly incarcerated inhabit this space.<sup>342</sup>

Public space is a sphere of power for citizens in a republic. But for non-citizens, such as immigrants or those denied the full rights of citizenship, it is a space of marginalization and vulnerability. Immigrants and felons are denied, in many respects, public voice or the ability to participate in

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337 See *Scott*, 60 U.S. at 422 (“[A] person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power. . . . Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.”). One author says that “[w]hite women in the nineteenth century endured a form of ‘civil death’ in which they legally disappeared into the private realm while ‘covered’ by the husband or other male surrogate in the public.” OLSON, *supra* note 336, at 55. Importantly, however, we suggest that the “private” realm was not really private for these women.

338 See OLSON, *supra* note 336, at 55 (“Black persons, whether female or male, free or slave, were *anticitizens*. Marked by slavery, they were the antithesis of freedom and as such stood outside of citizenship rather than being incorporated into it, even in a dependent or derivative fashion. . . . Slavery . . . was a form of ‘social death’ in which the person disappears as a social being from the community altogether.” (emphasis added)).

339 See Howe, *supra* note 334, at 1006.

340 See *id.* at 1006–07.

341 See PAUL BARRY CLARKE, *DEEP CITIZENSHIP* 82 (1996) (essentially arguing that the public/non-public distinction did not become public/private until the full development of the individual moral space emerged).

342 See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (examining current prejudice against incarcerated and formerly incarcerated persons); THE EXCLUDED WORKERS CONGRESS, <http://www.excludedworkerscongress.org/index.php> (last visited Aug. 29, 2011) (examining current prejudice against immigrants).

public affairs. These groups also lack private space, because they may be heavily regulated and surveilled, exposing these groups to possible exploitation. Prisoners not only lack a public voice, their incarceration entails confinement to an environment with minimal public visibility or privacy. They are subject to personal abuse from other prisoners or prison personnel with limited immediate recourse.<sup>343</sup> Immigrants are not only excluded from the public sphere, but their privacy is constantly under threat.<sup>344</sup> Legal immigrants are subject to surveillance and even public stops.<sup>345</sup> Undocumented immigrants enjoy virtually no privacy rights,<sup>346</sup> and are subject to private exploitation from employers who would threaten to report them.<sup>347</sup>

Before the Americans with Disabilities Act,<sup>348</sup> many developmentally disabled Americans also inhabited non-public/non-private space. Disabled Americans may have been permitted to vote or protect their rights in court, but they may not have enjoyed these rights as a practical matter.<sup>349</sup> The purpose of the Americans with Disabilities Act and one of the purposes of the Help America Vote Act was to secure these rights in practice.<sup>350</sup> Pervasive inaccessible housing, restaurants, or even movie theatres subject disabled Americans to limited dignity and privacy rights in public settings due to their conspicuity. The forms of help and assistance they require in daily living may also limit the privacy of disabled Americans. Similarly, the homeless live in public spaces, but enjoy neither the rights of the public, nor the freedom of private space. In many cases, they were taken out of institutions, and consigned to public spaces out of necessity. It makes for an

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343 Metzger, *supra* note 316, at 1393–94. This remains even more so the case for private prisons which “are not generally subject to open government laws or other measures designed to prevent and expose government malfeasance.” *Id.* at 1393 n.80.

344 Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1085–87 (2008). The infamous Arizona anti-immigrant bill 1070 would legalize racial profiling by requiring officers to stop any person if there is a ‘reasonable suspicion’ that they may be an undocumented immigrant. [cite]

345 *See id.* at 1087–88.

346 *See id.* at 1085–87.

347 *See, e.g.,* Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1120–24 (2009).

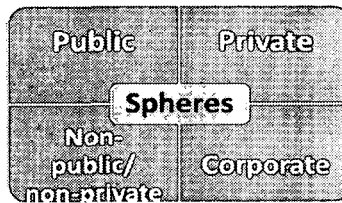
348 Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 328.

349 The paradigmatic example of a person’s practical inability to exercise a right is a disabled person who is not able to cast their vote because the polls are located on the third floor of a historic nineteenth century courthouse that is not handicap accessible. Although the person has the right to vote, as a practical matter, it cannot be exercised.

350 Americans with Disabilities Act of 1990 § 2(a)(5), 42 U.S.C. § 12101(a)(5) (2006) (“[I]ndividuals with disabilities continually encounter various forms of discrimination, including . . . the discrimination effects of architectural, transportation, and communication barriers.”); Help America Vote Act of 2002 § 101(b)(1)(G), 42 U.S.C. § 15301(b)(1)(G) (2006) (“A State shall use the funds [to] . . . [i]mprov[e] the accessibility and quantity of polling places, including providing physical access for individuals with disabilities.”).

unsettling case where, if the homeless cannot urinate in public, they cannot urinate.<sup>351</sup> The lack of adequate access to public or private space results in a denial of personhood and humanity.<sup>352</sup>

Rather than simply public/private spheres, we suggest that there are in fact four domains that have been erected in law and practice: public, private, non-public/non-private, and corporate. The public/private dichotomy, as a sharp categorical distinction, is not only false in the mind, but false in the world. The critical question is not how to define these categories, or make sense of them, but to understand the function of these domains.<sup>353</sup> This dichotomy inadequately explains the power relationships that exist within and between the two spheres. At best, these domains are heuristics, whose meaning changes from context to context and over time. Moreover, the Court has played a critical role in constructing these domains. By rendering these domains decisive legal issues, the scope and demarcation of these spheres became a significant legal question. However, the uncomfortable attempt to define behavior or institutions in dichotomous terms obscures other critical dynamics between public and private.



### C. Corporate Space

The history of corporate individualism and the doctrine of corporate personhood is critical phenomenon, but it is not a question of public or private. The expansion of excessive corporate prerogative – corporate space – should not be confused with private space. Yet, this conflation is common. In Part I, we surveyed the bases of corporate prerogative, each of which emerged through a public/private discourse. The public/private distinction has served to enlarge corporate prerogatives, although corporations fell uneasily into either category. Recall that corporations were quasi-public, then quasi-private, and now enjoy individual rights.

To refer to corporate behavior as “private” is misleading, and suggests a narrative that corporations are people, just like us. The growth and size of the modern multi-national corporations is without precedent

<sup>351</sup> See, e.g., Sarah Dooling, *Ecological Gentrification: A Research Agenda Exploring Justice in the City*, 33 INT’L J. URB. & REGIONAL RES. 621, 629 (2009).

<sup>352</sup> See MASSEY, *supra* note 10, at 13.

<sup>353</sup> See OKIN, *supra* note 328, at 110–11 (arguing that shared male-centric understanding, even if gender neutral, can effectuate gender discrimination).



for nongovernmental entities in human history, and cannot possibly be understood in the same vein as small “mom and pop” corner stores. This is the error of the *Lochner* era. The jurisprudence of the *Lochner* era portrays a false symmetry between actors, since “private” includes both the employing corporations and the potential employee, and all non-governmental entities. As we will further demonstrate in this section, corporate space often operates at the expense of private and public space.

The expansion of corporations as an institutional form raises serious questions regarding individual rights and privileges on corporate property. In *Marsh v. Alabama*, the Supreme Court struggled with the question of individual rights in a company town.<sup>354</sup> Consider the context of a commercial shopping mall.<sup>355</sup> We may think of that space as public space, but it is not. First Amendment rights are limited, and there is virtually no right to organize or petition.<sup>356</sup> Union organizers and picketers or protesters have limited rights to assemble on commercial property.<sup>357</sup> Nor do individuals enjoy expansive privacy rights. Commercial businesses are free to surveil, search, and monitor individuals on private property.

Corporate behavior may inhibit individual freedom and private space in other ways. Major corporations collect more data and information on individual consumers than ever before. Major companies like Google not only gather and store information on user behavior and interests, they manipulate this information into targeted advertisements on behalf of third parties.<sup>358</sup> Google’s street view project, in which it photographed residences and businesses on every major street, raised serious privacy concerns, especially regarding the use of stored information.<sup>359</sup> These concerns are pervasive in a cyber world. The Supreme Court case, *Sorrell v. IMS Health Inc.*, concerned data-mining practices by pharmaceutical companies collecting medical patient information of specific doctor practice groups.<sup>360</sup>

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354 *Marsh v. Alabama*, 326 U.S. 501, 508–10 (1946). In *Marsh*, the Supreme Court upheld First Amendment rights of private individuals on private property. *Id.* at 509. The company, the Gulf Shipbuilding Corporation, owned all of the property in the suburban town, including the streets, houses, and stores. *Id.* at 502–03. Justice Black, writing on behalf of a majority, said that the property rights of the corporation could not override the speech liberties of the residents in facilities in a company town performing a public function. *Id.* at 509–10.

355 *See* *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Hudgens*, the Court reversed direction (not coincidentally), holding that union picketers did not enjoy First Amendment rights and free speech protections in a private mall. *Id.* at 520.

356 *Id.*

357 *Id.*

358 *See Privacy Policy*, GOOGLE (Oct. 20, 2011), [www.google.com/privacy/privacy-policy.html](http://www.google.com/privacy/privacy-policy.html).

359 *See generally* Debadyuti Banerjee, “Is My Laptop a Viable Tool to Invade Your Privacy?” – *Such and Other Critical Legal Issues Generated By Google Earth*, 5 J. INT’L COM. L. & TECH. 260 (2010).

360 *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

The data had implications for pharmaceutical marketing campaigns.<sup>361</sup> These cases and other controversies illustrate the mounting privacy concerns in high tech contexts. It should not be surprising that a divided Court struck down a Vermont law that was designed to protect the privacy of patients by prohibiting pharmaceutical manufacturers from selling this data.<sup>362</sup> The Court determined that the statute violated the pharmaceutical manufacturers' corporate speech rights.<sup>363</sup>

The expansion of corporate space is a threat to both private and public space. Inhabiting corporate space is similar to residing in non-public/non-private space. Corporations are free to surveil people in this space, and there are limited opportunities to organize against them, as the cases restricting union organizing efforts and picketing activities demonstrate.<sup>364</sup> Private space is conceived largely as being free from the coercive, concentrated power of the state. Yet, what replaces the state in corporate space is the coercive, concentrated power of the corporation. It is not simply corporate property or speech rights that raise privacy concerns and infringe on individual liberties, the ideology of privatization serves to enlarge corporate space at the expense of private space while purporting to do otherwise. The ideology of privatization is ostensibly a shift of public space into private space, but its primary effect is to expand corporate space. The expansion of corporate space shrinks both public and private space, and it has profound racial and democratic implications. At the same time, corporate space may expand non-public/non-private space and engender the further marginalization of groups that inhabit this space.

Why is private space idealized over public? The anxiety over public/private is rooted in the question of who counts as part of the public. When the city of St. Louis announced plans to desegregate the public swimming pool in 1949, hundreds of whites appeared to keep blacks out.<sup>365</sup> Police had limited success at maintaining order, and the city was eventually forced to close its pool entirely.<sup>366</sup> Similar patterns occurred across the South during the period of massive resistance.<sup>367</sup> In the immediate Reconstruction period, President Johnson opposed the Freedman's Bureau and other land redistribution proposals as government largesse.<sup>368</sup> Meanwhile the

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361 *Id.* at 2661.

362 *Id.* at 2659, 2672.

363 *Id.* at 2663–64, 2672.

364 *See, e.g.,* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

365 LIPSITZ, *supra* note 307, at 26.

366 *Id.*

367 *See, e.g.,* John A. Powell and Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 *St. Louis U. L.J.* 1153, 1179 (2008) (“Rather than integrate, many Southern school boards shuttered up. Public pools closed. Public space shrank.”).

368 John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 *ROGER WILLIAMS U. L. REV.* 70, 87–88, 97 (2006).

Republican Party attempted to enact legislation that would redistribute of southern landholdings to freedmen was met with significant opposition.<sup>369</sup> In *Bell v. Maryland*, Justice Ginsburg noted that public accommodations were always “public” until after the Civil War.<sup>370</sup> As public space becomes more inclusive, it becomes more contested. To bring in blacks, Latinos, women, or other prior-excluded classes, ultimately constrains white male prerogative, but also excessive corporate prerogative. Before the Civil War, there was little doubt that public law encompassed private actions. Individuals were held responsible and liable for violating fugitive slave laws.<sup>371</sup> After the Civil War, the public/private distinction was erected to shield and protect private discrimination.<sup>372</sup>

This remains the case today. Both the devolution of authority from federal or state to local governments and the shift of control from public to private hands are used to expand corporate prerogative, but they also define the nation’s racial geography.<sup>373</sup> Both hostile privatism and defensive localism operate today to shield the prerogatives of white space and dominate discussions over public policy and investment.<sup>374</sup> Just as feminists drew attention to the underlying power structure that defined and connected both the public and private worlds, the ways in which corporate power affects all four spheres should be highlighted, and the corporate sphere should not be mistaken for the private sphere. Similarly, just as the feminists and abolitionists agitated for state intervention into the “private” world of the family and the plantation, the state has a role in the corporate sphere because of the power relationships that permeate it. Indeed, the Court recognized this in *Marsh v. Alabama*, in abrogating absolute rights of property against the speech rights of citizens.

The ideology of privatization rests on the belief that “the public sphere encompasses too much of American life.”<sup>375</sup> While there are many concerns

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369 *Id.* at 95–97.

370 *Bell v. Maryland*, 378 U.S. 226, 303–04 (1964) (Goldberg, J., concurring).

371 LIPSITZ, *supra* note 307, at 46.

372 *See* Part II.B.

373 LIPSITZ, *supra* note 307, at 87–90.

374 *See id.* at 28–29 (“The white spatial imaginary deploys contract law and deed restrictions to channel amenities and advantages to places designated as white. It makes the augmentation and concentration of private wealth the central purpose of public association. It promotes policies that produce sprawl, waste resources, and generate enormous social costs in order to enable some property owners to become wealthier than others. It produces a society saturated with hostile privatism and defensive localism through secret subsidies for exclusive and homogeneous housing developments premised on promoting the security and profitability of private property regardless of the larger social costs to society.”).

375 Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 225 (1985) (reviewing HENDRICK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW (1983)). The idea that the private sector can accomplish public functions better is well represented in candidate Gingrich’s remarks about the NASA program. *See supra* note 7.

that underpin this belief, including the anxiety over shared public provision and the classical liberal concern over centralized political authority, advocates of privatization often highlight governmental inefficiencies or a lack of “innovation” and productivity compared to the private sector as reasons to privatize governmental entities, property or services. Historically, economies of scale have provided a powerful incentive for expanded government provision, as has a larger view of the role of government, especially with respect to education and public safety.

Consequently, over the course of our nation’s history, many services and institutions have become a part of the “public sphere.” Fire departments were traditionally volunteer services or even private services rather than an instrument of the state.<sup>376</sup> It was not until the Common Schools movement of the latter part of the nineteenth century that primary and secondary education became a public good.<sup>377</sup> Even more recently, entitlements such as social security and Medicare mark the movement of old-age insurance and other forms of social supports as “public.”

At the same time that there has been an expansion of what counts as “public” over the course of our nation’s history, there have been countervailing forces. Today, there is a widely held view that public space is problematic: that perhaps too much is in the public sphere, and not enough in the private.<sup>378</sup> It is supposed that we can solve problems by privatizing, and improve public services at greater cost efficiency. The charter school movement has, in some measure, become a movement to divest public schools of their resources, often in the hopes of improving student performance.<sup>379</sup> Prisons are being privatized at a growing rate, in the sense that they are being operated, serviced, and run by private corporations.<sup>380</sup> Even military services have been and are being contracted to companies like Blackwater (now XeServices), infamous for their many abuses.<sup>381</sup> Notably, the Bush administration advanced a proposal that would

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<sup>376</sup> Annelise Graebner Anderson, *The Development of Municipal Fire Departments in the United States*, 3 J. LIBERTARIAN STUD. 331, 335–37 (1979).

<sup>377</sup> Carl F. Kaestle, *Victory of the Common School Movement: A Turning Point in American Educational History* (Apr. 3, 2008), <http://www.america.gov/st/educ-english/2008/April/20080423212501caifaso.8516133.html>.

<sup>378</sup> See *supra* notes 365–72 for examples that indicate the problems with “public space.”

<sup>379</sup> See Richard Corliss, *Waiting for ‘Superman’: Are Teachers the Problem?*, TIME (Sept. 29, 2010), <http://www.time.com/time/arts/article/0,8599,2021951,00.html> (detailing the attack on teachers unions, which are blamed for poor student performance by keeping bad teachers in schools). The publicly founded voucher plans were upheld in *Zelman* against an Establishment Clause challenge. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

<sup>380</sup> See *Developments in the Law: The Law of Prisons, III. A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1868–70 (2002).

<sup>381</sup> *Oversight Panel Chronicles Alleged Blackwater Abuses*, CBS NEWS (June 26, 2009, 5:14 PM), <http://www.cbsnews.com/stories/2007/10/01/politics/politico/thecrypt/main3316998.shtml>.

have partially privatized Social Security.<sup>382</sup>

Conceptually, privatization is a transfer of ownership over property or service delivery from the state or other governmental entity to private individuals. In practice, privatization often effectuates a transfer from one major institution to another.<sup>383</sup> When we imagine a privatization scheme, we may think we are turning over control of a government service or entity to actual people. Because of the legal fiction that corporations are people, we are in many cases turning over public property, function, or responsibilities to enormous institutions. The extreme version of this is the privatization of state monopolies such as those that occurred following the collapse of the Soviet Union.<sup>384</sup> The state controlled monopolies, largely intact, were simply transferred to private owners, who became national oligarchs.<sup>385</sup> While less extreme, similar examples abound. The Governor of Ohio, John Kasich, has recently introduced a state budget proposal which includes a plan to sell five prisons to private corporations.<sup>386</sup> A proposal in Ohio would privatize the Ohio Lottery.<sup>387</sup> The budget bill called for turning over the state lottery to a private company, to manage the \$2.5 billion daily operation.<sup>388</sup>

The privatization of public entities or the delegation of vital governmental services is more than a mere shift in categories of domains – public to private – it is a shift in power. The re-conceptualization of these domains helps illustrate these shifts. As a heuristic, the public/private dichotomy fails to capture these shifts in power, which are better represented as a shift from public to corporate. Privatization is, in many cases, an expansion of corporate prerogative. In our vernacular, privatization may count as “corporatization.” And, as we suggested in the previous section, the expansion of the corporate sphere entails risks for the public, private, and non-public/non-private.

As the corporate sphere expands through privatization, the space for people in terms of accountability and privacy shrinks.<sup>389</sup> The data collection

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382 Metzger, *supra* note 316, at 1369 n.1.

383 Cf. Metzger, *supra* note 316, at 1403, 1404, 1417, 1436–37 (explaining that the practice of handing over government programs to private entities may “place these programs outside the ambit of constitutional constraints,” or, in the alternative, may result in a public-private partnership that “minimizes the difficulty in enforcing constitutional obligations”).

384 WILLIAM H. COOPER, CONG. RESEARCH SERV., RL 31979, RUSSIA’S ACCESSION TO THE WTO 7 (2008).

385 *Id.*

386 CHRISTINE LINK ET AL., AM. CIVIL LIBERTIES UNION OF OHIO, PRISONS FOR PROFIT: A LOOK AT PRISON PRIVATIZATION I (2011).

387 Mark Naymik, *Ohio Senate Budget Bill Includes Lobbyist Legislation on Privatizing Ohio Lottery*, CLEVELAND.COM (June 2, 2011, 7:59 AM), [http://www.cleveland.com/naymik/index.ssf/2011/06/ohio\\_senate\\_budget\\_bill\\_includ.html](http://www.cleveland.com/naymik/index.ssf/2011/06/ohio_senate_budget_bill_includ.html).

388 *Id.*

389 See Metzger, *supra* note 316, at 1400–06.

and sale of personal information may raise privacy concerns, but the disappearance of state actors calls into question the issue of accountability.<sup>390</sup> As Gillian Metzger warns, “the move to greater government privatization poses a serious threat to the principle of constitutional accountability.”<sup>391</sup>

What is at stake is more than public accountability, but threats to the private sphere as well. Consider the secondary mortgage market. From the New Deal onward, the federal government has been an active and important participant in the housing market. The National Housing Act of 1934 created the Federal Housing Administration (FHA), whose purpose was to subsidize the mortgage market by insuring mortgages issued by private lenders.<sup>392</sup> Before the FHA, buying a home was not attainable to most Americans. Typically, a mortgage loan would have a term of 3–5 years, and 50% down payments were required.<sup>393</sup> By insuring private loans, the FHA encouraged strapped banks to begin lending again, and greatly expanded the market for family homes by making homes more affordable to potential homeowners.

As discussed above, Fannie Mae and Freddie Mac were chartered by the federal government during the New Deal to create liquidity in the mortgage market and increase the money available for new home purchases by buying mortgages from originating lenders.<sup>394</sup> In 2009 and 2010, as much as ninety percent of the mortgages created that year were guaranteed by Fannie Mae, Freddie Mac or Ginnie Mae.<sup>395</sup> They were privatized in 1968 and 1970, and were subsequently traded on the NYSE.<sup>396</sup> Massive losses in recent years and fears of instability in the housing market prompted the federal government to put both companies under “conservatorship” in 2008, and were given an infusion of capital by the Treasury Department.<sup>397</sup>

In February of 2011, the Obama administration submitted a proposal to Congress that would wind down both companies.<sup>398</sup> They would shift

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390 See *id.* at 1404–08 (explaining the difficulty of applying constitutional obligations to private entities); see also Barak-Erez, *supra* note 258, at 1172–83.

391 Metzger, *supra* note 316, at 1400.

392 National Housing Act, Pub. L. No. 73–479, § 1, 48 Stat. 1246 (1934).

393 Marsha Courchane et al., *Industry Changes in the Market for Mortgage Loans*, 41 CONN. L. REV. 1143, 1149 (2009).

394 See *supra* notes 311–15 and accompanying text.

395 See *The Future of Fannie Mae & Freddie Mac*, 7 N.Y.U. J. L. & BUS. 531, 538 (2011).

396 Courchane et al., *supra* note 393, at 1150.

397 Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654; see *How Fannie Mae and Freddie Mac Were Saved*, INVESTOPEDIA (Apr. 17, 2009), <http://www.investopedia.com/articles/economics/09/fannie-mae-and-freddie-mac-saved.asp#axzz1XeJvucsM>.

398 Press Release, U.S. Dep’t of the Treasury, Obama Administration Plan Provides Path Forward for Reforming America’s Housing Finance Market, Winding down Fannie Mac and Freddie Mac (Feb. 11, 2011), available at [www.treasury.gov/press-center/press-releases/Pages/tg1059.aspx](http://www.treasury.gov/press-center/press-releases/Pages/tg1059.aspx).

the responsibility for credit in the mortgage market to private markets, particularly four major banks that control seventy percent of the market: JP Morgan, Bank of America, Citigroup, and Wells Fargo.<sup>399</sup> The impact will be tremendous. The entire housing market as we know it would change. It would potentially make it much more difficult to get a loan, and increase, dramatically, the cost of credit for the entire industry. That is why the national realtors association, among others, has come out strongly against the proposal.

Fannie and Freddie bring us full circle to *Santa Clara*.<sup>400</sup> Recall that the respondents were railway corporations, and the named respondent was the Southern Pacific Railroad.<sup>401</sup> These companies were contesting the taxation of fences on their routes as a violation of the Equal Protection Clause.<sup>402</sup> Just as Congress chartered the government-sponsored enterprises, Congress incorporated these railroads by statute to serve as a “safe and speedy transportation of mails, troops, munitions of war, and public stores,” and a “liberal grant of public lands was made to it.”<sup>403</sup> Then, privatized, they became the most powerful corporations in America until the great trusts of the early twentieth century. These companies, just like Fannie Mae and Freddie Mac, were created for public purposes, and were subsidized and sponsored by government. In our discourse, we have for too long operated within a simplistic discourse of public/private – ostensibly categorically distinct – with relative values assigned to each depending on one’s political orientation. In our view, this simplistic bifurcation obscures critical power dynamics. Just as the shrinking of public space served a power function to protect Jim Crow arrangements, the expansion of corporate space poses special dangers for the other three spheres. We must recognize that corporate space is not private.

### III. REVISITING THE ROLE OF CORPORATIONS

When CNN anchor John King asked the Republican Presidential candidates about the respective role of the federal and state government, and the role of government in general, he elicited a scornful response.<sup>404</sup> Candidate after candidate found fault with government activity designed to improve economic conditions, protect the environment, or even the

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<sup>399</sup> *Panelists Work to Establish Future of Mortgage Market*, HOUSTON AGENT (June 22, 2011), <http://houstonagentmagazine.com/panelists-work-to-establish-future-of-mortgage-market/>.

<sup>400</sup> *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>401</sup> *Id.* at 394.

<sup>402</sup> *Id.* at 397–98.

<sup>403</sup> *Id.* at 398.

<sup>404</sup> *CNN Live Republican Debate*, *supra* note 2.

well-being of citizens,<sup>405</sup> preferring to let the private sector address the respective issues.<sup>406</sup> They negatively described governmental regulations and programs as hampering the private sector, reducing growth and killing jobs.<sup>407</sup> They repeatedly emphasized that the role of the government should be to promote private sector growth.<sup>408</sup>

Given the skepticism regarding the role of government, John King could have asked a logically sequential question: what, then, is the role of the private sector? This question would have bordered on the absurd given the prevailing assumption that government activity is illegitimate, while private sector activity is legitimate. Yet, it would have exposed the tacit assumptions regarding *why* a presumption in favor of private sector activity exists.

Mitt Romney articulated what he felt was the crux of the issue by explaining that “I think fundamentally there are some people – and most of them are Democrats, but not all – who really believe that the government knows how to do things better than the private sector. . . . And they happen to be wrong.”<sup>409</sup> While expressing an opinion about the relative competence or efficiency of government versus the private sector, Romney’s answer not only conflates the private and corporate spheres,<sup>410</sup> it does not answer the broader question as to what purpose the private sector, especially industries dominated by mammoth corporations, serves. While it may be conceded that many government functions could be more efficiently produced by the private sector, it does not resolve the question of whether such functions are *appropriately* served by private corporations. It is not clear that efficiency – or even superior performance – is an important or even relevant criterion for assigning responsibility for particular functions.<sup>411</sup> For example, no

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405 *See id.* As Time put it: “Cain wants to privatize Social Security; Gingrich wants to privatize NASA; most seem willing to voucherize Medicare along Congressman Paul Ryan’s lines.” Joe Klein, *Outsiders vs. Insiders: The Struggle for the GOP’s Soul*, TIME (June 16, 2011), <http://www.time.com/time/printout/0,8816,2077962,00.html>.

406 *CNN Live Republican Debate*, *supra* note 2; *see also supra* note 5 and accompanying text.

407 *CNN Live Republican Debate*, *supra* note 2 (showing that Michele Bachmann stated that “[the Environmental Protection Agency] should really be renamed the job-killing organization of America”).

408 *Id.* Herman Cain used the “engine” metaphor, suggesting that the government should provide the fuel. *Id.*

409 *Id.*

410 *Id.* Also, his apparent support of federalism is not in line with either federalism, as between states, the federal government, and citizen, or conservatism. As we have shown in this article, the founders were largely resistant to corporations and certainly the notion that they are private. *See supra* notes 17–26 and accompanying text.

411 One might credit Romney’s answer as a quintessential business perspective, where the only relevant criteria are price, efficiency, and performance. That perspective is too narrow. Democratic government is not formed because it is efficient or high performing. In fact, one might argue that Chinese style government or monarchy is a more cost “efficient” form of government, from a pure financial perspective. Democracy is costly and messy. Our elections



candidate seemed to suggest that military defense should be privatized.<sup>412</sup>

Possible answers to this question are not difficult to imagine. The private sector is, for the most part, an engine of economic growth, and serves the economy and the nation by creating jobs, promoting prosperity and generating wealth. Additionally, it may be supposed by limiting the scope and size of the government and enlarging the private sector, individual liberty is maximized and that, this too, is an end worth serving. By failing to ask the obvious, further inquiry into whether the private sector is in fact serving these goals has been precluded. It cannot be denied that private business is the most important employer of American workers, the source of entrepreneurial innovation, and catalyst for improvement in American standards of living.<sup>413</sup> However, it is far from clear that these goals are automatically or best served by limiting the role of government and minimizing the intrusion of government in the market place.

There is mounting evidence that the success and profitability of American firms does not necessarily translate into more American jobs or improved wages and living standards. In the last quarter of 2010, American firms generated \$1.68 trillion in profits.<sup>414</sup> American “companies make plenty of money; they just don’t spend it on workers here.”<sup>415</sup> In particular, companies that do business in global markets contribute “almost nothing to American job growth.”<sup>416</sup> From 1990 to 2008, the companies that

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are testament to this, often to our national embarrassment.

412 As TIME pointed out, Romney’s comments “raised the possibility that Romney might want to privatize the military.” Klein, *supra* note 405. Another government function that typically is discussed in the context of privatization is education. See, e.g., Milton Friedman, *Public Schools: Make Them Private*, BRIEFING PAPERS (Cato Institute, 1995), available at <http://www.cato.org/pubs/briefs/bp-023.html>. Although it is theoretically possible that for-profit corporations could provide a superior job of inculcating certain skills, part of the purpose of education is to prepare students for civic life in a democracy. Courts, including the Supreme Court, have long recognized this fact. “[Education] is the foundation of good citizenship.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). To the extent that the inculcation of civic values and democratic ideals are central to the educational mission, this is a function particularly suited for government, not private individuals or businesses.

413 See Chad Moutray, *Looking Ahead: Opportunities and Challenges for Entrepreneurship and Small Business Owners*, 31 W. NEW ENG. L. REV. 763, 779 (2009). This is especially true of small businesses. *Id.* Most new jobs are created by small and medium sized companies. *Id.*

414 Rana Foroohar, *What U.S. Economic Recovery? Five Destructive Myths*, TIME (June 8, 2011), <http://www.time.com/time/nation/article/0,8599,2076568,00.html#ixzz1PIQZNnPF>.

415 *Id.* To get a sense of how cash flush many major corporations are, consider the recent report that Apple has more cash on hand than the United States government. Brandon Griggs, *Apple Now Has More Cash than the U.S. Government*, CNN (July 29, 2011), [http://articles.cnn.com/2011-07-29/tech/apple.cash.government\\_1\\_ceo-jobs-apple-cash-balance?\\_s=PM:TECH](http://articles.cnn.com/2011-07-29/tech/apple.cash.government_1_ceo-jobs-apple-cash-balance?_s=PM:TECH) (“According to the latest statement from the U.S. Treasury, the government had an operating cash balance Wednesday of \$73.8 billion. That’s still a lot of money, but it’s less than what Steve Jobs has lying around. Tech juggernaut Apple had a whopping \$76.2 billion in cash and marketable securities at the end of June, according to its last earnings report.”).

416 Foroohar, *supra* note 414.

conducted business in global markets, particularly manufacturers, banks, exporters, and financial services and energy firms did not meaningfully contribute to job growth.<sup>417</sup> In contrast, companies that are largely confined to the US market or are immune to global competition (such as retailers and hotels) were the primary sources of job growth in the last decade.<sup>418</sup> Unfortunately, employees in these sectors are lower paid and lower skilled than those that were outsourced to labor cheap countries.<sup>419</sup> Our largest companies are cash flush but are not investing in American workers when those jobs can be easily outsourced to cheaper labor markets or invested in plant and production overseas.<sup>420</sup> It has not just been the case that labor, production, assembly, and even customer support, have been outsourced to much cheaper markets.<sup>421</sup> Corporations use the threat of outsourcing to achieve greater and greater tax benefits and labor concessions, including the slow destruction of organized private labor itself.<sup>422</sup>

The prototypical twentieth-century American Corporation, as described by the classic Berle and Means analysis, was a corporation that tended to increase both assets and employees over time.<sup>423</sup> Little more than a

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417 *Id.*

418 *Id.*

419 *Cf. id.*

[M]any firms would think twice before putting their next factory or R&D center in the U.S. when they could put it in Brazil, China or India. These emerging-market nations are churning out 70 million new middle-class workers and consumers every year. That's one reason unemployment is high and wages are constrained here at home. This was true well before the recession and even before Obama arrived in office. From 2000 to 2007, the U.S. saw its weakest period of job creation since the Great Depression.

*Id.*

420 *Id.* Gerald F. Davis refers to this as “Nikefication.” Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1131 (2011).

421 ANDREW L. BARLOW, BETWEEN FEAR AND HOPE 63 (2003). “Americans seeking technical support from Microsoft have their questions answered by information technology service providers in the Philippines; consumer services for a host of TNCs are provided by Indian women, mainly in Bangalore.” *Id.*

422 See Michael J. Zimmer, *Unions & The Great Recession: Is Transnationalism the Answer?*, 15 EMP. RTS. & EMP. POL’Y J. 123, 143–44 (2011). According to the Bureau of Labor Statistics, union membership rate in the private sector workforce has fallen from 7.2 percent in 2009 to 6.9 percent in 2010. U.S. BUREAU OF LABOR STATISTICS, UNION MEMBERS – 2010, at 1, 7 tbl.3 (2011), available at <http://www.bls.gov/news.release/pdf/union2.pdf>. The union membership rate for the decade is the lowest since the 1930s. See Gerald Friedman, *Labor Unions in the United States*, EH.NET (Feb. 1, 2010, 5:21 PM), <http://eh.net/encyclopedia/article/friedman.unions>. In addition, as of 2010, twenty-two states have so-called “right to work” laws that make it more difficult to organize workers into unions. Richard Vedder, *Right-to-Work Laws: Liberty, Prosperity, and Quality of Life*, 30 CATO J. 171, 172 (2010), available at <http://www.cato.org/pubs/journal/cj30n1/cj30n1-9.pdf>. The greater bargaining power by corporations depresses workers’ wages throughout the entire society. Zimmer, *supra*, at 127.

423 Davis, *supra* note 420, at 1131. For the classic analysis, see generally ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

generation ago, most of our largest corporations were vertically integrated.<sup>424</sup> The same corporation controlled the procurement of materials and parts, design, manufacturing, distribution and, sometimes, retail sale of goods. This no longer appears to be the case.

In contrast to the Berle and Means Corporation, the twenty-first century corporation outsources a substantial amount of the assembly and supply-chain management to overseas contractors.<sup>425</sup> The manufacturing, assembly, and distribution of goods are contracted to other companies, often in East Asia.<sup>426</sup> Only the “knowledge-based work of design and marketing” and similar high value-added endeavors are actually “done by the company that owns the brand.”<sup>427</sup> The impact on the American labor market of the maturing forces of globalization has been profound. In 1970, the twenty-five largest corporations employed 9.3 percent of the American private labor force. In 2000, that number had fallen to 4.0 percent, by more than half.<sup>428</sup> The largest corporations employ relatively fewer Americans than they once did.<sup>429</sup> In fact, in the 1990s, Fortune 500 companies erased more jobs than they created,<sup>430</sup> a trend that has continued though the 2000s. This is illustrated by the fact that Kroger, a major grocery chain, employs 334,000 workers in the United States – more than Apple (with 34,300 employees), Google (19,835), Intel (79,800), Amazon.com (24,300), Cisco (65,550), and Microsoft (93,000) combined.<sup>431</sup> In fact, Kroger employs over five times as many workers in the United States as Apple employs worldwide. And yet, companies like Apple, which employ a tiny portion of the American labor force, are considered our leading companies.

In 2010, Apple surpassed Microsoft as the most valuable American tech company, and second only to Exxon Mobil.<sup>432</sup> In 2011, Apple surpassed Google’s as America’s number one brand,<sup>433</sup> and briefly surpassed Exxon

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424 Davis, *supra* note 420, at 1133.

425 *Id.* at 1131.

426 *Id.*

427 *Id.* As previously noted, Davis refers to this trend as “Nikefication.” The Nike model, which has already taken root in apparel, swept through the electronics industry and is now standard practice in other industries. *Id.*

428 *Id.*

429 Nike is a company “with over \$19 billion in revenues, a market capitalization of \$42 billion, and 700 retail outlets. Yet it employs only 34,400 people globally.” *Id.* at 1132.

430 Donald L. Bartlett & James B. Steele, *Corporate Welfare*, TIME, Nov. 9, 1998, at 36.

431 Davis, *supra* note 420, at 1136.

432 Miguel Helft & Ashlee Vance, *Apple Is No. 1 in Tech, Overtaking Microsoft*, N.Y. TIMES, May 27, 2010, at B1 (“Wall Street valued Apple at \$222.12 billion and Microsoft at \$219.18 billion. The only American company valued higher is Exxon Mobil, with a market capitalization of \$278.64 billion.”).

433 Steve Petrovich, *Apple Knocks off Google as No.1 Brand*, BUSINESSNEWS EXPRESS (May 5, 2010), <http://businessnewsexpress.com/apple-knocks-off-google-as-number-one-brand/8778546/>.

as America's most valuable company.<sup>434</sup> As the case of Apple illustrates, these companies, which may hire relatively few American workers, can be quite large in terms of revenues and market capitalization.<sup>435</sup> In fact, these companies may be among the most cash rich institutions on the planet. A recent report indicated that Apple has more cash on hand than the United States Government.<sup>436</sup> However, they are hoarding cash,<sup>437</sup> waiting for a better time to invest, or investing in R&D and production in other countries. Long gone are the days of GM and Ford, large vertically integrated companies, responsible for creating so many American jobs.<sup>438</sup>

This data is not offered as a critique of American corporations. These corporations are simply fulfilling their purpose to maximize shareholder value, at which they are succeeding wildly. The outsourcing of production, supply, and distribution also allows these companies to produce their product as cheaply as possible, which generates value for American consumers. This is partially accomplished by producing goods where labor costs are minimized. But it does raise serious questions about the role of the private sector, and our largest corporations, in terms of job creation and improving standards of living, and the efficacy of public policies targeting major corporations as critical employers, especially those that provide tax breaks or subsidies.<sup>439</sup> Tax breaks, subsidies, credits, and other loans, grants and economic incentives offered by state and local governments to attract or retain major corporate employers may not only cost far more than they are worth, but have little to no effect on long-term employment.<sup>440</sup> The larger question is the following: *should* the purpose of our largest corporations be to maximize shareholder value or to serve some other goal?<sup>441</sup>

To put the role of corporations in our democracy in relief and provide a critical perspective, consider the insights of John Rawls, one of the eminent philosophers of the twentieth-century. In examining the merits of various social systems, Rawls distinguished between welfare-state capitalism and property owning democracy.<sup>442</sup> Both systems are private property regimes,

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434 Barbara Ortutay, *Apple Is Most Valuable US Company, For a Bit*, MSNBC, (Aug. 9, 2011, 5:38 PM), [http://www.msnbc.msn.com/id/44078696/ns/business-us\\_business/t/apple-most-valuable-us-company-bit/](http://www.msnbc.msn.com/id/44078696/ns/business-us_business/t/apple-most-valuable-us-company-bit/)

435 Davis, *supra* note 420, at 1132.

436 *See supra* note 415.

437 Rana Foroohar, *Stuck in the Middle*, TIME, Aug. 4, 2011, at 26 ("The economy is weak, and the private sector is still hoarding its cash.").

438 Please note that we are referring to large, for-profit companies. There are other legal business forms, such as employee owned and full-fledged cooperatives that are more democratic in their structure and can be more "public" in terms of transparency.

439 Such policies are premised on a conflation of the private and corporate spheres.

440 Laura Karmatz et al., *States at War*, TIME, Nov. 9, 1998, at 40.

441 Recall Adam Smith's concern about accountability. *See supra* notes 21–25 and accompanying text.

442 RAWLS, JUSTICE AS FAIRNESS, *supra* note 12, at 136–40. Rawls sets out five different

and permit private ownership of the means of production, a feature of Rawls first principle of justice.<sup>443</sup> In each system, the emphasis is different.

Under welfare state capitalism, the emphasis is capital. “[T]he aim is that none should fall below a decent minimum standard of life,”<sup>444</sup> and this goal is met by the provision of basic needs.<sup>445</sup> Yet certain background inequalities in wealth and income are acceptable, and participation in the political culture is not a given or even a necessity. In fact, this regime would permit the control of the economy and political life in the hands of a few.<sup>446</sup> While this regime has some concern for equality of opportunity, this is largely a token gesture, and policies designed to guarantee it are not pursued.<sup>447</sup>

In contrast, a property-owning democracy’s focus is to realize in society cooperation between citizens is regarded as fair and equal. To do this, the institutions of society must serve citizens, and not only a privileged few. The background institutions of a property-owning democracy operate to disperse the ownership of wealth and capital, in order to prevent the concentration of both economic and, indirectly, political power.<sup>448</sup> Importantly, this is accomplished not by redistributionist policies, but by ensuring equality of opportunity and the widespread ownership of productive assets and human capital at the outset.<sup>449</sup> Rawls is not anti-capital or anti-corporation, but what he is suggesting is that the primary focus should be democracy.<sup>450</sup> Private property and capital must ultimately, if indirectly, serve democratic ends, not the other way around.

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kinds of social systems, with varying “political, economic, and social institutions: (a) laissez-faire capitalism; (b) welfare-state capitalism; (c) state socialism with a command economy; (d) property-owning democracy; and finally, (e) liberal (democratic) socialism.” *Id.* at 136. He then examines each regime under his two principles of justice. In his analysis, he draws particular attention to differences between welfare-state capitalism and property-owning democracy. *Id.* at 139.

443 *Id.*

444 *Id.*

445 The welfare provisions Rawls imagines may be quite generous, however. *See id.* (“The least advantaged are not . . . the unfortunate and unlucky – objects of our charity and compassion, much less our pity – put those to whom reciprocity is owed as a matter of political justice among those who are free and equal citizens along with everyone else.”).

446 *Id.* at 139.

447 *Id.* at 137–38.

448 *Id.* at 139.

449 *Id.*

450 Rawls goes on to say that the aim of a property-owning democracy “is to realize in the basic institutions the idea of society as a fair system of cooperation between citizens regarded as free and equal.” *Id.* at 140. The background institutions sketched are required for that semblance of equality. Note the ways in which this understanding of equality meshes with the conception of equality in the Reconstruction period, regarding the ability to participate in economic matters as full and equal citizens. *See supra* notes 86–89 and accompanying text (discussing the Reconstruction Amendments).

The manager of the Berle and Means Corporation may have envisioned his role, and the responsibility of his corporation, as serving the public good, not just serving consumers.<sup>451</sup> The corporation was not simply a producer, but a major player in the broader societal landscape. On account of this fact, the corporation became a means, during the Nixon years, for realizing public policy goals.<sup>452</sup> The merger movement of the 1970s and 80s, and the wave of hostile takeovers, led to a shift in focus: an eventual triumph of the view that corporations merely existed to maximize shareholder value coupled with a rejection of any broader social aims.<sup>453</sup> Milton Friedman famously wrote an essay in the *New York Times* entitled *The Social Responsibility of Business Is to Increase Its Profits*.<sup>454</sup> Many believe that this has now come to pass.<sup>455</sup> In place of the institutions that originally required a *public* purpose, and were literally creations of the state, the immortal corporation now truly serves its own interests.<sup>456</sup> It is our contention that the singular exercise of its power on behalf of itself is inimical to the broadest public good, and that the conflation of the public and private spheres obscures these harms.<sup>457</sup>

Neither Adam Smith nor the founders of the nation subscribed to a faith in the intrinsic beneficence of corporate interests for the nation. Quite the contrary, they feared the concentration of economic power just as they feared the concentration of political power. These concerns became increasingly dire with the tremendous growth of industrial production. The Free Soil Party, which was subsequently incorporated into the nascent Republican Party, believed that wage labor was tantamount to white or “wage slavery” – a threat to economic independence.<sup>458</sup>

Towards the end of the Civil War, President Lincoln expressed concerns that would have resonated with the founding generation. In a letter to a wealthy businessman, Lincoln said:

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451 Davis, *supra* note 420, at 1125 (noting that economist Carl Kaysen claimed that “the professional managers who ran America’s major corporations . . . took seriously the corporation’s responsibility to the paramount interests of the community”).

452 *Id.* at 1126.

453 *Id.* at 1127–29.

454 Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Nov. 13, 1970, at 32.

455 JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 111–12 (2004).

456 The Michigan Supreme Court has, in fact, held that a business corporation is organized primarily for the profit of the stockholders, as opposed to the community or its employees. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). However, this case is arguably not relevant law today. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166–68 (2008).

457 In contrast, Joel Bakan argues that corporations are pathological. BAKAN, *supra* note 455, at 1–2. This is only true to the extent that a corporation is a person. Our argument contests the privileges of corporate power upon which that behavior may be based.

458 See FONER, *supra* note 22, at 58–59; *supra* note 89 and accompanying text (discussing the Republican Party’s suspicion of corporations and the slavery of the white worker).

As a result of the war corporations have been *enthroned* . . . an era of corruption in high places will follow and the money power of the country will endeavor to prolong its *reign* by working upon the prejudices of the people until the wealth is aggregated in the hands of a few, and the Republic is destroyed.<sup>459</sup>

The extended metaphor of monarchy, employing terms such as “enthroned” and “reign,” evokes the classical liberal fear of concentrated political or economic power, and suggests that tyranny destructive to the republic may arise from the concentration of economic power, not just political power.<sup>460</sup>

In the modern era, concentrated economic power has never enjoyed stronger voice in the market place of ideas or the political arena. The increasingly sacrosanct free speech rights of corporations, overlaying judicial hostility to campaign financial restrictions and the deregulation and increasing concentration of corporate media ownership, draws tighter the dangerously close connection between economic and political power.<sup>461</sup>

Corporations have amassed never-intended rights, powers, and authority. Consequently, they are able to accumulate enormous capital and centralize power. The top 1% of income earners currently generate 20% of the nation’s income—“near what it was in the Gilded Age and up from about 8% in the 1970s.”<sup>462</sup> The consumer value they produce and innovation they promote cannot be overstated, but the consequences for democracy are just as important. The centralization and concentration of wealth, concomitant with widening economic inequality, impact democracy in two ways. The centralization of economic power leads to intergenerational wealth and privilege and the inequality of opportunity. More critically for our purposes, centralized economic power leads to centralized political power, directly and indirectly. Corporations can influence our political system, and thwart attempts to regulate them. Centralized economic power, via corporate form, allows corporations to finance candidates through direct expenditures and campaign contributions that are sympathetic to their interests, giving them an outsized influence relative to the average citizen. They distort our democracy and generate inequality, since their main concern is profit, not

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459 ABRAHAM LINCOLN, *THE LINCOLN ENCYCLOPEDIA* 40 (Archer H. Shaw ed., 1950). It is worth pointing out that Lincoln’s concerns are voiced despite his service as an attorney for the Illinois Central Railroad, one of the nation’s largest corporations at the time. FONER, *supra* note 22, at 67.

460 *See supra* notes 442–50 and accompanying text.

461 The Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, was a “watershed” moment, deregulating and relaxing restrictions on ownership. The legislation, touted as a step that would foster competition, actually resulted in the subsequent mergers of several large companies, a trend which still continues today. Sean Condon, *Fighting for Air: An Interview with Eric Klinenberg*, *ADBUSTERS* (June 27, 2007), [http://www.adbusters.org/magazine/72/Fighting\\_For\\_Air\\_An\\_interview\\_with\\_Eric\\_Klinenberg.html](http://www.adbusters.org/magazine/72/Fighting_For_Air_An_interview_with_Eric_Klinenberg.html).

462 Foroohar, *supra* note 437.

our democracy.

The classical liberal fear of the danger of concentrated economic power to individual freedom and the liberty of the individual seems to have been realized just as public attention to this concern has largely disappeared.<sup>463</sup> Although the anti-statism fear of concentrated political power is as salient as ever, it has the ironic consequence of securing those undesirable excessive corporate prerogatives that threaten democratic aims. Anti-statism generates antipathy towards governmental regulations which might prevent or curb corporate excesses.

The expansion of excessive corporate prerogative rests not simply on the authority of corporations to assert their interests with monied speech, but also to manipulate democracy more generally. Corporations may deploy their considerable resources to reverse democratic processes or to even manipulate democratic processes to “rig” the game. In Ohio, corporations have sought and achieved legislative victories that preempt local communities from passing ordinances outlawing risky horizontal hydraulic drilling for natural gas (known as “fracking”).<sup>464</sup> Ohio fast food corporations have also influenced zoning, designed to improve food quality, in order to protect their interests.<sup>465</sup> Such attempts to rig the rules of the game in the race context have been, in at least several instances, overturned by the Supreme Court, as impermissible “political restructuring.”<sup>466</sup> It seems

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463 Although the Occupy Wall Street movement has emerged at the time of this writing as one group that seems to be expressing these concerns.

464 See, e.g., Act of Apr. 27, 2004, 2004 Ohio Laws HB 278 § 1509.02 (codified as amended at OHIO REV. CODE ANN. § 1509.02 (West 2007 & Supp. 2011)); see also Greg Coleridge, *Fracking Democracy*, OPEdNEWS.COM (Mar. 7, 2011, 3:54 PM), <http://www.opednews.com/articles/Fracking-Democracy-by-Greg-Coleridge-110307-981.html>.

465 See Colin McEwen, *Planning Commission Reviews City's Drive-Thru Study*, LAKEWOOD-PATCH (Aug. 5, 2011), <http://lakewood-oh.patch.com/articles/planning-commission-reviews-citys-drive-thru-study>.

466 In *Hunter v. Erickson*, *Washington v. Seattle School District No. 1*, and *Romer v. Evans*, sometimes collectively referred to as the “political restructuring” cases, the Court defended minorities from discrimination where majorities attempt to change the rules of the game by restructuring the political playing field. In *Hunter*, the Supreme Court struck down an amendment to the Akron City Charter requiring any city ordinance regulating housing discrimination to be approved by a majority of the city’s voters. *Hunter v. Erickson*, 393 U.S. 385, 393 (1969). This amendment placed majority and minority groups on unequal footing. *Id.* at 391. The minority, the group likely to need the protections, must overcome a unique procedural hurdle to obtain relief. See *id.* at 387. On the other hand, the majority had no need for protection against housing discrimination and therefore faced no such obstacle when approaching the city council for relief. *Id.* at 391. Because the amendment prevented minority groups from approaching the city council on the same terms as everyone else, the court characterized the charter amendment as a “special burden on racial minorities within the governmental process” and therefore a violation of equal protection. *Id.* In *Washington*, the Supreme Court struck down a statewide initiative designed to prohibit school boards from busing students as a desegregation remedy. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485–87 (1982). Prior to the initiative, minority groups could persuade school boards to adopt a busing plan;



unlikely that similar challenges to corporate sponsored legislation would succeed. Perhaps the boldest example of such efforts so far is Amazon.com's sponsored ballot initiative asking California voters to overturn a law that would tax its online sales.<sup>467</sup> Major corporations can "launch expensive lobbying campaigns against even the mildest laws reining in their behavior."<sup>468</sup>

In global labor and capital markets, corporations, in pursuit of ever greater profits, threaten both local government and government agencies with divestment or investment elsewhere unless they receive tax concessions, incentives, subsidized utilities, regulatory exemptions, and other benefits.<sup>469</sup> Corporations force local governments and even state governments to compete among one another in bidding wars to receive maximum tax incentives.<sup>470</sup> Unless local politicians bend to their demands, they can threaten to close a factory and move jobs to another state.<sup>471</sup> In addition, corporations drive a race to the bottom – internationally – forcing nation–states to offer favorable corporate tax rates or threaten to avoid

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subsequent to the initiative, minority groups were unable to lobby for a busing remedy without repealing the statewide initiative. *Id.* at 461–64. The court found significant the fact that the school boards in Seattle were the natural decisionmaker with respect to most other areas of educational policy. *Id.* at 474. "The initiative removes the authority to address a racial problem . . . from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* Therefore, the court extended application of *Hunter* to situations where the political restructuring resulted in a horizontal shift in decision–making from the local level to the state level. The majority was restructuring the political playing field to burden minority interests. *Id.* at 470–75. In *Romer*, the Supreme Court struck down an amendment to the Colorado constitution repealing laws that prohibit discrimination based on sexual orientation. *Romer v. Evans*, 517 U.S. 620, 635–36 (1996). Consistent with the *Seattle* decision, the court found that the reallocation of political power in *Romer* was an impermissible horizontal shift from the natural decision maker, the municipalities and cities, to the state. *See id.* at 626–31. In its broadest articulation of the political restructuring principle yet, the court held that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633.

467 Jim Christie & Bernard Orr, *Amazon Seeks Ballot Measure to Undo California Tax*, THOMSON REUTERS (July 11, 2011, 9:29 PM), <http://www.reuters.com/article/2011/07/12/economy-california-amazon-idUSN1E76A1XH20110712>.

468 TAIBBI, *supra* note 318, at 30.

469 BARLOW, *supra* note 421, at 63–64.

470 For an extensive discussion of this, see Karmatz, *supra* note 440.

471 Russell Mokhiber & Robert Weissman, *Corporate Shakedown in Toledo*, COMMONDREAMS.ORG (Feb. 8, 2000) <http://www.commondreams.org/views/021000-105.htm> ("Faced with the threat of the existing Jeep plant closing, Toledo put together a \$281 million local, state and federal subsidy package to support company plant expansion plans. The package includes a property tax exemption for 10 years, transfer of free land, including site preparation, transfer of environmental liability from DaimlerChrysler to the city and assorted other corporate welfare handouts."). See also Greg Leroy, *The Great American Jobs Scam: Corporate Tax Dodgin and the Myth of Job Creation*(2005).

repatriating tax revenues that may be subject to local tax authority.<sup>472</sup> Historically, the Court structured this pattern by fashioning rules that predictably led in that direction by erecting a system of federal protection against states, Congress, and workers.<sup>473</sup> This asymmetry is playing out on the international stage today, as the World Trade Organization protects corporate prerogatives from nation-states without providing equivalent protections for the nations' populations and the nations themselves.<sup>474</sup>

Appropriately, it is *Carolene Products* that highlights the need to protect democratic processes from corporate manipulation. Footnote four instructs that attempts to rig the game are subject to more searching judicial scrutiny.<sup>475</sup> It is on this basis, combined with the particular attention to discrete and insular minorities, and their unique vulnerability to majoritarian processes, that the political restructuring doctrine has been developed.<sup>476</sup>

By weakening governmental structures through devolution, federalism, and deregulation, or simply by erecting constitutional protections for corporate individuals, the threat of popular involvement in policy-making is reduced.<sup>477</sup> In the late nineteenth century, corporations escaped and attacked state regulations, taxation, and other forms of control by using federal law as a shield or by preempting state laws with weaker or nonexistent federal ones. Following the Environmental Protection Act (EPA), Occupational Safety and Health Act (OSHA), and other stronger federal forms of regulation, corporations now use the states to escape federal regulations, since states have weaker regulations and controls.<sup>478</sup> This also

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472 See *A Look at the World's New Corporate Tax Haven*, 60 MINUTES (Mar. 25, 2011, 10:31 PM), <http://www.cbsnews.com/stories/2011/03/27/60minutes/main20046867.shtml>; James Roberts, "60 Minutes" Investigates Why 100,000 American Jobs Went to Ireland, IRISH CENTRAL (Mar. 29, 2011, 7:30 AM), <http://www.irishcentral.com/news/60-Minutes-investigates-why-100000-American-jobs-went-to-Ireland-VIDEO-118830494.html>; see also FONER, *supra* note 22, at 316.

473 See *supra* Part I.

474 See, e.g., Sheldon Leader, *The Collateral Protection of Rights in a Global Economy*, 53 N.Y.L. SCH. L. REV. 805, 808–10 (2008).

475 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

476 See *supra* note 368 and accompanying text.

477 CHOMSKY, *supra* note 156, at 345.

478 See, e.g., Christopher B. Power, *West Virginia Legislature Voices Opposition to EPA Intrusion into State Water Quality Rulemaking*, NAT. L. REV. (2011), <http://www.natlawreview.com/article/west-virginia-legislature-voices-opposition-to-epa-intrusion-state-water-quality-rulemaking>. There is a parallel here, of course, to the race context. Before the Civil War, federal law was used by Southern slaveholders to protect the institution of slavery and to ensure the return of fugitive slaves. Following Reconstruction, "states rights" and "local control" were deployed and used to protect the South's racial arrangements, knowing that state laws would be more accommodating. As with corporate law, the situation is reversing itself in some measure. The federal courts, led by the Supreme Court, now employ federal laws to protect both our racial arrangements and corporate prerogatives. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723–25 (2007) and the upcoming review of *Western Tradition Partnership, Inc. v. Montana*, which the Supreme Court has stayed pending review.

drives the race to the bottom. California and other states passed laws implementing more stringent emissions standards, particularly regarding carbon dioxide, than the federal EPA.<sup>479</sup> These laws were challenged on preemption grounds, arguing that federal law preempted states from enacting more stringent rules.<sup>480</sup> The Supreme Court recently ruled that states could not enact more stringent rules than the EPA.<sup>481</sup> Federal law is now being used to overturn more aggressive state laws. Importantly, many of the challenges to these laws are funded by corporate billionaires.<sup>482</sup>

For all of their power and individual rights, including rights and privileges actual human beings do not enjoy, corporations cannot vote. Corporations must persuade voters to overturn laws and regulations that impinge on their profits. A basic strategy for making this case is to argue that these laws and regulations harm them as well, that they are a product of an overbearing, interventionist state.<sup>483</sup> This is accomplished through the guise of public/private. In each case, it is implied, the government is infringing the liberties and rights of private citizens. The other strategy is to scapegoat minorities or other marginalized groups. After creating a major financial crisis by securitizing and selling bundled mortgages, the major banks blamed the Community Reinvestment Act and the policy of the United States to expand homeownership.<sup>484</sup>

Historically, popular democracy and organized labor have checked excessive corporate prerogatives.<sup>485</sup> However, these efforts were ultimately blunted by the strategies just described. Initially an agrarian uprising, the Populist movement is an example of both the impulse for democratic accountability and the ways in which such movements may be undermined. American farmers, still a majority of the population in the 1870s, protested an unregulated monetary system that produced devastating depressions

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Am. Tradition P'ship Inc. v. Bullock, 132 S.Ct. 1307 (2012). In that case, the Montana Supreme Court upheld corporate political contribution limits under a 1912 state statute. W. Tradition P'ship, Inc. v. Attorney Gen. of State, 363 Mont. 220 (Mont. 2011).

479 Peter Lattman, *The Preemption Battle Royale: California v. The EPA*, WALL ST. J. (Jan. 3, 2008, 9:07 AM), <http://blogs.wsj.com/law/2008/01/03/a-preemption-battle-royale-california-v-the-epa/>.

480 See Barry Bagnato, *Supreme Court Backs EPA over State Govts on Climate Change*, CBS NEWS (June 20, 2011, 4:25 PM), [http://www.cbsnews.com/8301-503544\\_162-20072702-503544.html](http://www.cbsnews.com/8301-503544_162-20072702-503544.html).

481 Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527, 2537-38 (2011).

482 See, e.g., ALLIANCE FOR JUSTICE, BILLIONAIRES BEHIND THE CURTAIN: HOW KOCH BROTHERS' MONEY INDIRECTLY SUPPORTS POLLUTERS IN *AMERICAN ELECTRIC POWER V. CONNECTICUT* 3 (2011), [http://www.afj.org/connect-with-the-issues/the-corporate-court/billionaires\\_behind\\_the\\_curtain.pdf](http://www.afj.org/connect-with-the-issues/the-corporate-court/billionaires_behind_the_curtain.pdf).

483 TAIBBI, *supra* note 318, at 29.

484 *Id.* at 242-45.

485 Today, of course, the Tea Party espouses populist positions that fertilize and expand corporate prerogatives. See *supra* notes 119-121 and accompanying text.

and financial panics.<sup>486</sup> Financial speculation that “regularly set off Wall Street ‘panics’” produced economic depressions that dropped crop prices and left many families deeper in debt with every cycle.<sup>487</sup> The result was a system in which financiers enjoyed a “near monopoly on capital.”<sup>488</sup> The courts provided no recourse, as they were increasingly protective of corporate power. Elected officials were just as unresponsive.<sup>489</sup> A small group of farmers in Texas organized what would become the Southern Alliance, and, by 1890, the National Farmers alliance boasted of 500,000 members in the South.<sup>490</sup> This was the basis for the People’s Party, and the political wing of the Populist movement, which spread throughout the Midwest, West, and Northwest.<sup>491</sup> The early Populist effort was an attempt to build a national coalition among freed slaves, poor whites, and small, independent farmers.<sup>492</sup> They recognized the importance of making common cause across racial lines – that to take power they would have to make alliances with black farmers.<sup>493</sup> By the mid–1890s, the Populists were drawing between twenty–five to forty–five percent of the vote in twenty states.<sup>494</sup>

Southern planters feared this alliance, and through a combination of violence, race–baiting, and electoral fraud, crippled the southern populist movement.<sup>495</sup> Critical electoral victories in the South were denied to Populist candidates through ballot stuffing and voter intimidation.<sup>496</sup> The violence aimed at the Populists in the South was even more brutal than the state apparatus directed at the labor movements of the North, evidencing an “extreme disregard for human life.”<sup>497</sup> Through it all, appeals to white racism and attacks on inter–racial politics were a ground for southern terror. The crushing of the Populist movement not only precipitated the establishment of Jim Crow (which had been successfully warded off in the more immediate Reconstruction period), it also foreclosed the emergence

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<sup>486</sup> Kevin Baker, *The Vanishing Liberal: How the Left Learned to be Helpless*, HARPER’S MAG., April 2010, at 31.

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.* at 31–32.

<sup>490</sup> *Id.* at 32.

<sup>491</sup> MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 141 (1997)

<sup>492</sup> *See id.* at 139–41.

<sup>493</sup> *Id.* at 141 (1997) (“[W]hite leaders . . . realized early that they could not succeed, especially in the South, without their African American brethren. Thus, questions of race were to become integral to the development of this country’s most militant agrarian revolt.” (citation omitted)).

<sup>494</sup> Baker, *supra* note 485, at 32.

<sup>495</sup> GOLDFIELD, *supra* note 490, at 161.

<sup>496</sup> *Id.*

<sup>497</sup> *Id.*

of a national labor movement, a fact that would hamper union organizing for the next century.

The United States is unique among western democracies in lacking of a truly national labor movement.<sup>498</sup> Southern control of black labor inhibited the cross-racial solidarity needed to generate a strong labor movement in the region.<sup>499</sup> The failure to make common cause across racial lines meant that neither civil rights for freedmen nor a strong labor movement would come to fruition. Freedmen were used as scab labor to break unions, just as the white union organizers helped police Jim Crow. Furthermore, one-party dominance in the south for half a century insured Southern control of critical political institutions that would prevent the establishment of labor rules undermining the region's racial strictures.<sup>500</sup> Consequently, the United States has not had a labor party or a political party since the Populists in which the labor movement was a central driver.<sup>501</sup> Without the benefit of a national labor movement or labor party, critical institutional features that developed in other western democracies, the United States has had relatively fewer checks on the potential for excessive corporate prerogatives.<sup>502</sup>

When the postwar economic expansion drew to a close in the early 1970s, the "social compact" of industrial unionism began to dissolve.<sup>503</sup> Corporations demanded contract concessions and began the process of moving manufacturing jobs to low-wage states and overseas.<sup>504</sup> This pushed the labor movement into a defensive position from which it has never recovered in the United States. At the same time, the attack on unions is an expansion of excessive corporate prerogative over individual workers. The Taft-Hartley Act<sup>505</sup> made it more difficult for unions to organize, and the legislation upon which it was based exempted prevalent forms of southern labor, especially agricultural activity.<sup>506</sup> Today, right-to-work laws and other anti-union tactics prevent the development of checks on corporate prerogatives.

During the height of the *Lochner* era, John D. Rockefeller, Sr., the richest man in the world and the capitalist par excellence, came to recognize the

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498 See john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 380 (2007).

499 *Id.*

500 *Id.*

501 See ALBERTO ALESINA & EDWARD L. GLAESER, FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE 122–26 (2004). This is in contrast to European nations, which have major labor parties. See powell, *supra* note 497, at 380–82.

502 *Id.* at 129.

503 See FONER, *supra* note 22, at 316.

504 *Id.* at 316.

505 Labor-Management Relations Act, Pub. L. No. 80–101, 61 Stat. 136 (1947).

506 FONER, *supra* note 22, at 257.

harm that unregulated capitalism could generate. Rockefeller was the architect of the Standard Oil trust, and personally hostile to any form of governmental intervention.<sup>507</sup> In fact, Rockefeller pioneered virtually every major anticompetitive tactic to restrain trade and suppress competition.<sup>508</sup> He came to understand that a private sector without an umpire, especially one dominated by monopolies and oligopolies, had problematic features. His business acumen and devilish tactics taught the American public that “unfettered [free] markets tended . . . towards monopoly or, at least, toward unhealthy levels of concentration, and government sometimes needed to intervene to ensure the full benefits of competition.”<sup>509</sup> Following a major financial panic in 1894, Rockefeller “awakened to the public responsibilities attending great wealth.”<sup>510</sup> He cooperated with the federal government to help calm the financial markets, including providing liquidity.<sup>511</sup> This response indicates that Rockefeller came to understand that unbridled corporate power was not good for democracy or even the economy, especially given the boom and bust cycles endemic in unregulated markets. In the midst of the Depression, John D. Rockefeller, Jr. even issued an appeal for Franklin D. Roosevelt’s National Industrial Recovery Act.<sup>512</sup> In an environment where the government was too weak, he took this role on himself.<sup>513</sup> It is unfortunate that this is a lesson we must relearn. The repeal of Glass–Steagall Act,<sup>514</sup> according to some, directly precipitated the financial services mergers that brought upon us the 2008 financial meltdown.<sup>515</sup> Enacted during the Depression, the Glass–Steagall Act was designed to prevent the conglomeration of a business that was “too big to fail.”<sup>516</sup>

Franklin Delano Roosevelt, who finally cracked the stranglehold corporations exerted on American political and economic life,<sup>517</sup> also

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507 CHERNOW, *supra* note 32, at 338.

508 *Id.* at 297.

509 *Id.*

510 *Id.* at 338.

511 *Id.*

512 *Id.* at 667.

513 *See id.* at 338, 667.

514 Gramm–Leach–Bliley Act, Pub. L. No. 106–102, § 101, 113 Stat. 1338, 1341 (1999) (repealing the Banking Act of 1933, Pub. L. No. 73–66, §§ 20, 32, 48 Stat. 162, 188, 194).

515 Cyrus Sanati, *10 Years Later, Looking at Repeal of Glass–Steagall*, N.Y. TIMES (Nov. 12, 2009, 2:24 PM), <http://dealbook.nytimes.com/2009/11/12/10-years-later-looking-at-repeal-of-glass-steagall/>.

516 *See* Sam Stein, *Glass–Steagall Act: The Senators and Economists Who Got It Right*, HUFFINGTON POST (June 11, 2009, 5:12 AM), [http://www.huffingtonpost.com/2009/05/11/glass-steagall-act-the-se\\_n\\_201557.html](http://www.huffingtonpost.com/2009/05/11/glass-steagall-act-the-se_n_201557.html); *see also* *Glass–Steagall Act (1933)*, N.Y. TIMES (Oct. 12, 2011), [http://topics.nytimes.com/topics/reference/timestopics/subjects/g/glass\\_steagall\\_act\\_1933/index.html?offset=0&s=newest](http://topics.nytimes.com/topics/reference/timestopics/subjects/g/glass_steagall_act_1933/index.html?offset=0&s=newest).

517 *See* FONER, *supra* note 22, at 200–01.

appealed to corporations to change.<sup>518</sup> He asserted that without change capitalism was in serious danger.<sup>519</sup> There were strong popular hostility to the misalignment of corporations.<sup>520</sup> Dating back to the Populist<sup>521</sup> and Progressive<sup>522</sup> movements and into the 1930s,<sup>523</sup> Americans were deeply concerned and vocal about corporations destroying the economy and distorting our democracy. These concerns were not quelled by a facile claim that corporations are private. There was an understanding that expansion of corporate prerogative was a direct threat to livelihood and public voice.<sup>524</sup> This climate lent credibility to Roosevelt's assertion that some changes in regulating corporations were necessary to save capitalism.<sup>525</sup> There was also a strong belief that there needed to be a strong middle class to buy the products that were produced by corporations.<sup>526</sup> In today's environment the threat of corporate misalignment may be just as great. What we lack is a popular sense of urgency and concern that was present during the Gilded Age and Progressive/*Lochner* era.<sup>527</sup>

Some will argue that on the issue of civil rights and racial equality the modern corporation has been a force for good. This is questionable, but the record is probably mixed. Our point is not that corporations will always use their excessive prerogative for harmful ends, but that excessive prerogative itself is a structural distortion. It is not surprising that Paul made his attack on the Civil Rights Act because civil rights, claims of workers, women's rights, and environmental concerns all limit corporate prerogative. As Rawls and Franklin D. Roosevelt suggest, a healthy democracy and a fair economy require this limitation. We cannot achieve racial justice, economic justice, protect our environment, or enjoy a strong democracy unless we have a realignment of corporations. The structure of corporate prerogative has been undergoing realignment, but one in which their power is becoming ever greater. It is an alignment in the wrong direction.

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518 Franklin Delano Roosevelt, Presidential Campaign Address on Progressive Government at the Commonwealth Club, San Francisco, California (Sept. 23, 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE GENESIS OF THE NEW DEAL, 1928-1932, at 742, 754-56 (Samuel I. Rosenman ed., 1938).

519 *Id.* at 753-55.

520 *See* FONER, *supra* note 22, at 196.

521 *See id.* at 127.

522 *Cf. id.* at 140-41.

523 *See id.* at 204.

524 *See id.* at 197.

525 *Id.* at 195-200.

526 *See id.* at 199.

527 In fact, the popular sentiment runs against state intervention. *See supra* note 119 and accompanying text.

## CONCLUSION

Our political tradition embodies vigilance against the concentration and abuse of power. The founders of the Republic conceived of the United States in terms that resisted the exercise of centralized political power, which they called tyranny, and fashioned a tripartite system of checks and balances to defuse the authority of the federal government among co-equal branches. The Reconstruction era framers, having experienced the tyranny of state governments, built in further checks on power, to protect discrete and insular minorities from majoritarian tyranny. The framers of the Republic were equally wary of the concentration of economic power. But today, we remain too silent on the abuses this form of power may exercise.

In this article, we have suggested that a reason for this blind spot is the public/private dichotomy, by which all relevant actors are uncomfortably sorted into one of two categories. As an alternative set of heuristics by which we may become attentive to these dangers and better observe them, we offered four categories: public, private, non-public/non-private and corporate. The exercise of excessive corporate prerogatives has depended upon a simple conflation of these spheres.

In Part I of this article, we highlighted the bases for and described the expansion of corporate prerogative, ushered in by elites, lawyers, and courts, often over the opposition of democratic majorities. We explored the development of corporate personhood doctrine from its incipient forms in *Dartmouth* and *Letson* to its full-blown appearance in *Santa Clara*. This doctrine has become the foundation for clothing corporations in constitutional rights. The commercial speech doctrine that has evolved in decisions like *Citizens United* has continued that expansion. We examined how the State Action doctrine, Commerce Clause, and Substantive Due Process doctrines shielded corporations from both state and federal regulation. Although some of these doctrines may no longer exist in their original forms, they each played a vital role in legal thought and popular culture by conflating corporate and private actors.

Part II examined the origins of the public/private distinction, the hydraulic relationship between both domains, and the feminist and critical legal studies critique of this dichotomy. We noted the criticism of the public/private dichotomy in shielding discrimination and exploitation from government interference. We explored the relationship between public activity and private conduct. Laws arise from culture, and vice versa. A sharp public/private distinction not only obscures the relationship between law and culture, it cannot account for the ways in which private behavior – even private goods – are a product of public policy. From housing markets to private discrimination, law and public policy play a vital background role.



More generally, the state is present in all markets. As legal scholars have noted, market relations are conditioned by and dependent upon the existing system of legal rules, including property, tort, and contract law.<sup>528</sup> The notion of a free market wholly unencumbered by legal or professional regulation is a fiction, albeit a popular one. The question is not whether to regulate, but how.<sup>529</sup> The form of regulation not only distributes wealth and resources, but also power and belonging. This is the essence of the Civil Rights Acts, which seek to expand the circle of human concern by incorporating all groups into the public sphere and by prohibiting private discrimination. The public/private distinction masks the power dynamics that differentiate corporate and private actors, and serves to protect both corporate prerogatives and white space from governmental interference under the guise of 'free markets.'

Although we share the criticism of feminist legal scholars and critical legal theorists of the public/private distinction, we offer a four-sphere paradigm as a re-articulation of the public/private distinction. From this perspective, we are better able to observe how the corporate sphere threatens individual freedom and personal privacy, and how marginalized groups may experience exclusion from both public benefits and private rights. We explained how these spaces were constructed by the Court, and have continually been reinscribed in recent years. They also illuminate the dangers of privatization for expanding corporate space and reducing democratic accountability.

Part III brings into focus the need for a realignment of corporate space in the United States. We began by investigating the role of corporations today, and examined the justifications offered for the expansion of corporate prerogative. The exercise of excessive corporate prerogatives poses special dangers to our democracy. We explored the insights of John Rawls as a roadmap for examining a potential realignment for corporate space in our democracy.

Throughout this article we have argued that the expansion and exercise of corporate power properly coincides with and makes concomitant disempowerment of people of color. We observed pre-Reconstruction

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<sup>528</sup> SUNSTEIN, *supra* note 198.

<sup>529</sup> Cite to HARCOURT, *supra* note 206. In other words, every market is bounded by some regulatory scheme, whether it is as basic as fundamental property laws or as extensive as a control and command economy. As Harcourt explains:

The liberalization of markets and privatization of industries during portions of the nineteenth and twentieth centuries merely substituted one set of regulations, often governmental forms of rule-making, with other regulatory systems that merely favored a different set of actors. There is, to be sure, a sense of liberation that accompanies the "liberalization of markets. But it is illusory and serves as a cover that simply renders distributional outcomes more natural. It appears to take government out of the mix and thereby give the impression that outcomes are not based entirely on merit or talent. All the while, the state actually facilitates and makes possible the new order."

Id at 241.

moves to protect corporate standing while barring blacks from the same, culminating in *Dred Scott*. We then observed how the Reconstruction Amendments were hijacked from their asserted purpose and deployed in a variety of ways to definitively ground corporate personhood and shield corporate prerogatives during the period of *Lochner* and Jim Crow. We then observed how the Revolution of 1937 simultaneously reversed *Lochner* and began to unwind Jim Crow. Finally, we witnessed the sometimes halting and ultimately successful effort in *Bakke* and *Belotti* to expand corporate prerogatives while circumscribing the reach and protection of the Fourteenth Amendment for marginalized groups culminating in *Citizens United* and *Parents Involved*.

Members of the Court and many lay people worry that the expansion of corporate influence may crowd out democracy, especially in the area of political speech and electoral influence. While we share this concern, we are suggesting that even this framing is too limited an understanding of the stakes. What is less understood is the relationship between excessive corporate prerogative, civil rights, privacy and democracy. The Populist effort to challenge corporate power was organized in the context of building a racially inclusive democracy. This effort was not abandoned so much as it was thwarted on that front in favor of what Michael Omi and Howard Winant called a “racial dictatorship.”<sup>530</sup> The Populist movement foundered on the shoals of racial prejudice. The promise of democracy cannot be achieved unless it is broadly inclusive.

Our trend toward shrinking public space, hostile localism, and expansive corporate rights engenders the further marginalization of historically disadvantaged groups, expanding non-public, non-private space. While this may be most visible in cases such as *Dred Scott*, it is no less evident in cases like *Parents Involved* or *Milliken*, which sanction public and private behavior that contributes to the segregation of our nation’s geography by race and class. The consequences, however, reach beyond those spaces, but extend throughout the institutions they help erect and culture they generate.

This article suggests that corporations make good servants, but bad masters. To paraphrase Rawls, we can have either a corporatist welfare state or democracy, property respecting state.<sup>531</sup> The rapid expansion of corporate prerogative and growth of corporate space is not only a threat to individual liberty and democratic accountability, it is a threat to the broadest public good. The concentration of wealth and influence in corporate form is an increasingly evident structural distortion in our economy and our politics.

When the Populists abandoned the effort to build a broadly inclusive movement that included blacks in the south, they lost both the economic

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530 MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 65–69 (2d ed. 1994).

531 JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 12, at 135–36.

fight as well as the democratic possibility. In a much more diverse country, we are again confronting this challenge. While racial attitudes have improved remarkably since the late 1890s, there is increasing evidence of deep racial anxiety as the United States races towards a non-white majority within a few decades. It is no coincidence that these demographic changes are occurring amidst growing reluctance to invest in shared public provision and calls to privatize and divest public space. To make corporations our servant, we need as Theodore Roosevelt argued a century ago, a strong federal government, and perhaps an international regulatory regime as well as strong collective action by citizens.<sup>532</sup> To accomplish that goal, we must clarify a misleading public/private distinction and tame the Court as Franklin D. Roosevelt managed to do in the 1930s.

Through much of the late nineteenth century there were two overlapping struggles to realize the promise of our democracy: the struggle to realize civil rights, and the gilded era Populist and progressive effort to rein in corporations, which resulted not only in the progressive amendments to the constitution, but a bevy of state laws regulating corporate influence.<sup>533</sup> The *Lochner* era Court infamously inscribed corporate prerogatives throughout the fabric of the Reconstruction Amendments while simultaneously denying those rights to freed slaves and their progeny. The reawakened and invigorated ideology of market fundamentalism calls into question the scope of governmental authority to regulate the market, not only in an effort to check the exercise of excessive corporate prerogative, but also ensure the guarantee of civil rights.

It is not surprising that Senator Rand Paul, in a moment of candor, criticized the Civil Rights Act because civil rights, the rights of workers to organize, women's rights, and environmental protections all limit corporate prerogative. As Rawls and Franklin D. Roosevelt might suggest, a healthy democracy and a fair economy require this limitation. The danger we all face is not simply a weak democracy and anemic public space dominated by corporate elites, but a distorted private space surveiled and invaded by corporate actors. The expansion of corporate space is a threat to everyone, and should not be confused with the liberty of the private sphere.

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<sup>532</sup> By "regulation" we mean something different than the conventional understanding of a narrow rule which constrains a particular kind of behavior, but a more general set of market rules which would engender a more appropriate alignment of corporations in our democracy and across the globe. We are not anti-corporate or anti-market. We are not calling for the "regulation of free markets" by rather note that all markets are regulated, and the question is not whether regulations should exist, but how they should be structured.

<sup>533</sup> One such law is now being challenged in the Montana Supreme Court case as discussed *supra* note 478.