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Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights

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NEOFEUDALISM: THE SURPRISING FOUNDATIONS OF CORPORATE CONSTITUTIONAL RIGHTS

Daniel J.H. Greenwood*

Business corporations are statutory creations, recognizably modern only from the end of the nineteenth century, if not the New Deal. The modern statutes are loosely descended from far older corporate forms. In those earlier eras, corporations were self-governing entities with claims to partial or total autonomy—the Knights Templar, monasteries, guilds, cities, universities, or aristocracy.

Startlingly, the Supreme Court's constitutional jurisprudence continues to be deeply influenced by the feudal understanding of corporations as quasi-sovereigns entitled to something like comity. This image—not the word “person” in the Fourteenth Amendment, the “naturalness” or “artificialness” of corporations, nor the requirements of freedom of speech or religion—is the best explanation of both the historic and modern cases.

This semi-sovereign understanding of the corporation's constitutional status presents two underexplored problems. First, business corporations have no defensible claim to autonomy in a post-feudal, liberal democracy. Second, if they did, they would be subject to the standard liberal critiques of their unlamented predecessors: corporate officeholders wield unresponsive power unrestrained by republican or democratic norms.

Rejecting this notion would allow us to begin to explore the full implications of the alternative view—that business corporations, like our other governing agencies, “deriv[e] their just powers from the consent of the governed . . . [to] effect their Safety and Happiness.”¹ As we continue to debate the privileges and duties of citizenship, we need to also consider how the fundamental liberal rights of Due Process, privacy, freedom of conscience, and democratic accountability ought to apply in the corporate sphere.

* Professor of Law, Hofstra University School of Law. AB Harvard; JD Yale. I am deeply grateful to the many scholars from whom I have learned, many of whom I am unable to cite by name. See Kohelet (Ecclesiastes) 1:9 (וְאֵין כֹּחַ לְהִשְׁעָאָהּ). Special thanks for helpful comments to Kent Greenfield and Victor Brudney and their seminar students; Michael Dorff and the participants in the Southwestern Law School faculty seminar; and Dave Gerardi.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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I. INTRODUCTION

Are corporations “persons”? The Supreme Court’s decision in *Citizens United*² and Mitt Romney’s widely quoted statement that “corporations are people too, my friend” have revived the old debate.³ Popular

2. *Citizens United v. FEC*, 558 U.S. 310, 363 (2010) (overturning Teddy Roosevelt-era limitations on corporate campaign contributions as violations of Free Speech guarantee, apparently on the grounds that government and the people have no interest in limiting corruption other than provable, explicit “*quid pro quo*” bribery).

3. Constitutional scholars spilled much ink towards the late nineteenth century and beginning of the twentieth debating whether corporations should be seen as “aggregates” or “entities,” “governmental grants” or “private property,” “natural” or “artificial.” The Legal Realists ended an earlier round of this debate with what seemed at the time to be a decisive victory. See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUMBIA L. REV. 809, 811 (1935) (contending quite unrealistically that “[n]obody has ever seen a corporation” but more reasonably pointing out that much speculation on the nature or essence of corporations is irrelevant to the actual rights and duties at issue); see also John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 667–69, 673 (1926) (describing history of theories and pointing out “[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends” and advocating “eliminating the idea of personality until the concrete facts and relations involved have been faced”). But see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 67, 106 (1992) [hereinafter HORWITZ, *TRANSFORMATION*] (arguing that some theories were more useful than others in reaching desired results at particular times). After the Supreme Court overturned large portions of the post-Watergate campaign-reform system and then granted corporations First Amendment

constitutional history contends that corporate constitutional privileges stem from the Supreme Court's 1886 *Santa Clara* decision, which states that corporations are persons for purposes of the Fourteenth Amendment's Due Process Clause.⁴ In this telling, the word "person" becomes a talisman, explaining the origin of the multifarious rights and privileges of the Bill of Rights that the Court granted corporations,⁵ including, most importantly, the right to spend money to influence elections that the Court has found in the First Amendment.⁶ Based on this explanation of the Court's behavior, critics have proposed constitutional amendments specifying that corporations are not persons.⁷

But the popular view is wrong, as scholars have long understood.⁸ The words of the Fourteenth Amendment are neither the source nor the

rights to intervene in American elections, the debate revived. *See, e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS (1986). For a useful summary of this second wave, see Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990). *Citizens United*, 558 U.S. 310 and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) have inspired a vast third wave of commentary by corporate and constitutional scholars. *See, e.g.*, Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 312 (2015) (pointing out that the personhood debate remains far too blunt and arguing that constitutional law ought to take personhood more seriously); *see also infra* notes 119–20.

4. *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (holding, without explanation, that corporations may assert rights as "persons" under the Fourteenth Amendment). The definitive discussion of *Santa Clara* remains. Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985) [hereinafter Horwitz, *Santa Clara Revisited*]; *see also* HORWITZ, TRANSFORMATION, *supra* note 3.

5. Horwitz, *Santa Clara Revisited*, *supra* note 4, at 177.

6. *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that money contributions and spending in connection with elections is entitled to the protections of speech under the First Amendment).

7. *See, e.g.*, RECLAIM DEMOCRACY, <http://reclaimdemocracy.org> (last visited Nov. 25, 2016); *see also Move to Amend's Proposed 28th Amendment to the Constitution*, MOVE TO AMEND (Apr. 29, 2015), <http://movetoamend.org/wethepeopleamendment> (proposing the following amendment to the U.S. Constitution: "[t]he rights protected by the Constitution of the United States are the rights of natural persons only. Artificial entities established by the laws of any State, the United States, or any foreign state shall have no rights under this Constitution and are subject to regulation by the People, through Federal, State, or local law. The privileges of artificial entities shall be determined by the People, through Federal, State, or local law, and shall not be construed to be inherent or inalienable").

The spirit of this proposed Amendment is clear. However, several of the most important corporate-rights cases, as discussed below, claim not to be awarding the entity rights at all. *See, e.g.*, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (overturning restrictions on corporate-funded electioneering based, purportedly, on rights of speech rather than speaker); *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 86 (1809) (holding that corporations may assert diversity jurisdiction because if it were not a corporation, shareholders united in a business could). This rhetorical move no doubt reflects Cohen's continuing influence. *See* Cohen, *supra* note 3. In recent years, courts and academics alike are less likely to contend that corporations are entitled to rights as citizens than to claim that corporations are "mere legal fictions"—something that should be surprising to anyone who works for or purchases the products and services of these quite real and powerful entities. Still, the result is the same: doctrine and analysts alike rush to grant business corporations the rights of citizens instead of inquiring whether the closer analogy might be to municipal corporations and agencies of the state.

8. *See, e.g.*, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574–77 (1949) (Jackson, J., dissenting) (recounting history of interpretation of Fourteenth Amendment protection of corporations); Daniel J.H. Greenwood, *Telling Stories of Shareholder Supremacy*, 2009 MICH. ST. L. REV. 1049, 1074 & nn.59–60, 1075 & n.61 [hereinafter Greenwood, *Shareholder Supremacy*]; Horwitz, *Santa Clara Revisited*, *supra* note 4; Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1643–45 (1988) (stating that personhood was given to corporations to protect shareholders without problems of shareholder standing); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1467–68 (1987); Mayer, *supra* note 3, at 623.

limit of the Supreme Court's commitment to corporate privilege. Even were the proposed clarifying amendment to pass, the Court could easily read its precedents to require little or no change in its doctrine. (It is a separate question whether it would *choose* to do so in the face of the massive popular and elite mobilization necessary to pass a constitutional amendment.)⁹

Instead, the Court's holdings seem to stem from an unarticulated—and ultimately indefensible—view that business corporations are entitled to comity as if they were semi-sovereign foreign bodies within our polity: “wormes in the entrayles” of the state, in Hobbes's memorable description.¹⁰ The Court's constitutional jurisprudence atavistically recapitulates feudal doctrines limiting the sovereign's authority over the medieval corporations of Aristocracy, Church, guilds, universities, and cities,¹¹ as if business corporations were fundamental units of our polity or foreign states we must respect to avoid war.¹²

9. See Finley Peter Dunne, “Mr. Dooley” *Hands Down His Opinion of the Decision*, 22 LITERARY DIGEST 751, 752 (1901) (non standard spelling in original) (“[N]o matter whether th' constitution follows h' flag or not, th' Supreme Court follows th' election returns.”). Casual inspection suggests that Dooley's view is less than clearly correct.

10. THOMAS HOBBS, LEVIATHAN 230 (Richard Tuck ed., 1991) (non standard spelling in original) (“Another infirmity of a Common-wealth, is . . . the great number of Corporations; which are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man.”).

11. Although beyond the scope of this Article, this borrowing is not limited to constitutional jurisprudence. In particular, the judicially invented doctrine of the Business Judgment Rule—exempting corporate officials from ordinary tort liability for negligence or breach of their fiduciary responsibilities—is closely parallel to *Chevron* deference, the doctrine holding that courts should defer to governmental-agency determinations. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that a reviewing court ought to defer to a governmental agency's interpretation of its enabling statute). Both *Chevron* deference and the Business Judgment Rule reflect judicial determinations that agency officers, not the courts, ordinarily ought to set their own goals and choose the appropriate means to reach them. See, e.g., *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150, 1154 (Del. 1989) (“Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives. . . . That duty may not be delegated to the stockholders.”); *Smith v. Van Gorkum*, 488 A.2d 858, 871–73 (Del. 1985); see also *infra* note 344 (Business Judgment Rule).

12. On the unwritten rights of states to be treated with deference, see, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (overturning pre-clearance provisions of Voting Rights Act on the ground that the unwritten right of states to equal sovereignty is more powerful than an explicit grant to Congress of right to enforce citizens' equal right to vote); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (holding, in part, that Congress lacks power to “coerce” states to adopt certain changes to Medicare); *United States v. Morrison*, 529 U.S. 598, 610 (2000) (overturning the Violence Against Women Act because otherwise the “boundaries between the spheres of federal and state authority would blur”). The relative power of state and federal governments is a central concern of the Constitution, radically changed by the Civil War Amendments and the New Deal. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). In sharp contrast, the Constitution is silent as to business corporations. The relative power of corporations, markets, and political processes is, or should be, a matter for the political branches. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–35 (1962) (identifying the “root difficulty” of “judicial review” as its “counter-majoritarian” nature); Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomial World*, 53 RUTGERS L. REV. 781, 859–60 (2001) [hereinafter Greenwood, *Counter-Majoritarian Difficulty*] (arguing that the boundary between economic and political decision-making must be set by political processes).

But the Court does not directly defend this extraordinary deference or even articulate it explicitly—perhaps because the fundamental commitment of the United States to a democratic, republican form of government is incompatible with investing business corporations with the legitimate power of the State. Instead, it invokes a series of often contradictory metaphors to conceal the unifying strand of its jurisprudence, variously analogizing business corporations to individual citizens, self-help associations, political parties, property itself, pre-political associations, or governmental grants. The metaphors do little work in determining the holdings: they are invoked when convenient and abandoned when not.¹³ To understand the Court's holdings, then, we must look beyond its explicit rationalizations. Corporate constitutional law, in other words, provides a clear example of both the limits of doctrine and the power of ideology in the law. The Court repeats ancient tropes to support results that—while convenient to powerful economic incumbents seeking to escape democratic control—are fundamentally incompatible with the purposes and structure of modern law.¹⁴

The Court's opinions granting corporations constitutional rights appear to reflect a great debate regarding the nature of corporations. Are corporations artificial or natural, fictional or real, aggregates or entities, citizens in their own right or associations of citizens? Yet, as the legal realists pointed out many years ago,¹⁵ debates about the nature of the corporation have little effect on the decisions.¹⁶

13. See *supra* note 4 and accompanying text; see also, e.g., Daniel J.H. Greenwood, *Introduction to the Metaphors of Corporate Law*, 4 SEATTLE J. SOC. JUSTICE 273 (2005) [hereinafter Greenwood, *Metaphors*] (describing metaphors).

I take it as obvious that business corporations are human institutions which we value for their utility, if any, in promoting human flourishing, not as Kantian ends-in-themselves. Moreover, as institutions, they (and the behavior of their decision-makers) are not reducible to the individuals (and other institutions) of which they are composed. Prime Minister Thatcher's claim that society doesn't exist, a kind of methodological individualism run wild, is just as false when applied to corporations. Margaret Thatcher, *Interview for Women's Own*, MARGARET THATCHER FOUND. (Sept. 23, 1987), <http://www.margareththatcher.org/document/106689> (“[W]ho is society? There is no such thing. There are individual men and women, and there are families . . .”); see also *id.* (reprinting Thatcher's statement about the interview in *Sunday Times*, dated July 10, 1988.) (“But society as such does not exist except as a concept.”). Finally, legal personality has no essence, but consists simply of the legal recognition we grant to an entity or concept at a given time. In U.S. law today, it is possible to sue a boat in admiralty or a car in criminal-forfeiture law, but in the mid-nineteenth century well over half the population (including children, married women and slaves) could not bring a contract action in their own names. See *infra* text accompanying notes 247–52.

14. I mean, then, to reject simple Realist contentions that law is and ought to be an instrument of social control driven by considerations of policy; in this area at least, legal arguments clearly have autonomous power separate from utility or politics (high or low). Similarly, this Article illustrates a counterexample to Dworkin's claim that we do, or ought to, strive for a Herculean consistency in doctrine; not only is doctrinal consistency quite absent in this area, but no one seems to miss it. See RONALD DWORCKIN, *LAW'S EMPIRE* 239–75 (1986). Textualist notions, whether of the silly literalist variety or the more sophisticated contextual sort, have equally little to do with corporate constitutional rights. Modern corporations post-date all the relevant parts of the Constitution, and our system of ordered liberty could survive perfectly well if statutory creations had only statutory privileges.

15. See *supra* note 3.

16. The nineteenth-century corporate personality debates seem to have returned to fashion, although the terms remain as peculiar as ever. Corporations are obviously both real and artificial (if artificial means “man-made”) and natural (at least, they are not supernatural). They are creatures of the

In contrast to the oft-noted theoretical confusion, the actual holdings are startlingly consistent. Although the Supreme Court borrows images from the theoretical debates, it has rarely engaged them in any systematic fashion. On the contrary, as this Article seeks to show, its decisions have not depended on any particular conception of corporations. In this, I think Dewey and Horwitz agree: theoretical disputes do not determine, or even much affect, doctrinal results. If the Court invokes whichever metaphors or theories support its conclusion without regard to consistency or plausibility, the theories and metaphors are doing only rhetorical work; they are rationalizations rather than rationales.

The uniting theme of Supreme Court constitutional corporate rights is a free-floating, medieval defense of the power of unelected elites. Each contradictory theory of corporate essence is consistently invoked to protect incumbent corporate officeholders and their beneficiaries. In the name of the Constitution, but contrary to its purposes¹⁷ and text, the Court has consistently opposed both the creative destruction that characterizes successful markets and the rotation of power and responsiveness to popular will that are the bases of modern democratic rule.¹⁸

The Court's free-floating defense of the power of incumbent corporate elites defies fundamental American values. We jealously guard our right to supervise, inspect, replace, reform, and abolish government bureaucracy, and to change, restrict, and balance the powers of their officials. The officers and bureaucracies of business corporations are less fundamental to our form of government and more likely to stray from

state in the real sense that they can exist only by virtue of a complex of statutes that define their powers and privileges, all of which are subject to political debate and reform. They are aggregates in the sense that they are composed of people (although those people are employees rather than shareholders) and funds contributed by consumers, employees, and investors. They are entities precisely because corporate law treats them as such and provides rules to determine which (human) actions will be deemed corporate actions and corporate decisions.

17. The United States, of course, has many values, some quite ugly and immoral. Nonetheless, I take it that we can treat the Constitution, taken in its best light, as an ongoing, imperfect, experiment in government by the people, for the people, and of the people, notwithstanding the critiques of Charles and Mary Beard that the Constitution reflects rule by the economic elite and William Lloyd Garrison who called the Constitution a "covenant with death." See CHARLES A. BEARD & MARY BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); Paul Finkelman, *Garrison's Constitution*, 32 PROLOGUE MAG. 230 (2000), <http://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1.html>. See also the evidence of Supreme Court precedents such as *Dred Scott v. Sandford* or, more controversially, *Buckley v. Valeo* and *Shelby County v. Holder*. *Shelby Cty.*, 133 S. Ct. 2612 (2013) (overturning critical sections of the Voting Rights Act and opening new routes to voter suppression); *Buckley*, 424 U.S. 1 (1976) (overturning campaign-spending reforms by characterizing forms of corruption as protected political speech); *Dred Scott*, 60 U.S. 393 (1857) (holding that the intent of Constitution was to exclude many Americans from citizenship), superseded by constitutional amendment, U.S. CONST. amend. XIV. Cf. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (describing mass incarceration as, *inter alia*, racially-based exclusion of Americans from the body politic).

18. Markets, as Joseph Schumpeter points out, have no respect for the past, but instead constantly destroy old wealth to make way for new. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1942). Incumbent economic elites, of course, have great incentives to stop this process, even at the cost of tremendous damage to the economy as a whole. DARON ACEMOGLU & JAMES E. ROBINSON, WHY NATIONS FAIL (2012) (illustrating numerous historical instances in which economic growth ended because powerful elites found that general growth conflicted with their own success).

pursuit of the common welfare. A self-governing republic ought to preserve its right to prevent its most important economic institutions from escaping its control.

Reformers, though, must go beyond merely challenging misguided interpretations of the Fourteenth Amendment's use of the word "person." The legal tradition is both older and shallower than a strained reading of the Civil War Amendments. It rests on prejudice and metaphor, not logic, and so it is metaphors and common understandings that must change. The middle ages are over.

Corporations are merely governance devices we have created for our purposes. The fundamental principle of popular sovereignty teaches that the courts should not grant corporate governing officials fundamental rights against us. On the contrary, the time has come to recognize that corporate officers, no less than government bureaucrats, are our servants; and corporate governance, no less than state governance, requires checks and balances, countervailing powers, and fundamental protections for debate, representative majoritarianism, and individual autonomy. Once we recognize corporations as *quasi*-sovereigns, we can start to apply the lessons of limited government.

A. *The Medieval Precedent*

In the feudal period, a "corporation" was a self-governing body, rather than a business enterprise.¹⁹ Cities, universities, monasteries, and the Knights Templar asserted the right to rule themselves,²⁰ but these auton-

19. Well into the nineteenth century, corporate-law hornbooks dealt primarily with municipal law and secondarily with charitable endowments; business corporations were an afterthought. This reflected economic reality. With the notable exception of the railroads, few business enterprises were incorporated until the last quarter of the century. The various editions of JOSEPH K. ANGELL & SAMUEL AMES, *TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* (9th ed. 1871), for example, illustrate the transition. In the preface to the first edition, the authors explain that Kyd's 1793 treatise focused almost entirely on municipal corporations. ANGELL & AMES, *supra*, at vi-vii (citing STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS* (1793)). So did Willcock's 1827 treatise. *Id.* at vii-viii (citing J.W. WILLCOCK, *THE LAW OF MUNICIPAL CORPORATIONS* (1827)). But in the meantime, American legislatures had granted far more charters for purely private corporations and their new treatise would seek to respond to the new need for a law of business—or, as they put it, private—corporations. Even as late as the ninth edition (1871), however, Angell & Ames continue to treat municipal and other governmental corporations as the fundamental form, beginning their treatise with a historical essay going back to Roman colonies, and even after they have transitioned to private corporations, discussing the corporation's "legislative assembly." *Id.* at 9, 75. Similarly, although they spend many pages on joint stock corporations, they still present them as variants of a form that is paradigmatically a membership organization such as a church or a college. Chapter four, for example (titled, "OF THE ADMISSION AND ELECTION OF MEMBERS AND OFFICERS") struggles to make the rule that the right to vote goes with share ownership in stock corporations compatible with an older notion of "membership" more appropriate to a voluntary association. *Id.* at 90-91. In contrast, H.G. WOOD & GEORGE W. FIELD, *FIELD ON THE LAW OF PRIVATE CORPORATIONS* (rev. ed. 1883) has made the transition. For Wood & Field, the paradigmatic corporation, despite recurring echoes of the past, is a railroad. *See, e.g.*, WOOD & FIELD, *supra*, §§ 34, 37, 469, 494-95, 497, 504-05, 510-11.

20. *See* JOHN MICKLETHWAIT & ADRIAN WOOLRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 12 (2005); *see also*, JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* 43, 62-63 (2015) (evoking *libertas ecclesiae* (freedom of the church) to illustrate the theory of autonomous groups "substantially unconstrained in their dealing with members").

omy rights for corporate groups did not mean liberty or self-government for the people who composed the corporations.²¹ On the contrary: corporate rights empowered corporate leaders. In the medieval world, those leaders were often entirely unconcerned with the welfare of those below them.²² The Church's right to corporate self-government is another way to say that church officers could use church courts to enforce church-made rules;²³ their subordinates had no access to more neutral fora.²⁴ Church and aristocratic corporate rights meant that peasants had no, or only the most limited, right to appeal to the king's courts against their lord or monastery master—the lord was his own judge.²⁵ Corporate freedom of religion meant that the lord (or the rulers of the city, university, or guild), rather than the king, determined the collective religious practices;²⁶ it did not increase the religious freedom of anyone but the corporate leaders.²⁷ In short, corporate rights meant—and mean—that corporate officials are free to exercise power over the corporation and its dependents without outside interference.

By the time of the American Revolution, the medieval system was in steep decline. Henry VIII had abolished the Monasteries and tamed the Church,²⁸ and his successors and the common-law judges established the principle that corporate rights could derive only from a grant of the King (supplemented by the entirely fictional doctrine of the “lost charter” to explain unchartered corporations such as the City of London or Oxford University that managed to preserve some degree of autonomy).²⁹ Corporations, as symbols of the bad old days, were in disrepute. Adam Smith contended they were incompatible with free markets,³⁰ Edmund Burke denounced the East India Company as the most corrupt institution of the age,³¹ while the American colonialists still remembered their struggles to replace the Virginia Company and Massachusetts Bay Company charters with republican forms of government.³²

21. See, e.g., JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 60, 139 (2005); STEVEN BOWN, *MERCHANT KINGS: WHEN COMPANIES RULED THE WORLD* 1–5 (2010); NICK ROBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* 119–21 (2012). Similarly, in international law, we've long recognized that national sovereignty frees national elites from colonial powers—but whether the local population will benefit or suffer from their newly autonomous government is an entirely different question.

22. LEVY, *supra* note 20, at 62.

23. *Id.* at 93.

24. MICHAEL BURGER, *THE SHAPING OF WESTERN CIVILIZATION: FROM ANTIQUITY TO THE PRESENT* 199–200 (2013).

25. *Id.*

26. LEVY, *supra* note 20, at 94.

27. See BURGER, *supra* note 24, at 199; LEVY, *supra* note 20, at 93–95, 103–04.

28. LEVY, *supra* note 20, at 173.

29. *Id.* at 95–96.

30. ROBINS, *supra* note 21, at xiii.

31. *Id.* at 5.

32. See Daniel J.H. Greenwood, *The Semi-Sovereign Corporation*, in JAMES SMITH, *PROPERTY AND SOVEREIGNTY: LEGAL AND CULTURAL PERSPECTIVES* 267, 276–77 (2013) [hereinafter Greenwood, *Semi-Sovereign*].

Our corporate law has radically changed, several times over, since the original Constitution, and even since the Fourteenth Amendment. Modern business-corporation law and business corporations have little in common with the Knights Templar. Modern democratic political theory frowns on the notion that the people could permanently grant part of their sovereign power to an unelected, self-perpetuating group of businessmen.³³ Modern economic theory makes clear that economic actors must be regulated by markets under law—not empowered to create law and market rules that allow economic incumbents to turn past success into guarantees of future wealth and power.³⁴ Yet corporate law, and in particular the Supreme Court’s corporate jurisprudence, continues to be influenced by medieval conceptions of a corporate charter as an eternal derogation of sovereignty³⁵ and, conversely, of the corporation itself as a *quasi*-sovereign entitled to deference—much like a foreign government or an armed aristocrat. The divine right of kings is dead, but the Court has periodically revived the feudal rights of corporations.

B. *From Body Politic to Business Corporation*

Until after the Civil War, corporate-law hornbooks were largely concerned with the law of municipalities and charities, even as the railroads’ pioneering use of the corporate form was beginning to spread to other major enterprises.³⁶ Early corporate law was primarily the law of governmental and *quasi*-governmental enterprises; corporate form for relatively small businesses was still in the future.³⁷

In the early years after independence, states granted corporate charters for public works of infrastructure, such as bridges, turnpikes, colleges, and banks, which were thought to be beyond the capacities of private enterprise.³⁸ Every charter had a *quasi*-governmental aspect, creating a “body politic” to pursue a public task, often with special privileges stemming from its *quasi*-sovereign form.³⁹

33. See, e.g., *Rice v. Cayetano*, 528 U.S. 495 (2000) (overturning ethnically based voting for administrator of Hawai’ian lands).

34. See, e.g., Joseph E. Stiglitz, *The Economics Behind Law in a Market Economy: Alternatives to the Neoliberal Orthodoxy*, in *LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY* 153, 155, 160 (David Kennedy & Joseph E. Stiglitz eds., 2013).

35. The clearest statement of this doctrine in American law is *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 533 (1819), discussed *infra* Part II.B, which held that the state of New Hampshire was barred from modifying Dartmouth’s royal charter by the Constitution’s Contract Clause. In medieval fashion, the Court construed a corporate charter as an irrevocable derogation of sovereignty.

36. See *supra* text accompanying note 19.

37. See KYD, *supra* note 19, at 1–38; WILLCOCK, *supra* note 19, at 15–18.

38. See, e.g., Daniel Webster, *Economic Nationalism Continued*, in *JACKSONIAN AMERICA 1815–1840*, at 13–15 (Frank Otto Gatell & John M. McFaul eds., 1970).

39. The earliest corporations with the key modern characteristics of indefinite life and transferable shares may have been the great trading companies, beginning with the Dutch East India Company in 1623. Henry Hansmann et al., *Law and the Rise of the Firm*, 119 *HARV. L. REV.* 1333, 1376–77 (2006); John Ulric Nef, *Mining and Metallurgy in Medieval Civilisation*, in 2 *THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE* 693, 717, 741–43 (M.M. Postan & Edward Miller eds., 2d ed. 1987) (describing medieval mining firms with transferable shares). The trading companies, of course, were

The structure of these “bodies politic” was radically different from that prescribed by modern corporate law.⁴⁰ The firm was generally composed of a limited number of “members” who voted on its decisions directly⁴¹ and were understood to be “legislating” for themselves.⁴² In the earliest charters, members sometimes voted democratically (one person one vote) or, if votes were proportional to investment, with limits on the maximum votes an individual member could exercise, as in the East India Company.⁴³

To defend the state from encroachments on its domination of collective decision-making, incorporated businesses were highly restricted.⁴⁴ Corporate charters normally specified narrow limits on the corporation’s scope of activity, enforced by *ultra vires* doctrines that restricted the authority of corporate boards and agents to the specific business listed in the charter.⁴⁵ Corporations were barred from owning the stock of other corporations, with the intended result that mergers and acquisitions would be barred absent legislative permission.⁴⁶ Often the charter was valid only for a limited time (especially for business corporations), in-

quasi-sovereign in the strongest sense: they used force and violence to establish colonies, fight wars, tax or expropriate, regulate trade, issue currency, and sometimes even to operate courts. Even in the more clearly commercial sphere, however, corporate status in early America generally came with privileges beyond the form itself, such as local monopoly. *See, e.g.*, *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837) (describing, and limiting, privileges of the Charles River Bridge company); President Andrew Jackson, *Veto Message Regarding the Bank of the U.S.* (July 10, 1832), in JACKSONIAN AMERICA 1815–1840, at 139 (Frank Otto Gatell & John M. McFaul eds., 1970) (vetoing the renewal of the bank’s charter). Hovenkamp sees the *Charles River Bridge* case as the turning point, the end of the view of a corporate charter as a “special privilege from the state.” HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937* 13 (1991).

40. They share two critical aspects with modern corporations: personality (the right to sue and be sued, hold property, and contract in the corporate name) and “lock-in,” the rule that shareholders have no right to withdraw their investments at will. Several modern scholars have contended that lock-in is the most critical characteristic of corporate law. *See, e.g.*, Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 256.

41. Harvard University continues to use the older terminology: it calls its governing board “The Harvard Corporation,” and its voting officials are not directors or trustees but the Members of the Corporation. *See President and Fellows (Harvard Corporation)*, HARVARD UNIV., <http://www.harvard.edu/about-harvard/harvards-leadership/president-and-fellows-harvard-corporation> (last visited Nov. 25, 2016).

42. Early charters, such as the charter for Dartmouth College, routinely refer to the corporation’s power to make “ordinances, orders and laws” binding on the organization. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 533 (1819). Modern statutes would call these internal regulations “by-laws,” reflecting our lessened sense of the derogation of sovereignty involved in corporate law.

43. *See, e.g.*, ROBINS, *supra* note 21, at 27–28, 107. In England, voting was not proportional to shareholding at least as late as the Companies Clauses Consolidation Act of 1845. *See* Mariana Pargendler & Henry Hansmann, *A New View of Shareholder Voting in the Nineteenth Century: Evidence from Brazil, England and France*, 55 BUS. HIST. 585, 588–89, 588 n.30 (2013).

44. *See, e.g.*, Jackson, *supra* note 39, at 145 (“[W]hen the laws undertake to . . . make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their government.”).

45. *See* Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 651 & n.21 (2008) (discussing the “limits imposed on the scope of [an] enterprise [by] early charters”); W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 386 (1922) (“[I]f the corporation tries to effect purposes other than those for which it was created, its acts will be *ultra vires* and void.”).

46. *Id.* at 651–52.

cluding, famously, the Bank of the United States.⁴⁷ Chartered firms were expected to operate within the boundaries of the chartering state; for this reason, in the early days of interstate transportation, turnpike and railroad corporations sought a separate charter from each state the line would pass through.⁴⁸

To protect the public from concentrations of wealth that might be used to corrupt the political process, corporate charters often specified a maximum capitalization.⁴⁹ Conversely, to protect corporate creditors, corporations were usually required to have relatively significant minimum capitalization before commencing operations.⁵⁰

Moreover, “members” were often at least partly liable for corporate obligations if the firm failed to meet them.⁵¹ In the early years, shareholders were sometimes full guarantors of corporate liability, much like partners (although typically individual shareholders were only responsible for a share of corporate debt proportional to their shareholdings).⁵² More commonly, shareholder liability was limited to a multiple of the original subscription price.⁵³ This lasted as late as the Great Depression in the case of banks: in the event of failure, bank shareholders were frequently liable to depositors for specified additional amounts—usually two or three times the original subscription price.⁵⁴

Even when shareholders were liable only for the original subscription price, they often had potential liability to corporate creditors. Until the early twentieth century, creditors of an insolvent corporation were permitted to pursue current shareholders for the difference between the original subscription price and the consideration actually received by the corporation, even many years later and even from a shareholder that had purchased in the secondary market.⁵⁵ During most of the nineteenth cen-

47. *Id.* at 651; Andrew T. Hill, *The First Bank of the United States*, FED. RES. HIST. (Dec. 4, 2015), <http://www.federalreservehistory.org/Events/DetailView/94>.

48. ROBERT E. WRIGHT, *CORPORATION NATION* 107–08 (2014) (stating that early railroads passing through different states unified by contract what were distinct railroads by charter); see Hilt, *supra* note 45, at 646, 650 (stating that corporate charters are largely state-law matters).

49. For early understandings of corruption, which extended far beyond fear of explicit bribery, see the quotations collected at Lawrence Lessig, “Corruption,” *Originally*, CONST. ACCOUNTABILITY CTR., <http://ocorruption.tumblr.com/> (last visited Nov. 25, 2016) (quoting James Madison’s arguments from February 27, 1783 and December 24, 1799 that a permanent national debt would create a “dangerous moneyed interest, as corrupting the public manners” and foreseeing a spoils system in which the executive could corrupt elections by prerogative and patronage).

50. See, e.g., Hansmann et al., *supra* note 39, at 1387 (describing minimum capital rules in an 1844 United Kingdom statute).

51. See, e.g., *id.* (reporting that in the United Kingdom, the incorporation statute permitted, but did not mandate, limited liability starting only in 1855).

52. See *id.* at 1339 & n.11 (differentiating “weak owner shielding” in the United States and England from the 1770s to 1970s where “owners of a firm are jointly and severally liable for all firm debts” from a stronger form where “each owner is responsible only for his . . . pro rata” share).

53. Horwitz, *Santa Clara Revisited*, *supra* note 4, at 208.

54. See *id.* Massachusetts legislated unlimited liability from 1822 until mid-century. The modern rule became more common with the general incorporation statutes of the Jacksonian period, several of which included it as a default rule. HOVENKAMP, *supra* note 39, at 49–52.

55. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION & PRIVATE PROPERTY* 131–32, 142 (1932); Horwitz, *Santa Clara Revisited*, *supra* note 4, at 207–08, 212–13.

tury, shares were routinely “watered,” i.e., sold for less than par value or for non-monetary consideration of debatable value, or sold with only part of the subscription price paid at the time of purchase.⁵⁶ The result was that later shareholders could be required unexpectedly to meet an unmet obligation of the original subscribers.⁵⁷

None of these rules have survived. And, of course, as the economy has changed, so too have the actual sociological businesses. The writing of the Constitution predates the Industrial Revolution, steam and electrical engines, large factories, professional managers, and modern finance, let alone multinational, multidivisional businesses, employing people and operating all over the world.⁵⁸

By the 1868 enactment of the Fourteenth Amendment, both the economy and corporate law were in the midst of a major change. Turnpikes, canals, and especially railroads—the first large scale private enterprises—were marching across the landscape.⁵⁹ Corporate charters were valuable and promoters found that bribing legislators was an effective way to win them.⁶⁰ By mid-century, reformers using the Jacksonian rhetoric of opposition to monopoly and special privilege attacked the bribery problem by routinizing corporate status.⁶¹ The new general incorporation laws (beginning with New York in 1811 but adopted mid-century in most states) allowed promoters to form corporations without special legislation and without claiming any public purpose.⁶² By 1860, 2,300 charters had been issued.⁶³

Still, corporate form was used mainly for the largest enterprises—especially railroads—until later in the century.⁶⁴ Moreover, even after the rise of the general incorporation laws, corporate law continued to bar many of the most important and commonplace aspects of the modern corporate economy.⁶⁵

56. See Horwitz, *Santa Clara Revisited*, *supra* note 4, at 207–08, 212–13.

57. *Id.* at 211–12.

58. See generally ALFRED D. CHANDLER, JR., *VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); DAVID S. LANDES, *BANKERS & PASHAS: INTERNATIONAL FINANCE AND ECONOMIC IMPERIALISM* (1979); DAVID S. LANDES, *THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT* (1969).

59. HOWARD ZINN, *PEOPLE’S HISTORY OF THE UNITED STATES* 218–19 (2003).

60. *Id.* at 214–15.

61. Orestes Brownson, *The Laboring Classes*, in *JACKSONIAN AMERICA 1815–1840* 41, 43 (Frank Otto Gatell & John M. McFaul eds., 1970); HORWITZ, *TRANSFORMATION*, *supra* note 3, at 23; HOVENKAMP, *supra* note 39, at 13; see *supra* text accompanying note 44.

62. BERLE & MEANS, *supra* note 55, at 130, 136; Hilt, *supra* note 45, at 650–52.

63. ZINN, *supra* note 59, at 215.

64. David McBride, *General Corporation Laws: History and Economics*, 74 L. & CONT. PROBS. 3 (2011).

65. See Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 328–29 (2007) (describing the liberalization of corporate law in the 1890s as removing “limit[s] on the size, duration, and power of corporations to hold and sell stock in other companies, limitations on potential shareholder liability to creditors for issuing undervalued shares, and development of enabling statutes giving incorporators greater freedom to create and structure corporate powers”); see *infra* text accompanying notes 66–72.

Only at the turn of the twentieth century did state corporate law begin to assume its modern shape. First, in the last quarter of the nineteenth century, corporate lawyers learned to use the trust form to avoid, in some degree, corporate law restrictions on mergers, interstate operation, maximum capitalization, and *ultra vires* concepts.⁶⁶ Then, New Jersey, the “Traitor State,” changed its corporate law to accommodate the desires of the major firms of the day.⁶⁷ After reformers led by Woodrow Wilson succeeded in restoring some limits to New Jersey’s corporate law, Delaware took the lead in rewriting corporate law.⁶⁸

The new laws were designed to accommodate the desires of corporate management for more autonomy and less regulation.⁶⁹ Minimum and maximum capitalization rules, the presumption that corporations would exist and do business in the chartering state, the bar on corporate ownership of stock, holding companies and mergers without legislative permission, the *ultra vires* rules limiting corporate activities and purposes, and limited terms of existence all quickly disappeared.⁷⁰ Directors were granted original authority to govern the firm, supplanting the earlier idea that a corporation should have “members” with governance rights.⁷¹ Shareholders were relieved of nearly all governance rights and responsibility for firm obligations,⁷² and remnants of an older view of corporations as associations of members were thoroughly cleansed of all but rhetorical force.

66. Horwitz, *Santa Clara Revisited*, *supra* note 4, at 190–203. The basic technique was to place the shares of separate corporations into a trust; the trustees could then operate the various companies as a single entity. As a bonus, since the trustee was the sole shareholder, no one else would have standing to complain about violations of corporate law. This creative lawyering, or regulatory avoidance, is the reason our anti-monopoly law is known as the Anti-trust Law, even though the trust device is long obsolete.

67. Lincoln Steffens, *The Traitor State*, *MCCLURE’S MAG.* Apr. 1905, *reprinted in* LINCOLN STEFFENS, *THE STRUGGLE FOR SELF-GOVERNMENT* 209, 265, 271–74 (1906) (criticizing New Jersey for pandering to corporate elites by eliminating restrictions on *ultra vires*, watered stock, minimum and maximum capitalization, merger, and interstate operations).

68. Yablon, *supra* note 65, at 326 (describing New Jersey’s dominance of permissive corporate law as beginning in 1875).

69. Academics have debated whether the newly permissive (or “enabling”) corporate law ought to be seen as a race to the bottom, as Steffens, *supra* note 67, at 210, and William Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663, 666 (1974), argued, or a race to the top, as Judge Ralph K. Winter, *The “Race for the Top” Revisited: A Comment on Eisenberg*, 89 *COLUM. L. REV.* 1526, 1528 (1989), and others contended, and whether it is driven by Delaware’s search for extra-territorial tax revenue, managerial self-dealing, or corporate pursuit of profit. Critics and supporters of the permissive legislation, however, agree that the proximate decision-maker is corporate management, which determines where to incorporate the business, and that the key considerations for management are its own self-interest and stock-market reaction—the public interest enters in only to the extent that it is incorporated in those incentives. See generally Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 *YALE L. & POL’Y REV.* 381 (2005); Daniel J.H. Greenwood, *FCC v. ATT: The Idolatry of Corporations and Impersonal Privacy*, 5 *HARV. L. & POL’Y REV.: ONLINE PIECES* 2011, at n.24, <http://harvardlpr.com/online-articles/fcc-v-att-the-idolatry-of-corporations-and-impersonal-privacy/>.

70. HOVENKAMP, *supra* note 39, at 13; LAWRENCE MITCHELL, *THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY* 41–42, 54 (2007).

71. The concept of direct shareholder governance was in decline well before the New Jersey reforms. See, e.g., Hoyt v. Thompson’s Ex’r 19 N.Y. 207, 216 (1859) (holding that the power of the Board of Directors is “original and undelegated”).

72. Horwitz, *Santa Clara Revisited*, *supra* note 4, at 183.

Following the boom and bust of the Roaring Twenties and the Great Depression, the New Deal's introduction of the Securities Act⁷³ and the Securities Exchange Act⁷⁴ gave us a highly regulated and relatively stable financial market. The publicly traded, centrally directed, multinational corporation now began to assume something of its contemporary form.⁷⁵ The government's reversal of its long-standing hostility to unions underpinned the post-war economic model,⁷⁶ in which higher wages for working people—unionized and not—combined with massive government spending on war, highways, and building the suburbs, creating the demand necessary for rapid growth and mass affluence.⁷⁷

In the post-war period we have seen further major changes in the law of business corporations—first, the rise and demise of the industrial unions as basic parts of corporate governance,⁷⁸ and second, the rise and fall of the hostile takeover and the waxing and waning of the market for corporate control.⁷⁹ For closely held companies, the creation and eventual collapse of the corporate income tax over the course of the twentieth century drove equally profound changes.⁸⁰

In short, over the first century and a half of American law, legislatures repeatedly transformed corporate law. They had inherited an institution conceived as a political entity with governance rights, used largely for public purposes (especially foreign trade and conquest, cities and universities, but also large scale transportation—turnpikes, ferries, and, a

73. Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a-77aa (2012)).

74. Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a-78pp (2012)).

75. On the rise of the modern bureaucratic firm, see generally CHANDLER, JR., *supra* note 58. *But see* CHARLES PERROW, *ORGANIZING AMERICA: WEALTH POWER AND THE ORIGINS OF CORPORATE CAPITALISM* 113-17, 212-28 (2002) (offering an alternative account). On the history of the machinations that led to the transcontinental railroads, see, e.g., RICHARD WHITE, *RAILROADED xxiv-xxxii* (2011). The rise of the railroads, a story of massive governmental subsidy, intervention, and corruption, suggests that Hovenkamp's contention that the classical period was characterized by rejection of "special privilege" is too simple. HOVENKAMP, *supra* note 39, at 4. On the legal history of the corporation see, e.g., Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 44 WAKE FOREST L. REV. 63, 64-65, 68, 83 n.59, 84, 86 (2009) (describing rise of the "enabling statutes," shift to view that directors' authority is "original and undelegated," and shifts in views of "directors as trustees, to . . . directors as representatives of the shareholders, to . . . directors [as] mere [passive] agents of shareholders").

76. National Labor Relations Act, Pub. L. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69); see ZINN, *supra* note 59, at 401-03.

77. Doris Goodwin, *The Way We Won: America's Economic Breakthrough During World War II*, AM. PROSPECT, Fall 1992, <http://prospect.org/article/way-we-won-americas-economic-breakthrough-during-world-war-ii>.

78. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L.J. 1021, 1084-85 (1996) [hereinafter Greenwood, *Fictional Shareholders*]; JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 1-30 (2014) (discussing the rise and decline of private-sector labor-union contributions to corporate governance).

79. See Daniel J.H. Greenwood, *Looting: The Puzzle of Private Equity*, 3 BROOK. J. CORP. FIN. & COM. L. 89 (2008) [hereinafter Greenwood, *Looting*]; Andrei Shleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 SCI. 745 (1990).

80. See Joel Friedman, *The Decline of Corporate Income Tax Revenue*, CTR. ON BUDGET & POL. PRIORITIES (Oct. 24, 2003), <http://www.cbpp.org/research/the-decline-of-corporate-income-tax-revenues>.

little later, canals and then railroads), and to guarantee some degree of continuity and independence. Such entities potentially conflicted with the ability of the State to govern, so state elites sought to limit their privileges.⁸¹ Over the course of the nineteenth century, they created an entirely new creature: a vehicle for economic enterprise, freed to pursue private interest, relieved of old restrictions, and, by the end of the century, regularly endowed with extraordinary privileges.⁸² Business corporations were no longer restricted to specified purposes. They could accumulate wealth and combine without corporate-law limits—while limitations continued to exist, they shifted to antitrust law.⁸³ Investors and control parties were almost entirely relieved of responsibility or liability for corporate actions, under the twin doctrines of “limited” (more properly, entity) liability⁸⁴ and the Business Judgment Rule.⁸⁵

II. CONSTITUTIONAL LAW BEFORE THE FOURTEENTH AMENDMENT

The basic history of the Supreme Court’s transformation of the Fourteenth Amendment into a font of *laissez-faire* protection of corporate privilege is well known.⁸⁶ In the seminal Fourteenth Amendment case *Santa Clara*,⁸⁷ the Supreme Court proclaimed that the Fourteenth Amendment’s reference to “persons” includes corporations—rather than

81. The early centralizing Supreme Court contributed to this struggle in cases such as *Charles River Bridge*, holding that traditional corporate privileges such as monopoly would no longer be implied if not set out explicitly in corporate charters. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 545–46 (1837).

82. Hansmann et al., *supra* note 39, at 1387, 1394–99; see *supra* text accompanying notes 66–72.

83. HOVENKAMP, *supra* note 39, at 242.

84. The doctrine of “limited liability” holds that a corporation is fully responsible for its torts and contracts, but its shareholders and bondholders are not responsible for them at all. Shareholder liability is thus “limited” by comparison with partners, who are fully responsible for any debts their partnership cannot fulfill. In the early period, shareholders were often expected to contribute additional sums (generally a specified percentage of par value) if the corporation was unable to meet its obligations. By the end of the nineteenth century, entity liability was the statutory norm (with some exceptions, see *supra* notes 55–57). A residue of the older view can be seen in N.Y. BUS. CORP. LAW § 630(a) (LexisNexis 2016) (permitting employees of an insolvent, closely held corporation to sue its largest shareholders for their wages).

85. This judicial doctrine holds that corporate directors and officers, unlike all other private-sector professionals, are largely exempt from the obligation to exercise their office with due care. Instead, they are presumed to have acted reasonably and therefore immune from ordinary tort liability. The early twentieth century cases distinguish directors from trustees (trust law usually held trustees strictly liable for damage they cause to their trust without requiring a finding of negligence) but do not explain why ordinary negligence law does not apply.

86. “*Laissez-faire*” means “leave it be,” but it is typically used to refer to the political ideology that called for adjusting the rules of the marketplace so as to empower the powerful and afflict the afflicted. See, e.g., HERBERT SPENCER, SOCIAL STATICS 379–81 (1851) (declaring a moral imperative to oppress the poor and comfort the rich). One characteristic example of the “*laissez-faire*” interventionist use of the law to redistribute wealth and power upwards is the judiciary’s distinction between worker coalitions—unions—which it condemned as criminal conspiracies in restraint of trade and capital coalitions—corporations and trusts—which it sanctified as constitutionally protected persons. For contemporaneous criticism, see Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

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

only human citizens and residents—within the scope of its Equal Protection Clause.⁸⁸

What is less well known beyond the small circle of constitutional history buffs is that *Santa Clara* was hardly the beginning of the Supreme Court's discovery of corporate rights in the Constitution.⁸⁹ The first cases—some of which continue to profoundly define the legal landscape—had nothing to do with the word “person.”⁹⁰ As we shall see, the same is true of later ones, including *Bellotti* and *Citizens United*, which held that corporate managers have constitutionally protected rights to use corporate money to intervene in politics.⁹¹ In those cases (and perhaps in *Santa Clara* itself), the Court relied on notions of corporate autonomy, not on the drafting oddities of the Fourteenth Amendment.⁹²

Conversely, and just as importantly, while legal personality is critical to ordinary corporate law, it has no logical connection to the question of whether corporations do or should have constitutional rights. We could decide that corporations ought to be legally recognized in contract, tort, and property law without concluding that the Due Process Clause restricts our right to define the scope of that recognition. Similarly, that we allow corporations to enforce contracts in their own name has no implications at all as to whether we ought to allow corporate officials to invoke corporate speech or privacy rights to protect their privileges against competitors for control of the firm, whether against other corporate constituencies or the population acting through government regulators. It follows, I believe, that reformers who seek to respond to the Court's precedents by denying corporations “legal personhood” are fundamentally misguided (even leaving aside the problems such a doctrine would cause in ordinary corporate law).

The Court's mistakes are driven by a strange combination of cheap metaphor and deep theory. If we want to understand why the Court has

88. See HORWITZ, TRANSFORMATION, *supra* note 3, at 69–70 (contending that *Santa Clara*'s view was based on a ‘pass-through’ theory resembling *Bank of the U.S. v. Deveaux*, 9 U.S. 61 (1809)). Horwitz shows that legal theories justifying corporate rights on the ground that it is a “natural entity” arrive after the result. But the notion of a corporation as a rights holder in its own right—apart from its members—is the core of the corporate concept and as ancient as corporations themselves: the Church, not any particular bishop, owns its property. The innovation, if it was one, of the late nineteenth century was to use the legal personality metaphor to justify deference to corporate elites using the language of liberal natural rights and limited government.

89. See *id.* at 65–107.

90. Like Horwitz, Hovenkamp dates the “personal or entity” view of the corporation to the very end of the nineteenth century. HOVENKAMP, *supra* note 39, at 12, 43. In his view, *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888) (and by inference, *Santa Clara*) reflect the older, pass-through theory of *Deveaux*. HOVENKAMP, *supra* note 39, at 12–16, 43–48; see also *infra* text accompanying notes 275–76 (discussing *Pembina*). For present purposes, the agreement between the two views overwhelms the differences. In both the “association” and the “entity” view, the Court rejects the obvious lesson of politics that governance matters. Both views reject any inquiry into how corporate leaders actually make decisions and what is necessary to encourage them to make decisions that reflect the interests and commitments of citizens associated with the firm or the public at large.

91. *Citizens United v. FEC*, 558 U.S. 310 (2010); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

92. See *Citizens United*, 558 U.S. at 342–47; *Bellotti*, 435 U.S. at 778–86; see also *Santa Clara*, 118 U.S. at 396.

granted corporations constitutional rights, and even more if we want to bring the eighteenth-century project of limiting illegitimate power to fruition by limiting those rights, we must understand both theory and metaphor—not the magic word “personhood.”

Over the years, the Court has used four principal techniques to grant corporations constitutional rights, none of which depend on the text, history, or purposes of the Constitution itself. *Dartmouth College*⁹³ illustrates the claim—usually implicit rather than explicitly defended—that, as in feudal England, corporate status includes an irrevocable grant of autonomous authority to a *quasi*-sovereign elite.⁹⁴ This extreme deference to corporate elites, without regard to their democratic legitimacy (or lack thereof) is the best explanation of the full range of the Court’s grants of constitutional rights: from its suggestions that the Internal Affairs Doctrine might be constitutionally required;⁹⁵ to its holdings that legislatures may not restrict corporate managers’ ability to use corporate assets to lobby, promote products or politic regardless of the views of other corporate participants;⁹⁶ to its interpretation of the Religious Freedom Restoration Act (“RFRA”) to permit corporate elites to impose their religion on other corporate stakeholders;⁹⁷ to its reading of the Fourth and Fifth Amendments to restrict the citizenry’s right to control the bureaucracies that operate our largest economic enterprises.⁹⁸

The *Deveaux*⁹⁹ metaphor that a corporation is nothing more than its “members,”¹⁰⁰ long since abandoned in *Deveaux*’s own Diversity Clause

93. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

94. See *supra* text accompanying notes 19–32. The feudal era has long passed, and this theory should have passed with it. However, this metaphor seems to drive doctrines that are otherwise quite anomalous such as the modern “Internal Affairs Doctrine” (stating, contrary to ordinary choice of law rules, that corporate governance is controlled by the law of the state of incorporation rather than the state where the firm has economic impact) and the “Business Judgment Rule” (stating that courts ought to defer to corporate elites rather than enforce ordinary professional-responsibility concepts). See, e.g., *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987) (internal affairs doctrine); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (Business Judgment Rule) *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253–54 (Del. 2000).

95. See *Edgar v. MITE Corp.*, 457 U.S. 624, 645–46 (1982); cf. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78 (1987).

96. See *Citizens United*, 558 U.S. at 365–66; *Bellotti*, 435 U.S. at 790–93.

97. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–76, 2780–82 (2014).

98. See *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353–54 (1976) (holding that warrantless seizure of records in corporate offices violates the Fourth Amendment); *United States v. S. Ry. Co.*, 485 F.2d 309, 312 (4th Cir. 1973) (citing *Fong Foo v. United States*, 368 U.S. 141 (1962), as suggesting that “the double jeopardy clause of the Fifth Amendment . . . applie[s] to corporations as well as to natural persons.”). These cases suggest that corporate bureaucrats, unlike public ones, may not be restrained by open-records law, a government-accountability office empowered to investigate or audit on behalf of the public, or other routine good-government devices.

99. *Bank of the U.S. v. Deveaux*, 9 U.S. 61 (1809).

100. Modern business-corporation laws do not provide for “members.” The theory remains strong, however, generally without any discussion of who the members might be. Generally the courts seem to assume that shareholders are members, but shareholders have almost none of the characteristics of real members of a membership organization: they have no right to set the goals of the institution, they have no responsibility for and little influence over its decisions, and while the shares vote for the board of directors, they usually do so on a one-vote-per-share basis, implying that shares, rather than shareholders, are the successors to the “members” role. In any event, in modern publicly traded

context, continues to be invoked to justify the Court's grant to corporations of search-and-seizure, speech, and free-exercise rights.¹⁰¹ The personhood metaphor, used in *Letson*¹⁰² long before its more famous instantiation in *Santa Clara*,¹⁰³ treats the corporation as a *quasi*-citizen,¹⁰⁴ thus rhetorically justifying transforming the meaning of constitutional rights from protections of the people against their governors to the reverse.

Each of these metaphors conceals the real issue at stake in most corporate-rights cases, which is not the "rights" of the organization, but the conflicting claims of various human beings to control the entity or have it act in accordance with their views. No organization is a perfect representation of its participants—that is the reason, after all, why modern democracies think it important to have limits on the power of elected officials.¹⁰⁵ By treating the corporation as if it were a single, unconflicted, individual—whether "citizen" or "person" or "association"—the metaphors hide the Court's intervention on behalf of incumbent officeholders against their challengers.

The fourth technique may have been the most consequential of all. *Lochner*¹⁰⁶ abstracted rights from their contexts—holding that the Due Process Clause requires legislatures to respect the "liberty" of bakers to contract to work twelve hours a day in life-threatening conditions,¹⁰⁷ regardless of the underlying conditions necessary to make anyone agree to such a bargain.¹⁰⁸ After the Switch in Time, the Court purported to relegate *Lochner* to the dustbin of history,¹⁰⁹ but it quickly revived *Lochner*'s rhetorical trick of using "equality" to protect incumbent economic pow-

corporations, most shares are held by institutions, many of which rapidly trade. Even if institutions can be members, rapid traders lack the commitment to the institution that "membership" implies.

101. See, e.g., *Hobby Lobby*, 134 S. Ct. at 2765 n.15, 2766, 2774 (free exercise); *Citizens United*, 558 U.S. at 342–56 (speech); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (search and seizure).

102. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844) (holding that a corporation is a creature of the state that charters it and therefore deemed its citizen). *Letson*'s rationale was modified slightly in *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314 (1854) (holding that shareholders are presumed, regardless of fact, to be citizens of chartering state). The result, however, is unchanged.

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

104. *Letson*, 43 U.S. at 558.

105. See, e.g., 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 94 (1835) (discussing the use of "intermediate associations" to restrain tyranny of majority); see also *infra* note 165. Mid-century political-economic theory tended to praise the reality that political institutions cannot reflect their citizens; political and technocratic elites, the argument went, must have space to enact sound policies free from the vagaries of public opinion. See, e.g., ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 37 (1971) (emphasizing role of elites); SCHUMPETER, *supra* note 18, at 289; see also *infra* text accompanying notes 121, 220, 343–45 (describing judicial reluctance to override corporate elites' decisions).

106. *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

107. *Id.* at 70–71 (Harlan J., dissenting).

108. For that matter, the *Lochner* analysis precluded legislatures from considering the larger issue, quite critical today, of whether a low wage economy can produce economic growth. On the supply side, when bakers have no choice but to accept inhuman working conditions, employers have no incentive to invest in automation or safety. On the demand side, low wages mean that bakers will not be meaningful customers—again reducing employer incentives to increase productivity.

109. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

er. Today, in economic regulation, the First Amendment functions much as the Fourteenth did a century ago, again reading into the Constitution “an economic theory [*laissez-faire*] which a large part of the country does not entertain.”¹¹⁰ *Lochner* lives when the Court holds that *laissez-faire* free-speech principles require that we allow corporations to use corporate funds to influence tastes or politics so as to generate more corporate funds or to refuse to disclose information that citizens or consumers seek to know in order to control corporate officials.¹¹¹

The theories contradict each other. They also conflict with competing views of the corporation as a legal fiction with no reality (also associated with *Dartmouth*), as private property owned by shareholders, or as a contractual arrangement between shareholders (or, in its late-twentieth-century version, all corporate constituencies) who appoint managers as their agents.¹¹² But courts, scholars, and the business press show remarkably little anxiety regarding the contradictions between the theories or their tensions with fundamental rules of corporate law. Instead, the various theories are summoned when they support a given conclusion and ignored when they do not. In the Supreme Court, the only consistent point is a free-floating (if not limitless) commitment to protecting corporate leaders’ autonomy from State, Society, and those affected by their decisions. *Dartmouth* remains the secret, uncited, most influential case of all: the Court treats corporations as if they were the feudal aristocracy or foreign states entitled to autonomy from the Republic, its democratic institutions, and our Constitution’s principles of personal rights.¹¹³

A. *Deveaux: Corporation Disembodied*

Several of the Supreme Court’s earliest corporate cases concern corporate access to the federal courts via the Constitution’s Diversity Clause.¹¹⁴ *Deveaux* contended that for diversity purposes a corporation should be seen as its members, in what has come to be known as the “ag-

110. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

111. *Lochner*’s use of the language of equality to justify inequality continues in other areas of the law as well. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding that “free speech” equality requires that we allow wealthy individuals or corporations to purchase political advertising), or the many affirmative-action cases reasoning that equality principles allow legislatures and universities to discriminate in favor of donors, athletes, alumni, residents, and virtually any other cognizable group, but not African Americans. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

112. See Greenwood, *Metaphors*, *supra* note 13.

113. Under the State Action Doctrine, *The Civil Rights Cases*, 109 U.S. 3 (1883), constitutional rights generally protect citizens against governmental power—not the power of private citizens. Strictly speaking, major multinational corporations exercising powers granted by state and federal law and governed according to power structures created and enforced by law, are neither state nor citizen. One question raised by this Article is whether we ought to reverse the Court’s unreasoned assimilation of these bureaucratic enterprises to the “private citizen” rather than the “state” category.

114. U.S. CONST., art. III, § 2 (“The Judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . .”).

gregate” theory.¹¹⁵ Accordingly, it held that the corporation could bring a federal suit if its “members” were diverse—even though those members would have no standing to bring suit in their own name.¹¹⁶

Deveaux’s specific rule did not last in the diversity area, where the Court abandoned it as soon as it would have hindered rather than helped corporate access to the federal courts.¹¹⁷ (The Court, that is, turned out to care about the result—granting corporate elites special access to federal courts—rather than the logic of its position.) But *Deveaux’s* rhetorical trick—disregarding corporate form to treat the entity as if it were just a group of citizens united on all relevant points—influences modern speech and religion cases such as *Bellotti*,¹¹⁸ *Citizens United*,¹¹⁹ and *Hobby Lobby*¹²⁰ even when it is not cited. Each of those cases invokes a *Deveaux*-like metaphor of the corporation as unproblematically reflecting the views of (some of) the people composing it.¹²¹

115. See Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WIS. L. REV. 999, 1001, 1005.

116. *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 82–83 (1809); Avi-Yonah, *supra* note 115, at 1005–06.

117. See Avi-Yonah, *supra* note 115, at 1010.

118. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978) (finding that a corporation had First Amendment right to spend money to influence state referendum).

119. *Citizens United v. FEC*, 558 U.S. 310 (2010). Justice Kennedy’s opinion for the majority repeatedly refers to corporations as “associations” or “associations of citizens,” suggesting, as in *Deveaux*, 9 U.S. 61, that citizens should not lose constitutional rights just because they act collectively. *Citizens United*, 558 U.S. at 342–43, 349–50, 354–56. As noted in the text, there is no reason to think that managers acting for the corporation will act in the way that associated citizens would—even if stock traders or employees of a business corporation could be imagined to have “associated” for the purpose of influencing legislation or elections. See also, Daniel J.H. Greenwood, *Person, State, or Not: The Place of Business Corporations in our Constitutional Order*, 87 U. COL. L. REV. 351, 371 (2015) [hereinafter Greenwood, *Person, State, or Not*] (distinguishing entity rights from individual rights).

120. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (declaring that a corporation may exercise religion for purposes of the Religious Freedom Restoration Act). Doctrinally, *Hobby Lobby* is a statutory case; it is at least possible that the RFRA could grant business corporations rights to practice religion even if the Constitution does not. However, the holding of *Hobby Lobby* grants the corporate leaders the right to bar employees from access to medical insurance that the leaders, but not their followers, find religiously problematic. In ordinary contexts, we would call this an establishment of religion: a governing institution imposing its religious practices on dissenting subjects.

The Court’s treatment of the *Hobby Lobby* control parties is parallel to the deference we give to undemocratic rulers of foreign states under the Act of State Doctrine or comity. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (honoring Cuban expropriations that would be unconstitutional under United States law); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL’Y. 291 (1999). Judges similarly defer to administrative agencies under the *Chevron* Deference Doctrine and to the legislature under *Carolene Products*. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

In corporate law, state courts regularly defer to internal corporate decision-making under the Business Judgment Rule, which bears a striking resemblance to other deference doctrines. See *infra* text accompanying note 344. In each instance, the courts refer to the liberty of the entity (“sovereignty,” corporate rights) without inquiry into the legitimacy of the leaders’ claim to authority or the liberties of dissenters, thus recognizing another agency as a co-equal entitled to rule without judicial supervision. It is not entirely clear why our courts should view the decisions of business corporation elites, which are neither sovereign nor representative of democratic political processes, as entitled to deference.

121. Cf. *Bell v. Maryland*, 378 U.S. 226, 343 (1964) (Black, J., dissenting) (defending corporation’s alleged right to operate a segregated lunch counter) in which the dissent contends that a corporation has “social associates” and a cognizable right to determine them, similar to the right of an individual to

In *Deveaux*, a corporation—the Bank of the United States—sought to litigate a state-law claim in federal court. Georgia had seized the Bank’s property after the bank refused to pay a state tax.¹²² The Bank brought a state-law replevin action to recover the property, suing in federal court.¹²³ Presumably, its lawyers felt a federal court would be more sympathetic to the Bank’s claim to be exempt, like a medieval corporation, from the Georgia legislature’s taxing authority.

The Constitution allows the federal courts to hear state law claims only in narrowly specified circumstances.¹²⁴ The only relevant one is the Diversity Clause’s grant of jurisdiction when the parties are citizens of different states.¹²⁵ The Bank, of course, was not a citizen, as the Court recognized: “[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen.”¹²⁶ So the clause is, on its face, entirely inapplicable. The text, then, gives no support to the Bank’s claim.

Federalism and similar political theory concerns appear equally un-availing. The Bank had framed the legal issue as a matter of state law,¹²⁷ which presumably belongs in state courts. While the Bank was deeply unpopular in Georgia (and elsewhere), its unpopularity was not dependent on it (nor the human beings affiliated with it) being from out of state; rather, the struggle over the Bank centered on issues of the power of the federal government, conflicting theories of money, and competing banking elites.¹²⁸

Nevertheless, the *Deveaux* Court granted political rights to this controversial entity, considered by some contemporaries to be a form of tyranny. The Court rationalized that the Bank could be “considered [not] as a mere faculty, [but] as a company of individuals who, in transacting their joint concerns, may use a legal name”¹²⁹ Accordingly, the corporation would be allowed to assert diversity jurisdiction if all its “members” were diverse to the defendant.¹³⁰ In effect, the Court ignored the corporate entity entirely, as if the lawsuit were brought by a group of individuals. Of course, the individuals did not bring the suit. Had they done so, it would have been dismissed for lack of standing and damages: the taxes

control who he invites into his home, which might serve to protect its racial discrimination. See Greenwood, *Fictional Shareholders*, *supra* note 78, at 1090 n.138 (discussing *Bell*).

122. *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 63 (1809).

123. *Id.*

124. See U.S. CONST. art. III, § 2.

125. *Id.* (“The judicial Power shall extend . . . to Controversies . . . between Citizens of different States.”).

126. *Deveaux*, 9 U.S. at 86.

127. *Id.* at 62.

128. Nonetheless, the case likely does reflect an original purpose of the Clause. Presumably, the diversity clause resulted from common interests of Southern and Northern elites seeking to defend the “peculiar institution” or money-center creditors, respectively, before a more sympathetic forum than local juries and elected state judges.

129. *Deveaux*, 9 U.S. at 87.

130. *Id.* at 88.

were the obligation of the corporation alone, not the individuals, and the seized property belonged to it alone, not the individuals.¹³¹

The primary precedent cited by the Court was a line of English tax cases holding that a tax assessed on “inhabitants” (understood to mean landowners) includes corporate landowners, even though they do not have habitations.¹³² These cases, it contended, show that courts will ignore the ordinary meaning of words and instead look to the “substance” of a corporation rather than “technical” definitions or “a course of acute, metaphysical, and abstruse reasoning.”¹³³

1. *Is a Business Corporation Its “Members”?*

But what is that “substance?” The *Deveaux* Court does not explain; instead, it relies on the “aggregate” metaphor. Perhaps in 1809 it was plausible to identify a corporation with its “members” in “substance,” despite the corporation’s separate legal existence, property, and contracts.¹³⁴ Neither limited liability, the principle of centralized management by a board of directors, nor the one-share, one-vote system was yet fully established.¹³⁵ Before the general incorporation laws and freely traded stock, it may not have been irrational to analogize shareholders to “members” rather than investors, as if the Bank were a partnership or a political party rather than a corporation.¹³⁶

In any event, as a matter of modern business-corporation law, the *Deveaux* reasoning is indefensible. Most broadly, corporations are not “invisible, intangible, and artificial” or “existing only in contemplation of law.”¹³⁷ They are, instead, among the most important institutions of our economy.¹³⁸ They are invisible or intangible only in the trivial sense in which any organization is invisible: we buy from them, work for them, and worry about their quite tangible influence on our ecosystem and politics. The Bank of the United States was sufficiently tangible to erect a quite beautiful headquarters in Philadelphia, still standing,¹³⁹ and to in-

131. *Id.* at 89.

132. *Id.* at 87–89.

133. *Id.* at 81, 88, 90.

134. HOVENKAMP, *supra* note 39, at 16, 43, contends that the separation between shareholders and corporation was still controversial until mid-century. I think he is misled by his emphasis on tort, which was in the midst of its own revolution quite apart from corporate law. To my mind, corporate shareholders were never “members” in the most critical sense: its obligations were not their responsibility and its property was not theirs, critical distinctions in the era of entail, dower, the rule against perpetuities, and debtors’ prison.

135. Limited liability was known from an early period, but was far from universal. See *supra* text accompanying notes 51–54. Even today, the principle that shareholders are not liable for corporate debt is not universal. See *supra* note 84.

136. As noted above, *supra* note 19, I think not. But even if the case made sense when decided, the survival of its framing of the problem, let alone its aphorisms, astonishes.

137. *Deveaux*, 9 U.S. at 73, 86.

138. Daniel J.H. Greenwood, *A Progressive View of For-Profit Corporations and Corporate Law* 2–4, 37–38 (May 1, 2013), http://people.hofstra.edu/Daniel_J_Greenwood/pdf/demos.pdf.

139. *The First Bank of the United States: A Chapter in the History of Central Banking*, FED. RESERVE BANK OF PHILA. 11 (June 2009), <https://www.philadelphiafed.org/publications/economic-education/first-bank.pdf>.

spire perhaps the greatest political controversy of the early Republic that did not directly center on slavery, whiskey, or land theft.¹⁴⁰ Today, anyone who cannot see Amazon or Exxon is quite blind.

Similarly, the notion that a corporation is really a “company of individuals” is entirely unrealistic.¹⁴¹ In 1809, as today, as a matter of law and sociology, corporations exist independently of and separately from the people who work for them, manage them, invest in them, or have claims on them.¹⁴² People can move on; the entity continues.

That is the entire point of corporate law: a corporation is *not* the people who make it up. Instead, the entity owns its property, enters into contracts, assumes and satisfies obligations in its own name, all quite separately from the property, debts, and obligations of any of the people involved.¹⁴³ On the one hand, neither employees nor investors are liable for corporate obligations; on the other hand, corporate assets are safe from claims against the individuals affiliated with it.¹⁴⁴ Their debts are not its debts, and its property, privileges, debts, and delicts are not theirs. Their deaths, departures, or defaults do not affect its obligations or assets; the rules against perpetuities and entail are inapplicable¹⁴⁵ because the corporation need never die. As Dean Henry Rosovsky once said to a group of student protesters, “[y]ou are here for four years, the faculty is here for a life-time, but Harvard is here forever.”¹⁴⁶

To ignore this separation between a corporation and the people who participate in it is to ignore what makes a corporation a corporation. Without the rule of separation, the individuals who decide for or profit from a firm would simply be conspirators in restraint of trade, violating the (once) fundamental principle of markets that each individual negoti-

140. See *Second Bank of the United States*, NAT'L PARK SERV., <https://www.nps.gov/index/learn/historyculture/places-secondbank.htm> (last visited Nov. 25, 2016).

141. *Deveaux*, 9 U.S. at 87.

142. See, e.g., Greenwood, *Fictional Shareholders*, *supra* note 78, at 1025–27; Hilt, *supra* note 45, at 649.

143. See *infra* text accompanying notes 144–62.

144. See, e.g., Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393–95 (2000) (describing “asset partitioning” as a core function of corporate law); Hansmann, *supra* note 39 (emphasizing “entity shielding”: protecting business assets and creditors from personal claims). Hansmann and his co-authors contend that entity shielding is virtually impossible to achieve without special legislation such as corporation law; in contrast, there are relatively many ways to shield personal assets from business creditors. In my view, their argument downplays the importance of non-negotiated creditors. There are manifold routes, however, to eliminate that liability as well. See Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996) (describing routes to operate a business without making assets available to involuntary creditors using devices such as secured debt, sale-leaseback, asset securitization and insolvent “owners”); James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki's The Death of Liability*, 107 YALE L.J. 1363 (1998) (contending that companies are unlikely to judgment-proof themselves completely due to pressures of ordinary operation). White's critique appears inapplicable to companies that face unlikely-but-very-large risks; unprincipled profit-driven nuclear-power-plant operators should act as LoPucki predicts.

145. Cf. *Overbagh v. Patrie*, 8 Barb. 28, 43–44 (N.Y. Sup. Ct. 1850) (condemning all forms of entail and similar feudal encumbrances as a form of “caste” incompatible with free labor, similar to unlawful covenants in restraint of trade), *aff'd sub nom*, *De Peyster v. Michael*, 6 N.Y. 467 (1852).

146. Author's recollection; see also LEVY, *supra* note 20, at 43 (noting that some corporations are older than the states that host them).

ates on his own.¹⁴⁷ Moreover, associations change every time the membership does. Were a corporation an association, each time an individual “member” died or departed the firm, all its assets would be realized for tax purposes and its contracts would need to be renegotiated.¹⁴⁸

When the *Deveaux* Court “look[s] to the character of the individuals who compose the corporation,” it seems to mean the shareholders, but whether or not this was defensible at a time when the shareholders’ meeting had far more power than today,¹⁴⁹ in the modern world this is wrong.¹⁵⁰ Modern business corporations operate through the efforts of their employees, not shareholders. In any event, they have no “members.” The modern statutes draw from the law of agency to create a hierarchy, not a membership association.¹⁵¹

Moreover, many shareholders are not even human, let alone “individuals” who have a “character” or could “compose” the corporation. Most stock is held by institutions; the institutional employees are paid to maximize portfolio returns, not to act in the interest of the corporations in which they trade stock.¹⁵² Although one might imagine you could simply look through the shareholding institution to the next one down until you ultimately reach individuals, this is not the case.¹⁵³ Shares may be held by endowments, mutual funds, insurance companies, or private equity funds—none of which typically pass voting rights through to their beneficiaries.¹⁵⁴

Indeed, the beneficiaries may not even be identifiable as individuals: the endowments of Harvard College or the Ford Foundation are in-

147. See *People v. Fisher*, 14 *Wend.* 9, 14, 19 (N.Y. 1835) (holding that shoemakers’ joint action to raise wages violated the misdemeanor conspiracy statute barring “act[s] injurious . . . to trade or commerce”); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* ch. I, § 10 (1776) (describing an economy of small producers without major firms); *Cf.*, e.g., JOHN COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 296 (1924) (criticizing the rule that capital acting in concert is a corporate “person” whereas labor acting in concert is a conspiracy in restraint of trade).

148. Presumably, if corporations were associations, internal corporate affairs would be governed by contract law. Ideologues have contended for a generation that corporate law is contractual. See, e.g., Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972) (characterizing corporate law as contractual). Reality differs. In fact, inside the corporation contract law is displaced by corporate law’s hierarchal control and the agency law that implements it.

149. *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 91–92 (1809).

150. Shareholders are no more members of a modern business corporation than they are its owners or principals. See, e.g., Greenwood, *Metaphors*, *supra* note 13 (criticizing these commonplace metaphors).

151. Shareholders do vote to elect directors and to approve a small number of “fundamental” changes requiring amendments to the Articles of Incorporation, such as mergers. However, voting is on the entirely undemocratic basis of one-share, one-vote. See, e.g., Thomas W. Joo, *Corporate Speech and the Rights of Others*, 30 *CONST. COMMENT.* 335, 336 (2015).

152. Sam Ro, *Here’s Who Owns the Stock Market*, *BUS. INSIDER*, (Jan. 9, 2015, 10:24 AM), <http://www.businessinsider.com/stock-market-ownership-2015-1>.

153. Indeed, many nonprofits, including most of the education and arts sectors, large parts of the medical and insurance sectors, and many churches, do not have shareholders. Nonetheless, many are economically important business institutions showing only small differences from businesses organized as business corporations.

154. See Eleanor Bloxham, *Shareholders: Don’t Give Away Your Voting Rights*, *FORTUNE* (Dec. 16, 2014, 5:00 AM), <http://fortune.com/2014/12/16/shareholder-voting-rights/>.

tended to benefit the arts and sciences or to enable “all individuals, communities, and peoples . . . [to be] active participants in the decisions that affect them; [to] share equitably in the knowledge, wealth, and resources of society; and [to be] free to achieve their full potential.”¹⁵⁵ Similarly, any large pension fund is likely to be expected to fund retirements for workers who have not yet been employed or, perhaps, even born.

Next, shareholders do not have the rights or responsibilities of members. Shareholders have no right to operate the firm or direct its actions,¹⁵⁶ they are not responsible for its actions,¹⁵⁷ and they do not have any right to possess or control corporate property or to force it to return their (or their predecessors’) contributions.¹⁵⁸ Unlike members, neither law nor custom imposes any expectation, let alone obligation, that shareholders act in the interest of the corporation as a whole.¹⁵⁹ Conversely, the law directs corporate officers to manage the corporation in its own interests, not according to the values or views of shareholders or other participants.¹⁶⁰

Far from ‘composing’ the corporation, public shareholders of a modern corporation are little more than the successors in interest to fungible suppliers of a perfectly fungible commodity, money.¹⁶¹ That is why a modern corporation can function perfectly well without even knowing

155. *Mission Statement*, FORD FOUND., <http://www.fordfoundation.org/about-us/mission> (last visited Nov. 25, 2016).

156. Shareholders, even sole shareholders, never have the power to act for the corporation—they are neither its agents nor its principals. *See, e.g.*, *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227 (Del. 2008) (declaring illegal shareholders’ proposed by-law mandating reimbursement of dissident directors’ proxy solicitation expenses under certain circumstances because “stockholders . . . may not directly manage the business and affairs of the corporation” or require directors to act in violation of fiduciary duty); *McQuade v. Stoneham*, 189 N.E. 234 (N.Y. 1934) (voiding a shareholder attempt to bypass board). Dominant shareholders, however, at least when their votes will determine corporate policies, are bound by the duty of loyalty: like fiduciaries rather than principals, they must set the corporation’s interests above their own. *See, e.g.*, *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971). When shareholders ignore these basic rules, corporate law declares that the corporation is a sham and courts “pierce the veil”—that is, refuse to grant the control parties of the (non-)entity the fundamental privilege of corporate law. *See Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1968); *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 914 (N.Y. 1927).

157. *See, e.g.*, MODEL BUS. CORP. ACT § 6.22 (b) (Am. Bar. Ass’n 2006) (setting out entity liability principle).

158. *See, e.g.*, *Bird v. Wilmington Soc. of Fine Arts*, 43 A.2d 476, 483 (Del. 1945) (quoting *R.I. Hosp. Tr. Co. v. Doughton*, 270 U.S. 69 (1926)) (“The owner of the shares of stock in a company is not the owner of the corporation’s property.”); *cf.* *Hansmann et al.*, *supra* note 39, at 1342 (noting the importance of “lock in” and that investors in joint enterprises sought to prevent unilateral withdrawal from “[a]s far back as we can see”).

159. *See, e.g.*, *Levien*, 280 A.2d 717 (holding that shareholders owe duties to firm or other shareholders only in extraordinary circumstances).

160. *See, e.g.*, *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (finding that directors are required to exercise independent business judgment, not defer to shareholders even on an issue squarely within shareholder competence—deciding whether a stock sale price in a merger is attractive). This is why I have called shareholders a legal fiction. The presumed and legally mandated interests and goals of organizational shareholders, or shareholders as imagined by corporate insiders, have little to do with the actual commitments and real interests of the people behind the institutions. There is exactly no reason to think that all, or any, pension beneficiary cares about nothing other than the future value of his or her pension. *See* LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH* 60 (2012) (“It is shareholders that are fictional.”); *see also* Greenwood, *Fictional Shareholders*, *supra* note 78, at 1025.

161. Greenwood, *Looting*, *supra* note 79, at 104.

who, or what, owns its shares—and knowing that at any given time many of its shareholders are computer programs designed to sell within milliseconds.

2. *Corporations Are Limited-Purpose Bureaucracies, Not Civic Associations*

Corporations are authorized by law for a narrow set of purposes—economic growth, providing useful goods and services, and jobs—and subject to constraints designed to further those goals.¹⁶² The rules governing business corporations make clear that they are not associations of citizens joined together in a common purpose: the people who make them up are agents, subject to hierarchal control, not members who rule and are ruled. Moreover, ultimate control over the modern business corporation lies in the financial and consumer markets, not any human beings at all.¹⁶³

Thus, corporations, like states, are distinctly different from the individuals who compose them or depend on them.¹⁶⁴ If business corporations were governments, they would not be Rousseauian republics reflecting the general will of their citizens.¹⁶⁵ Instead, under standard views

162. Corporate law does not require that the corporation be a sociological organization (a corporation may be formed with no employees and only one shareholder, although most corporate statutes do require a minimum of three directors). For this reason, some scholars interpret the core of corporate law as the separation between business assets and personal assets. On this view, the corporation is not an association of people but a bundle of assets. *See, e.g.,* Hansmann et al., *supra* note 39; Hansmann & Kraakman, *supra* note 144. My primary concern in this Article is with institutionalized corporations that do, in fact, correspond to a firm. For simplicity, therefore, I will ignore corporations that have no employees or operating business.

163. Indeed, the fact that votes are readily bought and sold suggests that, if we must jam business corporations into an “association” box they do not fit, the associates are investment dollars, not people. At least for those who accept the profit-maximization norm, this is the interest the firm must pursue, in any event. *See* *Dodge v. Ford Motor Company*, 170 N.W. 668 (Mich. 1919) (holding that a business corporation may not be operated as a “semi-eleemosynary institution”). *But see* STOUT, *supra* note 160, at 60 (describing profit-maximizing shareholder as fictional).

164. In the early days, corporate charters specifically referenced the corporation’s status as a “body politic” and often granted specific permission to meet to enact legislation to bind the corporation’s members and agents (which otherwise would have been seen as *lèse-majesté*). Sometimes, grants to the corporation included even authority to impose criminal punishments on persons within its jurisdiction. For example, the Hudson Bay Company (currently the parent corporation of Lord & Taylor and Saks Fifth Avenue) received not merely monopoly trading rights and a massive land grant but the power to wage war on non-Christian nations and to impose law, including criminal law, on persons within its land grant. *See Royal Charter of Hudson’s Bay Company*, HUDSON’S BAY CO., May 2, 1670, <http://www.hbheritage.ca/hbheritage/collections/archival/charter/charter.asp>. Dartmouth College’s original charter similarly grants its trustees the right to establish “laws” and impose “government” on its students and officers. *See* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 533 (1819); *cf.* THE ORIGINAL CHARTER OF COLUMBIA COLLEGE IN THE CITY OF NEW YORK, OCTOBER 31ST, 1754, 17–18 (1836), <http://books.google.com/books?id=cHo4AAAAMAAJ> (“Impower[ing]” the college’s governors to make “Laws, ordinances, and orders, for the Better Government of the said College, and Students, and Ministers thereof . . . to bind and oblige all and every [sic] the Students Officers and Ministers.”). Columbia College’s governors, however, were granted only restricted powers of punishment, including “Degradation, and Public Confession” but not mentioning corporal punishment or fines. *Id.* at 18.

165. Even were business corporations organized on democratic lines, one might think that Madison’s faction analysis, Michels’ “iron law of oligarchy,” or even the public-choice “capture” theories of the last half century would lead the Court to question whether corporate executives or directors ap-

of employees as costs to be minimized and customers as profit centers, they resemble colonial regimes exploiting the locals on behalf of the (entirely fictional, in this case) metropole.

If corporations were democratic associations, their governance structure would be indefensible. But the rules make more sense for an economic organization, restricted to the limited task of producing goods and services for a structured market that will purchase them, only if consumers perceive them as useful at the price.¹⁶⁶ The top-down structure is designed to ensure conformity without precluding change in direction. The minimal supervision by board, shareholder vote, and judicial review is reasonably likely to lead to change in leadership in the event of major failure or deliberate theft. Market pressures, created and mediated by regulatory and related law, will—we hope—press the institution to act in socially useful ways.

Business-corporation law creates a single-purpose entity, designed for economic productivity rather than peace, justice, consensus, or accommodation of our many differences. The important aspects of our lives and debates, we assume, will go on elsewhere—after hours or in very different associations designed to reflect, not suppress, our values. We divert debates about corporate goals and the means to those ends to the democratically responsive legislatures and regulators—which ultimately control corporate behavior by setting market rules, determining which costs are included in price, and, if the system is functioning properly, preventing incumbent economic elites from using past economic success to dominate the future. That is why the undemocratic governance of corporations is not unacceptably totalitarian.

Deveaux's logic, then, is pure idolatry, placing our creation above us to rule us. We have designed corporations to serve us, guided by market rules that are ultimately responsive to the people's representatives. Treating the legal entity as if it merely reflected the will of those it controls and then granting it rights against the institutions that are meant to control it defeats that plan. In effect, it is the error of *Lochner*—pretending that a particular set of legislatively created market rules, and the market results that follow, are sacred and inviolable. No republic should permit that.

appropriately represent the interests of corporate stakeholders. One would be wrong. See THE FEDERALIST NO. 10 (James Madison); ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY (Eden Paul & Cedar Paul trans., 1915); see also Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014) (presenting evidence that politicians are responsive to views of donors but not voters).

166. See, e.g., Ilan Mochari, *The Simple Trick that Amazon, Apple, and Lego Know*, INC.COM (Feb. 4, 2016), <http://www.inc.com/ilan-mochari/strategy-execution-value-proposition-apple-amazon-lego.html> (discussing the value propositions of Amazon.com, Apple, and Lego).

3. *Constitutional Law Against Corporate Law*

Outside of constitutional law, the *Deveaux* Court's technique of looking through the corporate form to see something else, usually a fictionalized shareholder, is something courts do only when they conclude that the firm's controlling parties have ignored the corporate-law mandate.¹⁶⁷ The doctrine of piercing the corporate veil holds that creditors should not be required to accept the corporation's separate existence from its control parties if the latter treated corporate assets as their own property.¹⁶⁸

Thus, taking *Deveaux* seriously would suggest that any corporation asserting diversity jurisdiction is conceding it is not separate from its shareholders—and they are therefore personally liable for its obligations. Presumably, then, the Court did not mean for its metaphor to be taken terribly seriously, or at least it did not think through the implications of taking it seriously. Instead, the result seems to have driven the reasoning.¹⁶⁹

Moreover, a corporation's rights normally are quite independent of the rights of the people who compose or invest in it. For example, as John Dewey pointed out, the last time corporate personality was a hot topic, a corporation made up of married women would have been permitted to make binding contracts without consent of their husbands even prior to the Married Women's Property Acts.¹⁷⁰

The modern cases take the rhetoric of a corporation that is “merely” its shareholders no more seriously than does *Deveaux*. Thus, *Citizens United*, even as it invokes the *Deveaux* notion that granting the corporation rights protects the people involved,¹⁷¹ grants the institution rights that (some of) the people who make it up would not have. In this globalized era, most of our largest corporations—like Citigroup¹⁷²—are funded in large part by foreigners who have no constitutional right to influence American elections (indeed, basic democratic theory suggests that even citizens of one state should have no right to intervene in the electoral

167. See *supra* text accompanying note 156; see *infra* text accompanying note 168.

168. See, e.g., *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1968) (refusing to accept corporations' separate legal status when a shareholder treated multiple corporations as one); *Berkey v. Third Ave Ry. Co.*, 155 N.E. 914 (N.Y. 1927) (Cardozo, J.) (disregarding corporate form when shareholders used the corporation as their agent).

169. Hovenkamp (and others) suggest that if the Court had not protected corporations under the Fourteenth Amendment, it inevitably would have granted the same right to shareholders instead. Hovenkamp, *supra* note 8, at 1641. As a matter of legal realism, I agree; the Court's commitment to protecting entrenched property rights was too strong to be deflected by mere doctrinal niceties. As a matter of legal logic, however, that argument would fail for the reasons discussed in the text. It is fundamental that a corporation's property does not belong to its shareholders. Indeed, contractual participants with continuously negotiated contracts, such as at-will employees and commercial paper holders, have arguably stronger interests in and claims to corporate property.

170. Dewey, *supra* note 3, at 657.

171. *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

172. See CITIGROUP, ANNUAL REPORT 4 (2012), <http://www.citigroup.com/citi/investor/overview.html>.

politics of other states).¹⁷³ Reflecting this long-standing view, *Citizens United* reserved the question of whether a corporation “funded predominately by foreign shareholders” might be distinguishable.¹⁷⁴ Nonetheless, it seems likely that Citigroup and other major corporations may avail themselves of the *Citizens United* holding,¹⁷⁵ even though every publicly traded company has foreign shareholders and virtually all major American corporations derive a significant part of their funding from production and sales abroad.

B. Dartmouth: Corporation as Feudal Grant

*Dartmouth*¹⁷⁶ similarly illustrates the Court’s use of metaphor in lieu of serious consideration of the relevant issues of corporate governance or constitutional text and values. The issue was whether the state of New Hampshire could modify the corporate charter of Dartmouth College—issued by the King prior to independence—in order to reform the institution to better fit the desires of the current legislature.¹⁷⁷ The background was some combination of Federalist and Republican partisan conflict, a college president who had inherited his position and viewed the College—and the village church—as his private property, financial difficulties, and a corporate charter that no longer made much sense¹⁷⁸ because it provided for an English board of overseers to inspect (“visit” in the terminology of the day) to ensure that the College was fulfilling its mission.¹⁷⁹

The Supreme Court held that New Hampshire had no power to modify Dartmouth College’s royal charter, based on the Constitution’s Contract Clause, which bars state legislatures from “impairing the obligation of contract.”¹⁸⁰

173. See, e.g., *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.C. Cir. 2011).

174. *Citizens United*, 558 U.S. at 362. Any publicly traded corporation has a significant proportion of its shares held by foreigners, so if this distinction is meant seriously, *Citizens United* may turn out to be far narrower than it currently appears. On the other hand, no economically significant corporation is “funded predominately” by shareholders, foreign or otherwise. Corporations are funded by selling goods or services for less than they pay their producers, and shareholders expect to be paid by the firm, not the other way around.

175. See Daniel J.H. Greenwood, *Beyond Citizens United: The Solution*, AMERICAN CONST. SOC’Y BLOG (Jan. 21, 2010), <http://www.acslaw.org/acsblog/node/15154>.

176. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

177. *Id.* at 551–52.

178. *Id.* at 561.

179. Dartmouth’s original charter mission was the “education and instruction of youth of the Indian tribes in this land in reading, writing, and all parts of learning which shall appear necessary and expedient for civilizing and Christianizing children of pagans, as well as in all liberal arts and sciences, and also of English youth and others.” COLIN GORDON CALLOWAY, *THE INDIAN HISTORY OF AN AMERICAN INSTITUTION: NATIVE AMERICANS AND DARTMOUTH 22* (2010). Only nineteen Indian students, however, graduated between 1769 and 1970. *The Native Legacy at Dartmouth College*, DARTMOUTH COLL.: NATIVE AMERICAN PROGRAM, <http://www.dartmouth.edu/~nap/about/> (last visited Nov. 25, 2016).

180. *Dartmouth*, 17 U.S. at 519. The case is often seen as epitomizing the Marshall Court’s view of “vested rights” created by contract but protected from legislative interference after vesting. See HOVENKAMP, *supra* note 39, at 21. But *Dartmouth* involves a charter, not a contract.

As in *Deveaux*, the Constitution's language seems almost entirely irrelevant to the decision. Of course, there was no allegation that New Hampshire was declaring a debt jubilee or sought to "impair" the obligation of contracts as ordinarily understood.¹⁸¹ Moreover, a corporate charter is not a "contract" in any usual sense of the word and was even less so in those days when corporations were more clearly understood as *quasi-governmental* "bodies politic."¹⁸²

Instead, it is more plausible that the Court was inspired by the medieval notion that a charter is an irrevocable feudal grant. In the medieval world, government and government office were perceived as a form of property.¹⁸³ Once the king had conceded the autonomy of an entity or power, he no longer "owned" the right and could not reclaim it.¹⁸⁴ A corporate charter, in this old view, was the equivalent of a feudal grant to a lord or a city, recognizing a *quasi-independent*, self-governing entity within the state.¹⁸⁵ *Dartmouth's* vision of corporations seems to be that they are indeed, as Hobbes put it, "as it were many lesser Commonwealths in the bowels of a greater, like wormes in the entrayles of a natural man"¹⁸⁶—independent beings, dependent on, but not part of, the government, and thus, as Hobbes complains, limitations on its authority. This understanding, of course, made little sense in the new American republic, in which the People were (and are) understood to have retained

181. *Leviticus* 25:8-13. In the ideal law of Leviticus, in the Jubilee year all debts were cancelled, slaves freed and land contracts rescinded. Once a generation, that is, the entire nation would return to an initial position of equality. During the immediate post-Revolutionary period, a number of states had enacted or contemplated substantial debt relief, although nothing approaching the Biblical precedent; it seems clear that the fear these movements generated among the creditor classes inspired the Contracts clause. Justice Marshall acknowledges that fear of debt relief was the primary motivation of the Contracts clause, but rejects limiting the clause to that circumstance. *Dartmouth*, 17 U.S. at 628-29.

182. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388, 393 (1937) (noting that corporations succeed by displacing the market with hierarchy and contract law with agency). *But see* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972) (arguing that firms are purely contractual, with "no power of fiat").

Corporate boards are granted their powers by the legislature and function, like a pre-democratic sovereign, as the governing body for an organization that includes many disenfranchised participants. *See* DEL. CODE ANN. tit. 8, § 141 (West 2016) (board exercises powers of corporation); *Hoyt v. Thomson's Ex'rs*, 19 N. Y. 216 (1859) ("[T]he powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers."). Some older cases were even more direct: the directors "constitute" the corporation itself. *See, e.g., Burrill v. Nahant Bank*, 43 Mass. (2 Met.) 163, 166-67 (Mass. 1840). Harvard still refers to one of its boards as "the Harvard Corporation." The modern cases reaffirm the rule that directors alone have undelegated authority to manage the firm. *See, e.g., Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (citations omitted) ("Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives That duty may not be delegated to the stockholders.").

183. *See Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 643-44 (1837) (discussing the power of sovereigns to make irrevocable grants); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 683-84 (1819).

184. *See Charles River Bridge*, 36 U.S. at 643-44; *Dartmouth*, 17 U.S. at 683-84.

185. Greenwood, *Semi-Sovereign*, *supra* note 32, 279-84; *see supra* note 19-27, 33-34 and accompanying text.

186. *See HOBBS*, *supra* note 10, at 230. For further discussion, *see Greenwood, Semi-Sovereign*, *supra* note 32.

an undivided sovereignty, and governmental structures and officers remain subject to their ultimate will.¹⁸⁷

To be sure, Justice Marshall seems to say something quite different. First, he begins with the famous description of a corporation as “an artificial being, invisible and existing only in contemplation of the law.”¹⁸⁸ Setting aside the strange notions that Dartmouth College is invisible or exists only in the legal imagination, this metaphor fundamentally negates the embodied corporateness of the corporation. Rhetorically, if not logically, the metaphor conforms to the *Deveaux* view that corporations are just their control parties.

Perhaps surprisingly, *Dartmouth's* artificial-being metaphor has resurfaced in recent years as rhetorical support for quite different views. Thus, Justice Rehnquist's *Bellotti* dissent¹⁸⁹ uses it to argue that sovereign states have regulatory authority over their creatures, while Justice Ginsburg's *Hobby Lobby* dissent invokes it in arguing that corporations have neither souls nor fundamental rights.¹⁹⁰

The bulk of Marshall's opinion is devoted to arguing that Dartmouth and similar corporations are private, even if their goals are public. He begins by acknowledging that government grants corporate status for public reasons: “[t]he objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.”¹⁹¹ Yet, he says, this does not make the corporation part of the government or public; instead, the corporation is a sort of a trust created to preserve the donors' intentions forever.¹⁹² But that is exactly the medieval point: corporate law is a derogation of the king's authority, leaving the sovereign diminished and setting up a “private” (or, rather, nonstate) governing authority in its place.¹⁹³ Medieval Autonomy Doctrine is already previewing the *Civil Rights Cases* and their State Action Doctrine: corporations are private in the sense that the Constitution protects them against us and our representatives, not the other way around.

Where *Deveaux* ignored corporate law, *Dartmouth* takes corporate law too seriously. By 1819, feudalism was over.¹⁹⁴ Corporations may still have been referred to as “bodies politic,” but it was too late for Dartmouth College to claim, as the University of Bologna had several centuries earlier, the right to exempt its students and faculty from the ordinary

187. See U.S. CONST. pmbli.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

188. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

189. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 822–28 (1978) (Rehnquist, J., dissenting).

190. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2793–94 (2014) (Ginsburg, J., dissenting).

191. *Dartmouth*, 17 U.S. at 637.

192. *Id.* at 638, 642–43.

193. See Greenwood, *Semi-Sovereign*, *supra* note 32, at 279–83.

194. See *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 488–90, 513 (1837) (distinguishing feudal charter theories from those properly applicable in 1837 and earlier despite remnants of feudal institutions and charters in Great Britain's modern economy).

courts and law of the State.¹⁹⁵ Accordingly, every state promptly overruled *Dartmouth*, in effect if not in strict law. They included in every subsequent charter, and then in the general incorporation acts, an explicit provision reserving the right that *Dartmouth* said they did not have—the right to unilaterally modify corporate charters and retroactively change their governing law.¹⁹⁶ Corporations would remain “private” in the sense that the legislatures would delegate their governance to officers they did not appoint, but they are “public” in that they derive their authority, existence, and power only from the statutes that define who can act as the corporation and how.¹⁹⁷ American sovereignty is not property to be divided and alienated at the whim of a king or current officeholder.

C. Letson: *Corporation as Individual*

As the national economy developed, corporations soon came to have shareholders from many states. *Deveaux’s* reasoning would have prevented such corporations from asserting diversity jurisdiction. The Court preserved *Deveaux’s* result by abandoning its rationale. The new doctrine, announced in the 1844 *Letson*¹⁹⁸ decision, was that because a corporation is a creature of its state of incorporation, it may assert diversity jurisdiction as if it were a citizen of that state, even though it obviously is neither an individual nor citizen.¹⁹⁹ The decision seems to rely on an idea, not unlike *Dartmouth*, that the corporation is *quasi-sovereign*, par-taking of the state’s own right to assert diversity.

A few years later, in *Marshall v. Baltimore & Ohio R.R. Co.*,²⁰⁰ the Court found more privatized language to reach the same result, holding instead that shareholders would be counterfactually presumed to be citizens of the chartering state.²⁰¹ *Marshall*, thus, combined *Deveaux’s* view that the corporation has no separate existence²⁰² with *Letson’s* citizenship fiction²⁰³ to reach a conclusion justifiable, if at all, only on *Dartmouth’s* view that corporations are *quasi-sovereigns*.

195. J. PATRICK RAINES & CHARLES G. LEATHERS, THE ECONOMIC INSTITUTIONS OF HIGHER EDUCATION: ECONOMIC THEORIES OF UNIVERSITY BEHAVIOUR 20 (2003) (discussing the corporate privileges of the University of Bologna in the 1200s).

196. See, e.g., MODEL BUS. CORP. ACT § 1.02 (2010); DEL CODE ANN. tit. 8, § 394 (reserving the State’s right to modify corporate law and apply modifications to pre-existing corporations). HOVENKAMP, *supra* note 39, at 27 (stating the historical details).

197. The Supreme Court also sharply limited *Dartmouth* in *Charles River Bridge* and later cases, reading charters narrowly to allow states to avoid the older monopoly grants. HOVENKAMP, *supra* note 39, at 26, 112. However, the Court never wavered in its presumption that the Constitution provides a plentitude of unwritten rights for corporations.

198. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 559 (1844).

199. The Court has repeatedly held that corporations are not citizens for any purpose other than diversity jurisdiction. See, e.g., *Paul v. Virginia*, 75 U.S. 168 (1868) (holding that only natural persons are citizens).

200. *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 328 (1854).

201. *Id.*

202. *Id.*

203. *Letson*, 43 U.S. at 559.

Under the *Letson-Marshall* regime, it is irrelevant whether human beings associated with the corporation would be allowed to pursue diversity actions as individuals.²⁰⁴ The doctrinal contrast with *Deveaux*, thus, could not be stronger. The older case granted the firm rights in the name of its shareholders by pretending the firm did not exist or was a mere pass-through (conventionally known as the “association” theory).²⁰⁵ *Letson* grants it rights as an individual itself (conventionally called the “artificial entity” theory).²⁰⁶ *Marshall* combines the two theories while downplaying the role of the State (the “natural entity” theory).²⁰⁷

All three cases agree, however, in granting corporations the rights of human citizens—and in ignoring both the details of corporate law as well as the actual consequences to human beings. In 1844, corporations generally incorporated where they did business, and many states refused to allow out-of-state corporations to do business in the state.²⁰⁸ Those rules have long since disappeared.²⁰⁹ Today, every state routinely allows corporations incorporated elsewhere to operate as if they were domestically incorporated.²¹⁰ Conversely, states permit corporations to organize under their laws with no more connection to the state than an address at which the company can be served with process.²¹¹ Even in 1844, corporate shareholders were scattered over the country; today, though, it is safe to assume that all publicly traded corporations have shareholders in every state of the union and most countries abroad, many of which are not human, let alone citizens of the state of incorporation. The *Dartmouth-Letson-Marshall* result, however, continues to be good law.²¹²

204. John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 54 (2011).

205. See *Bank of the United States v. Deveaux*, 9 U.S. 61, 91–92 (1809).

206. See *Letson*, 43 U.S. at 559.

207. See *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 327–28 (1853).

208. See EDGAR J. MCMANUS & TARA HELFMAN, *LIBERTY AND UNION: A CONSTITUTIONAL HISTORY OF THE UNITED STATES, CONCISE EDITION* 152 (2014).

209. See *supra* text accompanying notes 66–77 (discussing changes in corporate law).

210. See, e.g., DEL. CODE ANN. tit. 8, § 371(b) (2016) (providing that a foreign corporation may do business on filing of certificate setting out minimal information and designating an agent for service of process); MODEL BUS. CORP. ACT § 1503 (2010) (similar).

211. See, e.g., DEL. CODE ANN. tit. 8, §§ 101(a), 102(a)(2).

212. In 1951, Congress limited corporate access to diversity jurisdiction by statute. See 28 U.S.C. § 1332(c)(1) (2012) (stating that for diversity purposes, a corporation is a citizen of the state in which its “principal place of business” is located as well as the state in which it is incorporated); *Hertz Corp. v. Friend*, 559 U.S. 77, 87, 93 (2010) (describing the history and rationale of legislative change and holding that ordinarily the “principal place of business” is the state in which the corporation is headquartered).

Since it is harder to place principal places of business, or even headquarters, in obscure places than to incorporate in small states, this reform limited *Letson*’s broad grant. However, since the 1950s, it has become far more common for headquarters to be located far from the operating core of the company, so the limitation is itself limited.

The bottom line, in any event, is that both the Court and Congress view the Constitution’s words as advisory, at best. Congress has no power to change the Constitution, which does not by its terms grant corporations any access to diversity jurisdiction, so the statute implicitly reaffirms the Court’s aggressive reading of the text. Since the Constitution sets out only the outer limits of judicial jurisdiction, the Congressional narrowing poses no interpretive issue; indeed, Congress could go further, if it wished, and restore the common-sense reading of the Constitution.

Under the *Letson-Marshall* Constitution, a corporation may avoid the state courts by the simple expedient of incorporating in a small state where it has no business activities and is therefore unlikely to be engaged in state-law disputes. The rule flies in the face of the clear text of the Constitution, which grants the privilege of diversity jurisdiction to citizens, not corporations.²¹³ Moreover, it seriously limits state sovereignty by making it easy for a corporation to avoid state courts even while taking advantage of the state's economy.²¹⁴ Apparently, state "police power" (the right to control the state's own economic policy, working conditions, contract and property rights, and tort law) is, in the Court's view, less important than protecting corporate activities from local interference.

Letson does not pretend that the Constitution's language requires, or even permits, the result. The power of the opinion rests, once again, in its metaphor: corporations should be treated as if the legal entity itself were a citizen because that fiction will lead to the desired result.²¹⁵ But the *ancien régime* is dead, along with its corporate representation. In a democratic republic, citizenship rights belong to human beings, not institutions.

If *Deveaux* metaphorically looked through an "invisible" corporation, *Letson* sees more than is there, treating the organization as if it were a citizen. In neither case, however, did the Court take its metaphors seriously. *Deveaux* is not authority for piercing the veil nor for requiring corporate law to grant consumers or employees the right to "opt out" of supporting corporate lobbying or electioneering,²¹⁶ and *Letson* is not authority for corporate citizenship—for example, to vote or be subject to jury duty and the draft.²¹⁷ It did, of course, prefigure *Santa Clara's* declaration that corporations are "persons" for purposes of the Due Process Clause (but not the Apportionment Clause) of the Fourteenth Amendment—but that doctrine is similarly one-sided, protecting corporate elites against the citizenry on the authority of words that mean something else entirely.²¹⁸

Letson's image of the corporation as citizen has influenced other cases that do not reference the Fourteenth Amendment, personhood, or

213. See U.S. CONST. art. III, § 2.

214. Cf. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding, based on unwritten principle of states' rights, that the Fifteenth Amendment's explicit grant to Congress of power to enforce right to vote does not allow Congress to require certain states to undergo "preclearance" before changing voting rights). In *Shelby*, the Court ignored the language of the Constitution to promote states' rights; in *Marshall* and its modern successors, the Court ignores the language of the Constitution to reduce states' rights. One might question whether states' rights is any more serious a doctrinal constraint than textualism.

215. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 557–58 (1844).

216. Cf. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (holding that the First Amendment bars states from requiring certain "partial" public employees to pay for union services they receive); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 242 (1977) (holding that public employees have a First Amendment right to opt out of union political activities).

217. But see *infra* note 240.

218. See *infra* Part III.

citizenship. For example, in *Edgar v. MITE*,²¹⁹ a fractured Court overturned a state anti-takeover regulation on the ground that a state has “no” interest in regulating the internal affairs of a “foreign” corporation, even though the corporation did extensive business in the state and included state citizens as investors, employees, and customers.²²⁰ A “foreign” corporation simply means a corporation that has chosen to file its incorporation in a different state;²²¹ therefore, a corporation incorporated in Delaware, for example, is a foreign corporation in Illinois even if some or all of its operations, employees, assets, executives, and shareholders are in Illinois.

A corporation’s internal affairs include the rules determining the selection, powers, and responsibilities of the corporate decision-makers, and the extent to which its investors and participants are liable for its obligations.²²² Thus, the *MITE* Court appears to be declaring that states are barred from effectively regulating their most important economic actors. Corporate managers may simply elect to have Delaware project its law beyond its borders. If this reading of *MITE* is correct, citizens of other states are required to defer to Delaware law’s characteristic limits on participant liability, complete absence of formal employee procedural or substantive rights, and extreme deference to corporate boards.²²³

MITE uses the *Letson* image of the corporation as a rights-bearing individual to give corporations rights no human citizen has. Real citizens do not have a parallel right to elect the law of any state to determine marital status or parental rights, nor may humans chose to have a foreign state determine which of their assets are subject to seizure by creditors.

III. CORPORATIONS AS “PERSONS”

The Constitution never uses the word “corporation.” *A fortiori*, it grants corporations no enumerated rights. Under a plain-language understanding of constitutional law, that would be the end of the story. Alternatively, perhaps a broader reading is possible. The best known “tex-

219. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

220. *Id.* at 645–46; see *Company History*, GARKENYON, <http://garkenyon.com/about/history-timeline/> (last visited Nov. 25, 2016) (presenting the company timeline of GarKenyon, MITE Corporation’s subsidiary from 1964 until 1988, that made mechanical components for common military and civilian aircraft); Dick Callahan, *1985 FIN – Emhart to Acquire Mite Corp.*, GLOBAL FASTENER NEWS.COM (Apr. 30, 1985), <http://globalfastenernews.com/main.asp?SectionID=20&SubSectionID=97&ArticleID=9800> (providing details about MITE Corporation’s operations prior to being acquired in 1985).

221. *Foreign Corporation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

222. See *supra* note 94 (internal affairs doctrine).

223. *MITE* does not overturn the long standing rule that a state may refuse to give effect to a corporate charter granted by another state, see, e.g., *Bank of Augusta v. Earle*, 38 U.S. 519 (1839), so a state presumably may refuse to allow out-of-state corporations to do business within its borders (none do). Modern Commerce Clause jurisprudence, however, presumably bars a state from discriminating against an out-of-state corporation. The relationship between these two clear rules is unclear.

tual” locus for constitutional protection of corporate elites is the Fourteenth Amendment’s Due Process and Equal Protection Clauses.²²⁴

In *Santa Clara*,²²⁵ the Supreme Court ruled that business corporations are “persons” entitled to Due Process and Equal Protection under the Fourteenth Amendment.²²⁶ It offered no legal rationale.²²⁷ Instead, the reporter’s syllabus states that:

[b]efore argument, Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.²²⁸

Notwithstanding the radical changes in constitutional law since then—including the rise and fall of *Lochner*’s theory of substantive Due Process and economic *laissez-faire*,²²⁹ and the more recent revival of *laissez-faire* under the First Amendment,²³⁰ the Court has never questioned

224. Granting rights to an organization ordinarily empowers elites and incumbent decision-makers against other participants. Thus, third-world dictators uniformly support the absolute rights of sovereignty, see Engle, *supra* note 120, at 313, 326, 329–30. “State rights” nearly always means the rights of local elites to ignore federal protection of the locally less-powerful. See *supra* notes 12 & 214 (discussing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)). “Privacy rights” in family law traditionally meant the right of the *pater familias* to control family assets and decisions. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953) (refusing to enforce a wife’s access to marital income during marriage), discussed in Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 541–42.

As shown below, corporate law is no different. Ordinarily, constitutional rights for corporations have the effect of restricting corporate participants and others affected by corporate decisions to internal corporate processes, by barring access to legislative or judicial relief from the overwhelming power corporate elites have within the corporation. Cf. Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 57 (2001).

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

226. It did not extend this treatment to municipal corporations. See, e.g., *Williams v. Mayor of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919).

227. Later cases have not remedied the omission. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 574–76 (1949) (Jackson, J., separate opinion) (reaffirming *Santa Clara* holding as *stare decisis* without substantive justification). Two dissents contested the conclusion, which has otherwise been taken to be settled law. See *id.* at 576–80 (Douglas, J., dissenting); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83 (1938) (Black, J., dissenting).

228. *Santa Clara*, 118 U.S. at 396.

229. A discussion of *Lochner* and *laissez-faire* is beyond the scope of this Article. For current purposes, the only important point is that contract, property, and market rules, like corporate law, are malleable, and different rules will lead to different negotiations and results. The particular set of rules that led bakers to agree to work twelve-hour days in inhuman conditions, as described by the *Lochner* dissent, was an artifact of a particular legal system which we have since partially replaced by different rules that lead to different and more meaningfully voluntary agreements. *Lochner v. New York*, 198 U.S. 45, 66–74 (1905) (Harlan, J., dissenting). “Free” contract necessarily reinforces existing power relations: the party that can most easily find an alternative generally can demand a disproportionate share of the gains from cooperation.

230. See, e.g., *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014) (declaring that a corporation may exercise religion for purposes of the Religious Freedom Restoration Act and enjoin the government from enforcing its contraceptive mandate); *Citizens United v. FEC*, 558 U.S. 310 (2010) (holding that the First Amendment protects campaign donations made by corporations).

this basic result. On the contrary. Today, most constitutional claims available to individuals are also available to business corporations.²³¹

Is this holding correct? Logic, text, history, and purpose say no;²³² but unbroken precedent says yes.

A. Text

As Justice Black correctly pointed out in 1937, the plain meaning of the Fourteenth Amendment excludes corporations.²³³ It grants its protections to “citizens” (in the Privileges and Immunities Clause) and “persons” (in the Due Process and Equal Protection Clauses). Neither term extends to corporations.²³⁴

Not because corporations are not “persons,” though. Lawyers have referred to corporations as legal persons from the dawn of time.²³⁵ Indeed, legal personality—the right to sue and be sued—is perhaps the most fundamental right of a corporation, the very thing that makes it “corporate”—one body instead of many.²³⁶ Moreover, the claim that a corporation should be deemed a Fourteenth Amendment “person” is, if anything, a less radical linguistic distortion than *Letson’s* theory that a corporation can assert the diversity rights of a “citizen.”²³⁷

Like the earlier cases, however, *Santa Clara’s* personhood claim is incompatible with the text of the Constitution. The Fourteenth Amendment three times uses the word in contexts that can only refer to natural persons, as opposed to corporate persons. The first sentence of Section One refers to “persons born and naturalized.”²³⁸ Corporations are neither born nor naturalized. Birth is biological; corporations are created by law and legal filings by their founders. Even more clearly, Section Two requires that apportionment in the House of Representatives be according to the “whole number of persons in each State, excluding Indians not taxed.”²³⁹ No one seriously contends that Delaware is entitled to more

231. See generally Mark, *supra* note 8. For a list, now somewhat out of date, of corporate constitutional rights, see Mayer, *supra* note 3, at 664–67 (1990). The most important constitutional right that corporations have not been granted is the privilege against self-incrimination. See *Wilson v. United States*, 221 U.S. 361, 382–86 (1911). Corporate privacy rights may be more limited than individual rights. See *FEC v. AT&T Inc.*, 562 U.S. 397, 408–09 (2011); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).

232. See *infra* Parts III & IV.

233. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1937) (Black, J., dissenting); *cf.*, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576–81 (1949) (Douglas, J., dissenting).

234. *Johnson*, 303 U.S. at 87–90; *cf.* *Wheeling*, 337 U.S. at 578–79.

235. Corporations, and their legal personality, predate the common law. See Dewey, *supra* note 3, at 665.

236. In the older cases and charters, corporations were often referred to as “bodies politic.” See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 524–25, 527 (1819) (quoting charter creating Dartmouth as a “body corporate and politic”). The concept, however, is identical to legal personhood: the corporate body, separate from the individuals who make it up, is deemed a legal actor, permitted to sue and be sued and generally to hold and transfer property “in as full and ample a manner . . . as a natural person.” *Id.* at 527.

237. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 559 (1844).

238. U.S. CONST. amend. XIV, § 1.

239. *Id.* § 2.

representation in the House because of its population of corporations.²⁴⁰ Even leaving aside the implications for democracy, the republic could not stand if the wealthy could multiply their votes by the simple expedient of forming multiple corporations; whoever controlled the corporate registry would control the country. Section Three, which bars rebels from serving in Congress, again uses “person” to mean a natural person—corporations cannot serve as Senators or Representatives.²⁴¹

Accordingly, for the Amendment to create rights for corporations, the meaning of the word “person” must have a different meaning in its second and third appearance than in its first, fourth, and fifth ones. That is not the American tradition of legal drafting.²⁴² Our presumption is that if drafters use the same word multiple times in close proximity, they intend for it to have the same meaning.²⁴³ This is especially true when standard vocabulary easily allows distinguishing different meanings—it would have been easy enough to draft the Amendment to distinguish between natural and legal persons.²⁴⁴

Additionally, the Due Process Clause itself uses the word “persons” in a way that must refer to individual human beings only. The clause protects “persons” against deprivation of life, liberty, and property.²⁴⁵ Corporations are not alive. Even if we read “life” metaphorically, no one has ever contended that the Due Process Clause restricts state regulation of mergers or dissolutions, although they lead to the end of the corporate person, nor do we consider corporate executives who destroy corporations, whether by merger or mismanagement, to be murderers.²⁴⁶

Finally, the word “person” was obviously lifted from the Due Process Clause of the Fifth Amendment, which the Fourteenth Amendment closely tracks, and the Three-fifths and Fugitive Slave Clauses,²⁴⁷ which it repealed. The latter two clauses clearly refer only to natural persons: no one expected corporations to be fugitive slaves nor intended to include

240. A recent bill in Montana, however, proposed that corporations be allowed to vote in some elections, apparently by mistake. See John Celock, *Steve Lavin, Montana Legislator, Didn't Mean to Give Corporations the Right to Vote*, HUFFINGTON POST (Feb. 25, 2013, 6:44 PM), http://www.huffingtonpost.com/2013/02/25/montana-corporations-vote_n_2761209.html. Others took the idea and ran with it. *Republicans Debate Right to Vote for Corporations*, INZANETIMES (Aug. 15, 2011), <http://inzanetimes.wordpress.com/2011/08/15/republicans-debate-right-to-vote-for-corporations/> (claiming, satirically, that a leading politician advocated for corporate voting).

241. Again, satirists disagree. See MURRAY HILL INC., <http://murrayhillincforcongress.com/> (last visited Nov. 25, 2016) (presenting the fictional campaign website of a corporation running for office).

242. In other traditions, this point might be less clear. For example, the Mishnah, which was originally meant to be memorized, often groups rules together by sound—so consecutive clauses may use the same word in radically different senses with unrelated contexts. American drafters, however, use different words when they intend different meanings. See, e.g., *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013).

243. See, e.g., *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

244. See, e.g., *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895 (2013) (citation, internal quotation marks, and brackets omitted) (“Our inquiry ceases in a statutory construction case if the statutory language is unambiguous and the statutory scheme is coherent and consistent.”).

245. U.S. CONST. amend. XIV, § 1.

246. See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting) (stating that deprivation of “life” has never been held to apply to corporations).

247. U.S. CONST. art. I, § 2, cl. 3; *id.* art. IV, § 2, cl. 2; *id.* amend. V.

them in apportionment even as three-fifths of a person. Indeed, it is unlikely anyone thought about *business* corporations at all when the Constitution and the Bill of Rights were enacted: there were only about a dozen at the time.²⁴⁸

Nor does invoking “legal” personality solve the textual problem. Legal personality is never a natural category—it is a creation of the People acting through their governments, not of nature or nature’s God.²⁴⁹ To be a legal person in an area of law is to have legal capacity to create or assume rights and obligations under that law.²⁵⁰ No rule requires consistency across areas of the law. Thus, while corporations have been “legal persons” in contract and property law for as long as there have been corporations, it has not always been clear that they are legal persons in tort or criminal law.²⁵¹ Sometimes, this inconsistency is highly prized by its beneficiaries. For example, in recent decades, most closely held business corporations have been granted the privilege of electing not to be legal persons for purposes of the income tax.²⁵²

Similarly, legal personality has long been disconnected from human rights, intrinsic values, or philosophic personhood. Human beings often are not legal persons in particular contexts. Indeed, the Amendment’s primary purpose was to abolish the old slave regime, under which slaves were property rather than potential property owners, and to overturn the holding in *Dred Scott* that African Americans lack the legal personality necessary to sue in federal courts.²⁵³ Until the passage of the Married Women’s Property Acts, the common-law doctrine of coverture provided

248. Adam Winkler estimates six. Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE L. REV. 863, 863 (2004) (citing Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 449, 450 (1903)). This number presumably excludes universities, chartered cities, and nonprofits, the usual uses of corporate form before the railroads. The number of business corporations was rapidly growing in the early Republic, even if still relatively unimportant. Winkler reports that “approximately 350 business corporations [were] formed between 1783 and 1801.” *Id.* (citing Oscar Handlin & Mary F. Handlin, *Origin of the American Business Corporation*, 5 J. ECON. HIST. 1, 4 (1945)); see also *Citizens United v. FEC*, 558 U.S. 310, 426 n.53 (2010) (Stevens, J., dissenting) (collecting citations).

249. See HENRY BALDWIN, A GENERAL VIEW OF THE ORIGIN AND NATURE OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 136 (1837), <https://books.google.com/books?id=z0RRDAAAQBAJ> (“It is the object and effect of the incorporation, to give to the artificial person the same capacity and rights as a natural person can have, and when incorporated either by an express charter or one is presumed from prescription, they can take and enjoy property to the extent of their franchises as fully as an individual.”).

250. ROBERT C. CLARKE, CORPORATE LAW 17 (1986).

251. See, e.g., BAKAN, *supra* note 21, at 79 (discussing modern claims that corporations cannot commit crimes); HOVENKAMP, *supra* note 39, at 15 (describing the discussion in Angell and Ames’ 1832 treatise of whether a corporation could be sued in tort).

252. Under the Internal Revenue Code, most corporations with fewer than 100 shareholders may waive legal personality for purposes of the IRC, electing instead to be deemed to have passed revenues and expenses through to their shareholders, regardless of corporate law or financial reality. I.R.C. § 1362(a) (2016). The Court, however, has not suggested that corporations which elect not to be taxable entities are thereby giving up any constitutional rights.

253. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857) (holding that no African American could have legal personality to bring a lawsuit in federal court). While antebellum law treated slaves as property, it was inconsistent in its treatment of the property rights of human property, sometimes allowing slaves to own property in their own name and sue to enforce property rights. In contrast, it consistently held that slaves were legal persons for purposes of criminal law.

that a married woman's legal personality was subsumed in her husband, who controlled her property and had sole contract-making authority for her.²⁵⁴ Similarly, in contract law, even today, minors are generally not legal persons: they can neither make a binding contract nor be sued on one.

Conversely, legal persons frequently are not human. In classical international law, sovereign states—but not the human beings who are subject to them—have legal personality. In admiralty law, a boat may be a legal person; in the law of civil forfeiture, cars can be sued.²⁵⁵ In income-tax law, a married couple may elect to be treated as a single unit—a legal person composed of two human beings.

B. History

The history and context of the Fourteenth Amendment is, if anything, even clearer. We fought a Civil War to end slavery and preserve the Union, not to set business corporations above ordinary law and politics.²⁵⁶ The Amendment was enacted to set out the terms of the end of that war, not to reduce the power of legislatures to control their corporate creations.²⁵⁷

254. Married women began to win the right to control their own property and sign their own contracts in the mid-nineteenth century. See generally JOAN HOFF-WILSON, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 192 (1991). By the time the Fourteenth Amendment was passed, many states had passed legislation limiting coverture, but often only in part. Indeed, only in 1981 did married women win full legal personhood with respect to property in the entire United States. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding unconstitutional Louisiana statute granting husband sole control of marital property); cf. Teitelbaum, *supra* note 224, at 541–42 (describing a 1953 state law ruling preventing married woman from accessing marital assets). Several states, however, still give a husband partial control over his wife's body. See, e.g., S.C. CODE ANN. § 16-3-615 (2016) (barring marital rape only if “aggravated force” is used).

255. On civil forfeiture, see Sarah Stillman, *Taken*, *NEW YORKER* (Aug. 12, 2013), http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman.

256. *Slaughterhouse Cases*, 83 U.S. 36 (1873) (recognizing that the Fourteenth Amendment was intended to provide “constitutional protection to the unfortunate race who had suffered so much”); see *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576–81 (1949) (Douglas, J., dissenting); *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1937) (Black, J., dissenting); *Ins. Co. v. City of New Orleans*, 13 F. Cas. 67 (C.C.D. La. 1870) (No. 7052) (“The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons. This construction of the section is strengthened by the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal.”); cf. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 720 (1978) (Rehnquist, J., dissenting) (describing *Ins. Co.*’s reasoning as “impeccable logic”).

257. I take it that no citation is necessary. Not even those who call the Civil War the War of Northern Aggression and characterize it as primarily about “states’ rights” rather than slavery claim that the war or the amendments that the North imposed on the South were driven by struggles over the rights of national railroad corporations or the merits of a *laissez-faire* economic theory forced into a legal theory of substantive Due Process. While railroads and corporate law alike were in a period of rapid change before and after the Civil War, the war was not fought to fossilize a particular view that had not yet been fully articulated. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”); cf. HORWITZ, *TRANSFORMATION*, *supra* note 3, at xiii, xv, 102, 107–08 (describing rise of classical, *laissez-faire* legal theory later in the century).

To be sure, Roscoe Conkling, counsel for the railroad in one of the earliest cases asserting corporate rights under the Fourteenth Amendment, suggested that a secret cabal of drafters used the word “person” rather than “citizen” specifically in order to create corporate rights.²⁵⁸ But his argument is implausible on its face; for, as described above, it contradicts the actual language adopted.²⁵⁹ Far more plausible is Senator Bingham’s contention that the word “persons” was used to ensure that the Constitution protected humans who are not citizens, following the Biblical commandment not to oppress the stranger or alien.²⁶⁰

In any event, not even Conkling claims this alleged intention to include corporations in Section One (but not Section Two or Three) was ever part of the public debate.²⁶¹ Secret intentions of drafters hidden in language that naturally reads otherwise should have no weight in a democratic system. It is puzzling enough why we allow current representative bodies to be overridden by judges interpreting the words of long-dead legislatures.²⁶² To extend this rule-of-the-dead to include the secret, undocumented intentions of a handful of committee members would make a mockery of self-rule. This is especially true when, on the one hand, we have perfectly reasonable explanations of the words chosen that do not require strained, inventive readings, and on the other, it would have been easy enough to express the alleged secret intentions plainly.

C. Structure

First principles and the structure of our democratic republic confirm what the text says. Our Declaration of Independence proclaims that people are “endowed by their Creator with certain unalienable rights.”²⁶³

258. Conkling was counsel to the defendant railroad in *San Mateo Cty. v. S. R.R.*, 116 U.S. 138 (1882). See Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 *YALE L.J.* 371, 371 (1938).

259. See generally Graham, *supra* note 258, at 381 (rejecting Conkling’s argument as misleading and proposing, instead, that the word “persons” was preferred over “citizens” because of fears that the freedman might not be considered citizens); but see CHARLES A. BEARD & MARY BEARD, 2 *THE RISE OF AMERICAN CIVILIZATION* 111–13 (1927) (accepting Conkling’s account).

260. Graham states that Bingham, the alleged point-man for the conspiracy and an early exponent of a natural rights view of Due Process, explained his preference for the word “person” over “citizen” by citing *Exodus* 12:49 and the principle that citizens and aliens should be equal – never mentioning corporations. Graham, *supra* note 258, at 390 n.66, 400 n.97; See, e.g., *Exodus* 12:49 (King James) (“One law shall be to him that is homeborn, and unto the stranger that sojourneth among you.”); *id.* 22:21 (“Thou shalt neither vex a stranger, nor oppress him: for ye were strangers in the land of Egypt.”); *id.* 23:9 (“Also thou shalt not oppress a stranger: for ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.”).

261. Graham, *supra* note 258, at 386 n.50.

262. See Greenwood, *Counter-Majoritarian Difficulty*, *supra* note 12, at 785–86, 847, 853 n.176.

263. The Declaration is evoking the grand creation myth of Genesis: All human beings are descendants of Adam and Eve, the creations of God, and again of Noah, the survivor of the Flood. Thus, we are fundamentally equals. As the ancient rabbis taught, Adam was created as a single individual so that “no one may say my father is greater than yours.” JERUSALEM TALMUD, *Sanhedrin* 22a (author’s translation). That is, we are all descendants of the same ancestors, all made from and doomed to return to the same dust. The lesson was not lost on the slave-owning elite and later racists. See, e.g., STEPHEN JAY GOULD, *THE PANDA’S THUMB*, 163–64, 169–76 (describing Louis Agassiz’s theory of multiple creations, meant to avoid the embarrassment of Genesis’ obvious claim of equality); *cf.*

Corporations, however, are created by people under authority of state legislatures, not the Creator. They have only the fully alienable rights our statutes give them, and, since *Dartmouth*, explicitly reserve the right to take back.²⁶⁴ Like any other governance structure, they are “instituted among men” to “secure” our rights, and, like other governments, when a corporation or corporate law “becomes destructive of these ends, it is the Right of the People to alter or to abolish it.”²⁶⁵ To set our creations above us—to proclaim that our creatures are comparable to God’s—is a form of political idolatry: business corporations have no more divine right than kings.

More prosaically, legislatures create corporate law. Indeed, they have recreated it several times since the Constitution and since the Fourteenth Amendment was written.²⁶⁶ It would be perverse to give such changeable institutions immutable rights or to interpret our ancient Constitution to create rights for an institutional governance structure—the modern business corporation—that did not yet exist. Even if the Constitution had protected corporations at the founding or the Civil War, those pre-industrial corporations have as little to do with modern ones as the militia of the Revolutionary era has to do with the modern standing army.²⁶⁷ Startlingly, changes in corporations and corporate law generated virtually no discussion in the U.S. Reports.²⁶⁸ To the best of my knowledge, the Court has never suggested that changes in corporate law might require rethinking the status of these institutions under our Constitution.²⁶⁹

BABYLONIAN TALMUD, *Sanhedrin* 37a (parallel text restricting teaching to co-nationals, without explanation).

264. Hovenkamp, *supra* note 8, at 1616–17.

265. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

266. See *supra* Section I.B; cf. Hovenkamp, *supra* note 8 (describing the changes from the early mercantilist corporations, to the classical Jacksonian corporation, and then to the New Deal corporation at the end of his period).

267. Militia Act of 1792, sess. I, ch. 33, 1 Stat. 271 (repealed 1903) (requiring free able-bodied white men to participate in militia using their own weapons). And the Court’s recent Second Amendment jurisprudence would be far less radical if it restricted “arms,” like “jury,” to its eighteenth century meaning, protecting nothing more modern than smooth-bored, muzzle-loaded muskets treated as *quasi*-public property. The Supreme Court has a variety of inconsistent approaches to obsolete provisions of the Constitution. For example, it attempts to apply the right to a jury trial as if, counterfactually, we still maintained an eighteenth-century distinction between law and equity. In contrast, no case, so far as I am aware, has suggested that the combination of the Militia Clause and the bar on Standing Armies means either that our standing army is constitutionally questionable or that it must be raised by a draft of untrained, free, propertied, and often self-funded white men in the manner of an eighteenth-century militia. See, e.g., Michael A. Bellesiles, *The Second Amendment in Action*, 76 CHI.-KENT L. REV. 61, 66–68, 70 n.68, 71, 75, 95, 100 (2000) (describing the Constitutional Convention’s view of militia as alternative to standing army, noting restrictions on arms ownership by free blacks and other groups, and describing public “impressment” of private arms without compensation); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998) (describing militia as an enforcement for slavery).

268. See generally HOVENKAMP, *supra* note 39.

269. The rise, fall, and rise again of *laissez-faire* ideology on the Court, of course, sparked enormous changes in the substantive constitutional law. Compare *Lochner* with *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (limiting constitutional intervention in economic matters) with *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (using the First Amendment to overturn economic regulation). But through all these changes, the Court continued to use the same

Most importantly, the basic idea of republican self-rule conflicts with the notion that corporations have fundamental rights that ought to be entrenched beyond the reach of ordinary politics. Having created the corporate law that defines corporate powers and the powers of corporate officeholders, we should be entitled to recreate it as well. That is why the states rejected *Dartmouth's* theory of the unchangeable compact.²⁷⁰ Having set corporations loose in the world, we must retain the right, common to all self-governing peoples, to reform them or redirect them if they cease to work in our interests—otherwise, we are ignoring our Constitution and reasserting medievalism.

D. Beyond Personhood

In short, personhood is not central to constitutional doctrine.²⁷¹ As we have seen, the Supreme Court used similar metaphors before the Fourteenth Amendment made the word “person” seem significant—indeed, *Letson* used the same metaphor as *Santa Clara*, analogizing a corporation to a human being, as if the institution’s internal-decision processes were entirely unproblematic.²⁷² Similarly, recent cases generally have not relied on strained exegesis of the Fourteenth Amendment’s vocabulary.²⁷³

tired metaphors of a corporation as either a single, citizen-like individual or a transparent representative of unanimous “members.”

270. See *supra* Section II.B. The issue today is whether the Constitution silently places limits on those modifications, permitting states to change corporate law but not, for example, to use election law to limit the powers of boards of directors. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (overturning restrictions on corporate-funded electioneering based, purportedly, on rights of speech rather than speaker).

271. The point is not new. See HORWITZ, *TRANSFORMATION*, *supra* note 3, 66–107; HOVENKAMP, *supra* note 39, at 43 (arguing that absent “personhood,” the Court would have given corporate rights to shareholders); see also Dewey, *supra* note 3, at 669 (“Each [corporate] theory has been used to serve the same ends, and each has been used to serve opposing ends.”). I hope that my restatement will have some clarificatory value nonetheless. In particular, my focus is somewhat different. Horwitz and Hovenkamp are interested in a broader shift to and from legal classicism and so-called *laissez-faire* political economy. I focus, instead, on the older political theory issue of the relation of state to citizen. See, e.g., Greenwood, *Person, State, or Not*, *supra* note 119 (discussing the political-theory implications of quasi-sovereign corporations).

272. Of course, even individuals have complicated and contradictory decision making centers; the modern science of neurobiology emphasizes that individuals, too, may be understood as struggles between conflicting impulses. See also WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 1 (Jon Bosak 1999) (“To be, or not to be. . .”).

273. In some cases, the Court seems to rely on strained exegesis of different clauses. In *Citizens United*, for example, one of several arguments the Court offers is that corporations are protected by the Petition for Redress of Grievances clause of the First Amendment (as incorporated into the Fourteenth Amendment). See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 355 (2010) (“[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies.”) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 425 U.S. 765, 791 n.31 (1978) (collecting cases)). The Petition clause is limited by its terms to “the People.” Even if corporations could be squeezed into the language of the Fourteenth Amendment, they cannot possibly be included in the People. Ours is a republic of citizens, not organizations. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (contending that Fourteenth Amendment does not protect races but only individuals). But see David A. Westbrook, *If Not a Commercial Republic*, 50 U. LOUISVILLE L. REV. 35, 36 (2011) (contending that in a commercial republic, political processes, legal processes, and economic processes should be in tripartite equipoise).

Moreover, before and after *Santa Clara*,²⁷⁴ the Court invoked other metaphors as well to avoid confronting the collective aspects of corporate governance. Thus, at the same time as *Santa Clara*, *Pembina Mining*²⁷⁵ makes a *Deveaux*-type piercing-the-veil argument, logically inconsistent with personhood, but similarly denying the need to consider how corporate law structures corporate decisions:

[c]orporations are merely associations of individuals united for a special purpose and permitted to do business under a particular name and have a succession of members without dissolution. As said by Chief Justice Marshall: "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men."²⁷⁶

Corporate law gives employees, customers, and debt investors no governance rights, and it gives shareholders little more.²⁷⁷ Corporate personhood, like the older "association" and "entity" metaphors, elides the question of who decides for the corporation, leaving unquestioned the legitimacy of the selection, tenure, and powers of corporate officials. Personhood, like *Letson's* citizenship, treats the firm as a unified whole, ignoring the possibility of internal dissent. *Deveaux's* "looking through" the corporation similarly ignores the problems of disagreement.

But disagreement is the point. The issue in these cases is precisely that corporate officeholders are making decisions with which other corporate participants, or the representatives of the citizenry as a whole, disagree. Granting autonomy to a corporation—or indeed any entity—grants autonomy to the entity's decision-makers, not to those for whom they decide. Corporate autonomy is as likely to reduce as to increase the freedom of the people associated with the entity, such as a corporation's employees, customers, suppliers, or investors.²⁷⁸ As standard liberal political theory insists, individual freedom often requires the opposite. In the political sphere, our Bill of Rights protects the rights of individual citizens to dissent from official speech or religion, not the right of officials to impose their views on others. Within corporations, the analysis is the same. Individual freedom of thought, religion, or criticism of thin-

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

275. See *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

276. *Id.* (quoting *Providence Bank v. Billings*, 29 U.S. 514, 562 (1830)).

277. In the modern era, the simple "association" argument is even more problematic. Modern corporate law places corporate governance under ultimate control of the stock market. See e.g., *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1158 (Del. 1989) (stating that control was "in a fluid aggregation of unaffiliated shareholders representing a voting majority—in other words, in the market"); Greenwood, *Fictional Shareholders*, *supra* note 78. The stock market is not an individual. Similarly, shareholders are typically not individuals: most shares are held by institutions in diversified portfolios that commonly trade extensively and therefore have only minimal "association" with particular companies. More importantly, shareholders, whether human or not, do not associate or unite to form a corporation. The individuals who could be said to do that in some loose sense are employees, but they ordinarily have no legal right to determine the corporation's decisions. In any event, even if modern business corporations had members, which they do not, giving rights to the legal entity is no more likely to protect those who have "united" to form it than giving rights to a sovereign state governed by a dictator protects the dictator's subjects.

278. See *supra* note 224.

skinned incumbent bosses may be impossible if states, churches, or employers can impose the institution's leaders' ideology or practices on their subordinates. Due Process for individuals ordinarily requires limiting the arbitrary freedom of institutions to impose their will. Favoritism and corruption are more likely to be issues if their victims are barred from appealing to courts or similar outside authorities. When citizens decide that existing corporate rules are overproducing pollution or discrimination, or underproducing innovation, safety, or domestic jobs, or overpricing essential healthcare or executives, they may need to investigate internal corporate processes, change incentives, or substitute alternative decision makers—including external regulators—who will send the institution in a different direction. "Corporate" rights are likely to limit the ability of affected citizens to appeal to legislatures or other extra-corporate authorities which could serve as countervailing powers to corporate officials.

More recently, the Court has attempted to sidestep the "personhood" issue by assuming, without inquiry, that corporations can assert constitutional rights simply because the right is important or by focusing on the noncorporate party to the transaction.²⁷⁹ As we shall see, however, this last rhetorical device, epitomized by *Lochner*, simply continues the evasion in a new way.

IV. LOCHNER

Lochner v. New York—the exemplar of our legal system using "*laissez-faire*" theory to justify upward wealth transfer—provides the last of the classic rhetorical forms that the modern court uses to create corporate rights without confronting the basic question of whether extending the right in question to corporate officeholders promotes human liberty.²⁸⁰ In the *Lochner* move, the Court protects an abstract right freed of context, reified as a "brooding omnipresence in the sky," without regard to the actual people involved.²⁸¹ The Court assumes, without inquiry, that corporations may assert certain rights just because the rights are important.²⁸² Privacy, property, and freedom of speech are core values; thus, corporations must be allowed to assert them.

In the corporate context, the *Lochner* move should not have survived Hobbes' discussion of rights as limits on power, let alone Hohfeld

279. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978).

280. See *Lochner v. New York*, 198 U.S. 45, 54 (1905); see also *Bellotti*, 435 U.S. at 777 (purporting to avoid the corporate-theory issue by resting on the rights of speech without regard to the speaker). As in *Lochner*, this move has the effect of reducing rather than enhancing human freedom.

281. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

282. See *Lochner*, 198 U.S. at 57–58 ("The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.").

or legal realism: rights are power relations between human beings.²⁸³ Privacy, property, or speech rights asserted by a bureaucracy, whether state agency or corporation, usually have almost precisely the opposite significance from such rights asserted by an individual. Rather than protecting individuals against their institutions, they empower incumbent officeholders against those they are meant to serve.²⁸⁴

In *Lochner* itself, the Court evaded the question of whether the Constitution protects corporations by focusing on the other side of the transaction—*i.e.*, the human being contracting or otherwise interacting with the corporation. The case involved bakers working twelve hour days in conditions known to cause white lung disease.²⁸⁵ In the majority's view, the employees had a constitutionally protected right to bid their working conditions down to subhuman levels;²⁸⁶ the right of the employer—corporate or otherwise—to endanger or underpay them never even entered into the discussion.

After the Switch in Time, *Lochner* fell out of favor,²⁸⁷ and the Court has been less willing to rely on the Due Process Clause to protect the economic interests of corporations or other economic elites. But as the Court incorporated the Bill of Rights into the Due Process Clause, it usually continued to assume corporations were entitled to assert most of the rights of citizens under the Bill of Rights, and since the Burger Court it has used the Due Process Clause and the incorporated Bill of Rights, especially the First Amendment, to restrict people from using ordinary politics to control corporations.²⁸⁸

The *Lochner* move remained the main justification. Thus, the commercial-speech cases²⁸⁹ and corporate-electioneering cases from *Bellotti*²⁹⁰

283. See, e.g., Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1057–58 (describing the debate over legal rights to injure others).

284. See, e.g., Cohen, *supra* note 3, at 815; cf. Adolph A. Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 2, 10 (1965) (describing the rise of “collective capitalism” and the challenge it presents to traditional views of property, and asserting that corporations were increasingly being held to same limitations as the state).

285. *Lochner*, 198 U.S. at 68–72 (Harlan, J., dissenting).

286. *Id.* at 57–59, 61 (Peckham, J., majority opinion).

287. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

288. See Daniel J.H. Greenwood, *Are Corporations Constitutional Persons?*, 59–69 (Nov. 12, 2013) (unpublished paper) (collecting cases), https://people.hofstra.edu/Daniel_J_Greenwood/pdf/ConstitutionalPersons.pdf.

289. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002) (overturning restrictions on advertising “compounded” drugs intended to allow them to be sold but not promoted); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (overturning ban on price advertising designed to limit price competition between pharmacists). *But see Meese v. Keene*, 481 U.S. 465, 484–85 (1987) (upholding the requirement that certain Canadian films be labeled “political propaganda” because the label allegedly imposed no burden on film distributors’ speech).

290. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (creating a constitutional right for corporate managers to spend corporate funds on electioneering). In that case, the Court contended that it was protecting “speech,” making the identity of the speaker irrelevant. But freedom doesn’t float in the air; the passive voice works no better in politics than in grammar. The issue is whether we can control corporate executives’ use of corporate money to distort our politics—just as it would be if the issue were the rights of municipal officials to repurpose the municipal treasury for their

to *Citizens United*²⁹¹ contend that the dispute is over the rights of human listeners, not corporate speakers. According to the Court, the targets of advertising have a constitutionally protected right to have their views confused or distorted by paid corporate propaganda. This right, in turn, is said to preclude us from setting appropriate rules of debate more likely to lead to successful politics or a functional economy.²⁹² As the *Citizens United* majority states, the Court has “rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons’.”²⁹³ But, as we have seen, corporations are not associations.²⁹⁴ More importantly, it is perverse to refuse to distinguish between human beings and their institutions.

Lochner used the language of freedom of contract to protect economic incumbents from changes in the law designed to make markets work better. Today, the Court regularly uses the First Amendment on behalf of a similar, antimarket, economic incumbent protection project. Often it does so, appropriately enough, using the *Lochner* “rights of the victim” mode of analysis. In *Lochner*, bakers accepted inhumane working conditions because they had no better alternative; and, by banning those conditions, the legislature sought to improve the terms of trade.²⁹⁵ In *Virginia State Board*²⁹⁶ and other commercial-speech cases, the legislature similarly sought to redirect market forces it perceived as antisocial: intense pressure for profit maximization and cost-cutting likely would lead to deprofessionalization of pharmacists, loss of local business lead-

own electioneering. *Lochner* protected bakers’ reified “freedom” to agree to unconscionable working conditions; *Bellotti* protects corporate fiduciaries similarly abstracted “freedom” to spend other people’s money to influence voters.

291. *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010).

292. *Id.* at 343.

293. *Id.*; *id.* at 356 (“Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.”).

294. *See supra* Part II.A.2. Under American law, a business corporation is not an association of citizens. First, corporations are operated by directors and agents. Unlike members, directors and agents have a fiduciary obligation to set aside their own views, politics and interests, and the interests of the nation in order to work for the legally defined interests of the corporation. Moreover, corporations have investors, in the form of bondholders and shareholders, that are in large part diversified investment pools. Some of these institutional investors may ultimately act on behalf of human beings—but often the law requires investor fiduciaries to ignore the actual human beings. ERISA trustees, for example, are required to act in the interest of a purely imaginary pensioner who has no citizenship, no job, and no connection to the United States or Americans but, instead, cares only about the size of a future pension. In other cases, the institution may not represent even thin legal simulacrum of individuals: who are the “citizens” behind the endowments of Harvard or Trinity Church?

In no sense are these investors or employees “members”: most clearly, they entirely lack any right to determine the corporation’s stance on relevant political issues. Even directors, who do have the power to determine corporate positions, are required by law to do so only in pursuit of the corporation’s interests, even if those interests conflict with the director’s values.

Finally, every major corporation has employees and investors that are not American. So do all the significant institutional investors. So, even if business corporations had “members” and we looked through institutional investors to find human beings instead of legal fictions, many of the people involved would be Saudi princes or unborn generations of Norwegians, not American citizens.

295. *Lochner v. New York*, 198 U.S. 45, 66–74 (1905) (Harlan, J., dissenting).

296. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

ers as consolidation led to centralized chains, and pressure on quality.²⁹⁷ Markets generate determinate results only within a given set of rules. When the rules lead to results that citizens, or some of them, find immoral or unattractive, democracies look to political debate and struggle to reform the rules. Judgments, whether right or wrong, of how best to organize our market system are a core subject of democratic self-government. When the Court invokes vague constitutional clauses to replace legislative rules with its own market regulation, it is engaged in an intensely political process of redistributing market power. The *Lochner* move, however, conceals the Court's usurpation behind a veil-of-rights protection. Rather than acknowledging that it is writing market rules that will empower the wealthy at the expense of the public good as understood by the legislature, the Court claims to be discovering individual rights that exist independent of political decisions.

The *Lochner* move (with undertones of *Letson*) reappears in *State Farm*,²⁹⁸ the 2003 holding declaring that the Due Process Clause somehow bars state legislatures and state courts from using traditional common-law tort methods to regulate corporations.²⁹⁹ *State Farm* holds that Due Process caps the size of a punitive damage award against a corporation even if a jury concludes that a corporation will not be deterred from intentional wrongdoing without a larger penalty.³⁰⁰ Tort is a powerful tool to correct the incentives of corporate leaders who may be tempted to place current profit ahead of social utility; thus, good government and respect for the rights of potential victims might seem to demand that we use the tools of tort to encourage managers to act in a more socially appropriate fashion.³⁰¹ But the Court did not discuss the serious governance problems implicit in any attempt to control our largest economic institutions so that they serve the common good. Instead, it analogized regulating a corporation to the "basic unfairness of depriving citizens of life, lib-

297. *Id.* at 766. Whether or not the legislative judgment was correct in any particular instance is not, of course, the issue. Rather, the issue is relative competence—whether there is any rational reason to believe that fundamental questions of how to structure our economy should be determined by courts attempting to parse Free Speech Doctrine, let alone Free Speech Doctrine entirely separated from any consideration of the corporate law that authorizes, or determines, corporate elites in the reaction to market pressures.

298. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

299. *Id.* at 429.

300. *Id.* at 423.

301. See RICHARD EPSTEIN, TORTS 458–59 (1999). The Utah Supreme Court below had concluded that the jury had ample reason to believe that a large punitive damages award was necessary to deter State Farm, in part, because its systematic pattern of wrongdoing produced hidden gains that would only rarely generate lawsuits. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1148 (Utah 2001), *rev'd*, 538 U.S. 408 (2003). On remand, the Utah Supreme Court focused on State Farm's lack of remorse and held that a "9-to-1 ratio between compensatory and punitive damages . . . serve[d] Utah's legitimate goals of deterrence and retribution within the limits of due process." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah), *cert. denied*, 543 U.S. 874 (2004).

erty, or property.”³⁰² State Farm is not a citizen. The only citizens deprived of property here were State Farm’s victims.³⁰³

Similarly, the Court considered the “reprehensibility” of State Farm’s conduct as if it were a moral actor with a conscience and a soul.³⁰⁴ But State Farm is a business corporation governed by corporate law specifically designed to encourage it to pursue profit to the exclusion of other values. By focusing on State Farm’s soul instead of the rules by which it functions, the Court ignored any interest the State might have in reforming failing institutions that exert major influence on the State’s economy.³⁰⁵ A tort system which encourages State Farm to welsh on its contracts by making it highly profitable to do so—that is, the tort system that the Court finds in the Due Process Clause—clearly is reprehensible. It is less obvious that the same is true of managers acting in the interests of their employer as they understand them. The *State Farm* error is familiar: the Court has refused to take seriously corporate law, treating the institution as if it were an individual (*Letson*),³⁰⁶ or a transparent collection of potential wrongdoers (*Deveaux*),³⁰⁷ and hiding its sleight of hand behind reified rights (*Lochner*).³⁰⁸

The Diversity Clause cases and *Lochner* are not often cited. Their rhetoric remains influential, however, despite the massive economic and legal changes of the end of feudalism, the Industrial Revolution, and the rise of multinational corporations and the anonymous stock market. Stranger still, the Court repeats the reasoning of these ancient decisions as if the word “corporation” were a magic talisman making an eighteenth-century eleemosynary institution the same as a modern publicly traded, multinational business corporation.

The plethora of doctrinal defenses of corporate constitutional rights make clear that the issue here is not details of constitutional language. Instead, these decisions are driven by an understanding of the role of corporations in our constitutional space that precedes and guides the Court’s reading of the Constitution’s words. When the Court finds lan-

302. *State Farm*, 538 U.S. at 417.

303. Some of State Farm’s employees, customers, suppliers, and investors no doubt are citizens, and, of course, the illicit profits at issue here would eventually have gone to some or all of those corporate participants. It is fundamental to corporate law, however, that none of the corporate participants—citizen or not—has any property interest in State Farm’s assets unless and until its board of directors determines to grant them one by contract or, in the case of shareholders, declaring a dividend. Even the most confiscatory legislative enactment could not deprive them of property that they do not own; neither investors nor employees have standing to bring a regulatory-taking claim. Their inchoate collective claim to the proceeds of State Farm’s wrongdoing is weaker still.

304. *State Farm*, 538 U.S. at 418.

305. See *id.* at 427; *cf. id.* at 431–32 (Ginsberg, J., dissenting) (noting that State Farm management was driven by profit). Pursuing profit, of course, is far from “reprehensible”—it is a large part of what managers are *supposed* to do. The Court, however, does not seem to recognize that “profit” is a function of the rules that states set. If the Court allows states to change those rules only when corporations are “reprehensible,” it leaves us without remedy when the problem is, instead, the predictably reprehensible results of reasonable people operating within a given set of rules in the market system.

306. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 555 (1844).

307. See *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 85–88 (1809).

308. See *Lochner v. New York*, 198 U.S. 45, 64–65 (1905).

guage it can use, it does so. When the language is not there, it derives its conclusions from the atavistic metaphors of the semi-sovereign corporation.

A. *Contemporary Deveaux-ism: Rhetoric in Place of Analysis*

The twenty-first-century Supreme Court continues to rely on the medieval deference to corporations as well as the *Deveaux*, *Letson*, and *Lochner* rhetorical tricks, rather than analysis. The specific reasoning of these cases has long since been rejected, but the method of ignoring organizational reality and corporate law to treat the corporation as either an individual citizen or nothing more than the sum of (some of) its component parts has regularly reappeared.³⁰⁹

For example, the Court granted corporations constitutional rights against official searches and seizures and double jeopardy on the purported ground that the people making up the corporation would be entitled to them.³¹⁰ Rights for institutions, however, do not necessarily protect individuals, as should be obvious to anyone brought up in the liberal tradition of limited government.³¹¹

Similarly, the spirit of *Deveaux* can be seen in the recent spate of corporate-speech and now corporate-religion cases. Here as well, the Court regularly asserts that denying rights to a corporation is somehow equivalent to denying rights to its shareholders (other corporate participants ordinarily go without mention or remedy). Thus, in a *Bellotti* dissent and the *Citizens United* majority, several justices assumed that preventing a corporation from making contributions to a political campaign is equivalent to censoring its shareholders.³¹² But even if corporations

309. The Court has even looked through the corporate veil to discern race. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (allowing a corporation to assert that it was the victim of racial discrimination by an affirmative-action program seeking to increase the number of minority-owned firms). To the best of my knowledge, no corporate law gives corporations a race. See *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 492 U.S. 252, 263 (1977) (stating “[a]s a corporation, [JVM] has no racial identity and cannot be the direct target of the petitioners’ alleged discrimination.”); *Bell v. Maryland*, 378 U.S. 226, 342–43 (1964).

310. See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568, 573 (1977) (justifying corporate double-jeopardy rights based on “embarrassment” and “anxiety” without considering whether corporations are subject to neuroses); *Hale v. Henkel*, 201 US 43, 76 (1906) (corporation may assert Fourth Amendment protection against unreasonable searches and seizures because it is “an association of individuals under an assumed name”); cf. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 812 (1978) (White, J., dissenting) (assuming that corporate political speech is funded with shareholder money, rather than with corporate money derived from charging customers more than employees and other suppliers are paid); *Bell*, 378 U.S. at 343 (1964) (Black, J., dissenting) (defending a corporation’s alleged right to operate a segregated lunch counter, euphemistically described as a right to “choose [its] social and business associates,” by equating it with its manager-namesake).

311. See Joo, *supra* note 151, at 336.

312. See *Citizens United v. FEC*, 558 U.S. 310, 346 (2010); *Bellotti*, 435 U.S. at 812. The actual effects of restrictions on corporate spending are twofold. First, they may limit managers or other corporate officeholders from spending money that is not their own. The question of the authority of corporate officeholders to bind the entire firm or use its assets for their preferred purposes is, obviously, a corporate-governance issue with no free-speech implications at all. The First Amendment does not protect one person’s right to spend another person’s money in violation of otherwise applicable law. Second, they make certain forms of tax evasion more difficult. Campaign contributions and lobbying

were entirely barred from political spending, they would be perfectly free, within the constraints of corporate law, to distribute corporate property to shareholders or other corporate participants.³¹³ The recipients would then be entirely free to spend as they saw fit—with no censorship at all. Accordingly, the only personal “freedom” the Court’s approach protects is the “right” of corporate decision-makers to spend money that is not their own. That ought to be a matter of corporate law, not constitutional law.³¹⁴

Conversely, the corporate right invented by the Court does not protect corporate participants at all. Under current corporate law, the board or its delegates determines how to spend corporate money. Shareholders have no say. Neither do the employees who produce the corporation’s products or the customers who pay for them. Indeed, they lack even a right to know what portion of their contributions to the firm are being used for lobbying or political purposes.

Deveaux’s use of a metaphor in lieu of analysis similarly drives the majority opinion in *Hobby Lobby*.³¹⁵ *Hobby Lobby* was decided under RFRA and does not, at least formally, involve constitutional rights.³¹⁶ Nonetheless, the substantive issues are identical: does extending free exercise rights to a business corporation enhance or degrade the freedom of actual American citizens?³¹⁷

In *Hobby Lobby*, a corporation and members of the family that controls it insisted that their religious freedom was infringed by a regulatory requirement that employer-sponsored medical-insurance plans include coverage for specified forms of contraception.³¹⁸ Plaintiffs contend-

expenses are never deductible; however, a business may have an easier time disguising such expenses as deductible business expenses than an individual taxpayer would. Tax evasion, of course, is not a free-speech interest.

313. See, e.g., Treas. Reg. § 1.1361-2(a) (2016).

314. *Citizens United* also holds that corporations are protected by the Petition Clause of the First Amendment, which by its terms protects the right of “the People.” See *supra* note 273 (analyzing the Petition Clause and case law).

315. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

316. *Id.* RFRA protects “persons,” which is defined to include corporations “unless the context indicates otherwise.” 1 U.S.C. § 1 (2012). The question of whether this context includes corporations—which have no souls or consciences of their own on most theological accounts—is similar to the constitutional question of whether the Fourteenth Amendment’s language should be stretched to include nonhuman persons.

317. I ignore the substantive Free Exercise and Establishment problems of mediating between conflicting claims of citizens to practice, or not practice, inherently social religions in public. Instead, my focus here is limited to whether our ongoing struggles over how to live together in freedom and mutual respect are clarified by treating corporations as if the entity itself were a rights-bearer. Distinguishing representatives and represented, collectives and individuals, are core concerns of liberal politics; we ought to be suspicious whenever any authority pronounces that the way to free the people is to increase the power of their leaders and officials.

318. *Hobby Lobby*, 134 S. Ct. at 2765–66. We need not worry about a corporation suffering if we force it to choose between its earthly and heavenly sovereigns; corporations do not suffer the guilt of sin in that way. So the *Letson* metaphor would reject the corporate claim entirely. Instead, in *Hobby Lobby* and similar cases, controlling or sole shareholders have insisted that the corporation be granted Free Exercise rights on a pass-through theory much like *Deveaux*. See *Bank of the U.S. v. Deveaux*, 9 U.S. 61, 80 (1809). They contend that the corporation ought to be deemed to be exercising the shareholder’s religious rights, and the corporation’s expenditures should be treated as if they were the

ed that some of the companies' insured employees or their families might use such coverage to pay for forms of contraception that offended plaintiffs' religious beliefs, and this, in turn, would violate the free-exercise rights of the corporation itself or its control group.³¹⁹ The companies' insured employees and their families were not parties to the litigation and, of course, had no say in the corporate decision to pursue it. The Court held for the plaintiffs.³²⁰

As in the political-speech cases, the Court's result enhances the power of corporate officeholders over other corporate participants and assets. Following the *Deveaux* model, the Court asserts that by protecting the corporation it is protecting the people who compose it. But this claim is either disingenuous or silly. The litigation only arose because of disagreements within the corporation. Had the control parties of these two corporations believed their views were shared by those affiliated with the

shareholder's. The argument relies on slight of hand—it asserts, without explanation, that even a corporation with hundreds or thousands of employees is not, in fact, an independent legal entity separate from its shareholders. If that were true, it would not be a corporation and should not be deemed a separate entity for liability, contract, property, or taxation purposes either. See *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013) (“A holding to the contrary—that a for-profit corporation can engage in religious exercise—would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners.”), *rev'd*, *Hobby Lobby*, 134 S. Ct. 2751.

319. *Hobby Lobby* had 13,000 employees and *Conestoga* had 950. See *Hobby Lobby*, 134 S. Ct. at 2765; *Conestoga*, 724 F.3d at 390.

320. Aside from the corporate-governance issues I discuss, *Hobby Lobby* raises serious issues of the relationship between religious commitments and general law. The implications are radical if the Court now sees RFRA as overturning not only the *Smith* framework, *Emp't Div. v. Smith*, 494 U.S. 872 (1990), but all prior Free Exercise jurisprudence back to *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878) (upholding, against a Free Exercise challenge, a Congressional ban on the Mormon practice of polygamy). Our multifarious religious commitments mean that virtually any statute will have some religiously based opposition. For example, may doctors now avoid the gag order upheld in *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991), if they sincerely believe that acting to reduce mortality from back-alley abortions or unwanted pregnancies is a religiously mandated corollary of Exodus 20:13 or Leviticus 19:16? Similarly, ancient religious tradition interprets Gen. 1:26 to require us to care for God's creation. See, e.g., SONCINO, MIDRASH RABBAH 195 (1965) (“When God created Adam, He took him to see all the trees of the Garden of Eden and said to him: ‘See how good they are. Everything that I have created, I have created for you. Pay attention that you don't destroy my world, for if you destroy it, there is no one to repair it afterwards.’”). Does *Hobby Lobby* mean that an incorporated village or homeowners association which seeks to bar fracking due to a sincere belief that drilling presents a local environmental danger or contributes to global warming now has a RFRA right to override federal permits, so long as it affirms a religious and not merely scientific basis for its views? Compare, *Hobby Lobby*, 134 S. Ct. at 2779 (internal citations omitted) (“Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our ‘narrow function . . . in this context is to determine’ whether the line drawn reflects ‘an honest conviction’ . . . and there is no dispute that it does.”), with *Colorado Oil and Gas Ass'n v. City of Longmont*, No. 13CV63, 2014 WL 3690665, at 13 (Colo. Dist. Ct. July 24, 2014) (upholding state fracking permits against a contrary ordinance by an incorporated locality notwithstanding the “sincerely-held belief” of the locality); *aff'd*, *City of Longmont v. Colorado Oil and Gas Ass'n*, 369 P.3d 573 (Colo. 2016). And consider the mind-boggling implications of an exemption from otherwise applicable law for religious believers in the sabbatical year release of debts described in *Deuteronomy* 15:1–2 or the Jubilee undoing of all land sales and freeing of all prisoners, *Leviticus* 25:8–13, let alone antinomian readings of *2 Corinthians* 3:6 (King James) (“[F]or the letter [of the law] kills.”).

firm, they would have seen no need to litigate. Instead, they would have expected the contraceptive coverage to go unused.³²¹

Disagreement is inevitable. The political question is how corporate governance, as determined by state law, the Constitution, and RFRA, should deal with it. Should the corporation's religious practices be seen as a routine corporate decision so that corporate leaders may impose a collective religious mandate on corporate participants just as they would decide on a new investment or work hours? Or, in contrast, is religion sufficiently significant that this decision should be made by a more democratic procedure, either within the corporation or in the legislatures? Or should the spirit of the First Amendment prevail, barring compulsory collective-religious practice in order to free individuals to follow his or her own conscience?

The American disestablishment tradition closely parallels our free-speech tradition. Collective decisions about religion impose great costs on dissenters, dangerously raising the stakes of politics and threatening the legitimacy of the community.³²² Accordingly, we seek to free religion

321. The text is oversimplified. Aggregate rates of contraception use and abortion in this country (and the higher rate of abortion in areas where opposition is stronger) make it obvious that many vocal opponents do not act in accord with their stated beliefs. If they are not simply hypocrites, they must believe that the State ought to be forcing people to act in a way that they personally are incapable of doing on their own. Theoretically, these corporate plaintiffs could be representing corporate participants who seek such a punitively paternalistic authority to place roadblocks without which they would be unable to resist the temptation to choose not to bring unwanted children into the world. In reality, however, it would be extraordinary if 13,000 Hobby Lobby employees and 950 Conestoga employees—let alone the bondholders and other investors in each company—all share the plaintiffs' beliefs regarding contraception. Few individuals agree with themselves consistently on any significant issue, let alone with 950 or 13,000 others. Cf. Verified Complaint at ¶ 51, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. 5:12-cv-01000-HE) (stating that Hobby Lobby has employees "of all faiths or no faith.").

322. It is nearly always possible to imagine a different set of boundaries, a different electorate, or a different vote-counting rule that would produce a different majority. If we elected our president by a national election, Hillary Clinton would have won. Different electorates have different majorities; the legitimacy of any majoritarian decision depends on the legitimacy of the chosen forum and its electorate. For further discussion of the limits of majoritarianism, see Greenwood, *Counter-Majoritarian Difficulty*, *supra* note 12 (distinguishing the noncontroversial claim that majorities ought to prevail from the lack of a principled basis to determine which majority within which set of boundaries). Nationally, most Americans reject the Greens' views on family planning (and federal law, including the Patient Protection and Affordable Care Act, PL 111-148 (2010) (known as the "ACA" or "Obamacare"), generally reflects that majority view, with many concessions to strongly held minority views). The ACA law then can best be understood as changing the Hobby Lobby electorate to better reflect that general view that such matters are best left to the judgment of the affected individuals.

Prior to the ACA, Hobby Lobby was not governed by either general American views nor the views of the affected employees. Instead, the Greens' views dominated, via their domination of the corporation's board of directors and the trusts that own its shares. The details of this domination are not entirely clear, as Marty Lederman has pointed out. Marty Lederman, *Hobby Lobby Part V: Whose Religious Exercise? Of Corporations, For-Profit Employers, and Individual Plaintiffs Acting in Their Various Corporate Capacities*, BALKINIZATION, (Jan. 28, 2014), <https://balkin.blogspot.com/2014/01/hobby-lobby-part-v-whose-religious.html>. Hobby Lobby's complaint states that the Green family "owns and operates" Hobby Lobby via various trusts that, in turn, own Hobby Lobby's shares. Verified Complaint, *supra* note 321, at ¶ 2. The individual plaintiffs are officers of the corporation and the trust, and the trust document requires trustees to "affirm the Green family statement of faith" and to "honor God" (presumably in conformity with the Greens' peculiar understanding of God's will). *Id.* at ¶ 38. There is no explanation of what officers and directors do if their statutory duty to the corporation conflicts with their assumed duties to the Green family creed. Presumably, they see serving two

from collective control by freeing public institutions from religion. The same principles apply in the corporate sector. That is why Congress determined in 1964 that large businesses (those with more than fifteen employees) may not impose their leaders' religious views on those subject to their jurisdiction.³²³ The Affordable Care Act ("ACA") applied this general principle to the specific issue of tax-subsidized medical insurance: individuals, not corporate officers, should determine how to apply their religious beliefs in their personal lives.

Hobby Lobby does not engage the issue of whether RFRA or the First Amendment mandates a particular theory of corporate governance. Instead, the majority simply assumes away the conflict that is at the core of the case: the conflict between agency law's authoritarian grant to the master, and a free citizenry's demand for personal agency. The common law of agency granted masters (here, the corporation) the authority to direct servants (here, the employees) and required servants to accept those directions.³²⁴ But the feudal age is over. Agency law in its full ancient form is untenable. We are a free people who have long since rejected the status of master and servant. The corporation consists of people; they—and, therefore, it—cannot be owned, but must be governed.

The Court does not defend medieval agency law to explain why the Green family patriarch's religious beliefs must trump contrary ones of Hobby Lobby employees. Nor does it explicate a theory of property rights that would allow the beneficiaries of a shareholding trust, the trustees of those trusts, or the directors and officers of a corporation to insist that these roles give them archaic ownership rights over the personal lives of American citizens who contract with the corporation.

Instead, it follows *Deveaux*.³²⁵ It pretends that the Greens and the corporation are one, unconflicted, fully unified being.³²⁶ It ignores the disagreements, actual and potential, within the corporation that motivate the case in the first place. Necessarily, then, the rationale of a statutory provision meant to change the rules by which the entity deals with disagreement, protecting some corporate participants against overreaching by others, vanishes as well. By a trick of perspective, corporate officials seeking to impose their views on others suddenly become victims—if it were true that the corporation is just the Greens, and the Greens all

masters in this way as unlikely to create a conflict, or they plan to violate their secular obligations, relying on the corporate-law doctrines that only shareholders have standing to bring a lawsuit for breach of fiduciary duty and that courts generally defer to officers' determinations of the corporation's interests.

It is only corporate law that gives the Greens the power to create corporate policy, not any fundamental principle of religious freedom. It should, therefore, be a question of corporate law, as modified by the ACA, that determines whether the Greens or their dissenting employees shall prevail when they disagree over corporate policy.

323. 42 U.S.C. § 2000e(j) (2012); Jeremy J. Zacharias, *Religious Accommodations in the Workplace: An Analysis of Atheistic Accommodations in the Workplace Pertaining to Title VII of the Civil Rights Act of 1964*, 15 RUTGERS J.L. & RELIGION 135, 141 (2013).

324. RESTATEMENT (SECOND) OF AGENCY § 385(1) (AM. L. INST. 1958).

325. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014).

326. *Id.* at 2755.

agree on the requirements of their faith, the ACA would be a purely symbolic demand that they abandon their own faith, rather than an application of venerable disestablishment principles to the workplace.

The key to the Court's decision, then, has nothing to do with religious liberty. It lies, instead, in its undefended assumption that the Greens' control of the corporation entitles them to act as if they alone were the firm or as if they owned it and its employees.³²⁷ Instead of confronting the true constitutional issues—whether, in our post-post-*Lochner* age, Congress still has authority to free employees from employer attempts to control their personal lives, or may determine that large employers must accept the public mores of disestablishment and nondiscrimination, or may legislate marginal changes to the rules that determine the authority of corporate leaders—the Court hides behind a rhetorical screen.³²⁸

The *Hobby Lobby* opinion does not explain why religious-liberty values require that we allow the Greens to impose their views on Hobby Lobby and its 13,000 employees. It simply asserts that granting rights to the entity empowers those subject to it.³²⁹ Several hundred years of struggle against feudalism suggests the Court is wrong.

In politics, we have progressed beyond the claims of medieval kings and modern dictators to “be” the nation or to represent “its” will. Representative democracy and limited government are based on our understanding that dissent and disagreement are fundamental. No leader can ever fully heal or represent our divided national reality; complete unity must wait for the Messiah at the end of time. In corporate law, the Court seems to be stuck in an authoritarian past. Whatever the merits of the Greens' theology or the politics of National City Bank's corporate leaders, the Court's attempt to vindicate their claims to lead a united front towards a messianic future amounts to little more than a word game.

327. *Id.* at 2765. For example, the Court does not explore whether any expenses the corporation may incur to comply with the law are properly imputed to the Greens. In their director or trustee roles they have no claim at all to those funds and as trust beneficiaries only a highly attenuated one.

328. Similarly, the Court offers no reason why a business should be treated as indistinguishable from an incorporated association of people united around a common religious practice—a church—just because they share a name. The two institutions are fundamentally different. So should be the consequences of the leadership diverging from followers on issues of contraception. In a church, people unite to further the beliefs or practices of the church. In contrast, a business corporation exists primarily to segregate a group of assets, see Hansmann & Kraakman, *supra* note 144, at 390, and to subject a group of people to common direction in pursuit of an economic activity, see, e.g., Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate*, 85 VA. L. REV. 247, 248 (1999); Coase, *supra* note 182. People participate in order to make a living or produce a useful service. Economic theory, the law, and basic political theory suggest that the powers of the institution's leaders should be deep but narrow: businesses need centralized control, but function better if they keep out of the personal lives of their employees and investors. Market economies are far less likely to function effectively if employees, investors and customers do business along partisan or *millet* lines.

329. *Hobby Lobby*, 134 S. Ct. 2751.

V. GRAND THEORY AND LOW METAPHOR

By the time *Santa Clara* misread the Fourteenth Amendment to create corporate rights that are not to be found in its text, the Court had long viewed narrow interpretation—text, history, and context—as irrelevant in determining corporate rights.

The decisions, instead, depend on grand theory and low metaphor.³³⁰ All the early decisions result in granting corporations constitutional rights—rights far greater than those enjoyed by many Americans at the time.³³¹

The theories and metaphors are more disparate. All agree that corporations are private—more like citizens than government—even though they are collective institutions empowered to make rules binding on individuals without their consent.

Deveaux rests on a metaphor of the corporation as easily reducible to citizens,³³² as if the organization were completely transparent or somehow able to embody Rousseau's general will. *Dartmouth* emphasizes that the mere fact of public function, special charter, and special privileges—including the privilege of being a “body politic” with the right to make law binding on the students and faculty—is not enough to make a “private eleemosynary institution” into “a grant of political power . . . a civil institution, to be employed in the administration of the government.”³³³ It remained, in the Court's image, a private body—essentially, the private property³³⁴ of the original donors and its founder despite the terms of the charter itself. In this sense, *Dartmouth* follows *Deveaux* in looking through the corporation to the people behind it—here, not the “members” (and certainly not the Amerindian supposed beneficiaries) but the original donors and founders, who are given rights from beyond the grave in a revival of medieval entail and mortmain.³³⁵ *Letson* describes corporations as citizens themselves, as if the organization itself were an

330. The theory I focus on is somewhat different from the rhetoric of entity, aggregate and person or mercantilist versus *laissez-faire* political economy. See *supra* text accompanying notes 86 & 115. I am interested, instead, in the distinction between state and society at the core of liberal political theory.

331. On the one hand, the Court saw corporate access to the federal courts and protection by the Constitution as so obviously part of the scheme of things that the principle overrode constitutional language. *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 411 (1886). On the other, it thought it equally obvious that free American blacks could not be citizens, *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and that married women were not entitled to access the state courts, let alone federal courts, to enforce contracts or control their property, *HOFF-WILSON*, *supra* note 254, at 279. On the one hand, it viewed corporate charters as sacred treaties not to be modified. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 638 (1819). On the other, it took a somewhat more flexible view of real treaties with American Indian tribes. *Id.* at 638.

332. *Bank of the U.S. v. Deveaux*, 9 U.S. at 88.

333. *Dartmouth* 17 U.S. at 623–30, 659.

334. The notion that an organization can be property was and is quite strange. An organization is a group of people organized under some set of rules. People are not property. Even before the Thirteenth Amendment, free men were not property.

335. *Dartmouth* 17 U.S. at 635, 642–43; *cf.*, *Overbagh v. Patrie*, 4 How. Pr. 394 (N.Y. Sup. Ct. 1850).

individual, entirely separate from the people who operate it or invest in it.³³⁶

At the same time, however, each of the Court's disparate metaphors grant the corporation itself status as a rights-bearing entity, entitled to a sort of comity. This reflected traditional views of corporate law—a corporation was the “uniting of a Societie . . . into one bodie by the Prince or Soueraigne, having auctoritie to make lawes and ordinances”³³⁷—that lasted, at least in the treatises, until the final quarter of the nineteenth century.³³⁸ Despite the words of *Deveaux*, *Dartmouth*, *Letson*, and even *Santa Clara*, the metaphor that actually explains the results is not that a corporation is an individual person or citizen, or that it is reducible to citizens, it is that the Court's corporation is a foreign sovereign or a coordinate branch in our system of polycentric governments.³³⁹

In *Letson*, this is obvious: while the decision uses the language of citizenship, the actual holding assimilates corporations to foreign sovereigns.³⁴⁰ *Letson* grants corporations diversity status even when the Constitution would deny it to the citizens who work for or invest in them, much as comity grants rights to the sovereign itself rather than its subjects or citizens.³⁴¹ Similarly, when the *Dartmouth* court declared that Dartmouth College was not a “civil institution”—not an instrument of the State of New Hampshire—it elevated the college to a co-equal of the state, “perpetual[ly]” beyond the control of the people and their elected representatives.³⁴² In effect, it treated Dartmouth College as if it were a sovereign and its charter a treaty, rather than ordinary legislation.³⁴³ And while

336. *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 532–36 (1844).

337. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 518 n.67 (2006) (quoting *A Discourse of Corporations* (c. 1587–1589), in TUDOR ECONOMIC DOCUMENTS 265, 273 (R.H. Tawney & Eileen Power eds., 1924)). Bilder explains that “[w]ithin English law, under Edward I, such [corporate] jurisdictions were conceptualized as instances in which the king had delegated liberties . . . Corporations were a particular type of delegated jurisdiction within the ‘King’s exclusive prerogative’. Most corporations arose when the Crown granted franchises, liberties, rights, powers, privileges, immunities, or property to a group by letters patent. A corporation thus held delegated authority as a body politic.” *Id.* at 515–16.

338. Conversely, the older view also saw sovereigns as corporations. See, e.g., *Ngiraingas v. Sanchez*, 495 U.S. 182, 201 n.8 (1990) (“The sovereign was considered a corporation. See [3 H. Stephen, Commentaries on the Laws of England 166, 170 (1st Am.ed.1845)]; see also 1 W. Blackstone, Commentaries *467 . . . W. Anderson, A Dictionary of Law 261 (1893) (“All corporations were originally modeled upon a state or nation”); 1 J. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America 318–319 (11th ed. 1866) (“In this extensive sense the United States may be termed a corporation”). *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886) (“The United States is a . . . great corporation . . . ordained and established by the American people . . .”) (quoting *United States v. Maurice*, 2 Brock. 96, 109 (1823) (Marshall, C.J.)); *Cotton v. United States*, 11 How. 229, 231 (1851) (United States is “a corporation”).

339. See, e.g., *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 863 (1984) (agency deference); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 461–67 (1964) (Act of State and comity deference).

340. *Louisville*, 43 U.S. at 554.

341. *Id.* at 558.

342. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 641–42 (1819).

343. This is more than the Court granted to actual sovereign nations in the United States. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 16, 19 (1831) (holding that the Cherokee Nation, while a “State,” was a “domestic dependent nation” not entitled to invoke the Constitution’s grant of diversity jurisdiction for suits involving “foreign states” and, separately, refusing to enforce the treaty).

state legislatures rejected *Dartmouth*, state courts to this day routinely follow its spirit in ordinary corporate law, deferring to corporate officeholders through judicially constructed doctrines such as the Business Judgment Rule³⁴⁴ and the Internal Affairs Doctrine.³⁴⁵

VI. CONCLUSION

The cases before and after *Santa Clara* confirm what a careful examination of that case suggests: the Court has never based its findings of corporate rights under the Constitution on the text, the original intent, specific history, or any identifiable context of the provisions on which it relies. Instead, its holdings are better explained as an atavistic perpetuation of a feudal tradition of deference to coordinate sovereigns that should long ago have lost its authority.³⁴⁶ Moreover, it has routinely ignored fundamental principles of corporate law, especially the most fundamental principle of all: the separation between the corporation and the people who compose it at any given time.³⁴⁷

Instead, the Court has discovered corporate rights from other sources.³⁴⁸ The Beards long ago suggested crude class warfare was the explanation,³⁴⁹ and perhaps in part it is. More visible, however, is a combination of poorly understood metaphors and unarticulated political theories that sharply distinguish between governmental and non-governmental power.³⁵⁰

The first decisions seem to borrow from medieval conceptions of corporations as *quasi*-sovereigns, states within the state, with rights like those of the aristocracy and Church.³⁵¹ Paradoxically, they combine this atavism with a simple liberal dichotomy between citizen and state.³⁵² The former theory presents the corporation as state-like; the latter as citizen-like. Yet, instead of this tension leading to insight, the two incompatible notions lead to the same result: on both theories, the Court finds that the Constitution demands deference to corporate decision-makers.³⁵³ The

344. See *supra* text accompanying note 11. The Business Judgment Rule holds that, absent a showing of conflict of interest or intentional wrongdoing (“bad faith”), judges will refuse to hold corporate directors and officers to the ordinary standard of care. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 51–52 (Del. 2006). Instead they apply a standard of review that closely resembles post-*Carolene Products* “rational basis review”: the board’s decision is upheld if any rational argument might support it. See, e.g., *id.* at 74–75 (upholding board’s payment of millions of dollars to failed CEO); cf. *Bell v. Maryland*, 378 U.S. 226, 343 (1963); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938).

345. See *supra* note 94. The Internal Affairs Doctrine holds that state courts should respect the choice-of-law decisions of corporate decision-makers, even when those officeholders choose law which conflicts with important state policies.

346. *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 416–17 (1886).

347. *Id.* at 414.

348. HORWITZ, *TRANSFORMATION*, *supra* note 3, at 75.

349. See BEARD & BEARD, *supra* note 259, at 538–608.

350. See Greenwood, *Semi-Sovereign*, *supra* note 32, 267, 271.

351. *Id.* at 280.

352. See generally Greenwood, *Shareholder Supremacy*, *supra* note 8.

353. For further discussion of the standard metaphors of corporate law, see Greenwood, *Metaphors*, *supra* note 13, at 282; Greenwood, *Shareholder Supremacy*, *supra* note 8, at 1060.

Court is quick to see the possibilities of governmental overreach, but much less willing to see the problems of “private,” let alone corporate, power.³⁵⁴

The constitutional doctrine we have depends neither on the text of the Constitution nor the nature of corporate essence. If we pause to consider the possibility that we have a written Constitution,³⁵⁵ we find that here, at least, we do not. If the Court were to take seriously its task of protecting Americans from illegitimate power, it would discard the obsolete metaphors and start anew. Business corporations are the most important institutions in our economy. It is time to take them seriously as institutions—as our institutions, ultimately under our control.

354. The social contract tradition of government for the limited purpose of keeping the peace begins, in the modern West, with Hobbes, who was so concerned with the problem of illegitimate private power that he condemned all restraints on the state that was necessary to restrain it. As the Talmud put it, a millennium earlier, we must pray for the health of the *rashut*—the authorities, even the occupying Roman Empire—for without it men would eat each other alive. MISHNAH, *Avot* 3:2. The Court, in contrast, seems to see its role as defending private power against the state and organized attempts by the people to use state power to restrain private overreaching.

355. See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* (2012); Thomas Grey, *Do We Have A Written Constitution?*, 27 *STAN. L. REV.* 703 (1975); Jed Rubenfeld, *The New Unwritten Constitution*, 51 *DUKE L.J.* 289 (2001). Had Grey focused on corporate constitutional rights, he would have answered his question with a resounding “no.” Rubenfeld begins his discussion of the Court’s transformation of text and doctrine with the example of the Eleventh Amendment, where the Court has read “another State” to mean “the same State.” Rubenfeld, *supra*, at 294–95. He concludes by describing a “new unwritten Constitution” in which the Court uses balancing tests that are not—indeed cannot be—rationalized or explained. “Argument drops out.” *Id.* at 305. But this is not so new in the corporate law jurisprudence. We have no rational argument for virtually any of the rights the Court has granted corporations. See, most dramatically, the discussion of the Diversity Clause, *supra* Sections II.A & IV.

