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Person, State, or Not: The Place of Business Corporations in Our Constitutional Order

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**PERSON, STATE, OR NOT: THE PLACE OF
BUSINESS CORPORATIONS IN OUR
CONSTITUTIONAL ORDER**

DANIEL J.H. GREENWOOD*

Business corporations are critical institutions in our democratic republican, market-based, economic order. The United States Constitution, however, is completely silent as to their status in our system. The Supreme Court has filled this silence by repeatedly granting corporations rights against the citizenry and its elected representatives.

Instead, we ought to view business corporations, like municipal corporations, as governance structures created by We the People to promote our general Welfare. On this social contract view, corporations should have the constitutional rights specified in the text: none. Instead, we should be debating which rights of citizens against governmental agencies should also apply to these state-like governance institutions.

* AB Harvard; JD Yale. This Article has no aspirations to originality. The basic principles of legitimate government on which it draws have been commonplace for centuries. See *Kohelet (Ecclesiastes)* 1:9 (וְאֵין כֵּל-הָדָשׁ תַּחַת הַשֶּׁמֶשׁ) (“Nothing new under the sun”). My apologies to the many scholars from whom I have learned and whom I am unable to cite by name; if it looks like I am parroting or responding to someone else’s analysis, it is probably because I am. 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.

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INTRODUCTION: THE BUSINESS CORPORATION AND THE CONSTITUTION

Current constitutional doctrine grants business corporations¹ most of the constitutional rights of citizens.²

1. Corporations that are not business corporations, such as non-profits and municipal corporations (cities), may raise somewhat different issues. Generally, cities are not granted federal constitutional rights against the legislatures that create them; except where state constitutions protect home rule, legislative power is plenary. See *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) (holding that a municipal corporation's charter is not a contract under the Constitution, unlike the charter in *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923) (no due process rights); *City of Newark v. New Jersey*, 262 U.S. 192 (1923) (no equal protection

Since the earliest days of the Republic, the Supreme Court has treated corporations as if they were, like human beings, endowed by their Creator with unalienable rights.³

But we, not the Creator, create corporations, and neither nature nor our Constitution endows them with any unalienable rights whatsoever. To set our creations above us is the sin of idolatry, in the language of Exodus.⁴ In secular terms, to set

rights); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) (city has no constitutional privileges and immunities “which it may invoke in opposition to the will of its creator”); *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998) (discussing cases and noting limits to doctrine); Michael A. Lawrence, *Do “Creatures of the State” Have Constitutional Rights: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILLANOVA L. REV. 93 (2002) (arguing that municipalities are not entirely without constitutional rights); *id.* at n.3 (“Unless restricted by the state constitution, the state legislature has plenary power to create, alter, or abolish at pleasure any or all local government areas.”) (quoting 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 1.21 (John H. Silvestri & Mark S. Nelson eds., 3d ed. 1999); *cf.* *Twp. of River Vale v. Town of Orangetown*, 403 F.2d 684, 686 (2d Cir. 1968) (holding that municipality may assert due process rights against a state other than its own). Non-profits generally have the same constitutional rights as business corporations (even when they have no shareholders and no members, making membership-based or shareholder-centered rationales for constitutional protection absurd). Thus, for example, the earliest case granting speech rights to a corporation concerned a non-profit, *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), as does one of the most recent, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). We also have a plethora of other business forms beyond the scope of this Article, including partnerships and the newer limited liability entities. Much of the analysis in this Article would apply to such organizations. However, details matter: there may be limited circumstances in which small business enterprises should be viewed as alter-egos of their proprietors for constitutional purposes even if they are considered separate for property, contract, and tort law. That discussion is beyond the scope of this Article as well.

2. With a few exceptions, the Court has allowed corporations to assert the same constitutional rights as individuals. *See infra* note 5.

3. I justify this summary of the Court’s constitutional jurisprudence in a companion piece, Daniel J.H. Greenwood, *Neofeudalism: The Surprising Origins of Corporate Constitutional Law* (unpublished manuscript) (on file with author) [hereinafter Greenwood, *Neofeudalism*]. *See, e.g., Woodward*, 17 U.S. (4 Wheat.) at 518 (holding that New Hampshire legislature had no power to change a corporate charter granted by the King prior to the revolution); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (holding that railroad had constitutionally protected right to equal protection); *Citizens United*, 558 U.S. at 310 (holding that business corporation managers have a constitutionally protected right to spend corporate money to influence American elections).

4. *Exodus* 20:2, 20:4. Idolatry, strictly speaking, is treating a man-made creation—an idol—as if it were a god; that is, worshipping our own creation. Treating corporations, which are just forms of government, as if they had God-given natural rights is precisely analogous. *See also* CATECHISM OF THE CATHOLIC CHURCH 2113, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c1

our creatures up as our masters violates the basic principles of limited government and human freedom, without support in the letter or spirit of the Constitution.⁵

Business corporations, like governments, are instituted among us for our purposes. Accordingly, they should have the rights we grant them—and since those rights are expedient rather than natural, we should feel free to change our minds as the economy changes or according to the vagaries of politics. In a democracy such as ours, these rights, like most economic regulation, should be the product of legislation rather than judicial interpretation of a silent Constitution. We trust legislation to create corporations and define their internal structure; we should trust the legislatures to regulate corporate relationships with the regulators, the state, and the citizenry

a1.htm [<http://perma.cc/D645-787R>] (“Man commits idolatry whenever he honors and reveres a creature in place of God, whether this be gods or demons (for example, satanism), power, pleasure, race, ancestors, the state, money, etc.”).

5. Corporate constitutional rights are rights that are not subject to the will of the people or their elected representatives. Ordinarily, we justify such rights by claims that they are so important that they cannot be left to the vagaries of politics, or that they were recognized by prior generations as of that level of importance. Those arguments do not apply to business corporations; the laws authorizing them postdate any relevant part of the Constitution. In any event, we do not have an agreed-upon, fundamental rights-based understanding of how to operate our largest business enterprises. On the contrary, we nearly all agree that one of the great advantages of the capitalist system over its competitors is the flexibility we have to experiment with new methods of production and organization. Every constitutional right the Court grants to business corporations limits our ability to experiment with new (or old) methods of making bureaucracies more responsive. Thus, for example, granting a corporation privacy rights limits our ability to use open records laws or GAO-type ombudsmen to make corporate executives more responsive. Moreover, all such provisions have costs—open meetings are terrible ways to make personnel decisions, for example. But courts interpreting ancient texts are peculiarly poorly designed to make those compromises. Similarly, granting corporations “speech” rights effectively means permitting corporate officials to use the funds entrusted to them for economic growth to, instead, lobby to change the rules that determine their incentives and authority. It would be an obvious violation of democratic norms were a government agency’s officeholders permitted to use agency funds to lobby for rules enhancing their own powers. When we grant such powers to business executives, we not only violate democratic norms, but also threaten the flexibility that makes markets work: Schumpeter’s “creative destruction” cannot survive if economic incumbents are permitted to use past success or luck to change the rules of the market in order to guarantee themselves future fortune. *See, e.g.,* Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001) (discussing the Copyright Term Extension Act (CTEA) of 1998, Pub. L. No. 105-298, 112 Stat. 2827, known as the Mickey Mouse Copyright Act because of Disney’s successful lobbying effort to prevent Mickey Mouse from entering the public domain).

as well.

Corporations are essential components of our economic system. Thus, legislatures will be reluctant to radically change the legal rights corporate management has long enjoyed. But corporate executives are subject to the temptations of power just as government officials are, and corporate bureaucracies can fail in all the ways that governmental ones can. Sometimes reformers will persuade legislatures to restrain corporate power structures, just as we restrain governmental power.

Often, corporate governance, just like state administration, can be improved by the standard devices of liberal republican democracy: ensuring that officials understand they are servants rather than masters; rules and norms to restrain powerful decision makers; electoral responsibility; sunshine and open records rules to assure accountability; audits and ombudsmen; forums for debate on goals, values, and means, and the information necessary to make those debates meaningful; protection for critics and dissidents; limits on nepotism; limits on corruption and the abuse of office for personal gain; division of powers and institutionalization of countervailing powers; protected spheres for individuals to pursue individual tastes and values even when they are not shared by the powers-that-be; and so on.

From time to time, then, we—acting through our political systems to enact statutes or regulations governing all corporations, or as participants in a particular corporation—will seek to change the powers or authority of incumbent corporate officeholders. There is no answer written on high explaining how best to balance the requirements of profit with those of justice, or when efficiency is best served by rules or by allowing exceptions to them. These are matters for political struggle and debate. The political resolutions will change along with changes in the economy, political climate, and persuasiveness of proponents of different positions. Corporate incumbents are powerful political actors, so even when the policy debate clearly favors reform, reformers will face an uphill battle to overcome parochial interests.

What citizens should not have to do is also overcome the Court's routine protection of incumbent corporate power. The rights of the Constitution ought to protect us against our governors (including our corporate governors), not the other way around.

The Court's corporate rights jurisprudence is rarely based on textual interpretation in any narrow sense.⁶ Instead, its

6. Business corporations are not mentioned in the Constitution, and the modern corporate form only dates to the end of the nineteenth century, long after the relevant parts of the Constitution were written. Accordingly, one might imagine that the Constitution has nothing to say about modern business corporations or their predecessors. This has not been the Court's view. For example, in 1819, the Court declared that Dartmouth College's charter was subject to the "contracts" clause, although charters have few similarities to contracts. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 518. The Court held that a corporation could sue in diversity even though it is not a "citizen" in *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 64 (1809) (holding that a corporation is nothing more than the citizens who make it up), in *Louisville R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 520 (1844) (holding that corporation is a creature of the state that charters it and therefore deemed its citizen), and in *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. (16 How.) 314, 328 (1854) (holding that shareholders are presumed (regardless of fact) to be citizens of chartering state). It held that corporations are "persons" for purposes of the Equal Protection Clause of the Fourteenth Amendment, *Santa Clara Cty.*, 118 U.S. at 409, although no one has ever suggested that corporations were "persons" under the Three-Fifths Clause repealed by that Amendment. In the *Lochner* era, see *Lochner v. New York*, 198 U.S. 45 (1905), it made no distinction between the purported freedom of contract rights of citizens and those of business corporations. See, e.g., *Adair v. United States*, 208 U.S. 161, 174-75 (1908) (overturning a criminal conviction of a corporate agent for firing an employee for union activity, on the ground that the corporate employer has the same "personal" right to refuse to hire that the employee has to refuse to work). However, it never considered extending to business corporations the old doctrine barring employees from uniting even if corporate form allows numerous investors to coordinate their negotiating position. See *Vegeahn v. Guntner*, 44 N.E. 1077, 1079-82 (Mass. 1896) (Holmes, J., dissenting) (making this parallel). Since the demise of *Lochner*, it has not let the Constitution's silence stop it from holding that corporations have various privacy, due process, speech, and religious freedom rights. See, e.g., *Waters-Pierce Co. v. Texas*, 212 U.S. 86, 108 (1909) (assuming without discussion that corporation is protected by Ex Poste Facto clause); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (constitutionalizing authority of corporate managers to spend corporate funds to influence referendum related to corporate regulation); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538-43 (1980) (constitutional right to spend ratepayer funds to influence customers on matters of major political concern); *Citizens United*, 558 U.S. at 365 (extending *Bellotti* to apply to use of corporate funds to influence candidate elections); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 513 (1972) (holding that corporation has protected right to "petition [for redress of grievances]"); *Hale v. Henkel*, 201 U.S. 43, 74, 76 (1906) (corporation may assert Fourth Amendment protection against unreasonable searches and seizures because it is "an association of individuals under an assumed name") *limited by* *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporations do not have an "unqualified right to conduct their affairs in secret"); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1976) (Fourth Amendment warrant required to "invade" corporate offices, no basis for treating corporation differently under tax laws than an individual); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 571 (1977) (holding that corporation is entitled to double jeopardy protection in order to prevent "him" from "embarrassment" and "anxiety"); *Penn Cent. Transp. Co. v. City of New*

holdings rely on several closely related metaphorical or rhetorical moves to find a place for corporations in our largely

York, 438 U.S. 104, 124 (1976) (applying Takings Clause to business corporation); *Armour Packing Co. v. United States*, 209 U.S. 56, 72–73 (1908) (holding that corporation has a right to trial by jury in criminal case; no discussion of whether its “peers” are also corporations); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426–29 (2003) (holding large punitive damages award against corporation a violation of due process); *Dow Chem. Corp. v. United States*, 476 U.S. 227, 236 (1986) (holding that a large bureaucratic corporation involved in production of potentially dangerous materials “plainly has a reasonable, legitimate, and objective expectation of privacy” that protects managers against public inspection of their official actions). Recently, it has used “corporate speech” as a vehicle to reinstate the discredited *Lochner*-era notion that the US Constitution requires specific forms of “laissez-faire” regulation, in effect protecting economic incumbents’ use of their economic power to amass more power still. *See, e.g., Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); *Liquormart, Inc. v. Rhode Island* 517 U.S. 484 (1996); *United States v. United Foods*, 533 U.S. 405 (2001); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (using First, instead of Fourteenth, Amendment to impose constitutional limitations on economic regulation). *Cf. Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 69 (2d Cir. 1996) (overturning Vermont statute requiring milk producers to disclose use of bovine growth hormones as a violation of producers’ Free Speech right to keep silent). For a discussion of the controversy over Monsanto’s efforts to prevent consumers from knowing about use of its product, see Christina Cusimano, *RBST, It Does a Body Good*, 48 SANTA CLARA L. REV. 1095 (2008).

Indeed, the Court has even suggested that the Constitution enacts limits on state regulation of hostile takeovers, giving business corporations a right to choose one state to regulate their “internal affairs” regardless of where they operate, or, conversely, allowing one state to impose its view of appropriate property laws outside its borders in a manner not seen since the Fugitive Slave Laws. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). Had it granted that right to human beings, we would have had functional marriage equality immediately after *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (holding that the Massachusetts constitution protected the right of same-sex couples to marry).

The only constitutional rights that the Court has definitively denied to corporations are self-incrimination, *Hale*, 201 U.S. at 43, and the privileges and immunities of citizenship, *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888). *But see Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“[T]he rights created by the first section of the Fourteenth Amendment are . . . personal rights.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (corporation may assert property, but not liberty interests under the Fourteenth Amendment); *Berea Coll. v. Kentucky*, 211 U.S. 45, 54–55 (1908) (corporation may be forced to segregate in circumstances where citizen might have a right to not do so). Some constitutional rights remain adjudicated. Thus, I have not found any case testing whether corporations are persons for purposes of apportionment under the Fourteenth Amendment or the Three-Fifths Clause that it repealed; presumably, even aggressive corporate lawyers have hesitated to press corporate claims that far. Similarly, I am aware of no federal case involving a corporate right to bear arms, although several Progressive-era state constitutions include, or included, Pinkerton Clauses specifically barring business corporations from waging private warfare.

individualistic legal system.⁷ None is fully argued, and none is satisfactory.

Our Constitution does not mention corporations, and all relevant parts were written before the invention of the modern business corporation at the end of the nineteenth century and the radical restructuring of corporate law in the twentieth century.⁸ Thus, a text-based constitutional interpretative

7. For further discussion, see the companion piece, Greenwood, Neofeudalism, *supra* note 3, building on Daniel J.H. Greenwood, *Introduction to the Metaphors of Corporate Law*, 4 SEATTLE J. SOC. JUST. 273 (2005); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995 (1998) [*hereinafter* Greenwood, *Essential Speech*]. In constitutional law, the Court has treated business corporations as if they were co-equal branches of government entitled to comity (in sharp distinction to municipal corporations, which have essentially no rights against legislatures, *supra* note 1); but it has defended this position by contending that the corporation has no separate existence, e.g., *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) (corporation entitled to assert equal protection rights because private corporations “are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution,” but limiting equality to other similar associations), or by analogizing corporations to contracts (*Dartmouth Coll.*, 17 U.S. (4 Wheat.) 518), individual citizens (*Deveaux*, 9 U.S. (5 Cranch) 61), human beings (*Santa Clara Cty.*, 118 U.S. 394; *Martin Linen Supply Co.*, 430 U.S. 564; *Dow*, 476 U.S. 227; *cf.* *Burwell v. Hobby Lobby Stores*, 124 S.Ct. 2751 (2014) (statutory case imputing religious beliefs to institution itself)), associations of citizens (*Letson*, 43 U.S. (2 How.) 497; *Hale*, 201 U.S. 43), legitimate participants in our politics (*Bellotti*, 435 U.S. 765), and racists (*Bell v. Maryland*, 378 U.S. 226, 331 (1964) (Black, J., dissenting on ground that corporation has freedom of association right to refuse to serve Black customers “against his [sic] will”)), even while treating the corporation as property that can be owned by shareholders without regard to the human beings who compose it (*Bellotti*, 435 U.S. 765; *Citizens United*, 558 U.S. 310; *Burwell*, 124 S.Ct. 2751; *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (“The rights and securities guaranteed to persons by [the Fourteenth Amendment] cannot be disregarded in respect to these artificial entities called ‘corporations’ any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations.”)). Modern black-letter corporate law, however, holds that business corporations are not membership organizations, shareholders do not have any cognizable claim to corporate assets, and shareholders need not be human beings, let alone rights-bearing Americans.

8. More than a century ago, the Supreme Court held (without reasoning) that the Fourteenth Amendment’s use of the word “person” transforms the Civil War amendments into a fount of corporate rights. See *Santa Clara*, 118 U.S. at 394 (granting railroad corporation constitutional right to challenge local taxation). The holding is not entirely unmoored. Legal personality—that is, the right to sue and be sued—has been fundamental to the corporate form since long before modern business corporations were invented. See, e.g., Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985). Still, neither history, structure, nor context support *Santa Clara*’s reading. We did not fight the Civil War to end the “peculiar institution” of subjecting state-

tradition ought to begin by asking whether corporations have any constitutional rights at all. Democratic theories point in the same direction: constitutional silence suggests that corporate rights should be entirely subject to majoritarian politics and the police power.⁹ So do fundamental republican and liberal principles: rights are to protect individuals against their governors, not the other way around.

Most importantly, our political tradition draws from liberal social contract theory that is, in turn, based on a great distinction between state and citizen. Liberal political theory presumes that we need a state to avoid Hobbes's "war of all against all" and the unjust coercion by the more powerful of the less well off.¹⁰ At the same time, however, as Lord Acton pointed out, power corrupts.¹¹ State officials may act in their

chartered corporations to statutory law; nor, as this Article argues, does anything in the nature of ordered liberty require that we entrench any particular rules of corporate governance. Moreover, the Amendment's text itself makes clear that, in this instance, "persons" means human beings as opposed to citizens, not legally recognized actors as opposed to legal non-persons such as married women, children and slaves: only natural "persons" can be born or naturalized or are counted for apportionment. See Greenwood, Neofeudalism, *supra* note 3. In any event, this particular rhetorical stratagem is more used in popular than legal culture today, perhaps due to its association with *Lochner*, widely regarded as among the Court's worst failures. But see, *Va. Citizens Consumer Council*, 425 U.S. 748; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. 557; *Liquormart*, 517 U.S. at 484 (using First, instead of Fourteenth, Amendment to impose constitutional limitations on economic regulation).

9. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) (raising the "counter-majoritarian difficulty" that ordinarily political decisions belong in the political branches); Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781 (2001) [hereinafter Greenwood, *Counter-Majoritarian Difficulty*] (discussing the appropriate realms of judicial and legislative power); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (interpreting "necessary and proper" clause to authorize Congress to take all non-forbidden actions appropriate towards permissible ends). The state legislatures, of course, have plenary power absent constitutional restrictions.

10. See, e.g., THOMAS HOBBES, *LEVIATHAN* ch. XIII–XIV (Richard Tuck ed., 1991) (1651); JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971) (emphasizing justice as fairness and urging organizing society in such a way that free people might agree to arrangements without knowing which social position they might hold); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 11 (1974) (emphasizing that justice stems from non-coercive, voluntary arrangements of persons acting within their rights); MICHAEL WALZER, *SPHERES OF JUSTICE* xiii (1983) (describing goal of liberalism as a society free of domination).

11. "Power tends to corrupt and absolute power corrupts absolutely." Letter from John Emerich Edward Dalberg-Acton, 1st Baron Acton, to Mandell Creighton (April 5, 1887), in *HISTORICAL ESSAYS AND STUDIES* 504 (John Neville Figgis & Reginald Vere Laurence eds., 1907).

own interest, preserving or extending their own power or exercising illegitimate authority over citizens instead of protecting them or bettering their lives. So our tradition requires restraints on governmental institutions to assure that they serve the people and respect individual autonomy. The state, in short, exists to serve the citizenry yet always threatens to drift from its assigned task.¹²

Our Supreme Court has repeatedly placed business corporations on the citizen side of this divide, holding that they are "private" for state action purposes (so that we have no constitutional rights against them) and "persons" or "citizens" entitled to constitutional protection against the state (so that they have constitutional rights against our governments).¹³ But this is wrong. The state does not exist to protect business corporations; they are not members of our political community, citizens, or ends in themselves entitled to respect regardless of their utility. On the contrary, business corporations pose many of the same advantages and dangers as states: like states, they are collective governance institutions essential for liberty and affluence, but also threats to both if not restrained to work in the public interest. The state/citizen or public/private dichotomies are deeply misleading, especially when large and powerful institutions are placed on the individual side of the liberal divide.¹⁴

12. See, e.g., JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 14 (G.D.H. Cole trans., 1913) (1762) ("The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."). Rousseau appears to believe that this ideal can be met only under extraordinary circumstances, such as the hypertrophied individualism he ascribes to the Spartans in his *CONSIDERATIONS ON THE GOVERNMENT OF POLAND*, ch. 3 (Kendall trans., 1972) (1772).

13. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) (establishing the state action distinction in order to protect private discrimination); *Santa Clara Cty.*, 118 U.S. at 394-96 (holding, without reasoning, that business corporations are "persons" protected by the equal protection clause of the Fourteenth Amendment). I discuss this history of the Supreme Court's corporate constitutional jurisprudence in a companion piece. Greenwood, *Neofeudalism*, *supra* note 3.

14. To be sure, long traditions emphasize the importance of "intermediate associations," see ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 191 (Reeve & Bowen trans., Phillip Bradley ed., Knopf 1945) (1831), and "separation of powers"; CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748) (outlining importance of checks on power); *THE FEDERALIST* NO. 10 (James Madison) (similar). We find our freedom, in part, in the interstices between our governing institutions and the conflicts among them. But the importance of corporations as subsidiary parts of government is no reason for the

Constitutionally entrenched rights are important in limited circumstances. Constitutions protect us from the institutions we have established where we fear that politics, left unrestrained, could spin out of control, with officeholders or successful coalitions using temporary power to grab even more power until they are too powerful to resist. Useful as they are, political institutions should never rewrite the rules that govern them in ways that allow them to escape our control or to invade basic personal liberties.¹⁵

For the same reasons, constitutions ought to protect us from our major business enterprises (and the market system they exist within and to avoid).¹⁶ Decent countries in the liberal, rights-oriented market tradition ought to have limited, entrenched, basic rights against business corporations, roughly parallel to the basic rights we have against government. Freedom of speech, the right to criticize, separation of powers, personal privacy, and rights to due process are just as important—if often different in detail—in the corporate context as in the governmental one.¹⁷ Corporate managers, no less than public ones, go astray when they protect themselves from contrary viewpoints.¹⁸ The basic liberal arguments for

Supreme Court to grant them constitutional rights outside of the normal political process. Municipal governments—which are often organized as corporations—and executive agencies are at least as important as countervailing powers in our system of widely dispersed and conflicting sovereignties. Yet it is clear that neither cities nor agencies have constitutional rights to use funds or otherwise act in violation of their authorizing statutes or other legislative restrictions on them.

15. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 5, 75–78 (1980) (advocating “interpretivism” to vindicate the primacy of democratic politics over judicial review); CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 16 (1960) (illustrating importance of judicial review to restrain official lawlessness). For my take, see Daniel J.H. Greenwood, *Beyond Dworkin’s Dominions*, 72 *TEX. L. REV.* 559 (1994) (emphasizing primacy of real politics over rights analyses); Greenwood, *Counter-Majoritarian Difficulty*, *supra* note 9 (considering the limits of legitimate majoritarian democracy).

16. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (theorizing that firms arise to avoid market problems). Coase’s key point is that business organizations must pay managers to do planning and supervising that the market price mechanism does for free. Thus, firms can only survive in situations where there is a benefit to suppressing market incentives or operations that outweighs the costs of bureaucracy.

17. Cf. MONTESQUIEU, *supra* note 14 (outlining importance of separation of powers); *THE FEDERALIST* NO. 10 (James Madison) (similar).

18. In the public sector, see, e.g., DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1972). The parallel literature in the corporate sector is extraordinarily efflorescent. See, e.g., Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy*, 37 *SEATTLE L. REV.* 749 (2014) (pointing out that

individual rights (that people need a protected sphere in which they can pursue their own values without regard to the views of the rulers)¹⁹ and for political rights (that the people, collectively and individually, must retain rights to “cashier” their governors and to participate in the debates that make those rights meaningful)²⁰ apply to corporate governance as well as conventional state agencies. However, in our particular system, in which the Constitution is difficult to change but economic enterprises rapidly mutate, most of these basic rights against corporations and their managers ought to be enacted by statute rather than judicial interpretations of the Bill of Rights.

In Part I, I argue that business corporations belong on the public side of the great liberal public-private divide. That is, corporations, like state agencies, are institutions we create to govern ourselves, to “secure our rights . . . and . . . effect [our] Safety and Happiness”²¹ and to “promote the general Welfare.”²² The starting presumption of any constitutional analysis, then, ought to be similar to the starting point for any discussion of the constitutional status of the City of New York (itself a corporation) or the Securities and Exchange Commission. Precisely because of the vital importance of these institutions, we should begin by assuming that the Constitution protects us from their overreaching, not that it protects them from our supervision. The following sub-parts

European firms view institutionalized influence of employees as improving decision making); Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003); IRVING L. JANIS, *GROUPTHINK* (2d ed. 1983).

19. See, e.g., Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (articulating the right to be left alone and locating it in property and tort law); TOCQUEVILLE, *supra* note 14 (emphasizing importance of individual defenses against power of mass democracy); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (1690), *reprinted in* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., Yale Univ. Press 2003) (justifying limited scope of government); JOHN STUART MILL, *ON LIBERTY* (1859) (arguing that people have an absolute right to act in ways that injure no one else); RAWLS, *supra* note 10 (arguing that justice consists in rules that all can agree to, absent self-interest).

20. See, e.g., EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 14 (Frank Turner ed., 2003) (1790) (denouncing the notion that citizens should assert such a right); *THE DECLARATION OF INDEPENDENCE* (U.S. 1776); *Reynolds v. Sims*, 377 U.S. 533 (1964).

21. *THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

22. U.S. CONST. pmbl.

explore the implications of viewing corporations as state-like rather than citizen-like in a variety of substantive areas.

Part II addresses the issue of what ought to replace judicially-created constitutional privileges for business corporations. One of the key advantages of the corporate form is that it allows long-term planning and investment commitments that would be impossible in a market unmediated by bureaucratic planning. Stability, then, is an essential value. But it must be balanced against other important values of personal liberty and economic prosperity.

Part III outlines a plan for legal reform to extend the insights of Eighteenth Century liberal thought to this critical sector. Just as we need self-government and protection against our leaders in the public sector, so too in the corporate sector. Power does not cease to corrupt simply because officials have corporate rather than governmental titles.

Part IV makes a series of concrete proposals for reform. Readers who are less interested in the political theory of the corporation or who already believe that reform is necessary may wish to skip directly to it.

I. THE BUSINESS CORPORATION: PUBLIC, PRIVATE, OR NONE OF THE ABOVE

What is the proper role of incorporated business in our constitutional order? The short answer is clear: corporations—especially large bureaucratic ones—are more similar to government agencies than to citizens. Like governments, they are collective decision-making systems, valuable because they are useful, not as ends in themselves.²³ The basic principles of republican democracy and market capitalism require that we control our governing institutions, not the other way around.

23. Cf. IMMANUEL KANT, *GROUNDWORK OF METAPHYSICS OF MORALS* 90, 96 (H.J. Paton trans. 1956) (“Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.”). Kant’s Categorical Imperative, like Hillel’s golden rule (Babylonian Talmud, 1 *Shabbat* 31a), applies to people, not to our institutions. There is no moral problem with treating an institution as a mere means or tool to our ends. Of course, the arguments of Burke (and the Declaration of Independence) remain strong—we should give substantial deference to the status quo even when its utility is not immediately apparent. In a dynamic economy, however, the anti-majoritarian, status-quo biases of our legislative branches should be more than enough protection even without judicial invention of constitutionally entrenched protections for incumbent corporate officeholders.

Accordingly, business corporations ordinarily should have no constitutional rights under the Fourteenth Amendment or the Bill of Rights. On the contrary, we should have basic rights against them.

In general, the constitutional status of business corporations and their officers should be similar to that of other bureaucratic agencies, including municipal corporations (i.e., cities). Business corporations, like municipal governments, are instituted to preserve our rights and promote the general Welfare.²⁴ Like other governments, corporations are creations of mankind, not naturally endowed with unalienable rights. When circumstances change or we decide that the rules we have established for them are not working to make our lives better, we are entitled to change rules and institutions alike until they better meet our needs.

24. After a generation of constant repetition of Gordon Gekko's "greed is good" and Milton Friedman's "The social responsibility of business is to increase its profits," the notion that a private corporation ought to promote the general welfare may seem shocking. WALL STREET (Twentieth Century Fox Film Corporation 1987) ("Greed, for lack of a better word, is good"); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, NY TIMES MAG. (Sept. 13, 1970). It should not be. The justification for any social institution is, or ought to be, that it makes us better off; profit is only valuable if it creates sound incentives that make us—not merely the executives who control corporations or manage investment funds—better off or better people in some fashion. In a country where many define their self-worth by their jobs, the first function of business corporations ought to be to provide good jobs; the second, useful products and services at reasonable prices. If profits flow from this, so much the better (but, of course, in a properly functioning competitive market at equilibrium, businesses should not be able to earn economic profits—the gains from cooperation and efficiency should go to consumers in the form of lower prices).

Corporations are legally defined entities that function, economically, as escapes from the market. Coase, *supra* note 16. They exist only because we enact statutes that recognize them, specify who may act for them, and create exceptions to otherwise applicable rules. Laws that define corporations in ways that lead to them acting to reduce the general welfare are laws we ought to change.

The level of abstraction matters. Our political and economic system is based on the shared assumption that prosperity, like happiness, is often best pursued indirectly. We generally start with a presumption in favor of markets as a device, as Adam Smith put it, to encourage economic actors to provide our dinners out of their own interest. ADAM SMITH, *WEALTH OF NATIONS* I.2.2 (1776) (only beggars look to benevolence for their needs); *cf. id.*, IV.2.9 (invisible hand).

Our disagreements are over the rules that will guide the market's invisible hand—what rules are needed to ensure that markets work rather than fail, and work to efficiently produce goods and not bads. In a democracy, it is the role of politics to define the rules under which markets function and the points at which markets must give way to other decision-making systems, such as corporations and similar bureaucracies. See Greenwood, *Counter-Majoritarian Difficulty*, *supra* note 9.

The basic principles of liberal social contract theory, applied to corporate law, offer familiar lessons. After centuries of struggle, we have established the principles that governmental positions are not property to be inherited or sold; that states have citizens rather than subjects; that officials hold office at our pleasure; and that we are not our governors' servants, but the reverse. The time has come to extend these principles to the multinational corporations that, in so many ways, serve similar functions and present similar benefits and threats.²⁵

We need powerful institutions, including business corporations. Modern economies depend on complex operations that must be planned and implemented by organizations that are large and stable enough to meet the scale of the challenge. Mom and Pop shops, individual entrepreneurs, or spot markets could not possibly build airplanes, pharmaceuticals, or mobile phone systems.²⁶

However, we also know that power corrupts. Like any power structure, corporate bureaucracies can do harm as well as good. Indeed, corporate officials and structures can threaten many of the same basic freedoms that state officials and structures can, often in similar ways.

For example, consider public and corporate sector corruption. Major institutions, whether corporate or governmental, economic or political, ultimately exist to serve the public, not merely their officeholders. Officials, corporate as much as public, may abuse their offices for private enrichment or power. Indeed, in the modern era, corruption rarely involves explicit bribery or government patronage. Instead, privatization of formerly governmental functions sends tax dollars directly to private profits, while governmental officials work in the shadow of the revolving door, always aware of the lucrative second career that awaits them if they do not offend

25. Until the mid-nineteenth century, and then again from the New Deal until the Reagan era, it would have been obvious that private corporations must serve the public interest. *See, e.g.*, Dalia Tsuk, *Status Bound*, 5 N.Y.U. J.L. & BUS. 63, 100 (2009) (describing the New Deal consensus); JAY W. LORSCH, *PAWN OR POTENTATES* (1989) (reporting on attitudes of the corporate elite, mid-twentieth century); ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312 (1932) (asserting that interests of community must be "paramount" in corporate governance).

26. Without the active assistance of government, neither could business corporations, but that is a separate issue.

the firms they are supposed to be policing, and politicians preemptively cower before implicit, or even imaginary, threats of corporate-funded attack ads.²⁷ Louis XIV's proclamation that "L'etat c'est moi"—rejecting the separation between office and officeholder—was soundly rejected by the French Revolution and all modern liberal regimes. "I am the corporation"—whether glorifying the imperial CEO or the supposedly sovereign stock market—is just as wrong and for much the same reason.²⁸

Similarly, corporate officials—no less than governmental officials—can create systemic problems with little accountability, as the last financial crisis illustrated dramatically. While governmental officials seem to have been

27. While it is rarely possible to prove a direct connection between an official's actions and subsequent employment, the "revolving door" has been an issue for many years, with citizens regularly complaining of the appearance of corruption when important officials appear to be rewarding their former or possible future employers. Some, for example, have questioned former Treasury Secretary's move to private equity firm Warburg Pincus, *see, e.g.*, Andrew Ross Sorkin, *A Conflict in Geitner's New Job?*, N.Y. TIMES: DEALBOOK (Nov. 18, 2013), <http://dealbook.nytimes.com/2013/11/18/hard-to-see-a-sellout-in-geitners-job-choice> [<http://perma.cc/CXF3-HWXW>], or former Defense Secretary Dick Cheney's ties to Halliburton—to which he steered privatized security work while in office under the first President Bush before becoming its CEO and largest shareholder, and then creating yet more work for it on his return to office as Vice President under the second President Bush, *see, e.g.*, Matthew Swibel, *Trading with the Enemy*, FORBES (Apr. 19, 2004), <http://www.forbes.com/global/2004/0419/041.html> [<http://perma.cc/VUW5-V9AT>] (discussing Halliburton's evasion of US sanctions against Iran while Cheney was its CEO); David Corn, *Rand Paul Says Dick Cheney Pushed for the Iraq War So Halliburton Would Profit*, MOTHER JONES (Apr. 7, 2014), <http://www.motherjones.com/politics/2014/04/rand-paul-dick-cheney-exploited-911-iraq-halliburton> [<http://perma.cc/D3A2-D8MY>]. More typically, regulatory officials or congressional staffers and defeated politicians find that regulated industry or lobbying firms are willing to pay high prices to obtain their expertise; inevitably, some current officials will be tempted to avoid taking actions that might reduce their chances at making this transition. For an example of a regulatory agency hit by departures to the private sector, *see* Yeganeh Torbati, *US Agency Enforcing Sanctions Faces Brain Drain*, REUTERS (Aug. 7, 2015), <http://www.reuters.com/article/2015/08/07/us-usa-sanctions-ofac-insight-idUSKCN0QC0CN20150807> [<http://perma.cc/NZ7R-FQY2>].

28. Some modern CEOs seem to contend, similarly, that their individual efforts or vision are responsible for the corporation's success, regardless of the many others involved, or that they are entitled to treat the corporation as something close to personal property. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 763 (Del. 2005), in which the Court characterized Disney's CEO as "the omnipotent and infallible monarch of his personal Magic Kingdom" before holding that his "lapses"—including a contract that handed \$140 million of corporate money to a failed CEO—were within his prerogative and not subject to judicial review.

asleep at the regulatory switches, it was corporate officials, especially in the banks, who actually ran the economy off the tracks.²⁹

The basic principle of liberalism is to limit the overreach of illegitimate power.³⁰ In this struggle, historically as well as today, private power is at least as important as public power. Indeed, modern social contract theory begins with Hobbes justifying legitimate government by the need to restrain private power.³¹ There is nothing special about governmental power that makes it worse than, for example, the illegitimate power of slave owners, thieves, bakeries demanding employees work twelve-hour days in unhealthy conditions, or coal processors that pollute drinking water.³² Governmental and corporate misuse of power are similar in other ways, too. Thus, modern disputes over the power of employers to impose their religious practices on employees bear a remarkable resemblance to earlier struggles to end state establishments of religion. Similarly, conflicts over managers using corporate office for personal enrichment and power are at least as old as Burke's criticisms of the corruption of the East India

29. Fundamentally, the Great Recession resulted from the collapse of the housing bubble, which left a large hole in demand. DEAN BAKER, *PLUNDER AND BLUNDER* (2009). Bubbles are a common artifact of market systems. *See, e.g.*, CHARLES KINDLEBERGER, *MANIAS, PANICS AND CRASHES* (1978). However, officers of banking and real estate development firms hold primary responsibility for feeding the bubble through developing and financing unsound projects. *See, e.g.*, PAUL KRUGMAN, *END THIS DEPRESSION NOW* (2013); SIMON JOHNSON & JAMES KWAK, *13 BANKERS* (2010); JOSEPH STIGLITZ, *FREEFALL* (2010); ALAN BLINDER, *AFTER THE MUSIC STOPPED* (2013).

30. *See, e.g.*, ROUSSEAU, *supra* note 12, at 5 ("Man is born free; and everywhere he is in chains.").

31. HOBBS, *supra* note 10, at 239–40 (1651); *cf. id.* at bk. 1, ch. 10 (describing endless pursuit of power after power in what we'd call a zero-sum game). Hobbes's innovation is to restrict the role of the state to preventing war and oppression, rather than seeking to unite a people around a vision of the good, or Godly, life. In his evocative phrase, the role of the state should be to create law "as hedges are set, not to stop travelers, but to keep them in their way." *Id.*

32. *See, e.g.*, Andrew Revkin, *Flaws in Chemical Laws*, N.Y. TIMES (Jan. 14, 2014), <http://dotearth.blogs.nytimes.com/2014/01/14/flaws-in-chemical-laws-in-the-context-of-the-west-virginia-spill/> [<http://perma.cc/3R73-HF9G>] (describing Freedom Industries use of chemicals that have never been tested for safety); Emily Atkin, *What Freedom Industries' Bankruptcy Really Means*, CLIMATE PROGRESS (Jan. 22, 2014), <http://thinkprogress.org/climate/2014/01/22/3182911/freedom-industries-bankruptcy-bad-news/> [<http://perma.cc/NMP6-MB25>] (describing Freedom Industries' possible use of bankruptcy to avoid answerability for injuries it caused while continuing to do business in same fashion).

Company.³³ Liberal republican states ought to limit corporations, and corporate leaders, to their proper sphere, much as they seek to preserve the rights of the people against our equally important and equally troubling legislatures, courts, and executive agencies.³⁴

Publicly traded business corporations are among the most powerful governing institutions on which we depend. On the one hand, they are largely responsible for our livelihoods, communities, necessities, and objects of desire—without them, life as we know it today would be impossible. On the other hand, left to pursue the path they follow most easily, they may corrupt our politics and distort our economy as they use concentrated wealth and power to create still more concentration.³⁵ Large corporations can make us rich and free, or destroy the natural and human systems we depend on.

Whether corporations should have particular legal rights is nearly always a question of prudential politics, rather than fundamental principle. Giving rights or powers to an institution usually has the effect of granting powers to the leaders who control and act in the name of the institution. No abstract or contextless rule can tell us whether increasing the autonomy of the leaders will enhance or detract from the freedom of the people affiliated with the institution.

Institutional freedom is different from personal freedom. This is often obvious in politics. Freeing the state sometimes frees its population, but the reverse is just as probable.

Thus, property rights are fundamental to our understanding of freedom. Basic security underpins all our other rights and abilities: if we cannot count on some ability to live in peace, earn a living, and retain the creations of our hands and minds, civilization itself is impossible.³⁶ Individuals

33. See, e.g., discussion of *Hobby Lobby* litigation, *infra* note 73.

34. For an account of the liberal tradition emphasizing the importance of multiple spheres of power and action—and of policing the boundaries between those spheres, see WALZER, *supra* note 10.

35. See, e.g., DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012) (describing economic failures due to elites becoming powerful enough to seize wealth rather than create it); JEFFREY A. WINTERS, *OLIGARCHY* (2011) (connecting economic success to disarming and restraining elites); CHRISTOPHER LASCH, *REVOLT OF THE ELITES* (1994) (describing increasing separation of American elites from middle-class success).

36. As the Talmud's Rabbi Elazar ben Azariah puts it, "No bread, no Torah (law/civilization/culture)." Mishnah, *Pirkei Avot* 3:21 (author's translation).

must have some assurance that they are not living in a Hobbesian state of nature before anything else becomes important. Yet, the first step towards a modern conception of property rights is to prevent state officials from treating the state or its subjects as property. Like states, modern corporations are institutions that must serve far larger groups than a tiny “ownership” elite; property rights will rarely be the best way to allocate their offices.

Similarly, we have known since the eighteenth century that the only way to preserve individual religious freedom is to deny the state any religious freedom at all, by either (as in the United States) separating the state from any religious practice, or (as in some other free countries) requiring it to support religions not its own on a fair basis.³⁷ To allow the people

37. An example of the “multiple establishments” view is Italy, which recognizes religions as corporate entities entitled to autonomy and self-governance: “the right to organize themselves according to their own statutes . . . protected against any assertion of jurisdiction by the state.” Silvio Ferrari, *The Emerging Pattern of Church and State in Western Europe: The Italian Model*, 1995 BYU L. REV. 421, 428–29. The state negotiates agreements with these religions, as if they were sovereign equals, rather than imposing statutory law on them. *Id.* at 425 (Italy has entered into “concordat” agreements with six minority religions patterned on its agreement with the Catholic Church). Concordat religions receive state support via a tax checkoff and tax deductions for contributions and may send teachers to state schools to provide religious instruction (at state expense in the case of the Catholic Church only). In sharp contrast, the classic American view separates the state from religion by barring state support. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (quoting Jefferson’s “wall of separation between Church and State”); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (barring state from paying teacher’s salaries in religious schools). Tax deductions, however, are permitted for all religions, despite the similarity of tax subsidies to appropriations.

In Europe, religious liberty is guaranteed by Eur. Conv. on H.R. art. 9 (“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”). The EU appears to view religious freedom as requiring that state authorities affirmatively provide “organizational measures to provide adequate space for the exercise of religion.” Alenka Kuhelj, *Religious Freedom in European Democracies*, 20 TUL. EUR. & CIV. L.F. 1, 13 (2005). Presumably such state support of religion would fail the *Lemon* test.

Similarly, the French tradition of “laïcité” demands that the state be entirely secular, frowning on the type of public professions of religiosity that American politicians seem to view as required and barring public officials (including teachers) from displaying “large” symbols of religion such as headscarves or

freedom of religion, the state must lose its ability to practice a religion or, indeed, even to ally itself with a particular religion. Conversely, allowing the state “freedom of religion” is the same thing as allowing the current officeholders to establish a religion: the state’s freedom means that the citizens are no longer free to practice their own religion as they see fit.³⁸ Many

yarmulkas. See Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges, et lycées publics [Law 2004-228 of March 15, 2004 concerning, as an application of the principle of separation of church and state, the wearing of symbols or garb which show religious affiliation in public primary and secondary schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190. However, while the foundational French law prohibits state funding of religion (Loi du 9 décembre 1905 concernant la séparation des Eglises et de l’Etat [Law of December 9, 1905 concerning the separation of churches from the state], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 11, 1905, p. 7205), this is understood to be compatible with state ownership and maintenance of church buildings and state involvement in the selection of Catholic Bishops, and in Alsace, even maintaining the prior regime of state support for four “recognized” religions. Kuhelj, *supra*, at 15–17 nn.35–36.

In contrast, the UK continues to have an officially established religion, the Church of England, but now uses public funds to support the secular curriculum of religious schools from many different religions. See, e.g., Elizabeth F. Defeis, *Religious Liberty and Protections in Europe*, 45 J. CATH. LEGAL STUD. 73, 82–83 (2006). In Germany, religious freedom is guaranteed in the Grundgesetz (Constitution) [GG Art. 4][Basic Law Article 4], translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0026 [<http://perma.cc/DBL3-53F9>], but churches are tax-supported, and state schools teach religion. Kuhelj, *supra*, at 25–26 nn.54–55.

While American law generally prohibits state support of religion, and EU law often requires it, see, e.g., Ferrari, *supra*, at 423, nearly everyone acknowledges that pure majoritarianism winner-take-all politics, in which the electoral majority sets rules that benefit it (and its chosen religion, if any) is not an acceptable solution to the problem of populations professing multiple confessions. Religion is simply too important to be left to the vagaries of parliamentary majorities, especially given the temptation for those who lose to redraw political boundaries so that they will win. Compare *Romer v. Evans*, 517 U.S. 620 (1996) (debating whether the proper majority to determine gay rights is municipal, state-wide, national—or judicial). The debates over DOMA, or the Fugitive Slave Act, in which politicians who often invoke states’ rights discovered that they were in favor of federal preemption when they are more likely to win at the federal level, are relatively peaceful equivalents to separatist movements everywhere, where elites seek to redraw boundaries in ways that increase their likelihood of success.

38. Thus, allowing the state to pray inevitably means allowing some individual officeholder or officeholders to designate a god to whom the prayer will be directed. Freedom of religion in a republic of equal citizens does not require that such prayer be avoided, but it does require that prayers reflect, over time, the diversity of the citizenry’s views. See, e.g., *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014) (upholding constitutionality of starting city council meeting with prayer, providing that town does not discriminate against minority religions in choice of prayer). As a practical matter, the non-discrimination rule of *Town of*

other rights work the same way. We restrain the state's propaganda to make room for personal speech, restrain its privacy to allow public debate about its actions, and reduce its property rights to make room for markets and democracy.

The same will be generally true for corporations. Like states, corporations do not pray or believe, but those who control them do (and those who depend on them often disagree with their leaders about how best to do it). Giving a corporation religious freedom means giving the corporation's top executives or board of directors the right to coerce corporate participants—employees, investors, or consumers—into participating in the leaders' choice of religion. If they do not want to go along, they must sever their ties with the institution, eliminating what otherwise might be an attractive economic relationship. In other words, *increasing* the institution's freedom *decreases* the liberty and options available for citizens, while simultaneously reducing the utility of the institution as a vehicle for economic progress.

Similarly, granting corporations privacy rights does not enhance personal freedom. Corporations are not human beings who must have a space free of social restraints in order to self-actualize or follow their consciences; they are institutions. Giving the institution "privacy" means allowing its leaders to operate free of criticism under cover of darkness or behind closed doors. Removing social sanctions on corporate leaders enhances the leaders' freedom to ignore social norms, the law, and their followers. It is hard to see how it automatically improves the lives or liberties of anyone else associated with the corporation any more than would allowing governmental

Greece seems entirely unworkable. Sooner or later, someone is going to demand the right to pray to the Flying Spaghetti Monster, see *Ponorovskaya v. Stecklow*, 987 N.Y.S.2d 543, 556–57 (Sup. Ct. N.Y. Cty, 2014) (noting that this "atheist" church ordains "pastafarian" ministers for a small fee), *Baphomet*, see *Prescott v. Okla. Capitol Pres. Comm'n*, 2015 OK 54, ¶ 3 n.8 (Okla. 2015) (describing Satanic Temple's request to place statute of Baphomet near Ten Commandments monument), Hadrian's deified lover Antinous, see *TEMPLE OF ANTINOUS, THE GAY GOD*, <http://www.antinopolis.org> [<http://perma.cc/2ZSV-GL55>], or another deity unpopular among adherents of larger sects, or to base a public prayer on *Matthew* 6:5–6 ("And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. . . . But thou, when thou prayest, enter into thy closet . . ."). See, e.g., Defeis, *supra* note 37, at 91, citing *A.R.M. Chappell v. United Kingdom*, App. No. 12587/86, Eur. H.R. Dec. & Rep. (1987) (protecting Druids as religion under European norms).

officials freedom from public view.

Instead, employees, investors, consumers, and citizens might often prefer to keep leaders answerable, using techniques similar to those we use in the public sector, such as compulsory audits by the GAO or similar ombudsmen, open meetings laws, protections for dissenters, requirements of open debate, the multiple and countervailing power structures of the division of powers, and so on.³⁹ These methods can enhance individual freedom precisely because they limit the freedom of powerful decision makers.⁴⁰

39. Current corporate law and practice do not include any analogues to open meetings laws or division of powers. In part, of course, this is because under current corporate law, corporate directors have virtually unrestrained authority to manage the corporation as they see fit; they have little incentive to limit their own power. This lack of restraint, in turn, flows in part from the "internal affairs" doctrine, pursuant to which states generally allow corporations to elect to incorporate in any jurisdiction (regardless of where the firm is located) and then hold that the selection and powers of corporate officers are governed by the law of the state in which the corporation is incorporated. Thus, corporate leaders, in effect, choose the law that determines the scope of their authority. Predictably, then, most effective limits on the power of corporate leaders come from outside state corporate law—principally federal law, such as the Securities Acts, OSHA, and the NRLA.

Moreover, when legislatures have sought to impose limitations on corporate managers, the Supreme Court regularly has invoked the Constitution to protect managerial autonomy. Thus, for example, a corporate sector equivalent to the GAO or an open meetings law would clearly raise constitutional issues under current doctrine. *Compare* Cal. Banker Ass'n v. Schultz, 416 U.S. 21 (1974) (taking seriously but ultimately rejecting banks' constitutional challenges to record keeping requirements of anti-money laundering statute) *with* Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (assuming that a search warrant would be necessary for the EPA to enter factory suspected of producing dangerous pollutants, but rejecting chemical producer's challenge to EPA aerial surveillance). Indeed, the Court has invoked constitutional limits to overturn even common law based restraints on corporate decision makers, such as tort law. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

Sometimes, in contrast, the Court's reading of the Constitution is remarkably deferential to Congress. For example, the securities regulatory regime depends critically on a prior restraint system—both sales documents and corporate election communications must be pre-approved by the Securities and Exchange Commission staff, which mandates various disclosures and vets them for compliance. So far, to the great benefit of our economy, the Court has not suggested that the First Amendment applies; if the Court were to apply its doctrines regarding electoral politics or even commercial speech, little would remain of our securities regulatory system.

40. The point is not that corporate decision making always ought to be disinfected by Brandeis's "sunlight." LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914) (describing importance of publicity in taming the Money Trust). Often operating in public is more trouble than it is worth. For example, open debate of salaries—even CEO salaries—often has bad

Speech works similarly. Freedom for the institution is usually the same thing as coercion for its participants. As a practical matter, a corporate right to “speak” can only mean that the Constitution decrees that corporate managers must be granted authority to order corporate employees to advocate corporate positions determined by corporate managers and to use corporate funds to pay for advertising written by those employees or other paid agents. If this is speech at all, it is expensive and coercive, not free.

In any event, it is hard to see why these issues of corporate hierarchy should be determined as a matter of (constitutional) speech law as opposed to (statutory) corporate law. The basic question is not “more” or “free” speech but the limits, if any, that state and federal law should place on the authority we grant to corporate managers over other people and other people’s money. Obviously, giving managers this new power to use corporate money to intervene in politics does not enhance the freedom of customers, employees, or investors to speak or to spend. On the contrary. The new managerial authority forces all other corporate participants to choose between taking their business elsewhere (with whatever costs that may impose) or submitting to a decision not their own to advocate values not their own.

But corporate rights do not even enhance the freedom of the managers who make the decisions.⁴¹ Corporate managers have a legally imposed duty to act on behalf of the institution regardless of their own values (or the values and interests of the public, employees, and investors who compose it), and they often function within tightly coercive markets.⁴² Giving them

side effects, creating increased envy and competition, lowering morale, and, at least in the case of CEOs, dramatically increasing costs. Disclosure is not a panacea that automatically solves all problems.

The argument, instead, is that when and whether personal privacy trumps the “sunlight” disinfectant is going to be context-dependent and changeable. It belongs in the legislature or the regulatory agencies, not the Constitution. Courts interpreting ancient constitutional texts have no comparative advantage here.

Similarly, we may wish to protect some trade secrets, if we conclude that protection is more likely to increase productivity than inefficient monopoly or unfair rent seeking. But the question of when such privacy is warranted is fraught. Resolution requires political debate and administrative regulation, not judicial interpretation of eternal principles.

41. *But see* HOBBS, *supra* note 10, at ch. 21 (maintaining that freedom and power are the same).

42. For further discussion, see Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees?*, *Revisited*, 69 S. CAL.

“freedom” to use corporate assets often will mean that they will be compelled (by market if not law) to act against their own values. Indeed, if managers believe that a particular corporate act is irresponsible or immoral but also would be profitable if legal—say, paying extremely low wages, polluting, or producing an unhealthy, addictive product—managers may feel compelled to use corporate resources to attempt to change or evade the law.⁴³ To the extent that corporate fiduciaries feel compelled by law to funnel corporate resource into advocacy of a particular political position—profit maximization at the expense of competing values such as craftsmanship, honesty, fair dealing, creativity, leisure, or patriotism—free speech law has been turned on its head. Legally compelled propaganda is the opposite of free speech.

Sometimes, to be sure, corporate freedom will enhance individual freedom, just as sometimes the rights international law grants to sovereigns serve to help the subject people rather than to protect dictators. Some people may prefer to work in a homogeneous environment of people with similar religious or other views and tastes; they will find this easier (especially if

L. REV. 1021 (1996) [hereinafter Greenwood, *Fictional Shareholders*] (describing managerial obligations).

43. This is an incorrect understanding of the obligations corporate law places on fiduciaries. The Delaware courts are unlikely to hold that a board's decision to place other corporate goals or values above short-term profit or share price is a violation of duty, absent some evidence that the “value” in question is personal profit for insiders. See, e.g., *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (upholding board's refusal to negotiate with potential purchaser, despite attractive price, because, inter alia, it “did not serve Time's objectives or meet Time's needs”). Nonetheless, the spirit of *Dodge v. Ford* haunts the imagination of America's businessmen. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (stating that a corporation may not be operated as a “semi-eleemosynary institution” but must be “carried on primarily for the profit of the stockholders” regardless of the views of the majority shareholder or the board). For discussion of *Dodge v. Ford*, see Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. BUS. REV. 163 (2008) (pointing out that case does not reflect dominant law) and Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. BUS. REV. 177 (2008) (pointing out that ALI Principles of Corporate Governance and others adhere to the profit maximization principle, although *Dodge* remains the only case ever to enforce it). While *Paramount v. Time* and other Delaware cases make clear that the board of a corporation has virtually unlimited discretion to determine both the goals and means of the corporation (except after it has put the corporation up for sale), board members regularly state, and are equally regularly told by media and other experts, that their duty is to maximize corporate profits and returns to shareholders. In any event, competitive markets often coerce managers where the law does not.

many others share their tastes or views) if firms are permitted to discriminate and differentiate.⁴⁴ Sometimes leaders require confidentiality to make sensible decisions—the full light of day or full debate among the poorly informed do not always improve matters.⁴⁵ These complexities and judgments about how to balance the countervailing considerations are likely to be highly controversial.

Political and artistic speech, in the modern era, is likely to be ineffectual if not backed by some form of institutional publisher or well-funded publicist. Some such institutions may be organized (as universities usually are) to protect the individual autonomy of specific researchers, thinkers, or polemicists. Others may be more effective with defined points of view and internal constraints to ensure that artists or activists work towards a common goal. Thus, Harvard University emphasizes finding great researchers and then maximizing their individual autonomy, protecting them from the influence of market and politics alike; in sharp contrast, the American Enterprise Institute treats its researchers as part of a common project and quickly disassociates itself from independent thinkers, while Disney makes great movies that often seem to have no individual artist at all. Google, Microsoft, Bell Labs, and IBM all have, or had, strong records of innovation using varied management models—IBM was famous for organization and regimentation; Microsoft for top-down innovation; Bell Labs for encouraging research teams to pursue interesting projects without regard to immediate marketability; Google for granting engineers substantial autonomy. Reed College and the New York Times build support for independent thought into their corporate structures in differing ways.⁴⁶ Different techniques will work in different

44. Indeed, the Ottoman Millet system, in which different religious groups were granted quasi-sovereign autonomy (allowing communal leaders to impose communal norms on communal members) is not necessarily incompatible with liberal republican norms, if appropriate protections are built in to allow dissidents to escape communal domination. See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983).

45. See KANT, *supra* note 23.

46. Time Inc. famously contended that its corporate structure was specifically designed to preserve the editorial independence necessary to make Time Magazine excellent. See *Paramount Commc'ns, Inc. v. Time Inc.*, 1989 WL 79880, at *715 (Del. Ch. July 14, 1989) (describing testimony of Director Horner that "Time's editorial freedom . . . free from political or other kinds of intervention is absolutely essential if members of our society are to be enlightened enough to

places and for different goals.

In short, the point is not that we ought to replace corporate “speech” rights with a rigid “Fairness Doctrine” or a governmental-style abstention doctrine applied to our largest business corporations.⁴⁷ It is, instead, that we have no generally accepted one-size-fits-all model for the best design for freedom-enhancing institutions.⁴⁸ General principles will not decide these specific cases. Rather, in the spirit of *Carolene Products*’ Footnote 4,⁴⁹ a democratic system ought to trust democratic processes to determine how best to structure corporate law and the markets in which they function. The legislatures and politics, not courts and interpretation of ancient texts, are the better institutions for creating rules that will enhance our freedom and the effectiveness of our business enterprises.⁵⁰

form wise judgments and fulfill their responsibilities as citizens The governance provisions were necessary to ensure Time writers and editorial personnel that editorial independence would continue to be respected at Time.”), *aff’d* 571 A.2d 1140 (1989).

47. Sometimes freeing corporate employees to dissent would enhance both freedom and corporate effectiveness. *See generally* ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970) (describing advantages and limits of controlling organizations by market mechanism of “exit” and democratic mechanisms of “voice”). The problem of “yes men” and echo chambers plague corporate bureaucracies as much as governmental ones. *Compare* HALBERSTAM, *supra* note 18 (describing the failures of governmental decision making that led to Vietnam War), *with* BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* (2003) (describing failures of corporate decision making).

48. *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

49. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (rejecting *Lochner* and setting out the general principle that the Constitution delegates economic regulation to the political branches).

50. Of course, any institution that makes rules regarding the economy, whether legislative, regulatory, or judicial, will be subject to the well-known problems of regulatory capture and corruption. Legislators may be especially susceptible to such temptations in this age of high and largely unregulated campaign finance expenditures. *But see*, Mike Stark, *I Was Sued by Bob Murray and Won. Here’s Why*, DAILY KOS (Dec. 13, 2014, 1:24 PM), <http://www.dailykos.com/story/2014/12/13/1351586/-I-was-sued-by-Bob-Murray-and-won-Here-s-why> [<http://perma.cc/8DEN-Y695>] (suggesting that judges may also be corruptible by impugning the neutrality of the judge in alleged “slap-suit” libel case). There is no reason to think that democracy is perfect or that legislatures will often reach the optimum result—even if we agreed on what that optimum is, which we do not.

However, shifting economic regulation to the courts is no solution. Economic regulation is essentially forward-looking and largely pragmatic: it involves crafting rules that will incentivize economic actors to act in ways that provide us

The next sections discuss broad categories of rights that the Court has found corporations hold under the Constitution, beginning with property rights. Property rights have provided the template for liberal freedoms at least since John Locke.⁵¹ Since corporations are economic enterprises, it may seem obvious that they must have constitutionally protected property rights. Obvious, perhaps; but false. In a dynamic, mixed economy such as ours, the definitions and limits of property rights are necessarily a core aspect of politics. Judges are trained to look backwards via interpretation; our Constitution, which predates most of the relevant problems, will give them no guidance. But even if it could, backwards is the wrong direction.

A. *Property Rights Abstracted*

Rights are relations between human beings.⁵² Property rights (and for that matter privacy or speech rights) asserted by a bureaucracy (whether state agency or corporation) may have the opposite significance from rights asserted by an individual. Rather than protecting individuals against their institutions, they empower incumbent officeholders against those they are meant to serve.⁵³

with satisfying jobs and useful goods and services, with a minimum of negative economic, environmental, or social side effects, all within the context of deeply contested views of what kind of society we are aiming for. Judges are trained in interpretation rather than economics, science, or sociology. They are constrained to base their decisions on our Constitution, all relevant parts of which long predate the modern economy. At least in the federal system, life tenure means that the institution is answerable to public opinion only indirectly and with long lags. It is irrational to believe that backward-looking textual judicial interpretation will reach better or more popular resolutions of these tradeoffs than legislatures, which are at least partly responsive to popular views of what constitutes the good life, or regulatory agencies, which—unlike the judiciary—may have the relevant technical expertise on their staff.

51. LOCKE, *supra* note 19, First Treatise § 42, Second Treatise §§ 6, 25, 27 (deriving limited government from a theory that while God alone owns our lives, we own the products of our hands).

52. See, e.g., Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975. But see First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777, 784 (1978) (suggesting that the First Amendment protects “speech” rather than speakers).

53. See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815–16 (1935) (Courts use “thingification” of property to “distribute a new source of economic wealth or power”); cf. Adolph A. Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 1, 10 (1965) (describing rise of “collective capitalism” and the challenge it presents to

Property rights are fundamental because they define privacy—the space in which individuals can act without (much) concern for others.⁵⁴ A “man’s home is his castle” means, first and foremost, that within an individual’s private property, tort concepts of reasonable behavior or patriotic concepts of other-directedness give way to less-fettered will and caprice. The resulting freedom from social norms is a key aspect of individual liberty—one of the reasons so many of us and our ancestors fled peasant communes or small towns for the anonymity of the city.

The same freedom from socially imposed mandates is the core of property law’s economic importance. In pre-capitalist societies, market actors were tightly constrained by social norms and law;⁵⁵ in the command-and-control economies of the former Communist bloc, a (relatively) unified hierarchal bureaucracy attempted to impose a consistent order on the economy as a whole. Neither system could flexibly adjust to changing economic needs. We use property rights to avoid these results. Property defines the zone within which a property-owning entrepreneur or organization may innovate (or prevent others from innovating) unilaterally, with only minimal reference to social norms or (external) bureaucratic imperatives.

Conversely, property rights must be limited because property is power over other people.⁵⁶ If one person may monopolize a particular place or concept or process, others may

traditional views of property, and asserting that corporations were increasingly being held to same limitations as the state).

54. See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that property rights should protect interests beyond land ownership).

55. India’s “regulatory Raj” bears a striking resemblance to pre-modern France’s regulatory state. See, e.g., EMMANUEL LE ROY LADURIE, *THE ROYAL FRENCH STATE: 1460–1610* (Juliet Vale trans., Blackwell Publishers 1994) (1987); *THE ANCIEN RÉGIME: A HISTORY OF FRANCE 1610–1774*, at 165 (Mark Greengrass trans., Blackwell Publishers 1996) (1991) (describing Colbert’s economic regulations).

56. We fought the Civil War over the most extreme form of property. See, e.g., *Confederate States of America—Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/csa_scarsec.asp [http://perma.cc/V4ZE-R7F7] (Adopted Dec. 24, 1860) (stating that the Constitution protects property in slaves and seceding because of unacceptable actions of free states that “denied the rights of property [in slaves]” and “permitted open establishment among them of societies, whose avowed object is to disturb the peace and to eloin the [human] property of the citizens of other States”).

not build on it, literally or figuratively.⁵⁷ If one man's right to swing his arm ends at another's nose, it is property law that must define the limits of arms and fists.⁵⁸

Property rights protect freedom of action, but taken too far they make society and even coexistence impossible. A man's home may be his castle, but to protect the competing freedom of others, property law, criminal law, divorce law, family law, environmental law, zoning law, and tort law all limit the castle proprietor's authority. True castles lead to very unpleasant societies.⁵⁹ As an ancient story explained, seeking to answer the question of what motivated Cain's murder of Abel:

About what did they quarrel? "Come," they said, "let us divide the world." One took the land and the other the movables. The former said, "The land you stand on is mine," while the latter retorted, "What you are wearing is mine." One said: "Strip;" the other retorted: "Fly [off the ground]."⁶⁰

That is, unlimited property rights lead straight to war. Each person's property rights necessarily conflict with other's; absolute property rights are absolute power over other people. Accordingly, the liberal project has been, above all, a continuing effort to both establish and limit property rights. The original Constitution abolished the aristocracy and, with it, the idea that officials could own their offices.⁶¹ Our officers

57. See, e.g., Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 94 TEX. L. REV. (forthcoming 2016) (exploring implications of expansions of property law).

58. See generally R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (explaining property rights in terms of conflicting claims to use). Coase points out that the nose is interfering with the fist quite as much as the other way around, a point important to bullies and reformers alike.

59. See, e.g., Kim Severson, *One Man Lost and Impaired, the Other Fearful and Armed*, N.Y. TIMES (Dec. 3, 2013) <http://www.nytimes.com/2013/12/04/us/one-man-lost-and-impaired-the-other-fearful-and-armed.html> [<http://perma.cc/4TJH-KL9J>] (homeowner shot and killed an innocent Alzheimer's sufferer); Alan Blinder, *No Charges in Death of Alzheimer's Patient Mistaken for Intruder*, N.Y. TIMES (Mar. 1, 2014), <http://www.nytimes.com/2014/03/01/us/no-charges-in-death-of-alzheimers-patient-mistaken-for-intruder.html?ref=us> [<http://perma.cc/WL7Y-TXYG>] (No prosecution, based on homeowner's purely subjective fears).

60. Midrash Rabbah, *Genesis* 22:7. The lesson: absolute property rights are absolutely unworkable. See also THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 102–14 (The Viking Press, Inc. 1931) (1899) (arguing that most property is used to demonstrate status, an inherently competitive zero-sum game).

61. U.S. CONST. art. I, § 9. The Title of Nobility clause was only the beginning

serve; they do not own. It took another century and a civil war to extend this principle to its next step by abolishing private property rights in people.⁶² Today, we continue to struggle with questions of what may be owned and how far the rights of ownership can extend before property rights serve oppression rather than freedom.

Because property rights are so fundamental to our relations to each other, they are inherently controversial. This was the basic insight of the post-*Lochner* era of constitutional law.⁶³ Property rights do not exist in a neutral and unchanging form, outside of politics, waiting for courts to discover or vindicate them.⁶⁴ Economic regulation is, instead, the quintessential object of politics in the modern world. In a democratic age, property rights belong in the legislature, not the courts.⁶⁵

If individual property rights are inherently controversial, corporate property rights are even more problematic.⁶⁶ A

of a longer struggle that also includes other limitations on the explicit and implicit sale of elected and unelected office, such as the Civil Service Acts, the Tillman Act (1907) and other campaign finance limitations, and the Estate Tax.

62. U.S. CONST. amend. XIII.

63. *Lochner v. New York*, 198 U.S. 45 (1905). The *Lochner* era was characterized by Supreme Court cases finding that the Constitution bars many legislative actions to improve the workings of the markets, particularly when they increased the bargaining power of employees relative to the Court's understanding of existing law that the Court viewed as neutral.

64. This view, that property rights are social constructs rather than eternal verities discoverable by any rational practitioner of legal science, of course, predates the "switch in time" and *Carolene Products* Footnote 4. It is commonly associated with Justice Holmes, *see, e.g.*, *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky."). *Cf.* JEREMY BENTHAM, ANARCHIAL FALLACIES 501 (1883) ("*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts."). Modern doctrine accepts that the parameters of property rights are set by statute. *See, e.g.*, Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.) (creating new property rights in old writings without regard to limits of Lockean natural rights justification and despite weakness of scarcity or incentive rationales); *upheld* in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

65. *United States v. Carolene Products, Co.*, 304 U.S. 144 (1938).

66. In an early case, the Court stated that the rights business corporations have under the Fourteenth Amendment are the rights of property, not liberty. *Nw. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906). The distinction is not clear. Thus, for example, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (overturning statute banning private schools) purports to be protecting the property interests of the schools, rather than a freedom of expression interest. *But see Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (granting corporation free

corporation, not being an individual, cannot assert a property right by itself. Instead, some corporate decision maker—an executive or a board of directors—must make the claim on the institution’s behalf.

Corporations must have property rights to function. Indeed, what makes the entity “corporate” in the first place is the legal right to hold property and enter into contracts in its own name, with the legal entity, rather than its changing participants, members, or investors, as the legal obligor and rights holder. But this general principle leaves open whether the Constitution or statutes should define the limits of corporate property rights or when those rights should be similar to the rights of human beings. People have consciences and needs beyond profit, while current law creates corporate governance rules designed to reduce the effects of such motivations.

Moreover, the general rule that corporations should have property rights decides few actual cases. For example, common law bars perpetuities in order to assure that property returns to the market from time to time, to limit the influence of deceased property owners over their successors, and to reduce the likelihood of dynastic wealth.⁶⁷ However, for the last 150 years, American law has usually allowed business corporations to exist and hold property indefinitely, even though this permits exactly the same concentration of wealth and influence of the past that the rule against perpetuities was thought to reduce.⁶⁸ Standard Oil and its successors, including Exxon, concentrate economic power and influence at least as much as the Rockefeller family wealth did, and have proved longer

press and speech rights). For reviews of the cases arguing that the distinction has been strictly maintained, see Brief of Amicus Curiae Historians and Legal Scholars Supporting Neither Party, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356). Cf. Brief of the Brennan Center in Support of the Government, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> [<http://perma.cc/Z9UJ-66K3>].

67. The Rule Against Perpetuities is no longer good law in many states, which are, instead, competing to create new forms of dead hand trust, perpetuating family fortunes over many generations. See, e.g., Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L. J. 356 (2005).

68. Compare, e.g., *Vanderbilt v. Eagle Iron Works*, 25 Wend. 665 (N.Y. Sup. Ct. 1841) (describing early NY corporation enabling acts that expired after five years) with *Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978) (noting that “perpetual existence” is a defining characteristic of corporate form).

lasting. Nothing in the nature of capitalism or corporate form determines which rule ought to prevail (or whether we should allow perpetual corporate existence to exempt businesses from the estate tax).

Common law bars conspiracies in restraint of trade; business corporations under current law are a device to allow a representative of disparate investors to negotiate as a single voice with labor, customers, suppliers, and regulators. Is that unified voice a violation of the anti-monopoly principle? Current law says no in the case of corporations but still has trouble with employee unions.⁶⁹ That distinction may or may not be correct, but it certainly does not flow from any eternal principle that should be enshrined unchangeably.

Similarly, property rights are closely connected to privacy rights, as discussed above. But governmental agencies, even when they own property, lack many of the rights to arbitrarily exclude or include or to manage without outside interference that we routinely grant human property owners.⁷⁰ Business corporations—especially large, institutionalized, and impersonal ones—are far more similar to government bureaucracies than individual citizens, exercising and potentially abusing great power over individuals. At least as a first cut, their rights ordinarily should be assimilated to the rules binding the former rather than the latter.

Finally, often the business corporation is viewed as a form of property itself, despite the fact that a business is little more

69. It is fundamental that a corporation is a single actor, not a conspiracy. Of course, the antitrust authorities will intervene to prevent mergers or even to break existing corporations into smaller parts when they deem a corporation to threaten competition in the consumer markets. I am not aware of any instance in which a merger has been denied or a firm broken up because of excessive influence in local employment markets. The status of unions has been more controversial, with both courts and legislatures treating employee joint action as suspect except when pursuant to the limited exceptions of the NLRA. *See, e.g.*, DAVID MONTGOMERY, *FALL OF THE HOUSE OF LABOR* (1987) (describing early history of labor movement).

70. Most obviously, government agencies are required to treat citizens equally under equal protection principals. No such rule applies to non-state actors, and, indeed, Congress has no power under the Fourteenth Amendment to extend the ordinary norms governing state actors to non-state actors. The Civil Rights Cases, 109 U.S. 3, 18 (1883) (holding that the Fourteenth Amendment did not authorize Congress to bar non-state racial discrimination and overturning Civil Rights Act of 1875); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding parts of VAWA beyond Congressional power under XIV Amendment). *See generally* Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441 (1982).

than a collection of people working together and we have long since abolished property rights in human beings. Our corporate law largely rejects this view; it is fundamental to corporate law that shareholders have neither the rights nor the responsibilities of ownership. Unlike owners, shareholders are not liable for the actions or liabilities of the corporation.⁷¹ Unlike owners, shareholders have no right to use corporate property or remove it from the firm. Similarly, shareholders are barred from treating corporate property as their own under veil piercing doctrines, and executives and directors have fiduciary duties to act in the interests of the enterprise regardless of their personal interests or the views of shareholders.⁷² Yet a persistent ideological strand, occasionally affirmed in the courts and statutes, treats business corporations, like a medieval state, as private property which the owners—usually but not always understood to mean shareholders—may use in their private interest regardless of the consequences to other participants.⁷³

71. “Limited” liability, i.e., the rule that ordinarily corporate creditors may not recover from shareholder assets, is, of course, one of the key reasons small businesses adopt corporate form. *See, e.g.*, MODEL BUS. CORP. ACT § 6.22(a) (AM. BAR ASS’N 2006).

72. “Piercing the veil” doctrine holds that if shareholders treat corporate property as their own, they will be deemed to have failed to respect the separate existence of the corporation and creditors will be allowed to pursue the shareholder for corporate debts. In other words, our corporate law holds that if shareholders act like owners, the courts will deem the corporation non-existent (an “alter-ego”). *See, e.g.*, *Walkovszky v. Carlton*, 223 N.E.2d 6, 7 (N.Y. 1966) (describing doctrine).

73. For example, *see Burwell v. Hobby Lobby Store, Inc.*, 134 S. Ct. 2751 (2014). In that case, the Green family, which controls Hobby Lobby, Inc. via shareholding trusts, that control a majority of its shares, sought to exempt the corporation from an otherwise applicable requirement of the Affordable Care Act requiring corporations that provide medical insurance to employees to include coverage for certain forms of birth control. As a matter of corporate governance, the question was simply who is to determine whether corporate resources are used to provide this service: the employee or the corporation’s managers (who answer, indirectly, to the Green family). As a matter of religious freedom, the issue was the same—the law must decide whether the consciences and values of individual employees or corporate managers will determine the use of corporate funds. Congress delegated the decision to the employees. The Supreme Court rejected this change in corporate law. As a matter of freedom of religion, this decision is odd: ordinarily, allowing officeholders to determine the religious practices of those they govern is what we call “establishment” of religion. The Court, however, does not discuss the conflict between employee autonomy and managerial authority. Instead, it relies on the metaphor of ownership to conflate the corporation with the Greens. The issue, in its view, is only whether the regulations “violate the sincerely held religious beliefs of the companies’ owners.”

We fought a revolution to reject this sort of claim in the governmental sphere; in a free country, the people are not the property of the king.⁷⁴ We should treat the claims of corporate officers and shareholders, to “be” the corporation with the same disdain we reserve for government officials who make similar claims.⁷⁵ Today, corporate officials use their office to acquire vast riches far more often than public ones.⁷⁶

Similarly, investors in our largest business enterprises, important as they are, are no more their owners than are investors in our municipal corporations. We do not think that we should run our cities primarily to make the bondholders rich; there is no more reason that we should imagine that the primary purpose of our employers is to make their investors rich.⁷⁷ Large business enterprises are composed of many people and institutions in many roles—employees, customers, suppliers, and investors. Those individuals and groups are

Id. at 2759. The fact that the regulations imposed obligations only on the corporation, not the Greens, disappears. In contrast, in *Bellotti*, the majority dismisses Justice White’s concerns for the rights of shareholders; the “speech” right vindicated in that case is the right of managers to use corporate assets as they see fit. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In effect, *Bellotti* treats managers, rather than shareholders, as owners of corporate assets. *Id.* at 803. Like *Hobby Lobby*, however, it uses the property metaphor to support its holding that the legislature may not change internal corporate decision-making procedures to empower other corporate participants. *Id.* at 784.

74. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969) (describing early American rhetoric of freedom).

75. See *supra* note 28 and accompanying text.

76. See, e.g., Lawrence Mishel et al., *Wages: The Top, and Very Top, Outpace the Rest*, in *THE STATE OF WORKING AMERICA* 173, 175 (Econ. Policy Inst. ed., 12th ed. 2012) (describing the rise in CEO salaries as a major source of inequality); LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE* (Harvard Univ. Press 2004) (discussing extraordinary rise in CEO pay and debunking claims that it is based on executive contributions to profits).

77. Bondholders sometimes argue that cities or even countries ought to be operated for their benefit—that, for example, Detroit ought to renege on its pension pay obligations or liquidate the collection of the Detroit Institute of Arts, or Spain ought to impose mass unemployment on its citizens, rather than require lenders to accept the risks for which they charged interest. This position is extraordinary. Even Alexander Hamilton’s classic argument for protecting speculators in the debt of the Continental Congress and states was premised on the claim that this would be in the long-term national interest—not simply profitable to the bondholders. WILLIAM HOGELAND, *FOUNDING FINANCE* 161, 167–68 (2012). This is not to say that the views of Hamilton and other Federalists were disinterested. See *id.* at 25, 78, 83–85, 92, 148, 156, 170 (describing Hamilton, Morris, Madison, and Washington as aiming to create or protect an American rentier class with little regard for the interests of the property-less, who they did not consider full members of the polity).

engaged in a constant, never-ending struggle over the governance of the firm and the allocation of the gains resulting from its joint enterprise.⁷⁸ Giving rights to “the corporation” is never the same as giving them to all those groups—more often than not, it is simply a disguised strengthening of incumbent managers against their internal competitors.

Ordinarily, the corporate property right claim is that the corporation has a right to act as “it” pleases without outside interference. But the corporation has no pleasure independent of those who make it up. As a result, when a corporation asserts a property right, usually the hidden issue is a dispute regarding who gets to act for the corporation and with what restrictions or constraints.

Different corporate affiliates may have conflicting moral or legal claims to “be” the corporation or to participate in the corporate decision process. Current law gives almost exclusive decision-making power to directors and their delegates, the corporate officers.⁷⁹ But this is simply the result of current

78. See, e.g., Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972) (arguing that, contra Coase, corporate hierarchy cannot operate by fiat, authority, or discipline, but rather can only renegotiate contracts as if in an arms-length market relationship). While Alchian, Demsetz, and their successors in the “nexus of contracts” school sought to obfuscate the actual power relationships in corporate and agency law, they usefully bring to the forefront one critical point: any successful business creates a surplus, and no participant has a “natural” claim to it. Instead, corporate participants struggle over it, using the market tools Alchian and Demsetz highlight and the bureaucratic ones they downplay. See also Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250–51 (1999) (describing board of directors as “mediating” claims of different contributors to corporate product). Shareholder apologists in the “nexus of contracts” tradition cannot appeal to the notion that shareholders are morally entitled to seize corporate surplus by property rights. Instead, they often appeal to a contract in which shareholders have bargained to receive the “residual” after other claimants are paid. But this is nonsense. First, it doesn’t reflect actual existing corporate law and the (entirely non-contractual) rights it grants shareholders. More importantly, a “residual” can only be identified after the fact. If other corporate participants seize the surplus (consumers in a classical competitive model; employees, suppliers, tax authorities, other investors, or top executives in less competitive markets), it is not a residual. Conversely, if shareholders manage to take more than the actual surplus, for example by destroying the company’s reputation or eliminating its research and development department, we will label the funds they seize as “residual” (at least until the company enters bankruptcy). The “residual”, in other words, is simply a label for “whatever shareholders manage to take.”

79. Under modern corporate law, the power of the board of directors is “original and undelegated,” *Hoyt v. Thompson’s Ex’r*, 19 N.Y. 207, 216 (1859), and plenary: “The business and affairs of every corporation . . . shall be managed by or

legislation, not some property of the world. No corporate officeholder ever has a natural or unlimited right to act for the corporation. Neither directors nor officers may treat the corporation as their own property or an expression of their own personalities. Instead, they have only the rights provided by corporate law, as constrained by agency and fiduciary norms and the manifold provisions of property, contract, tort, tax, and other areas of regulatory law.⁸⁰

Other potential claimants have fewer formal legal rights but may be able to make strong moral or cultural claims. The people who actually do the work of the corporation—the past and present employees who used their labor or creativity to produce the corporation’s product—obviously have a strong claim to “be” the corporation. Under popular “natural” rights theories of property stemming from John Locke or Adam Smith, these employees are the creators and makers of the corporate surplus and, therefore, the most obvious potential rights holders.⁸¹ Moreover, executives seeking to create incentives for employees to contribute to the firm regularly invoke these ideologies to remind employees that they are teammates and stakeholders in a common enterprise.

under the direction of a board of directors” DEL. CODE ANN. tit. 8 § 141(a) (2014); *cf.* MODEL BUS. CORP. ACT § 8.01(b) (AM. BAR ASS’N. 2013) (delegating all corporate powers to the board of directors). In practice, boards delegate virtually all of this power to hierarchically organized professional managers under the control of a Chief Executive. *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 36–37 (Del. 2006) (describing the extraordinary power of two Disney CEOs, one of whom effectively picked his successor, including hundreds of millions of dollars in compensation). The CEO, of course, is a “servant” in the terms of agency law, but servants do not usually receive paychecks on that scale. *See generally* BEBCHUK & FRIED, *supra* note 76 (describing disconnect between CEO pay and performance).

80. Officers are corporate employees and thus are governed by the law of agency, which requires them to set aside personal interests and act in the interests of their principal, the corporation. Directors are not agents, but they have similar duties. *See, e.g.,* MODEL BUS. CORP. ACT § 8.30 (setting out fiduciary obligations of directors).

81. Locke derives property rights from God’s original gift to all humanity in common and the physical mixing of a man’s labor with natural products. LOCKE, *supra* note 19, §§ 25, 27, 45. Smith agrees. SMITH, *supra* note 24, §§ I.5.2, I.5.17. This account requires sophisticated massage to justify standard agency law, which holds, to the precise contrary, that an agent’s product automatically belongs to the principal. Locke and Smith, writing before modern bureaucratic corporations but aware that in their day servants did much of the labor from which others profited, explain that after the introduction of money, property can also derive from other sources. *See, e.g.,* LOCKE, *supra* note 19, §§ 34, 36–37, 50; SMITH, *supra* note 24, §§ I.6.4–I.6.8.

If employees make the firm or make its success, standard democratic ideologies suggest that they should *act* as the firm as well. The law often agrees. Agency, contract, tort, and even criminal law often grant ordinary employees extensive powers to act for the corporation, even contrary to the expressed will of their superiors.⁸² The corporation has acted when a lower-level employee, even in violation of explicit orders from higher-ups, dumps dangerous waste in a local waterway, conspires with a competitor, or issues a press release slandering a critic.⁸³ Exactly when an employee may act as the corporation, binding it unilaterally, is a source of controversy in every area of the law.

Similarly, the finance sector and its advocates regularly contend that a corporation “is” its financial investors, or perhaps only its shareholders.⁸⁴ Taken seriously, this claim

82. Black letter agency law holds that acts of an employee agent bind the corporate principal whenever the employee has actual, apparent, or inherent authority. RESTATEMENT (THIRD) OF AGENCY § 2.03 (AM. LAW INST. 2006) (apparent authority); *id.* § 7.03 (tort); N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909) (holding corporation criminally liable for actions of its agent). *But see*, Danielle Ivory & Ben Protess, *Laws Hinder Prosecutors in Charging G.M. Employees in Ignition Defect*, N.Y. TIMES (July 19, 2015), <http://www.nytimes.com/2015/07/20/business/laws-hinder-prosecutors-in-charging-gm-employees-in-ignition-defect.html?ref=business> [<http://perma.cc/4TJU-GXGQ>] (describing statutory limitations on criminal liability for auto manufacturers and their executives in connection with fatal defects).

83. This is black letter agency law. A master (employer) is always liable for torts committed by its servant (employee) within the scope of employment. *See*, e.g., RESTATEMENT (THIRD) OF AGENCY § 7.04 (direct liability if agent’s action is authorized); *id.* § 7.07 (vicarious liability if agent’s action is unauthorized and within scope of employment); *id.* § 7.08 (vicarious liability if agent’s action is taken with apparent authority).

84. We regularly speak, and sometimes legislate, as if the shareholders were the only relevant part of a corporation or corporate interests were the same as shareholder interests. This metaphor is known in the literature as the “aggregate” or “legal fiction” theory of corporate law, stemming from early cases such as *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and *Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (each of which long predates the modern form of business corporation). *Cf.* cases cited *supra* note 6 (each treating corporation as identical to its shareholders. *But see* *Bell v. Maryland*, 378 U.S. 226, 343 (1964) (Black, J., dissenting) (treating corporation as alter ego of its manager). Delaware law, in contrast, places the choice of corporate goal in an elected board of directors. *See* *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989). As commentators have noted at least since Berle & Means, shareholders lack the control that ordinarily characterizes ownership. BERLE & MEANS, *supra* note 25, at 65, 66, 294, 300 (using the term “separation of ownership and control,” awkwardly, to describe the fact that shareholders do not have legal rights to control a corporation—that is, that they are not owners in the ordinary sense). The notion

implies that at least half of the American population is part of every corporation traded on the stock exchanges.⁸⁵ After all, through our pension funds, roughly half of us are indirect shareholders and bondholders of every publicly traded company.⁸⁶ Even more of us lend to banks and insurance

that corporate managers act (or should act) as agents for the shareholders, rather than the corporation, is associated with Michael C. Jensen & William Meckling, *Theory of the Firm*, 3 J. FIN. ECON. 305 (1976). Jensen & Meckling, of course, do not mean “agent” in the legal sense, since that would make shareholders responsible for corporate obligations, thus defeating one of the major purposes of corporate form, and would allow shareholders—perhaps by vote of a majority of shareholders rather than shares—to direct corporate managers to pursue specific goals and to remove them at any time. Nor do they mean “shareholder” in any realistic sense; the shareholders of their theory are entirely fictional beings with no interests or values other than the single goal of profit maximization at the firm level. See Daniel J.H. Greenwood, *Fictional Shareholders*, *supra* note 42; LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 60 (2012) (“It is shareholders that are fictional.”). “Shareholder centered” views, thus, often turn out to mean “profit-centered regardless of the values of the people affiliated with the corporation.” For a typical example, see James R. Copland, *Getting the Politics Out of Proxy Season*, WALL STREET J. (Apr 23, 2015), <http://www.wsj.com/articles/getting-the-politics-out-of-proxy-season-1429744795> [<http://perma.cc/D2U2-8XN6>] (advocating rule barring shareholders from seeking to have corporation pursue any goal other than profit).

85. Gallup reports that fifty-five percent of Americans say they own stock, mostly indirectly in mutual funds and through their pension plans. Justin McCarthy, *Little Change in Percentage of Americans Who Own Stock*, GALLUP (April 22, 2015), <http://www.gallup.com/poll/182816/little-change-percentage-americans-invested-market.aspx> [<http://perma.cc/KXH4-KUER>]. Other methodologies generate somewhat different numbers. Pension funds, like mutual funds (the other institution through which ordinary Americans invest in the stock market) ordinarily are highly diversified. Accordingly, it is safe to say that most people who have pensions or hold mutual funds are invested in all publicly traded stock—if not at any single moment in time, certainly over short periods. The same is true of any American who is the beneficiary of an endowed charity, foundation, museum, or university; to some degree, that is all of us.

86. *Id.* Stock holdings are extremely unequal; only the richest Americans hold meaningful quantities of stock. Edward N. Wolff, *Recent Trends in Household Wealth in the United States*, tbl.9 (Levy Econ. Inst. of Bard Coll. Working Paper No. 589, 2010), http://www.levyinstitute.org/pubs/wp_589.pdf [<http://perma.cc/M2K9-6G93>] (89.3% of stocks and mutual funds held by top 10% (net worth over \$880,000), with half of that held by top 1% (net worth over \$8.3 million)); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 248 tbl.7.2, 348 tbl.10.5, 349 tbl.10.6 (2014) (showing highly unequal distribution of wealth in US).

Conversely, most stock is owned by institutions, which generally do not pass control rights through to their beneficiaries. Indeed, in many cases—most dramatically, endowment funds for institutions such as the Ford Foundation or Harvard University—there is no identifiable human being to whom such control rights could be passed. By definition, the beneficiaries of a broad foundation or a university are society as a whole, future generations, the causes of knowledge or justice, and a wide and changeable group of grant recipients, students, teachers, and researchers—none of whom have, or should have, control over the

companies that, in turn, lend to corporations, publicly traded or not. And, of course, market pressures, standard loan terms, and corporate law all give finance capital a strong say in how corporations are operated.⁸⁷ In fact, standard accounts of how shareholders influence corporations focus on the stock price rather than shareholder votes, emphasizing that shareholder control is via the “market for corporate control.”⁸⁸ Stock prices, of course, reflect the views of sellers, buyers, and abstainers as much as current shareholders—anyone who is, or potentially could be, invested in the stock market is a governing participant in the corporation to the extent that its managers attempt to respond to the market for corporate control.

Employees and financiers are not the only strong claimants to being or owning or having the right to act as corporations. As customers, we supply the funds that make corporate activities possible and, in standard economic models, are the ultimate “sovereigns” of the firm. Indeed, standard economic models contend that at equilibrium, competition reduces prices to the point where economic profits disappear. This implies that consumers are the residual claimants on the gains from the firm’s cooperative production; investors, in contrast, can expect to receive no more than the ordinary returns to fungible capital.⁸⁹

institution’s endowment, let alone the companies in which it is invested.

87. Again, black letter law is clear. Finance capital never “owns” the corporation in the ordinary sense of property law. Shareholders vote for the board of directors but may not treat directors as their puppets or use the corporation as a tool for personal interests. *But see* *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (holding, in a close corporation, that the controlling shareholder must operate the company for the benefit of shareholders). *Dodge* is the leading case supporting the (minority) view that courts may require corporate management to operate business corporations according to the court’s view of shareholder interests. Critically, this necessarily means that shareholders, even controlling shareholders like Henry Ford, will be denied the most important property right associated with ownership: the owner’s right to use property as he, she, or it sees fit with only minimal regard to social expectations.

88. For an example of the extensive literature lauding the market for corporate control as a restraint on managers, see Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. REG. 119 (1992). My own view is that the stock market’s interests are rarely aligned with the public interest, so that turning control of our largest economic enterprises to the market is not likely to advance the general welfare. See Daniel J.H. Greenwood, *Democracy and Delaware: The Mysterious Race to the Bottom/Top*, 23 YALE L. & POL’Y REV. 381 (2005); Greenwood, *Fictional Shareholders*, *supra* note 42.

89. Actually, absent monopoly or some similar market imperfection, shareholders should expect to receive nothing at all. Shareholders have no right to withdraw shareholder’s equity from the firm, so shareholders’ investment is best

Finally, as citizens, we subsidize most economically significant businesses by providing essential infrastructure, research, and services; by paying for the legal and security systems that make business possible; by stabilizing markets to make business planning practical; by enacting rules that allow many businesses to externalize costs, seize monopoly rents, or charge prices above marginal cost; and by tax breaks and direct payments. Conversely, we also routinely assert the right to make, direct, or restrain corporate decisions and to share in corporate profits by means of zoning and property laws, tort, consumer, finance, and environmental protection, contract and tax law, and so on.

This broad range of legal rules and controversy regarding corporate decision making makes clear the basic point: there are no eternal rules of corporate law given to us by nature or nature's God. Nothing in the Constitution, let alone the nature of the world, tells us when citizens who have acted for the corporation in these various roles or made its activities possible may claim to be or to act for the corporation and with what safeguards or checks and balances. That is entirely an issue of corporate, agency, and regulatory law.

The upshot is that corporate property claims are not about property rights at all. Typically, property law declares that a given individual, the "owner," has presumptive rights to make decisions, with only the most limited answerability to others, over a bundle of issues encompassed in the property. Property disputes, thus, are disputes over the identity of the owner or over the scope of property rights. But the only owner of a business corporation's property rights is the corporation itself, and the corporation cannot assert its rights without some internal process to determine who speaks for the entity.

Thus, when corporations invoke property rights, the real issue typically is the legitimate powers of corporate officeholders to determine the corporation's behavior: To what degree must incumbent corporate officers defer to other corporate role-holders, other claimants on corporate resources,

understood as a sunk cost. At competitive equilibrium, sunk costs earn no return; specifically, a corporation that pays dividends will have higher costs than one that does not and, in a competitive market, will be driven out of business. Thus, we ought to expect that in competitive markets, public shareholders will earn no returns, residual or otherwise. See Daniel J.H. Greenwood, *The Dividend Puzzle: Are Shares Entitled to the Residual?*, 32 J. CORP. L. 103 (2006).

loyalty, and action, or other officeholders in the legislatures or regulatory agencies? In other words, the dispute is over corporate governance. Property law principles, let alone constitutional law, have little to offer to resolve these governance conflicts. Property law determines the extent to which an “owner” can exclude others from the decision-making process—but here the problem is who speaks for the owner. Property law has nothing to say about who decides for the corporation. Instead, we must look to law that determines the rights, powers, and claims of all those involved with the corporation: agency law, corporate law, securities law, labor and employment law, regulatory and environmental law, tax law, consumer protection law, bankruptcy law, and so on. Property principles are beside the point because the issue is not the owner’s rights but different claimants’ rights to determine the owner’s actions.

Constitutional law affecting corporations derives from backwards-looking judicial interpretation of common-law property doctrines or a Due Process Clause that predates the institutions we need to regulate. But those processes will not give us sensible rules to structure our ever-changing economic institutions.

The status-quo allocation of power in the corporation is a function of statute—the business corporation statute of the incorporating state, the “internal affairs” doctrine of the state in which the corporation acts, and the federal securities regime. Other common law and statutory doctrines in agency, contract, tort, and criminal law also affect the allocation of power. So do market conditions—the relative bargaining power of different corporate participants—and the manifold legal and regulatory decisions that affect that power, ranging from the Federal Reserve’s monetary policy to minimum wage and working condition rules to the ease or difficulty of organizing unions or obtaining educational credentials.

When the Supreme Court determines that a “corporation” has a constitutional right, it is enhancing the power of some participants in this struggle at the expense of others. Thus, when consumers and corporate managers struggled over the proper behavior of electric utilities in a time of rising concern about waste, the Supreme Court’s decision that the “corporation” has a property right to control “its” billing envelopes is—in fact—a governance decision masquerading as

a property decision.⁹⁰ The question in *Pacific Gas* was who would be authorized to act for the corporation. The Court, without confronting the reality of its decision, used the Constitution to insist that managers alone make this corporate decision.

Corporate governance disputes ought to raise no constitutional issues; the US Constitution has no provisions protecting incumbent economic officeholders against those they are meant to serve, whether the general public or specific participants in the firm. Treating a governance dispute as if it were a property right of the entity itself is to make the same error as if we declared that the State has a property right in its decision-making structure, so that serious due process concerns limit any attempt of the American people to reform, for example, civil service decision procedures. After the rejection of *Lochner's* economic due process symbolized by *Carolene Products*,⁹¹ it should be obvious that the Due Process Clause and the incorporated limits on the legislatures are simply inapplicable here. The internal governance of business corporations is an intensely political matter involving few, if any, great constitutional principles.

Indeed, if the Constitution speaks to corporate governance at all, it is in the Guarantee Clause, requiring that the United States and its constituent parts maintain republican forms of government.⁹² No court, to my knowledge, has ever sought to apply the republican form of government clause to corporate law and I am not advocating that they begin. Yet, the courts are not the sole enforcers of constitutional values. We the people and our political representatives ought to be informed by them as well, and here the implications are clear. Our Constitution—and indeed, the concept of republican government itself—commits us to reject monarchy and authoritarianism. Just as we have rejected both unrestrained power and inherited or purchased office in the governmental sector, it is time to reject both in the corporate sector.⁹³ The

90. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986).

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

92. U.S. Const. art. IV, § 4. For discussion of this Clause and some of the relevant scholarship, see, e.g., Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

93. In the *Citizens United* era, it may seem ironic to presume that “we” reject the power of money in the public sector. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). Nonetheless, even the *Citizens United* Court

limits on corporate law, thus, would be some requirement that large, institutionalized businesses respect the forms of limited and divided government, individual rights, and democracy that characterize our Republic.

B. Corporate Speech

The second primary area in which the Supreme Court has created corporate constitutional rights is speech, including advertising and campaign finance.⁹⁴ Speech rights, perhaps surprisingly, have much in common with property rights.⁹⁵ Freedom of speech and freedom of exercise, like private property, create a space in which the individual can think and act independently of ordinary pressures to conform.⁹⁶ Free speech reflects a free society's commitment not to make a collective decision about religion or taste in movies, just as we

rejected outright purchase of office. *Id.* While older notions of corruption may be under pressure, I think it is still safe to presume that American political culture accepts that money and politics require some separation. *See generally*, WALZER, *supra* note 10 (arguing that justice requires separating spheres of money and politics). In the corporate sector, in contrast, it is entirely appropriate, and in the eyes of some, even commendable for a wealthy individual or organization to purchase corporate office with no other qualifications at all: that is the functional meaning of most corporate takeovers and going-private transactions, whether hostile or friendly.

94. The speech cases begin with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), discussed in more detail *infra* note 125. The electioneering cases begin with *Buckley v. Valeo*, 424 U.S. 1 (1976), which equated campaign spending with speech, and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which overturned a state statute restricting corporate management's ability to use corporate funds to influence an election as a speech issue rather than a corporate governance issue.

95. I do not mean to endorse *Buckley's* egregious equation of spending with speech. Purchased speech is remarkably similar to what the classical theorists called "corruption" and we more often call "bias." Sanctifying this literal "marketplace for ideas," in which commitments and analyses are freely bought and sold, is more likely to degrade than free the speaker, regardless of whether the speaker is understood to be the seller or, as in the corporate speech cases, the buyer. Not so long ago, it was a commonplace that the epitome of corruption was allowing the wealthy to purchase loyalty. *See, e.g.*, ROUSSEAU, *supra* note 12, at 45 ("[N]o citizen shall ever be wealthy enough to buy another, and none poor enough to be forced to sell himself . . ."). Similarly, pursuit of truth, art, and politics alike are often considered vocations that demand authenticity and are threatened when their practitioners become too tied to the pursuit of wealth. *See, e.g.*, Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

96. *See generally* MILL, *supra* note 19; Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

have decided not to make a collective decision about (some) of what goes on inside our house-castles.

And, of course, more cannot be better automatically in the realm of speech any more than in the realm of property.⁹⁷ Giving Cain complete freedom of speech would leave no room for Abel to talk, just as Cain's complete property right leaves no room for Abel to walk. Moreover, in both cases, we had to limit these rights to create freedom out of feudalism. To make an aristocracy into a republic, we had to eliminate officials' claims to property rights in their offices. To end established religion, we had to abolish the freedom of the state to assert its own religion. To create a vibrant civil society and freedom of debate, we must restrain the government's freedom of speech.⁹⁸

The issue for corporate rights is whether granting a corporation some specific rights is similar to granting that right to an individual against the state, or to the state against individuals, or a new thing altogether. We struggled for centuries to abolish property, speech, and religious rights in government and establish them for individuals (with the limitations necessary to avoid a Hobbesian war of all against all, or Cain against Abel). Is granting these rights to corporations a step forward or backward?

To answer this, we need more than simplistic claims that the rights are important or, on the other hand, "purely personal" and therefore are not suitable for corporations. No better is the equally vacuous argument that a corporation is just the people who make it up (but never the actual employees who act for it),⁹⁹ or its logical opposite that the organization is

97. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) for a clear presentation of the argument that laissez-faire is as implausible in speech as it is in markets. The war of all against all is not conducive to freedom, prosperity or science.

98. See generally GEORGE ORWELL, 1984 (1949) (describing dystopia of government propaganda). Of course, governments have no monopoly on overpowering propaganda. The defeat of feudalism required ending the aristocracy's property rights in government, not just the king's. So, too, free speech.

99. The view that corporations "are" the people who make them up, but do not include the actual people who actually make them up, is widespread. Often, it is combined with a seemingly contradictory claim that the corporation is property. The two images are contradictory: we no longer allow owning people. However, polemicists can avert attention from the implications of each metaphor by invoking the other. For example, Conestoga Wood Specialties Corporation argues that its freedom of exercise is violated by Affordable Care Act (ACA) regulations that require it to include certain contraceptive coverage in health insurance

policies it chooses to offer its employees, even though “its” religious belief is that these contraceptive methods are a form of murder. Brief for Petitioner at 17, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-356). The argument depends on separating the corporation from its employees (if employees shared Conestoga’s alleged theology, they would not use the contraceptives). The brief sets up this separation by portraying the corporation as property owned by its shareholders. *Id.* On this view, Conestoga’s shareholders have a right to impose their views on other corporate participants (the employees) because they own it (or them). Taken seriously, this argument is untenable: we have abolished serfdom; no one has a property right to impose their religious values on others.

Moreover, the property view defies corporate law. First, property owners are responsible for the use and misuse of their property. The key reason to organize a business as a corporation is precisely to separate the investors from the business—unlike owners, shareholders are not responsible for the corporation’s actions. That is what we mean by “limited” liability, and it is the only plausible explanation for why these “owners” chose to organize the business as a corporation separate from themselves in the first place. Second, while Conestoga contends that the controlling parties’ views cannot be “separate[d]” from the corporation’s, *id.* at 17, 27, corporate law requires them to do precisely that. If the directors and managers are imposing their own views on the corporation without regard to its interests, they are in violation of the fiduciary duty of loyalty. Here, the corporation has straightforward interests in minimizing its compensation costs by taking advantage of tax subsidies for employer-sponsored health insurance that complies with the ACA, in avoiding strife by respecting the autonomy of its employees, and in avoiding human misery by reducing unwanted or unplanned pregnancies. Its (as opposed to its shareholders’ or managers’) countervailing interest in imposing a particular theological view on its employees is far less obvious.

To avoid these issues, the brief switches to a contradictory vision of the corporation as an incorporated association, similar to churches or guilds that consist of their members, *id.* at 22, 26, 27, and insists that the corporation ought to be granted rights because “the people who form and operate them do.” *Cf.* Brief for Respondents at 24, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) [hereinafter *Hobby Lobby Brief*] (citing cases involving incorporated associations such as churches to support “group” rights, and then assuming that a business corporation is also a group—without specifying the membership of this group). But if a corporation is a group, the members of the group must be the people involved. In that case, the spirit of the Free Exercise Clause would be promoted by the ACA’s attempt to enhance the autonomy of each of the corporation’s 950 employee associates to decide whether the worse sin is contraception or bringing a child into the world without proper care, or how to balance the moral claims (if any) of pre-implantation fertilized egg cells against those of women (and their partners) conscripted by ineffective birth control to dangerous and difficult pregnancy, childbirth, and child rearing. In democratic groups, minority rights create difficult philosophical problems. *See, e.g.*, ROBERT MICHELS, *POLITICAL PARTIES* (1911) (describing inevitable failure of leadership to reflect followers’ views). But in a business corporation, there is no reason to believe that managers speaking for the corporation represent the “group.” Employees have no vote, managers are obligated to follow the directives of the directors, and directors are required to exercise independent judgment regardless of the views of their electors and without regard to their personal interests. Granting management rights to direct employee religious practice does not promote “group” autonomy. The only resolution to this problem is rhetorical, not

so unique that it must be entitled to freedom in its own right. Governments are also enormously important and distinctively unique institutions. They too are made up of people and often conceptualized as individuals. Yet we have acknowledged since the Enlightenment that freeing government often restricts human freedom. The argument that the government's freedom is the people's freedom is the defense of every petty dictator; the claim that the organization must be given rights even at the expense of the people who compose it is the core of nationalist extremism.¹⁰⁰ In a democratic republic, we ought to have a better reason before sacrificing real people to a sanctified collective tool or allowing leaders to transform themselves into our lords and masters.

C. *Corporate Speech Is Compelled Speech*

The corporate speech cases present an especially troubling problem. One of the major advantages of business corporations as economic enterprises is their separation from politics. Internally, corporations can hire and do business with people on the basis of relevant performance criteria rather than tribalism or political patronage.

Externally, the division of labor between business corporations and politics makes the corporation's job far easier. Corporations can focus on creating goods and products that customers are willing to buy and, hopefully, decent jobs at decent pay. The government handles the more difficult issues: ensuring that the price system encourages productive rather than antisocial activities, limiting externalities and other

logical: to revert to the metaphor of corporation as property, not an association at all. See, e.g., Hobby Lobby Brief, *supra*, at 31 (pretending that corporate shareholders, as shareholders, make corporate decisions).

Neither argument is consistent with corporate law. Moreover, we can safely assume that the primary reason the shareholders organized this business as a corporation was precisely to separate themselves from it—to avoid personal liability for business obligations.

100. See, e.g., Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (1999); AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES 9–10, 29 (1997) (describing and criticizing claims of some Asian leaders that Asian values require granting state (i.e., leaders) rights primary to individual rights and that human rights must be resisted as a foreign imposition). Lee Kuan Yew's claim, discussed by Engle and Sen, that his country's particular national values require subordinating ordinary morality to the nation's will—which, in practice, means the incumbent leader—should be familiar to students of authoritarian movements and regimes everywhere.

market failures, and macroeconomics (and, in particular, ensuring that citizens are paid enough in their employee roles to keep businesses going in their customer roles).

Most important of all, business corporations can largely avoid the vital, but extraordinarily difficult, struggles of ordinary politics: to define the limits of our common culture and to vindicate competing and sometimes conflicting understandings of the requirements of justice. It is government that will decide how to structure markets so that they generate acceptable results, when profits must give way to more important values and what parts of our lives should be kept out of markets altogether—not monetized or made into saleable commodities. Business executives can assume that it is someone else's job to worry about these issues, leaving them free to focus on the technical—and difficult enough—problems of production and motivation and marketing and invention. Moreover, because we assume that the main problems faced by managers are technical, not value conflicts, business corporations can be run by technocrats (or even hired guns answerable to hereditary rentiers) without raising intolerable legitimacy issues.¹⁰¹ Democracy is vital in the public sector, where we debate our goals, but much less important in the business sector if its primary task is merely implementation.

This division of labor depends on the separation between business corporations and politics. If that separation were to break down, the result would be extraordinary and destructive corruption. Innovation in competitive markets is expensive, but buying politicians is relatively cheap. And it is easy to think of laws that grant intellectual property monopolies, create network effects, allow businesses to impose their operating costs or risks on others, directly subsidize incumbents, burden potentially disruptive technologies, force the public to pay higher prices, or replace public servants with profit opportunities. Economic incumbents—those who prospered in the past and now control large assets—would be able to use

101. If, on the other hand, corporate executives assert the right vindicated in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), to use corporate money to intervene in political debates—particularly on issues of economic regulation where the corporation's profits may be affected—believers in democracy must begin to ask whether this action is compatible with our deepest commitments. Executives were entrusted with corporate leadership to operate a business. Once they use that office to attempt to take over the public sector, they are no longer capitalists so much as aspiring plutocrats.

their wealth to purchase controlling positions in corporations that are even wealthier. They would then be able to use their economic resources, leveraged with corporate finances and organization, to move the political debate and law in directions that make them richer still. Innovation is hard, and making large profits in competitive markets is even harder.

The important issues of politics involve structuring the limits of markets when interests conflict with values. We live in a society that uses markets to make many decisions—but we use politics to determine when and how we use markets. It is politics, not markets, that determines that housing and life-saving pharmaceuticals, but not kidneys or college athletes, may be sold for whatever the market will bear. It is a political decision that food markets are arranged to ensure that large farmers of corn and soy make more profits than they might otherwise, that the prices of water and fertilizer and fast food do not reflect their actual social costs, that Monsanto has a guaranteed monopoly on certain GMO seeds, and that some, but not all, of our poorest fellow citizens pay somewhat less in the supermarkets. In an economy dominated by disposable goods, it is a political rather than a market decision that determines that most producers need not include the cost of disposal in the price of their goods, thus undermining the efficacy of our pricing system.¹⁰²

And most important of all, it is law and politics, not markets, that determine that corporations bargain on behalf of their investors rather than their employees, so that it is trivially easy to unite disparate small investors into a single bargaining unit—but difficult and often illegal to do the same for employees.¹⁰³ This unbalanced bargaining power, in turn,

102. For a graphic example of costs created by a disposable product but not included in its price, see Matt Flegenheimer, *Wet Wipes Box Says Flush. New York's Sewer System Says Don't*, N.Y. TIMES (Mar. 13, 2015), http://www.nytimes.com/2015/03/15/nyregion/the-wet-wipes-box-says-flush-but-the-new-york-city-sewer-system-says-dont.html?_r=0 [<http://perma.cc/JA5B-YYU5>] (describing costs imposed on general public by “wet wipes” that clog sewer systems). More significantly, the costs of global climate change are not included in the price of carbon-based fuels, leading corporate managers to ignore those costs in their decisions.

103. A potential manager may form a corporation by filing articles of incorporation and paying a modest fee. The organizers may determine the corporation's geographic and economic scope virtually without limit. Corporate law is designed to limit the ability of individual investors to withdraw (shareholders have no right to demand return of capital or a dividend), to free ride

dictates that much of the surplus created by the collective action of all corporate participants will go to capital rather than labor, resulting in the great inequalities and chronic demand deficiencies of the modern American economy. With different politics, our markets might generate more equality and more growth.

Politics, then, is critical. Corporate law, however, directs corporate managers to act in the interests of the corporation, regardless of their personal political views; this is the core of the fiduciary duties of care and loyalty.¹⁰⁴ Accordingly, managers acting in conformity with corporate law will act in the interests of the corporation, not according to shareholder values, or, indeed, any human being's values.¹⁰⁵ (I leave aside the issue of whether institutional shareholders even have values beyond the legally imposed and market enforced pursuit of private profit). This alone, in my view, ought to disqualify corporations as First Amendment speakers: corporate managers are barred by corporate law from spending corporate money in pursuit of *any* real citizen's values or politics unless those values happen to coincide with the corporation's own interests as understood by management.¹⁰⁶ When the Supreme

(nearly every corporate decision may be made without consulting investors at all, and even those that require investor consent require support only of a majority of the economic interest of shares), and give leaders unfettered ability to use corporate resources on behalf of the whole without regard to dissident views. No parallel provisions exist in labor law.

104. MODEL BUS. CORP. ACT § 8.30 (AM. BAR ASS'N. 2013).

105. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). In *Van Gorkom*, the Delaware Supreme Court held directors personally liable for breach of fiduciary duty for approving a plausible plan to sell the company—even though by law the sale would be entirely contingent on a majority vote of the shares. This holding makes sense only if directors owe their primary responsibility to the company rather than the shareholders; shareholders should be entirely capable of deciding for themselves whether to accept a buyout offer, since valuing stock is the core of their business. In contrast, directors are much less likely to be expert in this matter, since their primary job is to operate the company, not value it. Accordingly, if the job of directors were to reflect or protect shareholder interests, the appropriate response to any even potentially attractive buyout offer would be to send it to the shareholders—precisely what *Van Gorkom* holds is a breach of duty.

106. Of course, corporate interests often will coincide with the public good or individual citizen's values. That's why we have corporations in the first place. However, the political issue arises when those values do not coincide: when, for example, some citizens think that profit from fracking should be secondary to preserving our water supplies from potential damage or our weather system from heat-trapping gases, or reducing our dependence on the fractious Middle East. For reporting on conflicts between fuel extraction profits and environmental values,

Court requires us to allow corporations to electioneer, as in *Citizens United*¹⁰⁷ or *Bellotti*,¹⁰⁸ corporate law and market pressures combine to demand that corporate managers press to change law in order to enhance the wealth of economic incumbents.¹⁰⁹ That way leads to economic and social decline.¹¹⁰

Second, corporate law grants corporate directors (and their delegates, the top executives) virtually unreviewable discretion to determine what the corporation's interests are.¹¹¹ This creates a conflict. Managers are obliged to act in the company's interest—not in their own interest or according to their, or anyone else's, politics, morality or values. On the one hand, if they use corporate assets in violation of their fiduciary duty, they are, basically, thieves—and no theory of speech or corporate law protects a thief's use of his victim's property to promote the thief's political views.¹¹² On the other, if they

see, e.g., Katherine Bagley, *Scientists Band Together, Urge Canada to Stop Tar Sands Expansion*, INSIDECLIMATE NEWS (June 10, 2015), <http://insideclimate.news.org/news/10062015/scientists-band-together-urge-canada-stop-tar-sands-expansion> [<http://perma.cc/SV39-3TR4>].

107. See *supra* note 3 and accompanying text.

108. See *supra* note 6 and accompanying text.

109. See, e.g., Greenwood, *Essential Speech*, *supra* note 7; Kent Greenfield, Daniel J.H. Greenwood & Erik S. Jaffe, *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875 (2007) (contending that corporate managers are required by corporate law to spend corporate assets to further corporate interests, even when those conflict with the decision maker's values or views—so corporate “speech” (really spending) can never be free).

110. See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942) (describing importance of “creative destruction” to capitalist system, in which innovators overcome economic incumbents); ACEMOGLU & ROBINSON, *supra* note 35 (describing economic decline that results when economic incumbents are able to change rules to protect themselves). The idea goes back at least to Adam Smith, who suggested that businessmen, given the opportunity, will always conspire to eliminate competition. SMITH, *supra* note 24, § I.10.82 (“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

111. See, e.g., *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989) (deferring to board determination of corporate interest despite evidence of conflicts of interest).

112. Actually, this is not quite true, at least if the wrongful actor has transferred the funds to an innocent third party. A number of churches have insisted that they ought to be allowed to keep tithes received from the proceeds of fraud or constructive fraud (i.e., gifts by an insolvent debtor in violation of a fraudulent transfer act). Sometimes they win—that is, a court or legislature concludes that the debtor has the right to make gifts of the creditor's money. See Religious Liberty and Charitable Donation Protection Act, Pub. L. No. 105-183, § 3, 112 Stat. 517 (1998) (amending Bankruptcy Code 548(a)(2) to exempt from

clawback contributions by an insolvent individual of less than 15% of income or when consistent with debtor's prior practice); Minnesota Uniform Fraudulent Transfers Act, Minn. Stat. § 513.41 (2015) (amended in 2012 to prevent clawbacks from charities that received gifts from a Ponzi scheme mastermind, discussed in Andrew F. Dana & John D. Price, *Understanding and Addressing the Risks of Clawbacks*, TAXATION OF EXEMPTS 9 (May–June 2014); *Christians v. Crystal Evangelical Free Church* (*In re Young*), 82 F.3d 1407, 1418–20 (8th Cir. 1996) (holding that clawback of tithe from insolvent churchgoer would violate RFRA); *In re Missionary Baptist Found. of Am., Inc.*, 24 B.R. 973 (Bankr. N.D. Tex., 1982) (disallowing clawback on ground that insolvent corporation received fair value for contribution to related church because such contributions were within its corporate purpose, even though it received no goods or services in return). Such cases might protect a super-PAC or lobbying organization that received funds from a corporation in violation of the corporate officeholder's fiduciary duty. *But see* Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 531 B.R. 439, 484 (Bankr. S.D.N.Y. 2015) (denying motion to dismiss clawback claims against charitable investors in a Ponzi scheme on ground that RCLDPA does not apply to actual fraud); *Bloch v. Word of Life Christian Ctr.*, 207 B.R. 944 (D. Colo. 1997) (pre-RLCDPA case permitting clawback as fraudulent transfer of tithe received from insolvent churchgoer).

In corporate law, the long established rule is that third parties may benefit from ultra-vires actions by corporate officers. *See, e.g.*, DEL. CODE ANN. tit. 8, § 124 (2014). Such actions are by definition abuse of the officer's powers that, in an action against the officer, might well be conceptualized as breach of duty of loyalty—that is, theft from the corporation.

And, of course, we all believe that time can convert wrong into good title. There is no serious movement to disinherit the modern heirs of fortunes based on medieval conquest, slavery, now-illegal forms of ecological destruction, or computer services for the Final Solution.

Nor is the passage of time required to purify the proceeds of bad acts. It is basic to corporate law that if a publicly traded company earns money by antisocial activity—for example, selling legal but addictive and cancer-causing substances, causing great ecological damage, or selling “financial instruments of mass destruction”—and pays the “profits” out as dividends, the dividend recipients are entitled to keep their ill-gotten gains even if later calculations determine that the “profits” never existed, or never would have existed under proper accounting in the first place. So, too, those who sell to the antisocial wealthy are never required to inquire as to the source of the funds. Even if they do learn of the sleaze behind the scratch, they are only rarely expected to refrain from profiting themselves from the second-hand wrongdoing. *See* GEORGE BERNARD SHAW, MRS. WARREN'S PROFESSION (1894) (considering the problem of respectable wealth derived from immoral and disreputable sources). On the other hand, businesses including Nike and Apple have discovered that this rule is not without exceptions. *See, e.g.*, Burhan Wazir, *Nike Accused of Tolerating Sweatshops*, GUARDIAN (May 19, 2001), <http://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver> [<http://perma.cc/95N3-ZN83>] (covering allegations that Nike subcontractors operated sweatshops); Steven Greenhouse, *Documents Indicate Walmart Blocked Safety Push in Bangladesh*, N.Y. TIMES (Dec. 5, 2012), http://www.nytimes.com/2012/12/06/world/asia/3-walmart-suppliers-made-goods-in-bangladeshi-factory-where-112-died-in-fire.html?_r=0 [<http://perma.cc/5E5C-KSEB>] (covering Walmart's reaction to claims that it has some responsibility for unsafe conditions in factory from which it sourced); Duncan Jefferies, *Is Apple Cleaning Up Its Act on Labour Rights?*, GUARDIAN (Mar. 5, 2014), <http://www.theguardian.com/>

convince themselves, in good faith, that any given action is in the corporate interest, they are not merely free but obliged to use corporate assets to promote their views.

Corporate law as we know it makes this decision virtually unreviewable. First, neither customers, suppliers, employees, nor clients have any right to know, let alone influence, the decision.¹¹³ Second, corporate law vests the entire authority to make this decision in the board of directors.¹¹⁴

Thus, as General Motors resisted the inevitable demands of the market for two generations, or as HP spun through one reorganization plan after another in recent years, the ultimate decision makers were the companies' boards, under the influence of their top managers.¹¹⁵ Neither investors,

sustainable-business/apple-act-on-labour-right [http://perma.cc/B855-MAD8] (describing scandal involving factories manufacturing Apple products); cf. *Labor, CORPORATE WATCH*, <http://www.corpwatch.org/section.php?id=184> [http://perma.cc/6PK6-8LFP] (campaign to disclose corporate connections to sweatshops).

113. In the public sector, it is generally assumed that good government requires a degree of publicity. Even if Public Meetings or FOIA laws do not apply, generally we require budgets to be public, statutes and regulations to be published, and debates to be held, at least in part, before the public eye. There is no equivalent in corporate law. Employees and customers have no corporate law rights to disclosure at all, regardless of how important a decision may be to their lives. Internal corporate management decisions are often protected by the "Trade Secrets" doctrine even in litigation. Shareholders, as a matter of state law, have minimal rights: typically, they may inspect limited books and records, such as board minutes or the bylaws, for good cause. MODEL BUS. CORP. ACT § 16.02 (AM. BAR ASS'N 2013). Federal securities law, which applies to most corporations with publicly traded securities, is more generous: it requires extensive disclosures which, while addressed to shareholders, are in fact made available to the entire public on the Edgar website, <https://www.sec.gov/edgar/searchedgar/companysearch.html> [https://perma.cc/RE5W-GYEK].

114. DEL. CODE ANN. tit. 8, § 141(a) (2014).

115. On the quality control problems of American car manufacturers, the classic article is George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). GM's attempts and failures to produce market pleasing products have been a staple of the business press for half a century and have involved repeated attempts to transform internal decision making, deunionize and reduce employee pay, resist pressure from safety and environmental advocates, a move into finance so large that some observers saw the company as a lender offering cars as a loss-leader, and even a massive governmental bailout. See, e.g., DEAN BAKER, *THE END OF LOSER LIBERALISM* 111–12 (2011). HP's travails since 2000 under several CEOs, including 2016 presidential candidate Carly Fiorina, included mergers with Compaq, EDS, 3Com, and Palm (one of which was vocally opposed by a member of the founding family), layoffs of tens of thousands of employees and even larger expansion, sharp fluctuations in stock price, large payments to CEOs departing under clouds, an international bribery scandal, creating and then abandoning a new operating system, and spin-off of its core printer and PC divisions. For current purposes, the details of the ups and downs of these important companies

employees, unions, customers, nor the City of Detroit had any formal voice in the decision making despite its impact on them. It is simply nonsense to impute managers' decisions to these corporate participants.¹¹⁶

There are only two restraints on managers and directors. First, market pressures. The power of consumer sovereignty is easily overstated; nonetheless, as the example of General Motors shows, if a company fails to provide reasonable quality at a reasonable price for long enough, consumers ultimately will force change or collapse.¹¹⁷ Similarly, if it fails to produce what the stock market seeks—primarily profits—its stock price will drop, and if stock price drops low enough, competitors or finance entrepreneurs may accumulate enough stock to challenge incumbent directors in the so-called “market for corporate control.” But market pressures have little in common with membership organizations; market results reflect the distribution of wealth and legal rules at least as much as the

are not important; the point is that transformative or controversial decisions have been made, repeatedly—and our corporate law gives the decision entirely to the corporate board and its delegate the CEO, with no formal voice for any other affected constituency.

116. Not-for-profit corporations, which often do not have shareholders, share this board-and-management-centered governance structure. Thus, when the trustees of Cooper Union, expanded the institution unsustainably, ultimately abandoning the institution's fundamental commitment to free tuition, no other corporate participant had any formal say in the decisions—faculty, students, alumni, donors, and the communities that depended on them lacked any right to hear or be heard. For accounts of the Cooper Union controversy, see Petition at 2, *Committee to Save Cooper Union, Inc. v. Trustees of Cooper Union*, 2014 WL 2199372 (N.Y. Sup. Ct. May 27, 2014); Mike Vilensky, *Cooper Union Tuition Battle Centers on Founder's Flowery Words*, WALL STREET J. (Aug. 25, 2014, 9:25 PM), <http://www.wsj.com/articles/cooper-union-tuition-battle-centers-on-founders-flowery-words-14090163> 20 [<http://perma.cc/P6CH-HL2H>].

117. See generally HIRSCHMAN, *supra* note 47. On using consumer pressure to influence company decisions, see, Douglas Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526 (2004) (advocating labeling that would make such consumer influence more plausible). Exit is a blunt instrument, however. Consumers have few mechanisms to explain to corporate leadership where it is going wrong—and leadership often has no interest in listening. Michels's point about the Iron Law of Oligarchy—that leaders inevitably have different values, perceptions, and interests than their followers—applies well beyond the realm of political parties. See ROBERT MICHELS, *POLITICAL PARTIES*. (1911). GM's leaders were famous for their idiosyncratic views of American car quality, design, and safety. For a recent account of the limits of consumers' ability to induce companies to not endanger workers, see Michael Hobbs, *The Myth of the Ethical Shopper*, HUFFINGTON POST: HIGHLINE (July 15, 2015), <http://highline.huffingtonpost.com/articles/en/the-myth-of-the-ethical-shopper/?src=longreads> [<http://perma.cc/2H4Y-ASPG>].

will or values of human participants (and in the financial markets, most actors are institutions bound by their own fiduciary obligations and market pressures).

Second, the law provides limited judicial oversight in the form of shareholder derivative actions for breach of fiduciary duty. These actions are only of limited impact—courts are reluctant to second-guess director decisions absent evidence of self-dealing (and even then).¹¹⁸ But to the extent that they are effective, they only reinforce the point that a business corporation bears no similarity to a membership organization.

The upshot is that the Court's *Citizens United* jurisprudence is a threat to our system.¹¹⁹ Our corporate law has a single important task: to allow entrepreneurs and managers to structure organizations in a way that will permit them to create good jobs, pay decent wages, and make useful products and services without damaging the environment or endangering people or the workings of our economy. This task is difficult, and corporate law often is not up to it. *Citizens United* and the cases on which it builds, however, threaten to make the task impossible.

D. *Corporations and the Separation Between Politics and Economics*

Business corporations are the wrong sort of institution to have major influence on our politics. They are designed to promote one important value—profit—largely regardless of countervailing considerations. But in a capitalist society, politics is about the limits to profit.

We use democratic means to determine when profit must give way to other values—decency, care for our fellow Americans and other people, long-term self-preservation, ecological sustainability and empathy for non-human creatures, peace, beauty, tradition, and morality. We use politics as well to structure markets so that they lead to results we find attractive—creating rules intended to make selling

118. See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006) (upholding director decision to grant an extraordinarily generous contract to CEO and to terminate him on even more generous terms).

119. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that “corporation”—meaning corporate managers—has a First Amendment right to spend money to influence elections and overturning statutes restricting such spending).

destructive addictive substances or defrauding customers or shifting risk to the unaware less profitable than creating useful products in safe and well-paid workplaces, or, conversely, to ensure that corn producers do not have to worry about the costs their runoff imposes downstream and that suburban commuters are subsidized by non-drivers.

When profit-seeking institutions as effective as our major corporations enter the political sphere, they threaten this division of labor and the legitimacy of our system. It is one thing if Americans believe that corn and suburbs are so important that we ought to force our fellow citizens to subsidize them; a commitment to democracy requires accepting that sometimes our fellow citizens will make decisions with which we might disagree. It is a different matter if the past beneficiaries of subsidies, skill, or luck are able to convert that wealth into political power that, in turn, gives them more wealth still. When incumbents can use the power of incumbency to change the rules of the game in order to protect themselves, capitalism and democracy alike are in danger.

Adam Smith warned at the very beginning of the capitalist era that “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”¹²⁰ How much more so if corporations—commanded by law to pursue corporate interests alone—are invited to enter into politics.¹²¹ Their boards and managers are likely to understand their fiduciary duty to act in the interest of the company as requiring them to use corporate money to influence

120. SMITH, *supra* note 24, § I.10.82.

121. The problem of corporate lobbying dates back to the beginning of the corporate era, as do attempts to limit it. See Adam Winkler, *Other People's Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004). First Amendment values, properly understood, require more limits than we have ever had: corporate money ought to be excluded from the political sphere as much as possible, because we use politics to determine the rules that create corporations and the market incentives to which they ought to respond. In a mixed economy such as ours, ultimately politics must determine the rules of the market, not the other way around. For further discussion, see Greenwood, *Counter-Majoritarian Difficulty*, *supra* note 9. Instead, the Court has moved in the opposite direction, overturning the limited reforms the political branches have managed to enact, using its doctrines of “corporate speech” to reduce, instead of enhance, our ability to govern ourselves. See, e.g., LARRY M. BARTELS, *ECONOMIC INEQUALITY AND POLITICAL REPRESENTATION* (2005). See also LARRY M. BARTELS, *UNEQUAL ECONOMY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008) (describing influence of wealth on our politics).

the law. And, unfortunately, law that allows grift, cheating, monopoly, overreaching, deception, or suppressing competitors is likely to be, or appear, highly profitable.

Even beyond the dangers of allowing institutions designed to ignore all values but profit to write the rules that limit profit to its proper sphere, business is poor training for politics. In business, employment is a cost; generally, a company is better off if it can eliminate employees. But for the country as a whole, the reverse is true: our goal must be to employ as many as possible.¹²² Cutting wages, for a company, may increase profits; for a country, employee wages are more or less the same thing as customer demand, so cutting wages is likely to destroy demand, profits, and production alike.

For these reasons, we should take the Constitution's silence regarding corporations seriously. We created government to protect us and our fellow citizens. Corporations are tools—extraordinarily powerful tools, but like most powerful tools, potentially quite dangerous. It makes no sense to entrench rules preventing us, via our legislatures, from controlling them should we need to.¹²³

122. One could imagine an economy in which citizens could live decent, respectable, and productive lives without employment for wages. Indeed, if productivity continues to increase, at some point we may have to begin doing so. However, in the world we live in today, mass employment must be a primary goal.

123. Typically we rely on markets to control corporations. For ordinary purposes, this will work quite well, at least if the legal system sets reasonable rules for those markets. When markets are competitive and regulators can prevent deception, consumers will press corporations to produce useful products at reasonable prices. But when corporations instead compete by influencing politicians or regulators to stack the rules in their favor, citizen consumers will often find they have little influence. First, many important corporations sell to other institutions, which will have their own profit-seeking motives and fiduciary obligations to limit their willingness to boycott or otherwise police the separation between economy and politics. Institutional buyers will typically feel obligated to limit their focus to finding reasonable quality at a reasonable price. Secondary boycotts are often illegal, but more to the point, they are practically impossible. I may disapprove of the political interventions of Koch Industries or Warren Buffett's Berkshire Hathaway, but there is nothing I can do to avoid buying to reduce their influence; I may violently disagree with Microsoft's view on immigrant visas, software copyrights, or privacy, or Pacific Gas & Electric's attitude toward conservation, but as a practical matter I cannot avoid financing their activities without turning my life upside down. *Cf.* Elliot Negin, *Internal Documents Show Fossil Fuel Industry Has Been Aware of Climate Change for Decades*, HUFFINGTON POST (July 8, 2015, 2:59 PM), http://www.huffingtonpost.com/elliott-negin/internal-documents-show-f_b_7749988.html [<http://perma.cc/N55C-5N3E>] (Union of Concerned Scientists writer describing concerted effort by all major oil producers to disinform Americans regarding global climate change).

E. Wealth and Free Speech

In modern America, our major corporations are the largest—but by no means the only—holders of concentrated wealth. Wealth distorts the core truth-seeking and political peace purposes of the First Amendment. When truth is the actual goal, we never use markets, let alone unregulated debate, as a tool for discovering it. Even conservative news magazines used to pride themselves on protecting the truth-seeking function of the news pages from the temptations of commerce;¹²⁴ universities and other scholarly communities exist largely to ensure that existing elites are not able to simply purchase the results that reinforce their status.

Scientific method has little in common with the unlimited advertising regime the Supreme Court has enforced on us.¹²⁵ Even accepting that the best route to truth is a competition between ideas, the competition ought to operate by different rules than competition between products.¹²⁶ The First Amendment should represent our unwillingness to allow church, state, and corporate hierarchies to impose their versions of truth on us—not a mere sale of that right at

124. See *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1143 n.4 (Del. 1989); *Paramount Commc'ns, Inc. v. Time, Inc.*, 1989 WL 79880 at *7 (Del. Ch. July 14, 1989) (reporting testimony of Time Director (and Radcliffe President) Horner that “editorial freedom free from political or other kinds of intervention is absolutely essential . . . the *sine qua non* of this nation's and the company's future”).

125. Since *Va. State Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), the Supreme Court has viewed even purely commercial advertising as potentially raising free speech issues. This position necessarily constitutionalizes basic economic regulation (in *Virginia State Pharmacy Board* itself, the legislature had sought to limit competition, hoping—correctly or not—that this would increase the likelihood of pharmacists providing accurate information to their customers. The Court, however, overturned the regulation on the ground that it was suppressing speech—truthful price advertising. It is hard to avoid a cynical view that the speech rationale is merely a mask hiding the return of the Court to *Lochner v. New York*, 198 U.S. 45 (1905), and the imposition of laissez-faire economics on an unwilling nation. The “commercial speech” line of cases is clearly related to the line extending from *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), to *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), that, similarly, protects direct corporate electioneering as “speech” without regard to the actual economic issues at stake.

126. In ordinary markets, we often extensively regulate advertising. See, e.g., Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78a to 78pp (Westlaw through Pub. L. No. 114-25) as amended (requiring that securities issuers make extensive required disclosures and receive preauthorization from regulators before communicating with customers).

auction.

But truth is often beside the point. Political strife often is about values, morals, decency, allegiances, loyalties, and styles—matters that, important as they are, have little to do with truth in the scientific sense.¹²⁷

Robust debate is essential to challenge the immoral orthodoxies of any particular era, particularly when they benefit an entrenched elite, such as those who profited from slavery or from exploiting natural resources regardless of larger consequences.¹²⁸ In these cases, we hope—with Mill—that the moral truth will overcome error through the power of debate rather than authority.¹²⁹ Even if it doesn't, however, error rarely is worth war: liberal society is committed to the notion that people can live together in one nation even with differing views on matters of ultimate importance such as the good life, human freedom, or entrance into the Kingdom of Heaven.¹³⁰

Just as importantly, however, we require debate to find a compromise or *modus vivendi* that can allow people of diverse commitments to live together as one nation. Our First Amendment is better understood as a peaceful resolution of a millennium of European wars of religion than as a commitment to Mill's peculiar epistemological faith that the truth will prevail over error or the progress of morals. We agree on little, but (with a few notable exceptions) we have agreed that we are one nation committed to living together.¹³¹

127. See KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (1963) (defining scientific truth as falsifiable propositions that have been tested but not yet been falsified); DAVID HUME, A TREATISE OF HUMAN NATURE: BEING AN ATTEMPT TO INTRODUCE THE EXPERIMENTAL METHOD OF REASONING INTO MORAL SUBJECTS 325 (1739–40) (distinguishing between is and ought).

128. MILL, *supra* note 19.

129. *Id.* (arguing that competing views sharpen the truth). Holmes's cruder version seems to define truth by market success. *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.")

130. See, e.g., RAWLS, *supra* note 10 (contending that liberalism requires separating theories of justice from theories of the good).

131. Or so I interpret the victory of the Union in the Civil War and the progress since then, however erratic, towards realizing the Fourteenth Amendment's promise that all persons born in the United States are citizens entitled to the equal protection of the laws. See generally BRUCE A. ACKERMAN, WE THE PEOPLE (1991) (describing Civil War and the Civil War Amendments as

Living together requires compromise—a willingness to accept that others may not accept what we deeply believe to be true. Disestablishment allowed us to build a single country without war to convert, expel, or exterminate Catholics or Protestants. Its secular equivalent allowed our government to endure, if not permanently, at least for a century “half slave and half free”¹³² before the Civil War, and then again during the long Jim Crow period, despite that greatest of all moral conflicts. We remain fundamentally divided on issues critical and trivial: the moral claims of the worst-off¹³³ or unborn generations,¹³⁴ whether government spending in a depression increases or displaces jobs,¹³⁵ elementary science,¹³⁶ and whether a gay football player is an oxymoron.¹³⁷

one of the great constitutional moments in American legal history, when the American people, in a state of unusual political activation, revised our foundational principles). If I were writing a new version of social contract theory, I would derive the theoretical agreement that underpins a free state from a commitment to live together as partners in a common enterprise (in relative peace, as Hobbes, *supra* note 10, emphasized, but also in relative fairness, see, e.g., WALZER, *supra* note 10, and with respect for each other’s strong commitments. This requires a willingness to listen and compromise that is impossible in the theoretical politics and purely hypothetical debates of social contract theory. *But see* BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980) (seeking to elaborate requirements of justice based on imagined dialogues abstracted from actual political debates).

132. Abraham Lincoln, House Divided Speech (June 16, 1858) (“I believe this government cannot endure permanently half slave and half free”).

133. Compare, e.g., RAWLS, *supra* note 10 (arguing that social policy ought to maximize the position of the worst off) with ALAN SIMPSON & ERSKINE BOWLES, *THE MOMENT OF TRUTH: REPORT OF THE NATIONAL COMMISSION ON FISCAL RESPONSIBILITY AND REFORM* (2010), https://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf (urging reductions in Social Security retirement and disability payments, apparently to avoid increasing taxes on the best-off) or the continuing debate over providing guaranteed medical care to those who need it.

134. Compare the debates over abortion or global warming.

135. Oddly, the political classes seem to agree by consensus that military spending creates jobs, but are far less sure about government investment in infrastructure, research, or education.

136. The Scopes Monkey Trial seems to have resolved little. *See generally* *Scopes v. State*, 289 S.W. 363 (1927). For trial transcripts and other documents, see *The Scopes Trial (1925)*, U. OF MINN. L. LIBRARY: CLARENCE DARROW COLLECTION, <http://darrow.law.umn.edu/trials.php?tid=7> [<http://perma.cc/39UJ-SRHH>].

137. *See, e.g.*, Martin Rogers, *Niners CB Says Openly Gay Players Not Welcome on Team*, YAHOO NEWS (Jan. 30, 2013, 2:03 PM), <http://sports.yahoo.com/news/nfl—report—niners-cb-says-openly-gay-players-would-not-be-welcomed-on-the-team-190346715.html> [<http://perma.cc/3MB3-JKP2>]; *See also* Media Matters, *Rush Responds to NFL Domestic Violence Controversy*, MEDIA MATTERS BLOG (Sept. 12, 2014, 1:20 PM), <http://mediamatters.org/video/2014/09/12/rush->

To live together in relative peace, we rely on some combination of the First Amendment's disestablishment strategy (agreeing to disagree or to exclude matters from collective decision making precisely because they are important), political and economic decentralization, continuing low-grade struggles for power and advantage, and utterly unprincipled compromise. Given our deep divisions over issues as wide ranging as religion, economic and social equality, responses to economic and ecological problems, and rapidly changing social mores, the alternatives to finding a way to live together are unthinkable.

When the reason we debate is not to discover the truth but to find a way to live together, citizens of good faith must be able to distinguish between truly fundamental beliefs and strategic posturing.

Political advertising often is designed to distort this search for common ground, by making support for a particular position look broader or deeper than it actually is.¹³⁸ Corporate advertising is worse still. First, corporate managers, if they are obeying corporate law, should be directing corporate ads without regard to the actual views of any citizens; managers are required to set aside their personal views of the national interest or social good and instead act in the interest of the corporation.¹³⁹ Thus, managers are *supposed* to be seeking to

responds-to-nfls-domestic-violence-controv/200742 [http://perma.cc/A2YZ-UCM4].

138. The literature on advertising and intentional manipulation of rational cascades, or deliberately creating the appearance of consensus (or dis-sensus) is enormous. For a recent discussion of industries marketing dangerous products by creating mistaken impressions of safety, see NICHOLAS FREUDENBERG, *LETHAL BUT LEGAL: CORPORATIONS, CONSUMPTION, AND PROTECTING PUBLIC HEALTH* (2014).

139. The corporate law rule is that directors (and the managers they supervise) must act in the interests of the corporation. Precisely what the interests of a legal entity might be is controversial. For most of the last generation, conventional wisdom among academics and in the pages of the *Wall Street Journal* has been that the interests of the entity are the same as the interests of its shareholders (or, more often, a fictionalized shareholder with no other investments, values or goals beyond maximization of the price of this particular investment). See generally, e.g., ROBERTA ROMANO, *GENIUS OF AMERICAN CORPORATE LAW* (1993); See also REINER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW* (2009). The Delaware Supreme Court and a strong minority view among the academics, in contrast, have regularly distinguished between shareholder interests and corporate interests. See, e.g., *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (Del. 1985) (holding that corporation could discriminate against major shareholder that posed a "threat" to corporate interests); Greenwood, *Fictional Shareholders*, *supra* note 42; STOUT, *supra* note 84 ("It is shareholders that are

distort the political process in the perceived interests of an institution—not our fellow citizens.¹⁴⁰ Second, managers may be uninhibited in spending money that is not their own for positions that are not their own. Spending money with no human owner is always easier than spending the other kind.

Our desire to be one nation means that we must accord our fellow citizens' views respect even when they are wrong and wrongheaded, since otherwise there is no basis for the compromise necessary to live together in relative peace. However, there is rarely any reason why we ought to extend the same consideration to institutional views. Instead, we can reform the institution. Reeducation camps for humans are a terrible thing; redirecting a bureaucracy to better reflect the needs of society, or even the temporary victors of its political conflicts, is just routine governance.

When corporate fiduciaries use the wealth under their control to intervene in political debates about the rules of our economic marketplace, the consequences are even worse. Capitalist markets are, of course, notoriously disrespectful of the privileges of the past. Innovation disrupts. On that, Marx,¹⁴¹ Burke,¹⁴² and Schumpeter¹⁴³ agree. Yet it is also true

fictional.”).

However, the shareholder primacy norm is largely unenforceable in court. While the Delaware courts regularly remind directors that it is improper to make corporate decisions based on personal political views or the national interest, *see e.g.*, *Paramount Commc'ns, Inc. v. Time, Inc.*, 1989 WL 79880 at *7 (Del. Ch. July 14, 1989), they also recognize that the board, not shareholders or courts, is the proper body to determine corporate goals. Accordingly, for much the same reason that the *Caroleene Products* Court deferred to Congress on critical issues of national interest, corporate law and courts are deferential to board determinations, both procedurally and substantively. *See* DEL. CODE ANN. tit. 8, §327 (2014) (procedurally restricting derivative actions); *In re Walt Disney Company Derivative Litig.*, 906 A.2d 27 (Del. 2006); *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1989) (showing great deference to board determinations of corporate interest even in the face of circumstantial evidence of influence of narrow executive self-interest).

140. As discussed in the prior footnote, this norm is largely unenforced. So it is also possible that managers are using other peoples' money to pursue their own interests or political views. I ignore this possibility in the text because I find it hard to imagine any free speech theory that would justify constitutionalizing a right of managers to misappropriate corporate funds. Even if money is constitutionally protected speech, surely theft raises no First Amendment issues.

141. KARL MARX, *COMMUNIST MANIFESTO* (1848), *reprinted in* THE MARX-ENGELS READER 476 (Robert C. Trucker, ed., 2nd ed. 1978) (“Constant revolutionising of production, uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation distinguish the bourgeois epoch from all earlier ones. All fixed, fast-frozen relations, with their train of ancient and

that in any negotiation, the party that is best able to threaten to walk will be able to appropriate the surplus created by trade, and that the diminishing marginal utility of money always means that it takes more to persuade the wealthy than the poor. As a result, freedom of contract necessarily redistributes wealth upwards.¹⁴⁴ Left to its own, such a system will eventually self-destruct, as we have known at least as long as we have told the story of Joseph using free trade—voluntary sales of food in a famine—to enslave the Egyptian masses.¹⁴⁵

Moreover, it is easy to use law to lessen the market's disrespect for accumulated privilege. Copyrights can be extended. Organized labor can be classified as "conspiracy in restraint of trade," while organized capital is called "corporate persons."¹⁴⁶ Macroeconomic policies and reduced social investment can keep unemployment above the rate at which employees can demand pay increases. Tort law, limits on class actions, and arbitration agreements can permit "producers" to force others to pay their costs of doing business or allow them to expropriate the health and wealth of their employees, customers or neighbors. The finance industry can be permitted to shift risk to the unwary instead of eliminating it, or to profit by selling indulgences from taxation or regulation. Regulatory systems can be structured to protect incumbent companies instead of, or as well as, customers and citizens. With enough

venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify.").

142. BURKE, *supra* note 20, at 64 ("But now all is to be changed. All the pleasing illusions which made power gentle and obedience liberal, which harmonized the different shades of life, and which, by a bland assimilation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason.").

143. SCHUMPETER, *supra* note 110.

144. Cf. VICTOR HUGO, *LES MISERABLES* (1862) (illustrating the desperation of the poor leading to inequities of "free" contract).

145. Joseph was only selling to the peasants the food they themselves grew. *Genesis* 41:48, 41:56, 47:14-22. But that is not unusual. Sellers are rarely "producers" in anything but a mythical sense. He could easily have achieved the same result by the miracle of compound interest, as the masters of American sharecroppers did, and modern lenders seem to be attempting. This too is not news. We used to have effective bankruptcy for the same reason that *Leviticus* demands a jubilee year: the alternative is slavery. *Deuteronomy* 15:1, cf. *Leviticus* 25:30-33 (in Sabbatical year, all loans are to be forgiven and in Jubilee year, slaves must be freed and land returned to those who sold it).

146. See 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).

political power, economic incumbents may find it in their interest to convert entire segments of the economy to simple rent extraction¹⁴⁷—taking from the weaker, as Herbert Spencer prescribed, but with the predictable result of economic failure rather than racial victory.¹⁴⁸ Lobbyists can affect regulatory debate long after ordinary people must move on.¹⁴⁹

Money, in short, can buy the law and political influence that can make the marketplace more pleasant for old wealth. Today, the Court regularly uses the First Amendment on behalf of this anti-market, economic incumbent protection project.¹⁵⁰ Often it does so using the *Lochner* “rights of the

147. See, e.g., ACEMOGLU & ROBINSON, *supra* note 35.

148. Long before economic collapse, vested interests—Teddy Roosevelt’s “malefactors of great wealth”—may learn to exploit our political system’s multiple choke points to prevent any reform that does not preserve and enhance the power of economic incumbents. The past profits of pharmaceutical companies, the medical industry or finance, and the deep reserves of sunk costs in automobile manufacturing and the manifold associated industries, can be marshaled to convince politicians to ensure that legal innovation protects the status quo. Lenders can “reform” bankruptcy law to make it more available to break collective bargaining agreements but less available to escape compound interest on credit card or student loan debt. Cigarette companies and hot-house gas polluters can finance pseudoscience to confuse and distract from the real thing. The wealthy can hire opinion-makers or buy entire media industries to shift the Overton Window of plausible political projects far from the desires of ordinary citizens. See, e.g., Jane Mayer, *Is Ikea the New Model for the Conservative Movement?*, NEW YORKER NEWS DESK (Nov. 15, 2013) <http://www.newyorker.com/online/blogs/newsdesk/2013/11/is-ikea-the-new-model-for-the-conservative-movement.html> [<http://perma.cc/96S5-A94Y>] (describing the State Policy Network’s network of “independent” think tanks devoted to causes such as reducing the minimum wage and lessening access to the ballot).

149. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

150. Sometimes, the Court creates rights of economic incumbents to influence the political process (or avoid countervailing influences). See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980) (constitutionally protecting utility’s asserted right to promote energy consumption, despite public’s interest in conservation). In other cases, it has directly used First Amendment “neutrality” principles to overturn routine economic rules meant to correct perceived market failures. Regardless of the merits of the particular health or economic regulations at issue (which vary), it is hard to see why judges interpreting abstract speech principles is an appropriate way to set the rules that structure our markets. See, e.g., *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653 (2011) (overturning Vermont’s Prescription Confidentiality Law, on ground that it restricted speech of data miners and pharmaceutical companies seeking to use patient’s data to market pharmaceuticals); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding unconstitutional program requiring mushroom producers to jointly fund industry advertising); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005) (rejecting Free Speech challenge to similar program, based on a distinction between private and

victim” mode of analysis.¹⁵¹ The Court uses similar arguments to expand the influence of the wealthy in elections. Electioneering is one of the few areas where long established American law sharply restricts the rights of corporations relative to human beings. Almost since the beginning of the era of large business corporations, federal law has barred corporations from using corporate funds for electioneering.¹⁵² However, since *Bellotti*, the Court has limited such statutes on the basis of purported First Amendment rights, creating a new absolute right to spend money to influence elections.¹⁵³

The Court’s constitutional protection of corporate electioneering has perverse effects. If corporate managers *may* spend corporate money to promote corporate interests as they understand them (as the Court holds under the First Amendment), then, if they are acting in good faith, they *must*

governmental speakers); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 527 (2001) (holding that state’s ban on certain forms of tobacco advertising, designed to reduce cigarette consumption, violates First Amendment).

151. Thus, in the line of commercial speech cases beginning with *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), the Court relied on the purported First Amendment rights of consumers to receive “information” to overturn various restrictions on advertising. *Cf.* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (apparently protecting right of voters to be lobbied using corporate money). Note that according to standard economics, the corporate funds in question derive from consumers and are in corporate control only because the firm is able to sell at a price above marginal cost. In *Lorillard Tobacco Co.*, the Court discusses the speech without considering the identity of the purported rights holder at all—we are not told whether it is vindicating the rights of a corporation and its investors to influence consumers to purchase addictive dangerous drugs, the rights of consumers to be influenced, or rights of the broader citizenry to have their views on appropriate market behavior affected by corporate advocacy of unsafe practices. 533 U.S. at 553.

152. Tillman Act of 1907, 2 U.S.C. § 441b (2012) (banning direct contributions to candidates from corporate funds). *See generally*, Winkler, *supra* note 121. Of course, no statute has ever attempted to attain corporate money. That is the people—citizens and otherwise—associated with a corporation are completely free to electioneer in their personal capacities, even using money derived from corporate sources. Similarly, the law even permits a corporation to form and staff an organization (known as a PAC) to facilitate its employees and shareholders making such contributions from personal funds. 2 U.S.C. § 441b. *Cf.* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 321, 337–38 (2010) (contending that a PAC is a burden on corporate speech, without discussing what it means for a corporation to speak, why corporate executives should be allowed to use money that is not their own for purposes not contemplated by corporate law, or whether it would be a useful addition to our largest economic enterprises to have officials appointed based on party affiliation, as surely must happen if business corporations become significant players in partisan politics). Unsurprisingly, shareholders rarely contribute to such corporate PACs.

153. *Bellotti*, 435 U.S. at 767.

do so. Corporate managers are required to pursue corporate interests, not their own political views or even the national interest.¹⁵⁴ That is basic corporate law: managers and directors must “act: (1) in good faith and (2) in a manner the director reasonably believes to be in the best interests of the corporation.”¹⁵⁵

But corporate law, sensibly enough, limits the purview of most internal corporate debates, in order to make management tasks manageable. Managers are paid to implement systems to transform inputs into saleable products and services—not to debate when other values might be more important. Corporate law provides no mechanism for corporate participants to debate what corporate interests are or when they ought to be set aside in favor of other, more important values. (Employees and customers, of course, can refuse to do business with the firm, and individual investors who do not invest through mutual funds or other institutions can refuse to invest in it. Ordinarily, however, the firm will have little trouble finding other employees, customers, or investors who are less bothered. Thus, the effect of dissociation will be to entrench the status quo rather than challenge it. In other cases, the collateral consequences of refusing to do business may be overwhelming—it is hard to refuse a job if you are not certain

154. Obviously, corporations may have various interests and some managers may believe that long-term corporate interests require a strong country and a sound economy. I am not suggesting conflict in every instance. Nonetheless, corporate law is clear that when a conflict does exist, corporate managers are required to place the corporate interest first. *See, e.g.,* Paramount Comm'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989) (upholding the board's refusal to negotiate with potential purchaser as reasonable and proportionate). If managers in good faith believe that the corporation will be better off if the country is worse off, corporate law directs them to place company above country. It should be noted, however, that the courts generally refuse to enforce this norm; provided that a manager is willing to state under oath that he or she believed that he or she was acting in the corporate interest, courts will rarely overturn their judgment. *See, e.g.,* Kamin v. Am. Express, 383 N.Y.S.2d 807 (N.Y. Sup. Ct. 1976) (court accepts managers defense of their decision as in corporate interest where they decided to forgo massive tax subsidy in the hope of deceiving shareholders regarding prior managerial failures and thus improving stock price). Corporate charitable contributions are explicitly permitted in most statutes, *e.g.,* MODEL BUS. CORP. ACT § 3.02(13) (AM. BAR ASS'N. 2010), but apparently are relatively minor in size, *see, e.g.,* Ken Stern, *Why Don't Corporations Give to Charity*, SLATE (Aug. 8, 2013, 5:51 AM), http://www.slate.com/articles/business/moneybox/2013/08/corporations_don_t_give_to_charity_why_the_most_profitable_companies_are.html [<http://perma.cc/B784-2EHK>] (suggesting that pressure to maximize share price and executive compensation drives low charitable giving).

155. MODEL BUS. CORP. ACT § 8.30(a) (directors); *cf. id.* § 8.42(a) (officers).

of finding another one. In both cases, exit is not a substitute for voice.)

So, corporate interests sometimes will conflict with national interests and values, and managers have no legitimate means for representing the corporation's human participants in the broader political debate. The Court's *Lochner*-ist move to protect "speech" without regard to the actual needs of speakers creates well-funded automatons that promote a particular ideology in a political sphere for which they were not designed. And, like the *Lochner*-era Court, it gives us no explanation of why the Court is entitled to import this deeply dysfunctional economic theory into the Constitution.

When corporate managers and directors obey corporate law, they set aside their own interests and, instead, promote the corporate interests. But nearly everyone has financial interests that differ from those of the corporations they purchase from, work for, or invest in, and only the oddest miser has no political, aesthetic, or moral value that is more important than mere profit. Thus, corporate interests will not correspond with the interests, let alone the moral commitments, of their human constituents unless managers or directors are ignoring the separate existence of the corporate entity.¹⁵⁶ The paid corporate agents who produce the corporation's electoral activity and the bosses who supervise them do not represent or answer to the corporate participants who created the funds or who might receive them were the funds not used for political influence.¹⁵⁷ Granting the

156. In *Hobby Lobby*, 124 S. Ct. 2751 (2014), the Supreme Court seems to assimilate closely held corporations to their dominant shareholders. This, of course, ignores the many employees who do Hobby Lobby's actual work and the customers who fund it. But it also assumes that Hobby Lobby's directors are free to substitute their own religious commitments for the interests of the corporation. This is a controversial interpretation of state corporate law; it is hard to believe that the First Amendment resolves this long standing state-law issue.

157. Corporate funds typically result from charging consumers more than the corporation pays employees, investors, and suppliers. Thus, consumers, employees, investors, and suppliers all have a prima facie claim to having produced the corporation's funds. However, none of those corporate participants have a legally protected right to participate in corporate decision-making regarding those funds. Instead, corporate law gives corporate directors virtually unfettered discretion (within the constraints of markets) to allocate corporate funds among these parties or retain them for future corporate use, providing only that they exercise independent business judgment in the interests of the corporation itself. *E.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2014) (corporation is

corporation rights, thus, does not promote the rights of the individuals involved at all. They have no formal say (and generally not much informal influence) over the corporate decision, and there is no reason to think it is representing them, even “virtually.”¹⁵⁸

In contrast, denying corporate officers the right to spend corporate money in politics would have no impact at all on individual rights. Even if we entirely banned the use of corporate funds for lobbying or electioneering, directors would remain free to disburse corporate funds to participants (as wages, price cuts, interest, or dividends). Every participant in the corporation would remain free to use personal funds derived from the firm for that purpose. And the human beings would remain free to associate for political purposes using other legal forms, including PACs, even during work hours.¹⁵⁹

II. ENTRENCHING CORPORATE LAW

Generally, the rules empowering and governing corporations, like most of the rules governing a modern society, belong in statutes. Corporate law should be based on considerations of how best to operate our largest bureaucracies and the markets in which they operate. We seek (or ought to seek) to control excesses of power, greed, and corruption without eliminating the centralized authority that makes corporate business successful. Since those considerations will change with the economy, they should not be entombed in an interpretation of our difficult-to-change Constitution. Since they are forward rather than backward-looking, they belong in

managed under supervision and control of its directors).

158. I refer to the pre-Revolutionary British Parliament’s view that it virtually represented the American colonialists despite the latter’s disenfranchisement, not to some electronic version of representation. *See, e.g.,* ELY, *supra* note 15, at 82 (describing theory of virtual representation).

159. *See, e.g.,* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 415 (2010) (Stevens, dissenting) (discussing 2 U.S.C. § 441b provision authorizing corporate PACs, which allow human corporate participants to organize using the business association, but segregating political funds they contribute from general corporate business funds); Winkler, *supra* note 121 (describing long-standing statutory provisions banning campaign contributions from corporate funds but facilitating corporate participants joining together in a PAC to contribute using their own funds). In better days, of course, we would view the ability of corporations to pressure their employees to make contributions to the corporate PAC as itself a problematic form of corruption.

the political branches, not the precedent-bound judiciary. For all the problems of rough and tumble politics and interest group influence, legislatures and regulatory agencies are more likely to find the pragmatic balance we need, than is backwards-looking judicial interpretation of fundamental principles.¹⁶⁰

Corporate governance issues are difficult. Our existing system works well enough to keep most of us employed and reasonably affluent, but it is far from perfect. When a corporation asserts a due-process right, its executives (on its behalf or their own) are asserting an exemption from otherwise applicable norms. Whether we should grant autonomy to this institution or, instead, carefully guard its guardians (as we would with its governmental equivalent) depends on the characteristics and functions of the institution—not an abstract consideration of the importance of property rights in some other context.

Contrary to Supreme Court precedent, business corporations should have no constitutional rights whatsoever. We the people, acting through our legislatures, authorize corporations to exist. There is rarely any reason to protect political or economic incumbents from the reach of political reform. Generally, then, corporations—like governments—should not have constitutional rights against us: we should be able to set the rights and obligations of corporations by ordinary legislative processes—and also to change them as necessary to improve their domestic utility or our competitive position against foreign nations, or even because existing rules threaten to lead to results we do not like.

The problem is not that the Court has not read the Constitution closely enough or that it is ignoring the meaning that a long-deceased generation would have placed on the words.¹⁶¹

160. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (marking the modern Court's retreat from the judicial interventionism of the *Lochner* era, replaced by deference to the political branches).

161. The Court obviously has not interpreted these clauses in a literalist or originalist fashion. See Greenwood, *Neofeudalism*, *supra* note 3. But non-originalism is no more a problem than its opposite. Our Constitution establishes, and we consider ourselves to be, a democratic republic, which means we rule ourselves, in some imperfect fashion. Originalism, in all its variants, is inconsistent with self-rule: it replaces our decisions with rule by the dead. More precisely, since we have no access to the will of the dead, it replaces electoral politics with Supreme Court justices' interpretations of imaginary interpretations

The primary issue, instead, is that the Supreme Court has created constitutional rights for corporations that do not fit with our scheme of government, properly understood. Too often the Court has acted without considering, and sometimes without seeming even to understand, the actual workings of corporate law and the actual functions of corporations in our economy and polity.¹⁶² Instead, its legal analysis has been driven by atavistic remnants of half-forgotten medieval doctrine and inappropriate metaphor.

Corporations and corporate law change, quite rapidly, as they must in a dynamic economy. An eighteenth century lawyer would find little familiar in our modern corporate law, less in securities law, and nothing at all in the actual workings of a modern multinational corporation. Even rules so fundamental as entity liability or voting by investment rather than membership were still controversial in the early nineteenth century.¹⁶³ Indeed, a lawyer from the end of the

the dead might have made of the Constitution had they considered problems that did not exist in their day. In this respect, originalism bears a certain resemblance to Edmund Burke's defense of "inherited" rights over "natural" ones. Burke argues, "the idea of inheritance furnishes a sure principle of conservation and a sure principle of transmission, without at all excluding a principle of improvement. It leaves acquisition free; but it secures what it acquires." As he makes clear, this "kind of mortmain" is not real, but rather one of the "pleasing illusions which made power gentle"—if "improvement" is to be possible, the living must be the ones making the "choice of inheritance." BURKE, *supra* note 20, at 28, 64. Unfortunately, at least in this area, there is nothing gentle about the Court's power.

162. Not one of the majority opinions in the cases listed *supra* note 6 discusses how a "corporate" right would affect the various contenders for power within a corporation. For example, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens United*, 588 U.S. at 310, simply ignore the rights, if any, of the consumers and employees who fund the corporation's electoral expenditures through higher prices and lower wages respectively. Like the search and seizure cases, these opinions simply assume, without discussion, that regulators represent an outside force imposing on the corporation, rather than a change in governance law giving new rights to insiders—who might well prefer to have management act more openly or to have electioneering separated from the workplace and consumer marketplace. Many of us, I assume, would prefer to be able to buy electric power or obtain a mortgage loan without also supporting disarming the police who keep those markets sound, or fried chicken without taking a stand in the culture wars.

163. In the UK, the principle of entity liability became part of corporate law by the Limited Liability Act 1855, 18 & 19 Vict. c. 133. It seems to have become common, but not universal, somewhat earlier in the United States, particularly New York, which adopted it in 1846. See, e.g., Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155 (1992). Earlier charters had typically provided that

nineteenth century—before the rise of Delaware, “enabling” corporate law, the federal securities regime, legalized unions, or diversified portfolio investors—would find our system quite foreign. Even one from 1980—before the invention of the poison pill, before widespread use of complicated derivatives, the rise of the “independent” board, and the increased disclosure requirements of Sarbanes-Oxley¹⁶⁴ and Dodd-Frank,¹⁶⁵ and right at the beginning of deregulation, the death of antitrust, the defeat of the unions, and explosion of CEO salaries and finance profits—would need serious remedial work to catch up.

This dynamism counsels against constitutionalizing corporate law. When most of the system is rapidly changing, it will rarely make sense to fossilize another part. We are constantly creating and recreating these massive and powerful institutions; there is little reason to expect that eternal rules of governing them can be derived from our eighteenth century constitution, even with its later accretions, because there is little reason to believe that we—let alone our predecessors—have discovered such universal laws.

Even if we did know a “best” way to promote freedom in our enterprises, it is hard to believe that it could be found in our Constitution, which predates the rise of business corporations as socially significant enterprises. It is even

shareholders could be held liable for corporate debts in amounts up to their initial investment—usually called “double liability” but more accurately true limited liability rather than entity liability. For an account of the controversy over enacting entity liability, see Daniel Kahan, Note, *Shareholder Liability for Corporate Torts: A Historical Perspective*, 97 GEO. L.J. 1085, 1092, 1099–1101, 1107 (2009) (quoting 1846 opponent of entity liability who described it as “directly hostile to every principle of justice” and explaining that judges created entity liability in tort after 1850, following *Heacock & Lockwood v. Sherman*, 14 Wend. 58 (N.Y. Sup. Ct. 1835)); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1655 (1988). Double liability remained common in banking corporations until the Depression; vestigial remnants of the older view can still be found, e.g., N.Y. BUS. CORP. L. § 630 (proposed N.Y. Senate Bill 2232, 2015) (holding certain shareholders liable for corporate contractual obligations for wages). For a history of the NY statute, see Eric Tucker, *Shareholder and Director Liability for Unpaid Workers’ Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy*, 26 LAW & HIST. REV. 57, 64 (2008). Cf. E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351 (1948) (describing relatively late adoption in Massachusetts).

164. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

165. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered sections of 12 U.S.C.).

harder to believe that judges, using the backward-looking techniques of legal interpretation, have the right skills to interpret these rules out of that text, guiding us towards effective institutional design by examining the past.

When the world changes rapidly and eternal verities are scarce, entrenched rules are likely to be counterproductive. The liberal ideals of personal privacy; freedom of religion, conscience, taste, inquiry, and dissent; political, scientific, and artistic debate; and antiauthoritarianism are constants despite the changes in our economy and politics. But the methods of furthering those ideals must adapt to changes in economic relations and organizations. Corporate rights, to the extent that we conclude that they are congruent with or further personal freedom, can be set by the same statutory process we use to create corporations and determine who runs them.

III. A PATH TO REFORM

The time has come to reverse the Supreme Court's long line of precedent. Corporations belong on the state side of the great divide between state and citizen; like other governing institutions, they can be tools for good or bad, but they are always tools, never the goal. The purpose of government is the happiness of citizens, not the success of corporations. We measure governmental success by the success of the citizens. So too, corporate success should be measured by the happiness of the firm's employees, customers, and investors, or the importance of its products and services—not the bare power and wealth of the institution or its leaders.

Re-conceptualizing corporations as more public than private, governmental rather than citizen, bureaucratic rather than individual, is not hard; corporate bureaucracies are far more similar to governmental agencies than they are to individual citizens.

The legal and philosophic implications, in contrast, are radical. Moving the long struggle against the illegitimate power of absolutist government into a new sphere will require change as dramatic as the effort to remake governments into our servants instead of our masters.

Our Constitution promises to ensure the general Welfare

and to enhance human freedom.¹⁶⁶ To extend these promises to the corporate sector, we need to begin by extending basic principles and well-understood techniques for restraining power without destroying its utility from the public sector to major corporations.

The first stage in this continuing struggle against absolutism is to establish the fundamental point that corporations exist for us and not the other way around. Corporate officeholders, like their governmental counterparts, are—or should be—fiduciaries responsible for and to those they govern. When Walmart finds new ways of increasing employee productivity without passing the gains on to those employees, it is no more legitimate—even if less brutal—than colonial regimes that similarly treated their subjects as mere means to enrich others, tools to an end not their own.

The rule that pay tracks productivity was once thought embedded in our economy, but it has been absent from the statistics in the last generation.¹⁶⁷ Pay for productivity,

166. U.S. CONST. pmbl.

167. The theory that employees are paid their marginal product is fundamental to neoclassical economics. It is, however, not an accurate description of the American economy. Median wages have been roughly flat over a generation, while productivity has grown dramatically. See, e.g., PIKETTY, *supra* note 86, at 312, 315, 417–18 (arguing that wages at top and bottom are inexplicable in productivity terms); *id.* at 23 (arguing that Kuznet's curve was an artifact of a limited period); Steven Greenhouse, *The Wageless, Profitable Recovery*, N.Y. TIMES (June 30, 2011), <http://economix.blogs.nytimes.com/2011/06/30/the-wageless-profitable-recovery/> [<http://perma.cc/L3Q3-BKUX>] (reporting that 88% of returns to growth in current recovery went to profits and only 1% to wages); Edward Luce, *The Crisis of Middle-Class America*, FIN. TIMES MAG. (July 30, 2010, 5:04 PM) <http://www.ft.com/cms/s/2/1a8a5cb2-9ab2-11df-87e6-00144feab49a.html> [<http://perma.cc/YFP8-35U9>] (incomes of bottom 90% have been flat since 1973); Catherine Rampell, *Growing Economies, Stagnant Wages*, N.Y. TIMES: ECONOMIX (Nov. 3, 2011), <http://economix.blogs.nytimes.com/2011/11/03/growing-economies-stagnant-wages/> [<http://perma.cc/A4BH-EHNP>] (contrasting productivity growth to much lower median wage growth); Josh Bivens, *The Compensation/Productivity Link Is Broken*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 19, 2013, 10:00 AM), <http://www.epi.org/blog/compensation-productivity-link-broken-vast/> [<http://perma.cc/R8RP-MRDP>] (presenting data showing failure of median pay to track productivity); Chad Stone, *A Guide to Statistics on Historical Trends in Income Inequality*, CENTER ON BUDGET AND POLICY PRIORITIES (July 15, 2015), <http://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality> [<http://perma.cc/N7KN-T9CK>] (contending that all income growth since 1969 went to the top 10%); Lambert Strether, *The Only Chart You Need on Productivity and Wages*, CORRENTE (Jan. 1, 2011, 12:40 PM), http://www.correntewire.com/only_chart_you_need_productivity_and_wages [<http://perma.cc/GX3U-59KZ>] (graphic chart showing rising gap between productivity and wages since about

however, is not merely a falsifiable empirical claim: it is a moral demand that employees be treated as full members of the corporations that benefit from their work. The time has come to extend the concept of citizenship to the corporate sector. If our current market rules do not lead corporations to share the benefits of productivity with employees, then we need new rules to increase the power of employees relative to the power of CEOs and investors; apparently the latter groups have too much power to take the benefits of corporate activity for themselves.¹⁶⁸

Once we recognize that business corporations are quasi-governmental in form and function, the issue becomes why the liberal republican revolution stopped before it reached our large multinational corporations. We must consider which of the other dramatic differences between our public and corporate sectors are simply atavistic remnants and which reflect real human needs. Should we extend the principles of

1970). Note that most measures of pay in the US are distorted by our failed medical payment system: increases in the cost of medical care—even without any associated improvement in health—are treated as an increase in wages (because the costs are covered by employer-paid insurance) even though in reality, the only benefit has been to the health care industry. *See, e.g.,* BAKER, *supra* note 115; PIKETTY, *supra* note 86, at 92. Adjusting for this illusion would lower the reported earnings of most Americans (whether wages or employer-paid insurance go up to cover them) even if the increases do not reflect better health results but only result from higher medical industry income due to patent monopolies and artificial shortages. *See, e.g.,* BAKER, *supra* note 115, at 85, 140; PIKETTY, *supra* note 86, at 92; Dean Baker, *Turning Class War into Generational War*, CTR. FOR ECON. & POLY RES.: BEAT THE PRESS (Jan. 30, 2013), <http://www.cepr.net/blogs/beat-the-press/turning-class-war-into-generational-war> [<http://perma.cc/L6HK-WPBK>] (pointing out that our higher medical care costs reflect higher incomes for providers, not better care). Adjusting for this illusion would lower the reported earnings of most Americans. *See, e.g.,* David I. Auerbach & Arthur L. Kellermann, *A Decade of Health Care Cost Growth Has Wiped Out Real Income Gains for an Average U.S. Family*, 30 HEALTH AFF. 1630 (2011) (contending that employer-paid health care costs are ultimately borne by employees and, accounting for this, finding health care increases eliminated wage gains from 1999–2009).

168. Although the macroeconomic implications of such a change are beyond the scope of this paper, it seems likely that increasing the market power of employees and therefore raising wages would also increase economic growth. Mass affluence provides the demand that drives sales; investors pay for capital equipment or organize firms only because they expect to be able to earn returns from sales. *See, e.g.,* JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 135 (1936); ROBERT POLLIN, *BACK TO FULL EMPLOYMENT* 89, 93 (2012). Similarly, high wages encourage labor-saving innovation (i.e., increases in productivity), since investors will invest in innovative technology if it promises to increase profits by reducing labor costs.

separation of powers to the corporate sector?¹⁶⁹ Are there real political and economic justifications for the extraordinary power we grant to corporate officeholders, or are the agency law concept of "employment at will" and the corporate law concept of a board unanswerable to those it governs simply left over from medieval conceptions of masters and servants, kings and their subjects? There are rational explanations for corporate law's tolerance of nepotism and insider dealing that we would call corruption in government—but are the explanations good enough to justify the wide gap between the norms of the public and corporate sectors?

Similarly, we will need to begin the process of defining the fundamental rights every citizen should be able to assert against potentially overbearing corporate power. Those rights will look remarkably like the classic eighteenth century rights against absolute government: rights to a private space exempt from the demands of the public sphere; rights to speak, dissent, and follow our consciences in matters of religion, politics and aesthetics; and, above all, the right to be included within the corporate conception of the common good. They will also draw from long-standing understandings of the minimum requirements of good government: a degree of openness, competing or divided powers, the predictable and neutral decision making we call the rule of law, and, most radically, some right to be represented among the decision-making bodies.

Charles Reich famously suggested that property rights could be expanded to create new zones of freedom.¹⁷⁰ This Article suggests the opposite: that we need to replace existing claims of corporate officials and investors to property rights in their offices and the associated perquisites with republican and democratic concepts, much as we did in the government sector at the beginning of the modern era. Reich urged transforming propertyless employees into owners; I urge, in contrast, transforming the "servants" of agency law into something closer to citizens.

Courts that see corporations as citizen-like have routinely ignored the actual language of the Constitution in order to

169. Cf. MONTESQUIEU, *supra* note 14 (outlining the importance of separation of powers).

170. Reich, *supra* note 54.

create corporate rights with no textual basis.¹⁷¹ Were courts to accept that bureaucratic business corporations are more analogous to government agencies than human individuals, they would find the same language to clearly hold the opposite.

This does not mean, of course, that we should suddenly decide to deny corporations their day in court or that we should authorize unlimited monitoring of every corporate communication. Our business corporations are useful institutions, and we ought to respect the rules that make them useful. I see no reason to fear that we cannot do so by ordinary legislation. Indeed, given the extraordinary influence our corporations now have on our lives, the real fear should be the reverse. I see no basis for fearing that the people will rise up in some populist rebellion, encouraging legislatures to strip corporations of the legal rights that make them useful.

Rather, the real issue is that we have not even begun the process of bringing corporate governance into the modern era.

IV. SUMMARY: THE IMPLICATIONS OF CORPORATE POWER

It is time, then, to begin to think about when and whether we should use in corporate governance the concepts of separation and balance of powers we learned from Montesquieu.¹⁷² Do we need a democratically elected board to balance the plutocratically elected one we have now? Would some companies behave in a more socially useful way if they had ombudsmen structures to serve some of the functions of a loyal opposition in parliament, separation of powers, or a free press? Are there lessons of federalism for corporate law—should we have local governance over local parts of the company, perhaps in the form of elected councils like a faculty meeting or a German workers council, and if so, with what authority? The collapse of the US union movement in the public sector eliminated our primary countervailing power to the stock market's pressures of short-term profit and executive self-dealing; do we need to revive it or find a replacement? Corporate power overlaps and conflicts with state and national authority; is it time to incorporate corporations into the long-standing debates about conflicting claims between multiple

171. See *supra* note 6.

172. MONTESQUIEU, *supra* note 14.

law-making institutions?¹⁷³

We should also be considering the basic lessons of liberal democracy since the eighteenth century. Most of us have no vote for our corporate governors, and even those that own shares vote only as representatives of invested wealth, not as consumers, producers, or citizens.¹⁷⁴ Even without constitutionally protected lobbying and electioneering rights, or Second Amendment rights to create private armies, our business corporations will remain major influences on our politics. Acemoglu and Robinson have recently reminded us of the ancient truth that elites can often profit even as they destroy the economy and the lives of those beneath them.¹⁷⁵ In politics, the only effective method we have discovered for avoiding this process is democracy.¹⁷⁶ Would we be better off adding some democracy to our multinational corporations as well?¹⁷⁷

Employees, during the work day, often lack the most basic rights of American citizens. The rule of law, in the governmental sphere, helps to ensure that officials may not use power in arbitrary ways to enhance their own power rather than the public good. We expect that rules requiring consistent application of standards will tame power and protect subjects. Corporate law has no equivalent. Instead, executives control

173. See, e.g., Babylonian Talmud, *Bava Kama* 113a-b (“[T]he law of the land is the law.”), discussed in MICHAEL WALZER, MENACHEM LORBERBAUM & NOAM ZOHAR, EDS., *THE JEWISH POLITICAL TRADITION: VOLUME 1 – AUTHORITY* 433–34 (2000); Mark 12:17 (“[R]ender unto Caesar what is Caesar’s.”); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); Heather K. Gerken & James T. Dawson, *Living Under Someone Else’s Law*, 36 DEMOCRACY: A JOURNAL OF IDEAS 42 (2015).

174. Most shares are controlled by fiduciaries with a perceived obligation, enforced by cultural norms, market imperatives and, sometimes, law, to vote on behalf of the *cestui-qui*, which ordinarily is interpreted to mean to pursue the maximum share value regardless of other values the human beneficiaries may hold. This is true even when the owner is an institution profoundly dedicated to values other than profit maximization—see, for example, Harvard’s official position that its endowment should be managed without regard for the values pursued by the remainder of the organization, purely in order to maximize its size.

175. See ACEMOGLU & ROBINSON, *supra* note 35.

176. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that principle of one man one vote is fundamental). *But see*, *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (overturning key provisions of Voting Rights Act).

177. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1053 (2008).

their subordinates with no constraints of consistency. Agency law holds that an agent must obey the direction of his or her principal,¹⁷⁸ while the doctrine of employment at will allows an employer to remove any employee for any reason.¹⁷⁹ Few workplaces provide for appeals outside the chain of command and the law never requires it. Due process and basic fairness are not parts of many workplaces.

In the public sector, we are certain that criticism is vital to keep officials from hubristic calamity, and we know that powerful decision makers often insulate themselves by listening to closed groups of advisors who agree with them. Accordingly, we guarantee free speech, in part, to increase the probability that decision makers will hear alternative views.¹⁸⁰ In the corporate sectors, however, we do not have any parallel requirements in the law, and few companies (other than universities) have any equivalent as a matter of internal policy. Criticizing the boss, instead, is generally a sure route to exile from the job. We have seen enough foolish decisions by top managers protected from criticism to raise the issue of whether the lessons we long ago learned in the public sector do not also apply to major business corporations.

Free speech, in turn, requires some kind of tenure or civil service-like job protection—a radical change from current law. In politics, the abolition of outlawry was one of the markers of the end of the Middle Ages; democratic governments do not use exile or Gulags as methods of social control.¹⁸¹ Corporations remain entirely free to fire critics. Similarly, no employee has any constitutionally protected expectation of privacy from a private sector corporate employer, however large; the state action doctrine exempts non-governmental actors from the restrictions of the Bill of Rights and Fourteenth Amendment.¹⁸²

178. RESTATEMENT (THIRD) OF AGENCY, § 1.01 (AM. LAW INST. 2006).

179. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 54:39 (4th ed. 2001).

180. See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1949); MILL, *supra* note 19. But see Alien & Sedition Acts, 1 Stat. 570, 596 (1798) (restricting rights of dissent now recognized as core components of freedom of speech and conscience) (condemned in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273–77 (1964)).

181. See, e.g., MELISSA SARTORE, OUTLAWRY, GOVERNANCE, AND LAW IN MEDIEVAL ENGLAND (2013).

182. *The Civil Rights Cases*, 109 U.S. 3, 25–26 (1883) (holding that the Fourteenth Amendment does not reach “private wrongs” and overturning the Civil Rights Act of 1875). See, e.g., Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV.

Generally, courts applying common law have suggested that the employer, not the employee, has rights in company-owned computers, email servers, offices, and desks; of course, this can be changed by statute.¹⁸³

Private corporations are free to spy on our home computer use or to use information they have gathered to interfere with our ability to get credit, rent homes, or find jobs, in ways that we would never allow a government agency to do. Yet the government is ultimately answerable in elections, while corporations such as Doubleclick and Experian are answerable to no one.

The rights in question are rarely timeless. Rights are often thought of as abstract principles applicable without regard to context, although generally they are more properly specific examples of a general commitment to the notion that government is for all the people and the national good includes the good of all the people. In the corporate sphere, similarly, the most important task is not to establish specific, timeless rights. The rights we need will vary with the circumstances—provided that we have rejected the current law's permission for business corporations to treat us in an essentially exploitative way. Under the dominant current law, a corporation is better off if it convinces its employees to work harder for less pay or its consumers to pay higher prices than necessary, much as a colonial power considers itself better off if it is able to extract

1441 (1982) (describing state action doctrine). While state employers are restricted by the Fourth Amendment, in practice the Court has been deferential to employer claims. *See, e.g., City of Ontario v. Quon*, 560 U.S. 746 (2010) (holding that search of employee's text messages was warranted where motivated by a legitimate employment-related purpose); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (holding that while search by governmental employer of employee's office and desk was subject to Fourth Amendment, generally employees have little expectation of privacy in the workplace).

183. *See, e.g., In re Info. Mgmt. Servs., Inc. Derivative Litigation*, 81 A.3d 278, 289 (Del. Ch. 2013) (generally employer may eliminate any employee expectation of privacy in company email by policy so stating); *Johnson v. C&L, Inc.*, No. 95C6381, 1996 WL 308282, at *5 (N.D. Ill. 1996) (employee may not sue employer for searches in workplace; no expectation of privacy in desk owned by employer); *O'Bryan v. KTIV Television*, 868 F. Supp. 1146 (N.D. Iowa 1994), *aff'd in part, rev'd in part on other grounds*, 64 F.3d 1188 (8th Cir. 1995). *But see K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 636–38 (Tex. App. 1984), *writ refused n.r.e.*, 686 S.W.2d 593 (Tex. 1985) (holding that employee had some privacy rights in locker where employee supplied lock). *Cf., O'Connor*, 480 U.S. at 732 (Scalia, concurring) (noting that “searches to retrieve work-related materials or to investigate violations of workplace rules . . . are regarded as reasonable and normal in the private employer context”).

more from the colonized people. Instead, we ought to commit to the principle that the good of the corporation means the good of the people who participate in it or depend on it, just as the good of the state means the good of its citizens.

One aspect of this reconception is to see that employees are not a corporate cost but, rather, one of the business's purposes or goals. But this need not mean that employees ought to have property rights in their jobs, as Charles Reich famously proposed,¹⁸⁴ or citizen-like rights to continued membership in the firm.¹⁸⁵ Far better would be a system that reduced the cost of losing a job by, for example, countercyclical measures designed to guarantee a full-employment economy and separating employment from essential social services that are currently (in the United States) tied to it, such as medical care, union membership, and retirement pensions. Given those background rules, the inflexibility of property would be far less attractive than, for example, replacing the agency law presumption of employment-at-will with a rule requiring that termination be based on articulated grounds in good faith.

What we need is a genuine political debate—in the press and the blogs and the legislatures, not the courts—to apply the well-understood lessons of liberal republican government to the remaining frontier. To take back our largest companies from the officials who control them—both in the boardroom and on the trading floors—and to turn them to public service instead of the enrichment of an ever-shrinking few, will take new norms and new ideas and new laws. But that is our mission. The survival of the middle class may depend on it.

V. A PROGRAM FOR REFORM: EXTENDING THE EIGHTEENTH CENTURY LIBERAL REVOLUTION TO CORPORATIONS

The following sections list, without development, a series of areas in which re-conceptualizing corporations as state-like entities within our rights-based tradition might lead to significant legal changes.

184. Reich, *supra* note 54.

185. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding loss of citizenship to be an unconstitutionally cruel punishment because it is the “total destruction of the individual’s status in organized society”).

A. *Property Rights*

Current law is clear that neither managers nor directors may claim ownership rights in the corporation; however, they increasingly treat their offices as a form of property.¹⁸⁶ Similarly, corporate law bars shareholders from treating the corporation as shareholder property, but popular ideology often treats shareholders as “owners” and demands that firms be operated in the interest of imaginary shareholders with no other interests or values.¹⁸⁷

Accordingly, we must establish (outside the law books) that corporate CEOs, like government agency heads, are servants, not masters, of those they lead. Top executives no more produce the corporation’s product than a king does a country’s or a general an army’s, and they have no more claim to be paid as if they did than does the nation’s CEO.

In the political sphere, we abolished the aristocracy and limited the ability of officeholders to use their office to get rich. The next step is to extend the anti-corruption principle to the corporate sector—through maximum wage laws, changing corporate law’s tolerance for managers’ self-interested negotiation, and reviving high taxation levels on extraordinary pay.

B. *Equality*

Since Napoleon, at least, we have recognized that leaders who are closer to the people lead better. These insights have been lost in our corporate sector. We need significantly higher minimum wages for those at the bottom. For the middle, we ought to separate critical social services, such as medical care, education, retirement, early child care, and disability insurance, from jobs, in order to make labor more mobile. At the top, we should limit the ratio of CEO pay to ordinary employee earnings and to put an end to special executive

186. In the sense that top executives and directors increasingly grant themselves levels of pay and other prerequisites that are so high that it is implausible that they are merely payment for services rendered. When CEOs are paid millions of dollars a year, they are receiving a share of profits, not a professional’s hourly rate. This is appropriate for owners, but not for agents. On CEO pay, see AFL-CIO, *Executive Paywatch*, <http://www.aflcio.org/Corporate-Watch/Paywatch-2015> [<http://perma.cc/FFD6-QECD>].

187. See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

dining rooms, bathrooms, and jets.¹⁸⁸

C. *Political Speech, Lobbying, and Electioneering*

Business corporations—as opposed to membership organizations—should have no rights under the First Amendment. This is a simple matter of basic capitalist economics: organizations organized under laws designed to cause them to pursue profit have no business attempting to change the rules that determine how they profit.

Political participation, expression, and freedom of expression are rights of people. Restricting business corporations in this way should not limit the speech—or even the political spending—of citizens in any way. Our law provides for other forms of organizations for those purposes.

Anyone should be free to join or contribute to membership organizations, incorporated or otherwise, that are created to participate in political debate. However, to the extent that these organizations have assets of their own (separate from the assets of their members) and wish to use those in order to influence our politics, they ought to be required, at a minimum, to have some degree of internal democracy. Just as important as voice is exit:¹⁸⁹ organizational spending that is funded by voluntary contributions from members who will leave if the organization strays from their goals, is clearly entitled to more respect than funding that derives from sales to consumers who purchase based on non-ideological concerns. The American Automobile Association, for example, might be classified as a business corporation rather than a protected membership organization for these purposes since its primary funding comes from sales of insurance rather than contributions by citizens supporting its political stances.¹⁹⁰

D. *Artistic and Expressive Speech*

Individual or group authors do not lose their individual

188. See generally, LASCH, *supra* note 35 (pointing out problems arising from elite withdrawal from ordinary middle-class institutions).

189. HIRSCHMAN, *supra* note 47 (describing use of “exit,” i.e., leaving the institution, as an alternative form of institutional control to “voice,” i.e. voting and similar mechanisms).

190. See J.S. Hirsch, *Bumpy Ride: Hired to Rev Up AAA, an Outsider Discovers Changing it Is Tough*, WALL STREET J., Aug. 30, 1994, at A1.

speech rights by associating or being employed. Corporate publishers should remain free to honor any agreements respecting payment for resulting litigation. In practice, this means that publishers ordinarily will be able to assert the First Amendment rights of their authors—but the law ought to be clear that the corporate entity's rights are purely derivative. Sometimes, we can protect the artistic or political freedom of individuals by protecting the entities which employ them or which they join—but the connection is not automatic. There is no reason why the writing of a New York Times publicist, paid to promote whatever position management believes is in the interests of the corporation or its shareholders, should be entitled to the same protection as the essays of a journalist using the New York Times as a vehicle to disseminate his or her own views.

E. Commercial Speech

Commercial advertising is an economic activity that ought to raise no constitutional issues, contrary to current law. The question of whether to ban cigarette advertising is a subset of whether to ban cigarettes. The First Amendment should not be distorted to preclude legislatures from regulating our economy. Often, a society made up of people with diverse goals and values will seek compromises; the freedom and tolerance values of the First Amendment ought to encourage—not ban—our tolerating unpopular or disfavored activities while barring advertising them.

F. Expressive and Artistic Speech, Rights of Conscience, Freedom of Exercise, Right to Dissent

Statutes may, and often should, extend individuals greater protection than the bare First Amendment. Most realistic protections of freedom of speech and conscience require institutional commitments and frameworks that are better suited to legislative, rather than judicial, regulation.

Large business corporations are an important site for citizens' personal and political expression—at least as important as "Main Street" or the proverbial soap box in the public square.

Legislative improvements to protect speech rights at the

workplace begin with full-employment policies that make it easy for citizens to find suitable jobs, while separating essential insurance services such as retirement and medical care from employment as much as possible. As has long been a commonplace, the more dependent individuals are on particular employers, the less independent they can be in thought and action.

To preserve freedom of dissent, legislatures should establish a "good faith" requirement for termination, rules barring termination or retaliation against employees for actions irrelevant to their job performance, standards—similar to those used in academia and the press—distinguishing employee positions from corporate positions, or some form of limited tenure on good behavior.

Large business corporations should be expected, or required, to have institutional structures for creating and communicating contrarian views outside the ordinary line of command, equivalent to the role of a free press in ordinary politics. These might include ombudsmen's offices, parallels to the GAO, worker's councils in the German style, open meetings rules or FOIA access to documents to facilitate press, employee and investor access to internal decision making, limits on "trade secret" doctrine in the interests of "sunshine," and corporate board members who are democratically elected by nonshareholder corporate participants, such as consumers or employees.

G. Employee and Consumer Privacy

Legislation should establish limited property or privacy rights protecting employee workspaces and work product. Corporate employers, like government agencies, should be required to have identifiable cause before commencing surveillance: the general warrant is just as destructive of freedom when employed as an agent of private power as of the king's.

Consumers ought to have property rights in their own information and computers so that businesses wishing to use that information must obtain a license to do so. More sophisticated reform might include a royalty system to assure payment to consumers when their information is used to generate profits for others.

H. Due Process

Large corporations should be expected or required to provide adjudication systems with some semblance of independence and separation of supervisory and adjudicative functions.

Corporations that publish rumors about customers or employees, including through credit reporting and similar agencies, should be liable in libel or its equivalent for injuries they cause by inaccurate or misleading statements. This responsibility should extend as well to any credit agency that republishes the liable.

Employees should have some right to retain their jobs on good behavior. Employment at-will should be replaced by a principle that termination may be only in good faith and for articulable reasons.

I. Democracy

Basic democratic values require that employees have some voice in major investment decisions, perhaps along the lines of the German dual board and worker's council systems.

The division of labor between government and business corporations is useful and should be maintained; economically important corporations will be more successful if they can avoid having internal partisan battles. However, we need not decide this in the abstract: any business corporation (which funds itself by selling a product other than politics, political influence, or ideology) ought to be required to choose to establish itself as a "political corporation" or an "apolitical corporation."

Political corporations would be entitled to intervene in politics, electioneer, lobby, and generally advocate for corporate positions. However, in return they should be required to adopt internal decision-making processes that reflect minimally democratic standards. Just as we do not permit localities to become dictatorships or place their public offices up for auction, so too we should bar political corporations from doing so. At a minimum, a suitable electorate (presumptively including employees and long-term investors) must be allowed to vote, on a one-human, one-vote basis, for a representative body that will

have the ultimate say regarding the corporate position.¹⁹¹ Similarly, any non-profit corporation funded largely by donations from like-minded citizens (not other organizations, an endowment, or customers seeking to purchase a product or service at market rates) will be responsive to its donor constituency even without internal democracy.

Apolitical business corporations, in contrast, should be barred from political advocacy. Because they opt out of political participation, they may have a technocratic leadership largely insulated from value conflicts among the rank and file, much as contemporary corporate law permits. For an apolitical corporation to intervene in politics as a corporation should be understood to be a deeply anti-democratic form of corruption: officials using the power of their office and money not their own in order to improperly interfere in politics. Human participants, of course, would remain entirely free to politically participate in other roles (including a PAC organized as a separate, affiliated, political organization, as under current law).

191. I have drafted proposed state and federal statutory language to put this proposal into effect that, in my opinion, ought to pass Supreme Court muster even under current precedents. See Daniel J.H. Greenwood, *After Citizens United: Extending the Liberal Revolution to Corporations* (Hofstra Univ. Legal Studies Research Paper No. 2015-11), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2647478 [<http://perma.cc/32TT-GPD9>].

