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Trix Are Not Just for Kids: The Supreme Court's Clumsy Handling of the Public-Private Distinction and Its Legislative Impact on Breakfast and Beyond

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NOTE

TRIX ARE NOT JUST FOR KIDS: THE SUPREME COURT'S CLUMSY HANDLING OF THE PUBLIC-PRIVATE DISTINCTION AND ITS LEGISLATIVE IMPACT ON BREAKFAST AND BEYOND

I. INTRODUCTION

"Silly Rabbit, Trix are for kids."[1] It is more than just a slogan: General Mills believes it is constitutionally protected speech under the First Amendment.[2] But if Trix are for kids, recent Supreme Court decisions granting expansive constitutional protections to corporations are for adults.[3] As a result, General Mills's claim is less absurd than it would have seemed a generation ago. These decisions will continue to distort First Amendment doctrine in this fashion unless legislators and the Supreme Court embrace an understanding of the public-private distinction that better reflects the values of the U.S. Constitution.[4]

Anxiety about corporate power is more than an academic or policy issue. The tensions between government, corporations, and individual

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1. *Trix*, GENERAL MILLS, http://www.generalmills.com/en/Brands/Cereals/Trix.aspx (last visited Nov. 5, 2012) (internal quotation marks omitted).

2. Martin H. Redish, Childhood Obesity, Advertising and the First Amendment 1 (June 8, 2011) (unpublished White Paper), *available at* http://www.gmaonline.org/file-manager/Health_Nutrition/childhood_advertising__firstamendment.pdf (writing on General Mills's behalf in response to a solicitation from the Interagency Working Group on Food Marketed to Children regarding their proposal for restrictions on food advertising to children).

3. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748, 1751 (2011) (arguing that the efficiency interests of arbitration controlled); Fed. Commc'n Comm'n v. AT&T Inc., 131 S. Ct. 1177, 1182-83 (2011) (distinguishing between "person," which applies to natural persons and corporations, and "personal," which only applies to natural persons (internal quotation marks omitted)); Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010) (overruling *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), and "return[ing] to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity").

4. *See, e.g.*, Reza Dibadj, *How Does the Government Interact with Business?: From History to Controversies*, 5 ENTREPRENEURIAL BUS. L.J. 707, 729 (2010) (suggesting a constitutional amendment explicitly precluding corporations from constitutional protection).

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citizens have made their way into pop culture too, from the megacorporations in William Gibson's *Neuromancer*[5] to the extensive reach of the Umbrella Corporation in the Resident Evil franchise.[6] Such scenarios are not limited to fantasy, either.[7] Carnegie Steel hired the Pinkerton National Detective Agency to send 300 armed men to break up a union strike at the Homestead Steel Works in 1892.[8] Today, corporations employ more than just private security forces: companies in New York City hired off-duty police officers to exercise police power against "Occupy Wall Street" protesters last fall.[9]

Part II of this Note details how the Supreme Court granted constitutional rights to corporations over a series of landmark cases. It describes four different ways to draw the public-private distinction in order to better understand the Court's reasoning. Part III examines recent decisions that have either extended or solidified constitutional protections for corporations against the citizenry. The decisions are rooted in a tradition that places corporations on the same side of the public-private divide as individuals, and this tradition is shaping future legislation, such as the Interagency Working Group on Food Marketed to Children's proposed guidelines concerning the advertising of food to children. Part IV re-examines these cases through the lens of the traditional liberal democratic understanding of the public-private

5. WILLIAM GIBSON, NEUROMANCER (1984). Megacorporations are massive conglomerates that have their own private armies. *See generally id.* Vincenzo Natali will direct a forthcoming film adaptation. Matt Goldberg, *Vincenzo Natali's Adaptation of* Neuromancer *Moves into Pre-Production with Eye Towards Q1 2012 Start Date*, COLLIDER (May 19, 2011, 2:07 PM), http://www.collider.com/neuromancer-movie-vincenzo-natali-pre-production/91780/.

6. RESIDENT EVIL: APOCALYPSE (Constantin Film 2004). In the film, the Umbrella Corporation exercised state power by shutting down bridges to and from Racoon City, deploying and directing police forces, wielding military power by dropping a nuclear warhead on the city, and exerting draconian control over the press by whitewashing the zombie disaster and reframing it as a meltdown of the nuclear plant. *Id.* The Resident Evil franchise consists of twenty video games, five live-action films, and numerous licensed consumer products. *Media from Resident Evil (2002)*, INTERNET MOVIE DATABASE, http://www.imdb.com/find?s=all&q=resident+evil (last visited Nov. 5, 2012); *Resident Evil*, WIKIPEDIA, http://en.wikipedia.org/wiki/Resident_Evil (last visited Nov. 5, 2012).

7. *See generally* PAUL KRAUSE, THE BATTLE FOR HOMESTEAD, 1880–1892: POLITICS, CULTURE, AND STEEL (1992) (discussing the Homestead Strike in which Carnegie Steel hired a private army to remove union steelworkers).

8. *Id.* at 15; *see also* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492–PRESENT 276-77 (HarperCollins 2005) (1980). Before landing, Pinkerton's Captain Heinde announced from his river barge: "We don't wish to shed blood, but we are determined to go up there and shall do so. If you men don't withdraw, we will mow every one of you down and enter in spite of you." KRAUSE, *supra* note 7, at 18.

9. Pam Martens, *Financial Giants Put New York City Cops on Their Payroll*, COUNTERPUNCH (Oct. 10, 2011), http://www.counterpunch.org/2011/10/10/financial-giants-put-new-york-city-cops-on-their-payroll/.

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distinction and proposes that this framework better preserves the democratic values that shaped our Constitution. Finally, Part V concludes.

II. HISTORY OF THE PUBLIC-PRIVATE DISTINCTION

A line of cases have granted a series of constitutional rights to corporations.[10] From *Trustees of Dartmouth College v. Woodward*[11] and *Santa Clara County v. Southern Pacific Railroad Co.*[12] to *First National Bank of Boston v. Bellotti*,[13] the Court has been consistent about one thing: expanding the rights of corporate entities.[14] Far from providing liberty against the hand of government power, decisions like *Santa Clara* needlessly constrained regulation and elevated the rights of "fictional" persons above real individuals.[15] This expansionist agenda dismissed traditional democratic ideology.[16] By focusing on features of corporate power, as distinguished from government power, the Supreme Court aligned corporate entities closer to natural persons.[17] It looked at identity rather than power.[18] But protections for natural persons against aggregation of power is a central concern of traditional democratic theorists.[19] Section A looks at several key historical cases that expand

10. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 581-82, 664-65 app. I (1990) (listing a "Corporation's Bill of Rights").

11. 17 U.S. (4 Wheat.) 518, 634, 647-48 (1819) (reading corporations into the Constitution by virtue of the Contracts Clause in Article I protecting corporate charters); *see also* U.S. CONST. art I, § 10, cl. 1.

12. 118 U.S. 394, 396 (1886) (granting corporations Due Process and Equal Protection under the Fourteenth Amendment by reading "person" to include corporations).

13. 435 U.S. 765, 767 (1978) (holding that a Massachusetts law restricting corporate election spending violated the Constitution); *see also* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1017 (1998) [hereinafter Greenwood, *Essential Speech*]; Mark Tushnet, *Corporations and Free Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 253, 256 (David Kairys ed., 1982).

14. *See* Mayer, *supra* note 10, at 664-65 app. I.

15. *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 33 (2006) ("The 'corporate-law-as-private-law' assumption subtly and unnecessarily restricts the range of options available to those who search for mechanisms to regulate corporations."); Mayer, *supra* note 10, at 658 ("Equality of constitutional rights plus an inequality of legislated and de facto powers leads inexorably to the supremacy of artificial over real persons.").

16. *See* Mayer, *supra* note 10, at 664-65 app. I.

17. *See, e.g.*, *Santa Clara*, 118 U.S. at 396.

18. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 902-03 (2010) (addressing the *Bellotti* Court's holding that legislators may not restrict speech based on the identity of the speaker); *see Santa Clara*, 118 U.S. at 396. Part III.A, *infra*, explores the issue of identity in more depth, particularly as it relates to modern cases such as *Citizens United*.

19. *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 35 (James W. Ellington trans., Hacket Publ'g 3d ed. 1993) (1785) ("Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will."); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 3–4 (C. B. Macpherson ed.,

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protection of corporate rights under the Constitution. Section B contrasts the modern corporate form with its historical antecedent and discusses how traditional liberal democratic theorists approach issues of political rights and power. Section C introduces four different ways to draw the public-private distinction in order to provide a foundation to analyze recent Supreme Court decisions and upcoming legislation in Part III.

A. Expanding Corporate Protection Under the Constitution

The Supreme Court used *Dartmouth College* to begin to free corporations from legislative control with the "novel" approach of allowing corporations to have a private status.[20] The Court distinguished Dartmouth College from a municipality—both corporations.[21] This distinction was crucial.[22] Municipal corporations, said the Court, derived from sovereign authority; Dartmouth did not.[23] Municipal corporations fulfilled government functions; Dartmouth did not.[24] This distinction would later cast its shadow over the state action cases.[25] The decision calibrated a new line in the public-private divide.[26] The Court's purpose, Professor Morton Horwitz wrote, was "to free the newly emerging

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Hackett Publ'g 1980) (1690) ("T[o] understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a *state of perfect freedom* to order their actions . . . ."); JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publ'g 1978) (1859) (distinguishing individuals from all other powers that may threaten them); JEAN-JACQUES ROUSSEAU, *On the Social Contract*, *in* BASIC POLITICAL WRITINGS 139, 141 (Donald A. Cress ed. & trans., Hackett Publ'g 1987) (1762) ("Man is born free, and everywhere he is in chains.").

20. Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982) [hereinafter Horwitz, *The History of the Public/Private Distinction*] (discussing the rise of the public-private distinction from the English monarchy through the post-World War II period); *see also* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 609, 647 (1819); Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (proposing that the public function doctrine originated in *Dartmouth College* where the Court decided that the college trustees did not fulfill any duty that "flow[ed] from" government power (quoting *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 634) (internal quotation marks omitted)).

21. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 634, 647 (1819); Friendly, *supra* note 20, at 1290 ("Dartmouth, Chief Justice Marshall explained, was not like a municipal corporation, the charter of which the legislature could amend at will.").

22. *See Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 634; Friendly, *supra* note 20, at 1290.

23. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 634, 647; *see* Friendly, *supra* note 20, at 1290.

24. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 647 (holding that Dartmouth did not "fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant"); *see* Friendly, *supra* note 20, at 1290.

25. *See* Friendly, *supra* note 20, at 1290. Chief Justice Thurgood Marshall looked at whether Dartmouth trustees and officers performed any duty ordinarily performed by the government, and Friendly argues that this is the precursor to the public function doctrine "developed in the context of the contracts clause rather than of 'state action.'" *Id.*

26. Horwitz, *The History of the Public/Private Distinction*, *supra* note 20, at 1425 (describing contemporaneous efforts to privatize corporations).

business corporation from the regulatory public law premises that had dominated the prior law of corporations."[27]

The Supreme Court in *Santa Clara* widened the umbrella of Fourteenth Amendment protection to include corporations.[28] It did so dogmatically, declaring that corporations were "persons" for some sections of the Fourteenth Amendment by judicial fiat, with no explanation or argument.[29] Chief Justice Morrison Waite told the attorneys:

> The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that is does.[30]

While *Santa Clara* ushered in a number of similar cases that established corporate protection under the Fourteenth Amendment's Due Process and Equal Protection Clauses, it contributed to narrowing the Amendment to avoid its intended purpose of protecting former slaves from takings of life, liberty, and property by states.[31] In fact, in the half-century following *Santa Clara*, the Fourteenth Amendment was used on behalf of corporations (as opposed to African-Americans) by a ratio of more than a hundred to one.[32]

In a withering dissent in *Wheeling Steel Corp. v. Glander*,[33] Justice William Douglas attacked *Santa Clara*'s "distortion" of the Fourteenth Amendment and addressed both the meaning and intention of the original text.[34] Justice Douglas reminded the Court that the "evil to be

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27. *Id.* (continuing that "municipal and trading corporations . . . were regarded as arms of the state").

28. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

29. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 67 (1992) [hereinafter HORWITZ, THE TRANSFORMATION OF AMERICAN LAW]; Tushnet, *supra* note 13, at 255-56 (internal quotation marks omitted); Mayer, *supra* note 10, at 581 (interpreting the Court as decreeing "that a corporation is a person for purposes of the fourteenth amendment").

30. Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-77 (1949) (Douglas, J., dissenting) (internal quotation marks omitted) (referring to Chief Justice Waite's speech in *Santa Clara*). The *Santa Clara* Court did not include his words in their opinion, and the opinion did not address the issue at all. *Santa Clara*, 118 U.S. at 396.

31. Mayer, *supra* note 10, at 589; *see also Wheeling*, 337 U.S. at 576-77 (Douglas, J., dissenting) ("[T]he purpose of the [Fourteenth] Amendment was to protect human rights—primarily the rights of a race which had just won its freedom.").

32. *See* Mayer, *supra* note 10, at 589; THE CORPORATION (Big Picture Media Corporation 2003) (reporting that between 1890 and 1910, of the 307 cases brought under the Fourteenth Amendment, 288 were brought by corporations and only nineteen by African-Americans).

33. 337 U.S. 562.

34. *Id.* at 576-81 (Douglas, J., dissenting) (discussing the semantic and historical context of

remedied" by the Fourteenth Amendment and the Equal Protection Clause was a human rights issue.[35] Congress never intended it to shield corporations.[36] Justice Douglas hashed through each phrase in the amendment: "corporations are not 'born or naturalized.' Corporations are not 'citizens' . . . . It has never been held that they are persons whom a State may not deprive of 'life.'"[37] The Fourteenth Amendment applies to "natural and not artificial persons."[38] *Santa Clara* represents a significant expansion of corporate power by aggressive constitutional interpretation with little basis in the text, structure, history, or intent of the Amendment.[39]

Lochner v. New York[40] declared that corporations and other employers had the right to challenge legislative regulation of workplace health and safety as violations of the employees' constitutional right to Due Process.[41] Justice Rufus Peckham's decision effectively struck down as unconstitutional the New York Bakeshop Act of 1895, which limited the number of hours a baker could work for his employer.[42] Because the statute "interfere[d] with the right of contract," it "deprive[d] [a] person of life, liberty, or property, without due process of law," in accordance with the Fourteenth Amendment.[43] This sanctification of supposedly private contracts provided corporations with a "powerful wedge" to use to challenge government regulation.[44] The

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the Fourteenth Amendment).

35. *Id.* at 577 ("[T]he purpose of the Amendment was to protect human rights . . . . 'The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied . . . .'" (quoting Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 86 (1938) (Black, J., dissenting) ("[T]he people were not told that the states of the South were to be denied their normal relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations."); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873)).

36. *Wheeling*, 337 U.S. at 578 (Douglas, J., dissenting) (quoting Arthur Twining Hadley that, "It is doubtful whether a single one of the members of Congress who voted for it had any idea that it would touch the question of corporate regulation at all." (internal quotation marks omitted)); *Conn. Gen. Life Ins. Co.*, 303 U.S. at 86 (Black, J., dissenting) ("The records of the time can be searched in vain for evidence that this amendment was adopted for the benefit of corporations.").

37. *Wheeling*, 337 U.S. at 579 (Douglas, J., dissenting).

38. *Id.* (quoting Ins. Co. v. New Orleans, 13 F. Cas. 67, 68 (C.C. D. La. 1870)) (internal quotation marks omitted).

39. *Id.* at 581 ("It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people.").

40. 198 U.S. 45 (1905).

41. *Id.* at 53 (finding that government regulation violated a corporation's Due Process under the Fourteenth Amendment).

42. *Id.*; Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404, 408 (2005) (noting that the legislature passed the law unanimously).

43. U.S. CONST. amend. XIV, § 1; *Lochner*, 198 U.S. at 53 (finding that government regulation violated a corporation's Due Process under the Fourteenth Amendment).

44. *See* Mayer, *supra* note 10, at 588; *see also* GREENFIELD, *supra* note 15, at 30 (proposing

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Lochner Court viewed employment contracts as divorced from politics and the contractual relationship between employer and employee as a neutral negotiation between parties of equal bargaining power.[45] Fear of labor's influence on the use of legislative power to weaken the forces that protected wealth also shaped the Court's decision.[46] When labor "turn[ed] to government for help" against "concentrated corporate power," *Lochner*-era doctrine viewed corporations as "the oppressed."[47]

Bellotti extended freedom of speech to corporations.[48] A Massachusetts statute prohibited banks and other corporations from contributing to election referenda beyond those which directly affected the corporations themselves.[49] Rather than proving a positive, namely that corporations have protection under the First Amendment, the Court focused on the lack of a negative, that the appellee had not shown that corporate political speech undermined speech of private citizens.[50] Although the Court assumed, rightly, that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech,"[51] it assumed, incorrectly, that a corporation's political speech was taken for granted and required a proof against the weight of its influence.[52] The decision flatly ignores the effect on individual speech, which subsequently suffers the risk of corporate speech drowning it out.[53]

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that *Lochner*'s echoes resonate even today).

45. *See* GREENFIELD, *supra* note 15, at 34-36 ("Contract and property law are no more neutral, private, or prelegal than statutory law."). *But see generally* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) (challenging the notion that *Lochner* was an exercise in class legislation).

46. *See* Kens, *supra* note 42, at 417-18 (looking at the Court's concern for business interests during the *Lochner* era).

47. *See id.* at 418.

48. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978) (holding that a Massachusetts law restricting corporate spending on elections violated the Constitution); Tushnet, *supra* note 13, at 256; Greenwood, *Essential Speech*, *supra* note 13, at 1017.

49. *Bellotti*, 435 U.S. at 767-68.

50. *See id.* at 789 ("If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.").

51. *Id.* at 777.

52. *See id.* at 789 ("[T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts . . . ."); Mayer, *supra* note 10, at 653 ("[T]he decision ignores the political power of corporations to wield undue influence on referend[a] . . . [and] . . . that corporate contributions might lower the usefulness, while raising the volume, of the debate.").

53. *See* Mayer, *supra* note 10, at 658 ("The corporate exercise of [F]irst [A]mendment rights frustrates the individual's right to participate equally in democratic elections . . . ."); *see also* HARLAN ELLISON, *The Deathbird*, *in* DEATHBIRD STORIES 302, 302 (1975) ("Provisos of equal time are not served by one viewpoint having media access to two hundred million people in prime time

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B. Traditional Liberal Democratic Theorists on Power

Modern corporations do not share the same limitations early corporations did.[54] Two hundred years ago, many corporations had limited lifespans, they could not own stock of other corporations, they could not merge or operate in states other than the one that chartered them, they could not spend money on elections, and states granted them limited charters.[55] The *ultra vires* doctrine, now virtually extinct, barred them from doing anything outside of the purposes (often quite narrow) specified in their state-granted charter.[56] This has all changed.[57]

Modern corporations did not exist at the time traditional democratic theorists were writing.[58] They do, however, have similar features to entities that did exist at that time: governments.[59] Traditional liberal democratic theorists focused on how to protect the natural rights of citizens from governmental power.[60] For John Locke and Jean-Jacques

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while opposing viewpoints are provided with a soapbox on the corner."); OWEN M. FISS, THE IRONY OF FREE SPEECH 59 (1996) ("[E]conomics, not technology, [is] the constraining force on the press. The technological revolution . . . may present us with a large number of channels, but as long as they are governed by the market, there remains a risk that coverage will be skewed.").

54. THE CORPORATION, *supra* note 32 (tracing the history of modern corporate personhood).

55. *Our Hidden History of Corporations in the United States*, RECLAIM DEMOCRACY (Feb. 2000), http://reclaimdemocracy.org/corporate_accountability/history_corporations_us.html (looking at the change in the form of corporations throughout the life of the United States).

56. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 188 (1985) [hereinafter Horwitz, Santa Clara *Revisited*]; THE CORPORATION, *supra* note 32 (explaining that at least some state-granted charters included a mandate to serve the public good).

57. Darrell A.H. Miller, *Guns, Inc.:* Citizens United, McDonald, *and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 910-11 (2011); *Our Hidden History of Corporations in the United States*, *supra* note 55; THE CORPORATION, *supra* note 32.

58. Locke and Rousseau wrote in the seventeenth and eighteenth centuries, respectively. *See, e.g.*, LOCKE, *supra* note 19; ROUSSEAU, *supra* note 19. The cases in this Note all take place after their writings. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). The modern corporation dates to the great reform in corporate law at the beginning of the twentieth century. *See* LINCOLN STEFFENS, THE STRUGGLE FOR SELF-GOVERNMENT 209-10 (Joseph J. Kwiat ed., Johnson Reprint Corp. 1968) (1906); Horwitz, Santa Clara *Revisited*, *supra* note 56, at 195.

59. Daniel J.H. Greenwood, FCC v. AT&T*: The Idolatry of Corporations and Impersonal Privacy*, HARV. L. & POL'Y REV. n.53 (Aug. 14, 2011), http://hlpronline.com/2011/08/fcc-v-att-the-idolatry-of-corporations-and-impersonal-privacy/ [hereinafter Greenwood, *The Idolatry of Corporations*] ("Our major business corporations belong on the state side of the classic liberal divide between state and citizen: like the state, they are governance institutions on which we depend but which always threaten to escape our control."); *see also* Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 861 (2001) [hereinafter Greenwood, *Beyond the Counter-Majoritarian Difficulty*] (discussing the shift of "boundaries between state and society, politics and market"); Miller, *supra* note 57, at 891 ("Business corporations in particular possess a degree of coercive power equal to, and occasionally greater than, that of government.").

60. *See* KANT, *supra* note 19, at 35 ("Now I say that man, and in general every rational being,

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Rousseau, the purpose of government was to secure the natural rights of its citizens.[61] The purpose of all other "associations" was to improve the welfare of human beings.[62] Immanuel Kant and John Stuart Mill argued opposite approaches to the problem (deontological and utilitarian, respectively), yet they achieved substantively similar results.[63] For Mill, people created organizations to serve their interests, not the organizations'.[64] For Kant, people were ends and should not be treated as a means to an end.[65]

Protecting the natural rights of natural persons meant protecting them from power centers.[66] Corporations or associations of people were not identified as structures in need of protection.[67] As functions of the actions of natural persons, they were subservient to the rights of natural persons.[68] Power, not identity, was the issue.[69] It so happened that power in the time the traditional liberal democratic theorists were writing was concentrated in government entities, but that is a feature of history, not of the theories themselves.[70]

C. *The Four Public-Private Distinctions*

Semantic frameworks determine how we define words and how we draw distinctions, such as the public-private distinction.[71] A semantic

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exists as an end in himself and not merely as a means to be arbitrarily used by this or that will."); LOCKE, *supra* note 19, at §§ 3–4 ("T[o] understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a *state of perfect freedom* to order their actions."); MILL, *supra* note 19, at 9 (distinguishing individuals from all other powers that may threaten them); ROUSSEAU, *supra* note 19, at 141 ("Man is born free, and everywhere he is in chains.").

61. *See* LOCKE, *supra* note 19, at §§ 3–4; ROUSSEAU, *supra* note 19, at 141.

62. *See* ROUSSEAU, *supra* note 19, at 148; *cf.* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (explaining that "governments are instituted among men, deriving their just powers from the consent of the governed," and in order to secure their rights of "life, liberty and the pursuit of happiness," people may "alter or . . . abolish" this institution).

63. *Compare* LOCKE, *supra* note 19, at §§ 3–4, *and* ROUSSEAU, *supra* note 19, at 141, *with* KANT, *supra* note 19, at 35, *and* MILL, *supra* note 19, at 9.

64. *See* MILL, *supra* note 19, at 9.

65. KANT, *supra* note 19, at 35; *see also* JOHN RAWLS, A THEORY OF JUSTICE 256 (1971) (saying that a person should act according to her "nature as a free and equal rational being").

66. *See* KANT, *supra* note 19, at 35; LOCKE, *supra* note 19, at §§ 3–4; MILL, *supra* note 19, at 9; ROUSSEAU, *supra* note 19, at 141.

67. *See* ROUSSEAU, *supra* note 19, at 148 (writing about associations of people sharply distinguished from individual citizens).

68. *See id.*

69. *See id.*

70. *See* KANT, *supra* note 19, at 35; LOCKE, *supra* note 19, at §§ 3–4; MILL, *supra* note 19, at 9; ROUSSEAU, *supra* note 19, at 141.

71. *See* Janet E. Ainsworth, *Linguistics as a Knowledge Domain in the Law*, 54 DRAKE L. REV. 651, 653-54 (2006) (providing a brief background about linguistics as the field relates to law).

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framework simply describes the relationship between the words we use and their meaning.[72] Choosing amongst semantic frameworks yields different truths in relation to that framework.[73] The framework at issue in this Note is the public-private distinction, the ways to demarcate it, and, subsequently, where the Supreme Court and our legislative branch have placed corporations and citizens. There are four ways to draw the public-private distinction.[74]

The *Santa Clara* view is that governments are public, but corporations and individuals are private and, as such, receive protections against the exercise of government power under the Constitution.[75] While *Santa Clara* harkens back to the nineteenth century and its views almost certainly would not have been shared by Locke or Rousseau in the seventeenth and eighteenth centuries, it endures today in cases like *Citizens United v. Federal Election Commission*[76] and *AT&T Mobility LLC v. Concepcion*.[77] The Court refused to even hear whether or not corporations were persons under the Fourteenth Amendment.[78] No matter that the Court read them as persons under the first clause but not

72. *See id.* at 653.

73. *See* C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 489, 494 (1978) (positing that our choice of legal rules requires us to look at what kind of structure people want in the future); Miller, *supra* note 57, at 915 ("Whether a corporation enjoys some, none, or all of the benefits of a constitutional right depends in large part on the theoretical assumptions the Court makes about corporate personality."). Because previous decisions dictate the Court's theoretical assumptions about corporations, Miller continues, "[o]nce a corporation is deemed a person for one right, reason demands an explanation why it is not a person for another." *Id.*

74. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334, 343-44 (2007) (holding that corporations were public where they filled a role vacated by the government); Daniela Gobetti, *Humankind as a System: Private and Public Agency at the Origins of Modern Liberalism*, *in* PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 103, 103 (Jeff Weintraub & Krishan Kumar eds., 1997) (discussing the formulation of citizens as private contrasted to the institutional body as public, especially as elaborated upon by modern British thinkers); Frank I. Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1344, 1347 (1982) (arguing that the nature of private enterprise to act for itself distinguishes it from the public sphere). *See generally* Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635 (raising difficulties with the traditional binary way of looking at the public-private distinction and proposing a multi-dimensional approach).

75. Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886); *see* Goodman, *supra* note 74, at 1344, 1347 (arguing that the nature of private enterprise to act for itself distinguishes it from the public sphere).

76. 130 S. Ct. 876, 913 (2010).

77. 131 S. Ct. 1740, 1747-48 (2011) (ignoring the disparity in bargaining power between corporations and individuals).

78. *Santa Clara*, 118 U.S. at 396; *see* HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, *supra* note 29, at 67; Horwitz, Santa Clara *Revisited*, *supra* note 56, at 173-74; Mayer, *supra* note 10, at 581; Tushnet, *supra* note 13, at 256.

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under the second.[79] *Santa Clara* classified state-chartered institutions alongside natural persons as private entities deserving protection against the government.[80]

Under the situational view, governments are public, individuals are private, and corporations are private in some situations and public in others.[81] Proponents of this view suggest that there are social spaces that are "neither fully public nor fully private."[82] The public and private sides of the dichotomy remain, but rather than a line splitting them, there is a region of networks or communities that share aspects of one or both of the public and private sides without such a rigid division.[83] Professor Alan Wolfe suggests America's "civil religion"—a civil standard of norms and generalized attitudes—resides in this penumbra between private religions and the First Amendment's very public prohibition against establishing a State religion.[84] Intended to improve on the hard dichotomy of the traditional public-private distinction, however, this framework offers an ambiguous twilight zone wanting of clear definitions.[85]

Under the multidimensional view, X may be private in relation to Y but public in relation to Z.[86] This view holds that the way we have traditionally drawn the public-private distinction is incorrect.[87] Instead we should be looking at the relationship between the parties.[88] This framework has the advantage of skirting complicated categorizations of, for example, shopping malls.[89] It can ignore the tricky issue of whether a space is wholly private or a quasi-public zone where a privately owned

79. Wheeling Steel Corp. v. Glander, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting) ("It requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment.").

80. *Id.* at 576-78.

81. *See* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 334, 343-44 (2007).

82. Alan Wolfe, *Public and Private in Theory and Practice: Some Implications of an Uncertain Boundary*, *in* PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 182, 196 (Jeff Weintraub & Krishan Kumar eds., 1997).

83. *Id.* at 196-97.

84. *Id.* at 199 (internal quotation marks omitted).

85. *See id.* at 196-98 (preferring "collective," "particularistic," and "ambiguous" norms to absolutist public-private rules).

86. *See generally* Schoenhard, *supra* note 74 (raising difficulties with the traditional binary way of looking at the public-private distinction and proposing a multi-dimensional approach).

87. RAYMOND GEUSS, PUBLIC GOODS, PRIVATE GOODS 76, 103 (2001) (proposing not just that the traditional liberal view is a mistake but also that it is part of the problem).

88. Schoenhard, *supra* note 74, at 658 ("[T]he three-dimensional perspective . . . sorts public and private characteristics in relational terms.").

89. *Id.* at 643-44. Schoenhard complains that the "application of the public-private distinction has fallen into a state of troubling ad hocery." *Id.* at 642.

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property is open to the public at large, because it defaults to the relationships between the actors utilizing the property.[90]

The traditional liberal democratic theory view is that governments and corporations are public, and individuals are private.[91] As such, only individuals are entitled to protections against the exercise of government power under the Constitution.[92] While corporations may not have existed in the same way in the seventeenth and eighteenth centuries as they do today, they share enough features of the governmental power structures about which those thinkers were concerned.[93] Like governments (and unlike people), corporations are organizations created *by* people for purely human purposes.[94] Corporations have immortality (or at least no natural death—they are not alive in the sense we use to describe natural persons).[95] The composition of a corporation encompasses many individuals (with the exception of one-person corporations which still retain a multitude of roles—director, shareholder, executive—if not people).[96] Corporations also have no vote.[97]

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90. *Id.* at 643-44.

91. Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1028-29 (1996) [hereinafter Greenwood, *Fictional Shareholders*]; Gobetti, *supra* note 74, at 103. Gobetti explains:

> We are indebted to early modern Natural Law theorists, British ones in particular, for formulating a conception of the "citizen" as the holder of legal powers, and for giving us the notion of harm as the criterion of distinction between private and public *jurisdictions*—that is, between the "private" jurisdiction of the citizen/subject and the "public" jurisdiction of the body that makes decisions for a politically unified group.

Gobetti, *supra* note 74, at 103 (footnote omitted); *see also* Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1838 (1981) [hereinafter *The Corporation and the Constitution*] (observing how traditional liberal democratic theory makes "problematic the idea of corporate constitutional rights").

92. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) (demonstrating that the fictional personhood of a corporation was more fiction than person); *see also* Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1333-34 (1996) (suggesting a wrinkle that corporations may seek protection under the Constitution for private property rights but not for individual liberties).

93. Greenwood, *The Idolatry of Corporations*, *supra* note 59.

94. *See id.*

95. *See id.* at n.24; *see also* Miller, *supra* note 57, at 910-911. Juggling fictional and natural personhood metaphors can lead to confusion (and comedy), like one of Stephen Colbert's political ad parodies during the 2012 Republican presidential primaries that argued: if corporations are people and Mitt Romney carved up corporations for sale, then Mitt Romney is a serial killer. *The Colbert Report* (Comedy Central television broadcast Jan. 15, 2012), *available at* http://www.colbertnation.com/the-colbert-report-videos/405930/january-15-2012/colbert-super-pac-ad---attack-in-b-minor-for-strings.

96. Greenwood, *The Idolatry of Corporations*, *supra* note 59, at n.24; Miller, *supra* note 57, at 910-11.

97. Greenwood, *The Idolatry of Corporations*, *supra* note 59, at n.24; Miller, *supra* note 57, at 910-11.

If, for example, a corporation "speaks" during an election, it is clear that its voice does not belong to those individuals who comprise the corporation.[98] The executives and marketing department are agents, and if they speak, it is by setting aside their personal beliefs in order to serve the corporation's interests.[99] Corporate speech is not merely group speech; it is the speech of a power structure.[100] This structure is built to secure its own interests, not the interests of an individual or group of individuals.[101] Unlike traditional groups which represent the views of their members, a corporation is a fictional entity whose viewpoint has been divorced from the individuals who are its component parts.[102] The corporate stance is to maximize profit.[103] The views of the shareholders and the directors they elect do not count.[104] Moreover, a corporate (group) viewpoint is, at best, redundant to the viewpoint of any one of its members whose individual speech is already protected.[105] Natural persons are individuals, not structures. Corporations and governments are structures. The traditional democratic framework, motivated to secure the rights of natural persons, would lump modern corporations into the public sphere with governments.[106]

Applying different public-private distinctions changes how we look at cases in two ways. First, it may change the way we think a court should have decided the case.[107] Second, it reveals issues of power and inequality that may otherwise be hidden.[108] In cases like *Lochner*,

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98. Greenwood, *Essential Speech*, *supra* note 13, at 1049.

99. *Id.* at 1038.

100. *Id.* at 1033-34.

101. *Id.* at 1033.

102. *Id.* at 1033-34. For further discussion about the distinction between corporations and groups, see *id.* at 1029-48 (arguing that corporation speech is different than the group speech of, e.g., the National Association for the Advancement of Colored People).

103. *Id.* at 1049.

104. *See id.* at 1035-36 ("Not only are the expressed views of the shareholders irrelevant, but their actual interests are as well."). Directors have a fiduciary duty not to what the electing shareholders want them to do but to the corporation itself. *Id.* at 1035.

105. *See id.* at 1038, 1056-57. As Professor Daniel Greenwood noted:

> The actual speakers—the lobbyists, advertising copy writers, lawyers, executives, and publicists who speak on behalf of the corporation—speak as agents, not on their own behalf. That is, their roles demand that they set aside their personal views and act as professionals, seeking the most effective means to promote their clients' views.

Id. at 1038.

106. *See* Goodman, *supra* note 74, at 1344, 1347; Greenwood, *The Idolatry of Corporations*, *supra* note 59.

107. *See* Marijan Pavčnik, *Legal Decisionmaking as a Responsible Intellectual Activity: A Continental Point of View*, 72 WASH. L. REV. 481, 489 (1997) (discussing semantic frameworks in relation to legal decisions).

108. *See* Baker, *supra* note 73, at 493-94; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 361 (1979) [hereinafter Kennedy, *The Structure of*

framing the decision under the *Santa Clara* public-private view—as a vindication of freedom from government interference with the putatively free relationship between two private entities (employer and employee)—radically alters the roles of the parties as opposed to a traditional public-private view—as a defeat of employees' attempts to secure protection against a structure of concentrated monopoly power (corporations) imposing unfair terms on them with the assistance of state coercive force.[109]

III. HOW THE CURRENT SUPREME COURT INTERPRETS THE PUBLIC-PRIVATE DISTINCTION

Three recent Supreme Court decisions reveal the Court's fundamental attitude towards corporate entities: *Citizens United*,[110] *Federal Communications Commission v. AT&T*,[111] and *Concepcion*.[112] In these cases, the Court lumps corporate entities with natural persons on the private side of the public-private split.[113] This approach is consistent with the *Santa Clara* framework.[114] Corporations receive the same protections against the government as individuals.[115] Flowing from these decisions, cereal companies are lobbying to shelter advertisement speech under the roof of the First Amendment.[116] Section A describes the

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Blackstone's Commentaries] ("[U]nder cover of defining these rules, of settling alleged conflicts of rights, the state has in fact authorized one of the parties to the dispute to dominate the other." (emphasis omitted)).

109. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (finding that government regulation violated a corporation's Due Process under the Fourteenth Amendment); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 28-29 (1927); Kens, *supra* note 42, at 418 (2005) (looking at the Court's concern for business interests during the *Lochner* era).

110. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913 (2010).

111. 131 S. Ct. 1177, 1182-83 (2011) (distinguishing between "person," which applies to natural persons and corporations, and "personal," which only applies to natural persons (internal quotation marks omitted)).

112. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Jean Sternlight, *Eliminating Class Actions—A Tsunami in the Wake of* AT&T Mobility v. Concepcion *Threatens Access to Justice*, SCOTUSBLOG (Sept. 19, 2011, 9:19 AM), http://www.scotusblog.com/2011/09/eliminating-class-actions-%E2%80%93-a-tsunami-in-the-wake-of-att-mobility-v-concepcion-threatens-access-to-justice/ (explaining how the *Concepcion* decision diminished consumer power).

113. *See FCC v. AT&T*, 131 S. Ct. at 1182-83; *Citizens United*, 130 S. Ct. at 913 (overruling *Austin* and "return[ing] to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity"); Miller, *supra* note 57, at 915; Sternlight, *supra* note 112.

114. *See* Goodman, *supra* note 74, at 1347 (arguing that the nature of a private enterprise to act for itself distinguishes it from the public sphere).

115. *See FCC v. AT&T*, 131 S. Ct. at 1182; *Citizens United*, 130 S. Ct. at 913; Goodman, *supra* note 74, at 1344, 1347; Sternlight, *supra* note 112.

116. Redish, *supra* note 2, at 1, 7.

Supreme Court's constitutional approach to the protection of corporate speech. Section B explains how the Supreme Court retained its principle of corporate protectionism by delivering a narrow holding in *FCC v. AT&T*. Section C investigates how the assumption that contracting parties have equal bargaining power is consistent with the mistake in *Lochner*. Finally, this Note frames the food industry's reaction to proposed regulation in a public-private context in Section D.

A. Political Speech

In *Citizens United*, the Court expressly granted corporations protection against the government for political speech.[117] *Citizens United* is a descendant of *Bellotti*.[118] Perhaps it is *Bellotti*'s prodigal son: it granted more protections for corporations under the Constitution because where *Bellotti* permitted some distinctions between corporate campaign contributions and individual free speech, *Citizens United* did not entertain such a notion.[119] When the Court flatly stated that corporations should not be treated any differently than individuals under the First Amendment, it was operating under the *Santa Clara* public-private framework: corporations join individuals on one side and the government remains on the other.[120] The decision commits the same error as the *Lochner* Court by concealing the disparity in power wielded by individuals as opposed to corporations.[121]

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117. *Citizens United*, 130 S. Ct. at 913.

118. *Id.*

119. *Compare* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978) ("[U]nder the circumstances of this case, we find 'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit appellants from speaking." (quoting Shelton v. Tucker, 364 U.S. 479, 485 (1960))), *with Citizens United*, 130 S. Ct. at 913 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

120. *Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"); Goodman, *supra* note 74, at 1344, 1347 (arguing that the nature of private enterprise to act for itself distinguishes it from the public sphere).

121. *See* Kens, *supra* note 42, at 418 (looking at the Court's concern for business interests during the *Lochner* era); Floyd Abrams & Burt Neuborne, *Debating* Citizens United, NATION, Jan. 31, 2011, at 19, 22 ("In the world the Supreme Court has built, the very rich enjoy massively disproportionate political power. What's worse, the exercise of that power can now take place in secret and can tap the almost unfathomable wealth available to our newly minted corporate co-citizens.").

The *Citizens United* Court contrasted *Bellotti* with *Austin v. Michigan Chamber of Commerce*,[122] which it ultimately overruled.[123] It claimed *Austin* conflicted with *Bellotti*.[124] *Bellotti* held that legislators cannot curb speech depending solely on the identity of the speaker.[125] *Austin* held that legislators *can*.[126] The *Citizens United* Court explained that *Austin* looked at the potential for corporate speakers, who amassed substantial wealth, to create an imbalance—that legislators may find a "compelling governmental interest"[127] to restrict speech that arises from the prospectively "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[128] The Court concluded that the antidistortion argument in *Austin* reduced to a restriction based solely on identity.[129] But it was more than mere identity: the *Austin* Court raised a concern that *Bellotti* ignored.[130]

Adding another layer of confusion, the *Citizens United* Court—even after expressly overruling *Austin* for restricting speech based on identity—specifically looked at the identity of speakers.[131] It looked at the number of small corporations and how little wealth they had (and by extension how little distorting they would produce).[132] If the issue is solely about identity, analysis into the lack of distorting effects of speech from small, not-so-wealthy corporations would be unnecessary.[133]

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122. *Citizens United*, 130 S. Ct. at 903; Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 655, 660 (1990) (holding that the government could invoke a compelling interest, such as the distortion of speech created by concentrations of wealth, to restrict speech).

123. *Citizens United*, 130 S. Ct. at 913 ("*Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures.").

124. *Id.* at 903.

125. *Id.*; First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978).

126. *Citizens United*, 130 S. Ct. at 903; *Austin*, 494 U.S. at 668-69.

127. *Citizens United*, 130 S. Ct. at 903 ("[T]he *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest."); *Austin*, 494 U.S. at 666.

128. *Austin*, 494 U.S. at 660.

129. *Citizens United*, 130 S. Ct. at 904 ("If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form.").

130. *See* Mayer, *supra* note 10, at 658 ("The corporate exercise of [F]irst [A]mendment rights frustrates the individual's right to participate equally in democratic elections."). For further discussion on the use of regulation as both a friend and enemy of freedom of speech, see FISS, *supra* note 53.

131. *Citizens United*, 130 S. Ct. at 906-07.

132. *Id.* at 907 (demonstrating concern for "5.8 million for-profit corporations [that] filed 2006 tax returns . . . [m]ost of [which] are small corporations without large amounts of wealth").

133. *See* Abrams & Neuborne, *supra* note 121, at 22.

Further, the Court worried about silencing the viewpoints of corporate entities, forgetting that it is people who comprise these structures—people who continue to receive protection under the First Amendment and whose viewpoints may still be voiced.[134] The Court coyly referred to corporations as "associations of citizens," but conveniently overlooked that the atoms of these associations—the citizens—already had constitutional protection.[135] More significantly, the Court treated corporations as any other group, such as unions, instead of as fictional entities.[136]

B. Implicit Protection

FCC v. AT&T narrowly held that the Freedom of Information Act Exemption 7(C) ("FOIA Exemption 7(C)") only applied to natural persons and not corporate entities.[137] Implicitly, the narrow holding allowed the Court to remain consistent with previous decisions that upheld a corporation's right to protection against the government as if it shared similar status to that of a natural person.[138] The Court's dictionary treatment of the word "personal" allowed it to skirt the question of a corporate entity seeking refuge from governmental power in a manner similar to a person (the *Santa Clara* public-private framework).[139]

AT&T notified the Federal Communications Commission ("FCC") that it had overcharged the government for services to public schools as part of the FCC's Education Rate program.[140] AT&T provided numerous documents in the course of the FCC's subsequent investigation into the overcharging.[141] AT&T settled, paid $500,000 to the government, and

134. *Citizens United*, 130 S. Ct. at 907 ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.").

135. *Id.* (characterizing *Austin* as allowing "Government to ban the political speech of millions of associations of citizens").

136. *Id.* at 886; Greenwood, *Essential Speech*, *supra* note 13, at 1033.

137. *See* Fed. Commc'n Comm'n v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011).

138. *See* Greenwood, *The Idolatry of Corporations*, *supra* note 59 (arguing that the Court's "ability to use the dictionary" ignored "the critical issue—why ordinary language should be important in this alone of corporate rights cases").

139. *See* Goodman, *supra* note 74, at 1344, 1347; Greenwood, *The Idolatry of Corporations*, *supra* note 59 ("[T]he opinion is grossly inadequate, as the briefest examination of the Court's corporate jurisprudence makes clear. The Third Circuit was wrong, but it was not wrong because of illiteracy.").

140. *FCC v. AT&T*, 131 S. Ct. at 1180.

141. *Id.*

agreed to implement a new compliance plan.[142] A trade association later submitted a Freedom of Information Act ("FOIA") request for the documents used in the FCC's investigation.[143]

Under FOIA Exemption 7(C), records are exempt that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[144] The FCC determined that several documents were exempt in regards to the personal privacy of the individuals named in the documents but not for the company itself.[145] AT&T argued that because the Administrative Procedure Act defined corporations as persons, then personal privacy must refer to the privacy of any person, including corporations.[146] Chief Justice John Roberts carefully argued the scope of the word "personal" without ever challenging the notion of whether corporate persons ought to receive protection from government power as natural persons do.[147] He preserved the broader doctrine of corporate constitutional protectionism by addressing only the narrower statutory analysis of the meaning of "personal."[148] Citing dictionaries, Chief Justice Roberts dryly compared "personal" and "person" with "corny" and "corn" and "cranky" and "crank."[149] Because "corny" and "cranky" held little relation to the corn plant or the "crooked angular shape from which a 'crank' takes its name," Justice Roberts confidently stepped foot on solid legal ground to declare that "personal" was yet another adjective bearing a distinct meaning from its corresponding noun form.[150]

Chief Justice Roberts continued his ordinary language analysis.[151] "Personal privacy," like "personal tragedy" and "personal correspondence," refer to natural persons not corporations, he said.[152] The use of "personal" meant the opposite of "business-related."[153] He spent the remainder of the decision comparing the construction of FOIA

142. *Id.* AT&T did not admit liability. *Id.*
143. *Id.*
144. 5 U.S.C. § 552(b)(7)(C) (2006).
145. *FCC v. AT&T*, 131 S. Ct. at 1180-81.
146. *Id.* at 1181.
147. *Id.* at 1182.
148. *Id.* (internal quotation marks omitted); Greenwood, *The Idolatry of Corporations*, *supra* note 59.
149. *FCC v. AT&T*, 131 S. Ct. at 1181-82 (internal quotation marks omitted).
150. *Id.* (internal quotation marks omitted).
151. *Id.*
152. *Id.* at 1182-83 (internal quotation marks omitted).
153. *Id.* at 1182.

Exemption 7(C) with that of Exemptions 4 and 6.[154] Although the Court ultimately held that personal privacy did not extend to corporations such as AT&T, it limited the scope of the decision strictly to FOIA Exemption 7(C).[155] Chief Justice Roberts explicitly reserved constitutional privacy from this holding (and thus preserved the *Santa Clara* doctrine) when he wrote that *FCC v. AT&T* "does not call upon us to pass on the scope of a corporation's 'privacy' interests as a matter of constitutional or common law. The discrete question before us is instead whether Congress used the term 'personal privacy' to refer to the privacy of artificial persons in FOIA Exemption 7(C)."[156]

C. *Burden-Shifting and Bargaining Power*

In *Concepcion*, the Concepcions filed a claim against AT&T for a consumer dispute.[157] They subsequently joined a class action.[158] AT&T responded by invoking the class action waiver in its contract with the Concepcions, which called for a mandatory arbitration hearing.[159] The Concepcions sought protection under California law which prohibited unconscionable agreements.[160] By finding that state arbitration waiver clauses were invalid under the Federal Arbitration Act (the "FAA"),[161] *Concepcion* shifted the burden of risk of adhesion contracts onto individual consumers.[162] Again, this is a Lochnerian mistake where the

154. *Id.* at 1184-85.

155. *Id.* at 1185.

156. *Id.* at 1184.

157. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011); Marcia Coyle, *Divided Justices Back Mandatory Arbitration for Consumer Complaints*, 245 N.Y. L.J., Apr. 28, 2011, at 2.

158. *Concepcion*, 131 S. Ct. at 1744; Coyle, *supra* note 157, at 2.

159. *Concepcion*, 131 S. Ct. at 1744-45; Coyle, *supra* note 157, at 2.

160. *Concepcion*, 131 S. Ct. at 1745. In his majority opinion, Justice Scalia described the California unconscionability test:

> [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Id. at 1746 (alterations in original) (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (citation omitted)) (internal quotation marks omitted).

161. *See id.* at 1748, 1751 (arguing that the efficiency interests of arbitration controlled).

162. Sternlight, *supra* note 112.

Court assumed contracting parties had equal bargaining power and lived on the same side of the public-private divide.[163]

Justice Antonin Scalia focused the majority decision on corporate incentives and non-interference.[164] All consumer contracts are adhesive, he held, which meant consumers faced no barrier when invoking the California unconscionability test.[165] Allowing consumers to consolidate their claims under class action suits created a disincentive for corporations to deal with consumers individually.[166] Justice Scalia assumed consumers would not necessarily want class action suits (or their attendant benefits, including helping consumers "who do not know they have been wronged").[167] Instead, they would "remain free" to bring individual claims.[168]

The *Concepcion* Court summoned efficiency factors as to why class arbitrations were inconsistent with the FAA.[169] Class arbitrations are more expensive, time-consuming, complicated (procedurally, especially with regard to class certification), and they add difficulties such as confidentiality and absent parties.[170] The Court, however, emphasized these efficiency factors with regard to corporate defendants, rather than individual people.[171] In fact, the Court ultimately believed it was doing the Concepcions a favor because bilateral (non-class) arbitration would allow a swifter resolution and, if successful, recovery of damages.[172]

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163. *See* GREENFIELD, *supra* note 15, at 33; Goodman, *supra* note 74, at 1344, 1347; Kens, *supra* note 42, at 418.

164. *Concepcion*, 131 S. Ct. at 1750.

165. *Id.* at 1746, 1750.

166. *Id.* at 1750.

167. *Id.*; Sternlight, *supra* note 112 (noting that arbitration clauses "like AT&T's, which eliminate class actions, cannot help consumers or employees who do not know they have been wronged. Class actions, in contrast, allow a single knowledgeable victim to bring a lawsuit on behalf of those similarly situated").

168. *Concepcion*, 131 S. Ct. at 1750. *But see id.* at 1759 (Breyer, J., dissenting) ("Where does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration? The majority does not explain." (quoting *id.* at 1748 (majority opinion))).

169. *Id.* at 1750-51.

170. *Id. But see id.* at 1759 (Breyer, J., dissenting) ("The majority compares the complexity of class arbitration with that of bilateral arbitration. . . . But, if incentives are at issue, the *relevant* comparison is not 'arbitration with arbitration' but a comparison between class arbitration and judicial class actions.").

171. *Id.* at 1752 (majority opinion) ("[C]lass arbitration greatly increases risks to defendants."); Cliff Palefsky, *Separate and Unequal*, SCOTUSBLOG (Sept. 14, 2011, 12:57 PM), http://www.scotusblog.com/2011/09/separate-and-unequal/ (hereinafter Palefsky, *Separate and Unequal*) ("[The Court] shockingly expressed concern for the unfairness to corporate defendants of having to be bound by an incorrect result while inflicting that unfairness on consumers and employees without any concern whatsoever."). *But see Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting) (arguing that the guarantee of procedural advantages of arbitration was not the only motive of Congress in drafting the FAA).

172. *Concepcion*, 131 S. Ct. at 1753 (majority opinion) ("[T]he Concepcions were *better off*

Justice Stephen Breyer's dissent looked at Congress's intent in passing the FAA.[173] Arbitration was relatively new at the time, and Congress envisioned disputes between merchants where the issue was more industry custom than legal in nature.[174] These disputes would feature parties possessing "roughly equivalent bargaining power" as opposed to a dispute between company and customer.[175] Moreover, the majority's efficiency concerns were misguided.[176] Justice Scalia compared the complexity of class arbitrations to non-class arbitrations rather than class arbitrations to in-court class actions.[177] Justice Scalia's clumsy attempt to argue that the Concepcions were "*better off*" with bilateral arbitration derived from the same confusion about this comparison.[178] Class arbitrations may take advantage of the efficiencies of the arbitration process that would yield less time and expense than a corresponding in-court class action.[179] Additionally, one class arbitration would be more efficient than the time and cost to resolve "thousands of separate proceedings for identical claims."[180]

Disallowing class actions by mandating non-class arbitrations wildly shifts the economic burden onto consumers who, by the very nature of adhesion contracts, have no bargaining power.[181] Consumers with claims for small dollar amounts may desert rather than file their actions, succumbing to an unwillingness to deal with the hassle of litigation instead of pursuing otherwise meritorious claims.[182] Justice Breyer asked rhetorically, "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[183]

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under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield . . . recovery of a small percentage of a few dollars.'" (quoting Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255 at *12 (S.D. Cal. Aug. 11, 2008))).

173. *Id.* at 1757-58 (Breyer, J., dissenting).

174. *Id.* at 1759.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1753 (majority opinion); *id.* at 1759 (Breyer, J., dissenting); *see also* Cliff Palefsky, *Closing Thoughts on the Arbitration Symposium*, SCOTUSBLOG (Sept. 26, 2011, 6:41 PM), http://www.scotusblog.com/2011/09/closing-thoughts-on-the-arbitration-symposium/ (hereinafter Palefsky, *Closing Thoughts*) ("My sense is that the elimination of class actions is not merely a possible result of the [*Concepcion*] decision; rather, it was pretty clearly the goal of the majority.").

179. *Concepcion*, 131 S. Ct. at 1759-61.

180. *Id.* at 1759.

181. *See* Sternlight, *supra* note 112.

182. *Concepcion*, 131 S. Ct. at 1760 ("In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate."); Coyle, *supra* note 157, at 2; *see* Palefsky, *Separate and Unequal*, *supra* note 171.

183. *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting). Justice Breyer quoted *Carnegie v.*

What *Concepcion* did was look at corporations and individuals as existing on the same side of the public-private divide.[184] They were contracting parties with equal bargaining power.[185] The Court acted to protect corporations and their interests in arbitration hearings against a state actor, California in this instance.[186] Protection against government power in this manner is wholly consistent with the *Santa Clara* framework and also *Lochner*'s mistake: corporations and individuals on one side of the fence, with barbed wire to keep out the government.[187]

D. Breakfast of Champions

Consisting of members of several government agencies, including the Federal Trade Commission ("FTC") and the Food and Drug Administration, the Interagency Working Group on Food Marketed to Children ("IWG") published a guide proposing self-regulatory principles for the advertising of food to children.[188] The IWG solicited feedback on its proposal, including thirty questions—the last of which inquired whether enacting such principles infringed on First Amendment rights.[189] General Mills, maker of Trix, Lucky Charms, and Fruit Roll-ups,[190] commissioned a white paper by Professor Martin Redish which thumped the First Amendment drum in response.[191] Professor Redish cited several Supreme Court cases protecting commercial speech.[192]

Household International, Inc., "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Id.* (quoting 376 F.3d 656, 661 (7th Cir. 2004)) (internal quotation marks omitted).

184. *See supra* notes 107-09 and accompanying text.

185. Palefsky, *Closing Thoughts*, *supra* note 178 ("[T]he last mechanism of fairness protection, state unconscionability doctrine, got shot when it stood in between the Court and its target.").

186. *See id.*; Palefsky, *Separate and Unequal*, *supra* note 171.

187. *See supra* notes 107-09 and accompanying text; Palefsky, *Closing Thoughts*, *supra* note 178; Palefsky, *Separate and Unequal*, *supra* note 171.

188. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, PRELIMINARY PROPOSED NUTRITION PRINCIPLES TO GUIDE INDUSTRY SELF-REGULATORY EFFORTS, *available at* http://www.ftc.gov/os/2011/04/110428foodmarketproposedguide.pdf.

189. *Id.* at 24.

190. *Brands*, GENERAL MILLS, http://www.generalmills.com/en/Brands.aspx (last visited Nov. 5, 2012).

191. Redish, *supra* note 2, at 1 n.1.

192. *Id.* at 8; *see* GROCERY MFRS. ASS'N, COMMENT OF THE GROCERY MANUFACTURERS ASSOCIATION ON INTERAGENCY WORKING GROUP ON FOOD MARKETED TO CHILDREN: GENERAL COMMENTS AND PROPOSED MARKETING DEFINITION: FTC PROJECT NO. P094513, *available at* http://www.gmaonline.org/file-manager/Health_Nutrition/GMA_general_comment.pdf (arguing along similar lines as Professor Redish); *see also* Letter from Carter Keithley, President, Toy Indus. Ass'n, Inc., to Fed. Trade Comm'n (July 14, 2011), http://www.ftc.gov/os/comments/foodmarketedchildren/07840-80008.pdf (arguing not only that restrictions on advertising will violate the First Amendment but also that the IWG's proposal would have implications beyond the food industry into the toy industry).

In its report, the IWG stressed two principles: that the food industry should "encourage children, through advertising and marketing, to choose foods" that make up a healthy diet and to reduce "consumption of foods with significant amounts of nutrients that could have a negative impact on health or weight."[193] It called these principles "basic nutrition principles."[194] The IWG asked the industry to apply these principles to those foods "most heavily marketed to children, such as breakfast cereals."[195] The IWG's recommendation for self-regulatory standards was not unique.[196] As recently as 2008, the FTC reported on the nutritional value of foods marketed to children and adolescents.[197] The purpose of the latest report was to persuade the industry to advertise unhealthy foods less or to reformulate or repackage those foods accordingly.[198]

The issue about sugary cereals and children's health crossed into pop culture when artist and culture-jammer Ron English snuck altered cereal boxes onto the shelves of a Ralph's supermarket.[199] English changed Kellogg's Frosted Flakes, whose Tony the Tiger mascot boasts, "They're Gr-r-reat!" to Killkidds' Sugar Frosted Fat, whose obese tiger mascot retorts, "They're Gr-r-rooooss!"[200] He converted General Mills's Lucky Charms to General Propaganda's Yucky Children Charmer, boasting that it was "a good source of cavities" and nutrition free.[201] English announced in January 2012 that he would produce an obese vinyl figure parody of Tony the Tiger.[202] These counter-advertising

193. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188, at 3 (mentioning "sodium, saturated fat, *trans* fat, and added sugars" as among those nutrients which have a "negative impact on health").

194. *Id.*

195. *Id.* (including "carbonated beverages, restaurant foods and snack foods" on that list as well).

196. *Id.* at 4.

197. *See generally* FED. TRADE COMM'N, MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION (2008), *available at* http://www.ftc.gov/os/2008/07/P064504foodmktingreport.pdf.

198. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188, at 5-6.

199. Nara Ramanujan, *Cereal Boxes: Note From a Fan*, RON ENGLISH'S POPAGANDA (Oct. 14, 2011), https://www.popaganda.com/news/cereal-boxes-note-fan; *Short Shelf Life: At a Ralph's in Venice*, RON ENGLISH'S POPAGANDA (Oct. 11, 2011), https://www.popaganda.com/news/short-shelf-life-ralphs-venice [hereinafter *Short Shelf Life*].

200. *Compare Short Shelf Life*, *supra* note 199, *with* KELLOGG'S FROSTED FLAKES, http://www.frostedflakes.com (last visited Nov. 5, 2012).

201. *Compare Short Shelf Life*, *supra* note 199, *with Brands*, GENERAL MILLS: LUCKY CHARMS, http://www.generalmills.com/Brands/Cereals/LuckyCharms.aspx (last visited Nov. 5, 2012).

202. *Fat Tony Vinyl Figure: Coming Soon!*, RON ENGLISH'S POPAGANDA (Jan. 18, 2012), https://www.popaganda.com/news/fat-tony-vinyl-figure-coming-soon.

pieces tend toward the extreme, but call attention to cereal nutrition that normal advertising does not.[203]

Professor Redish's opposition view to the IWG squarely fits the *Santa Clara* framework where corporations are on the opposite side of the public-private distinction from governments.[204] He made no distinction amongst political advocacy, artistic productions, and commercial advertisements.[205] He complained that the proposed reductions on advertising certain foods to children constitute a violation of the First Amendment.[206] In this instance, he claimed they infringe on the First Amendment's protection of commercial speech.[207]

Strangely, Professor Redish linked the IWG's call for self-regulation with an implicit government threat to suppress speech.[208] Never mind that the IWG report was a request for comments and not a piece of actionable legislation.[209] There was no government restriction on speech in the IWG report.[210] Nevertheless, Professor Redish portrayed the food industry in the position of seeking protection under the Constitution against the government's implied regulatory threat.[211] The speaker is the corporation advertising to, among others, children.[212]

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203. Nick Carbone, *Tony the Tubby Tiger: An Artist's Warning Against Sugary Cereal*, TIME (Jan. 24, 2012), http://newsfeed.time.com/2012/01/24/tony-the-tubby-tiger-an-artists-warning-against-sugary-cereals/.

204. *See* Goodman, *supra* note 74, at 1344, 1347 (arguing that the nature of private enterprise to act for itself distinguishes it from the public sphere); Redish, *supra* note 2, at 7.

205. *See* Redish, *supra* note 2, at 7.

206. *Id.*

207. *Id. But see* Abrams & Neuborne, *supra* note 121, at 22 ("[T]he Supreme Court has upheld bans on . . . harmful advertising.").

208. *See* Redish, *supra* note 2, at 4-5 ("[G]overnment cannot be permitted to establish a regulatory framework, *the sole intent and effect of which will be to suppress speech* . . . .").

209. *See id.* at 5-6 ("The voluntary nature of the regulations is therefore appropriately deemed to be nothing more than a precursor to coercive enforcement in the event that the industry fails to comply."); Kathleen M. Sullivan, *The Interagency Working Group's Preliminary Proposed Nutrition Principles to Guide Industry Self-Regulatory Efforts: Constitutional Issues*, in COMMENTS OF VIACOM INC. app. A, at 28, *available at* http://www.ftc.gov/os/comments/foodmarketedchildren/07884-80045.pdf (arguing that the IWG's principles "inherently carry with them the implicit threat that failure to comply on a 'voluntary' basis will result in government stepping in to enforce them or otherwise induce compliance with them"). *See generally* INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188.

210. *See generally* INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188 (proposing principles in advertising by showing preference to healthier foods).

211. Redish, *supra* note 2, at 5-6. Professor Redish spends a good portion of his paper discussing why nutritional guidelines and product advertising have no impact on childhood obesity while ignoring the sources cited in the IWG report. *Id.* at 13-19. *But see* INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188, at 3-4 (listing several sources linking advertising impact and nutrition).

212. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188, at 7 & nn.14-16; Redish, *supra* note 2, at 3.

Professor Redish's argument takes its force from its unstated premise: helpless, powerless, fragile speech from one private entity to another should be protected from public power, because only in the absence of rules will the truth prevail.[213]

IV. RECONSIDERING RECENT SUPREME COURT DECISIONS AND PROPOSED LEGISLATION TO MOTIVATE A SOLUTION

Applying the traditional liberal democratic framework of the public-private distinction to the cases and legislation in Part III yields a deeper analysis of power structures.[214] Under the traditional liberal democratic framework, corporations should not receive protection under the First or Fourteenth Amendments.[215] They are not private persons with liberty rights but power structures from which citizens may need protection.[216] Individuals, not power structures, receive protection against power structures.[217] Sections A–C revisit the Supreme Court cases examined in Part III and apply the traditional liberal democratic framework analysis. Section D calls for an adoption of the traditional liberal democratic view of the public-private distinction and explains how it would affect the legislation discussion from Part III.

A. Citizens United *Redux*

In *Citizens United*, the Supreme Court granted corporations First Amendment protection.[218] A court employing the traditional liberal democratic framework, however, would reach the opposite holding.[219] Putting corporations on the proper side of the divide with government reinforces the motivation behind the First Amendment to secure protection for the speech of individuals.[220] A corporation speaks on

213. *See* Redish, *supra* note 2, at 12-13 (describing the steps used by the Supreme Court to "determine whether commercial speech could constitutionally be regulated or suppressed").

214. *See* Baker, *supra* note 73, at 493-94; Kennedy, *The Structure of Blackstone's Commentaries*, *supra* note 108, at 361.

215. *See* Greenwood, *Essential Speech*, *supra* note 13, at 1007 (arguing not only that the Court has erred in granting constitutional protection to corporate speech but also that there has been a lack of discussion from the Court on the matter).

216. *See id.* at 1007-08.

217. *See* Miller, *supra* note 57, at 891; *supra* notes 98-105 and accompanying text.

218. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 900 (2010).

219. *See The Corporation and the Constitution*, *supra* note 91, at 1834, 1856-57 (proposing a test regarding whether or not granting First Amendment protection "serve[s] speech interests").

220. *See* Abrams & Neuborne, *supra* note 121, at 22 ("[N]on-economic constitutional rights . . . flow from respect for human dignity. Robots have no souls. Neither do business corporations. Vesting either with free speech rights is legal fiction run amok.").

behalf of its fictional shareholders.[221] Corporate speech does not reflect the plurality of voices of the executives and employees who work on its behalf.[222] Their viewpoints remain their own.[223] Even the director's viewpoints remain their own.[224] The corporate viewpoint is simply the maximization of the profit interests of its fictional shareholders.[225] Thus, it is not free speech at all, but compelled speech.[226] This type of speech targets regulation so that the corporation can earn more profit, exert more influence, remove more profit-restraining rules, and so on.[227] This is exactly the type of power—an entity created by citizens limiting the ability of those citizens to self-govern—from which Locke and Rousseau sought to protect the citizenry.[228]

The *Citizens United* Court leaned on *Bellotti*.[229] Recall the *Bellotti* Court's theme that the source of the speech did not determine whether or not the Constitution protected what was said.[230] Corporations, the Court reasoned, contribute ideas, discussion, and information just as natural persons do.[231] Since the Constitution protects the speech of natural persons, it should equally protect the speech of corporate entities.[232] Corporate speech, the Court shrugged, may affect democratic elections, but the Constitution protects both effective and ineffective speech.[233]

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221. Shareholders are not determinate people with roots in a community and a finite window for retirement but are a fiction—like the corporation itself—concocted as a completely abstract notion. *See* Greenwood, *Fictional Shareholders*, *supra* note 91, at 1096. For a much more thorough discussion of this topic, see generally *id.*

222. Greenwood, *Essential Speech*, *supra* note 13, at 1049.

223. *Id.* at 1038.

224. *Id.* at 1052-53. If the directors acted on their own behalf instead of the corporations', they would be violating their fiduciary duty. *Id.* at 1035.

225. *Id.* at 1049.

226. *Id.* at 1055.

227. *Id.*; *see also* Abrams & Neuborne, *supra* note 121, at 23 ("*Citizens United* insists that unrestricted, massive corporate electioneering is really good for us.").

228. *See* LOCKE, *supra* note 19, at §§ 3-4; ROUSSEAU, *supra* note 19, at 141; *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 682 (1970) ("The broader the goals of the association, the larger its membership, the more impersonal the relations of its members to each other, the more compulsion there is to join, then the more similar the private government becomes to public government.").

229. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899-900 (2010) (discussing the holding in *Bellotti*).

230. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978) ("We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . ."); *see Citizens United*, 130 S. Ct. at 900 (citing *Bellotti* on this very point).

231. *Bellotti*, 435 U.S. at 783 ("[C]orporations . . . afford[] the public access to discussion, debate, and the dissemination of information and ideas.").

232. *Id.* at 784.

233. *Id.* at 790 ("To be sure, corporate advertising may influence the outcome of the vote; this

This is where the *Citizens United* Court muddied the waters with a confusing shift from discussing democracy and people to the identity of the speaker.[234] The Court first explained the intent of the First Amendment, which was entirely consistent with traditional liberal democratic theory: "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."[235] Two paragraphs later, the Court obscured the conception of corporate speech by invoking caution when speech restrictions censor one speaker but not another.[236] Justice Anthony Kennedy wrote, "Speech restrictions based on the identity of the speaker are all too often simply a means to control content."[237] From the control of the influence of officials, the Court steered the conversation to control of content; from "hold[ing] officials accountable to the people"—protecting the speech of the people—the Court turned to protecting the speech of the speaker.[238] This rhetorical flourish allowed the Court to hammer home the *Bellotti* holding that First Amendment protection extends to speakers, no matter the source.[239] The Court began with a traditional democratic theory framework under which the government protects people against sources of power but ended up with the strictly *Santa Clara* framework in which corporations (potential sources of power) are lumped in with natural persons by virtue of the government protecting the speech of all speakers.[240] Pulling the traditional democratic theory thread through the whole case would knit a different world in which natural persons would receive constitutional armor against all concentrations of power, both governmental and corporate.[241] This interpretation also preserves the Court's concern for the identity of the speaker, except it limits the scope of "speaker" to natural persons.[242]

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would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . .").

234. *Compare Citizens United*, 130 S. Ct. at 898 ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."), *with id.* at 899 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").

235. *Id.* at 898.

236. *Id.* at 898-99.

237. *Id.* at 899.

238. *Compare id.* at 898, *with id.* at 899.

239. *Id.* at 900 (discussing the *Bellotti* holding as it relates to political speech).

240. *Compare id.* at 898, *with id.* at 899.

241. Gobetti, *supra* note 74, at 103; Greenwood, *Fictional Shareholders*, *supra* note 91, at 1028.

242. *See* Greenwood, *Fictional Shareholders*, *supra* note 91, at 1027-28.

B. FCC v. AT&T *Redux*

The reason corporations do not have personal privacy is not because of how we define the word in the context of FOIA, but because they do not have liberty rights under the traditional liberal democratic view.[243] Thus, the Supreme Court's decision in *FCC v. AT&T* jibes with the liberal democratic approach but does so through a much different reasoning than in the Court's holding.[244] While it is true that an ordinary language analysis of FOIA Exemption 7(C) did not read corporations as persons having personal privacy, it is also true that the Court's scrutiny did not venture into constitutional privacy.[245] Determining whether artificial persons get the same or similar rights as natural persons should hinge on a broader policy than what is printed in the dictionary.[246] The liberal democratic paradigm is a stronger theory of corporate rights than the statutory analysis given by the Court.[247] It encompasses both how we view corporate rights under the Constitution as well as the smaller FOIA Exemption 7(C) issue.[248]

AT&T did not seek privacy protection under FOIA because it valued freedom from government intrusion.[249] Remember that it voluntarily handed over the same documents to the FCC during the latter's investigation.[250] To the contrary, AT&T sought personal privacy refuge from FOIA because it wanted to protect its informational market advantage from its competitors represented by the trade association making the FOIA request.[251] Essentially, AT&T sought protection from *competition*.[252] It is difficult to see how such protection benefits anyone other than AT&T.[253] AT&T provided a service, via a government program, to a public school.[254] Liberal democratic principles dictate that such services fall under public scrutiny, particularly after AT&T settled

243. Greenwood, *The Idolatry of Corporations*, *supra* note 59 (looking at the Court's reluctance to address the foundational reasons why a corporation should have neither personal privacy nor personhood).

244. *Id.*

245. Fed. Commc'n Comm'n v. AT&T Inc., 131 S. Ct. 1177, 1185 (2011).

246. *See* Greenwood, *The Idolatry of Corporations*, *supra* note 59.

247. *Id.*

248. *Id.*

249. *Id.*

250. *FCC v. AT&T*, 131 S. Ct. at 1180.

251. Greenwood, *The Idolatry of Corporations*, *supra* note 59.

252. *Id.*

253. *See id.*

254. *FCC v. AT&T*, 131 S. Ct. at 1180.

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a recent government investigation.[255] Intelligent public discourse, not the dictionary, requires access to AT&T's documents.[256]

C. Concepcion *Redux*

Any public-private view of *Concepcion* other than the one the Court applied reveals a stark shifting of litigious burden onto individuals.[257] The Court erred by assuming that corporations and individuals have equal bargaining power.[258] This Lochnerian mistake, where the Court assumed contracting parties lived on the same side of the public-private divide, fixes itself if future courts recognize the similarity in power between corporations and governments.[259] The consequences of failing to adopt the traditional liberal democratic framework here are decidedly pro-corporate and anti-individual.[260]

The *Concepcion* holding gave corporations permission to add class arbitration waivers to their boilerplate adhesion contracts as if corporation and individual were bargaining equally for fair consideration.[261] This violated the *intent* of arbitration to begin with.[262] The FAA intended arbitration to be "a matter of consent, not coercion."[263] Since adhesion contracts, by their nature, do not permit negotiable input from the consumer side, arbitration is no longer

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255. Greenwood, *The Idolatry of Corporations*, *supra* note 59.

256. *Id.*

257. Sternlight, *supra* note 112.

258. *See* Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001) (providing a test that courts look to such that unequal bargaining power created both procedural and substantive unconscionability). *But see* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624-25 (1982) (claiming that the doctrine of unequal bargaining power is impotent without looking at the paternalism of the State).

259. *See* GREENFIELD, *supra* note 15, at 34; Goodman, *supra* note 74, at 1344, 1347; Kens, *supra* note 42, at 417-18.

260. *See* Myriam Gilles, AT&T Mobility vs. Concepcion*: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights/; Palefsky, *Closing Thoughts*, *supra* note 178; Palefsky, *Separate and Unequal*, *supra* note 171.

261. *See* Gilles, *supra* note 260 ("[T]he [*Concepcion*] ruling is the real game-changer for class action litigation, as it permits most of the companies that touch consumers' day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.").

262. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989); Palefsky, *Separate and Unequal*, *supra* note 171.

263. *Volt*, 489 U.S. at 479 ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."); Palefsky, *Separate and Unequal*, *supra* note 171 ("Arbitration was always intended to be a voluntary process . . . .").

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voluntary but mandatory.[264] Eliminating class arbitration coerces consumers into bilateral arbitration.[265] By favoring corporations in this manner, the Court "has opened the door to every permutation of abusive and unfair arbitration process."[266] The Court has essentially invited corporations to draft mandatory bilateral arbitration clauses into their adhesion contracts and exercise full control over the resolution process.[267]

Under *Concepcion*, not only is a consumer less likely to bring a small-dollar claim against the corporation with which he or she signed an adhesion contract, but consumers who would have been alerted to the cause of action brought on behalf of others "similarly situated" but otherwise unaware that they may have been wronged will remain in the dark, their harm left unsatisfied.[268] This type of ignorance is easily resolved by understanding the disparity between individuals and corporations and realizing that individuals are limited with regard to the amount of information they need to effectuate legal action.[269] The burden on individuals is a heavy one: knowledge, time, and ability.[270] As defendants in these cases, of course, a corporation typically does not have the equivalent problem of joining its corporate brethren in a class action suit against a lone customer.

All of the aforementioned shifting of the burdens onto natural persons makes sense *if* the accepted context is that corporations and natural persons are *both* private, because privately contracting parties each negotiate for their own interests.[271] The burden-shifting makes less sense, however, if corporations are on the public side because of the

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264. Palefsky, *Separate and Unequal*, *supra* note 171 ("Real consent was always intended to be the only check and balance necessary to ensure fairness and to keep these matters out of the courts.").

265. *Id.*

266. *Id.*

267. *See* Gilles, *supra* note 260; Palefsky, *Separate and Unequal*, *supra* note 171. Palefsky explained:

> As a fundamental concept, you can't turn an adversarial system over to one side and invite it to design and control the process. It is thus no surprise that the abuses are getting all the attention and all of the positive attributes of voluntary [alternative dispute resolution] processes are lost in the noise.

Id.

268. Sternlight, *supra* note 112 ("[M]any victims will simply not realize they have been harmed, much less harmed in a violation of a law.").

269. *Id.* ("[M]ost of us lack the time or ability to figure out that we are being victimized by fraud, discrimination, negligence, or other misdeeds.").

270. *Id.* ("Indeed, even victims of larger or clearer wrongs may lack the knowledge or wherewithal to file claims, whether in litigation or arbitration.").

271. *See id.*

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impetus to protect individuals from coercive bargaining.[272] Parties, after all, waive constitutional rights when agreeing to arbitrate, and a natural person (as consumer) is the only party waiving these rights if corporations are on the public (protector) not the private (protectee) side.[273] The California law under dispute in *Concepcion* was, in fact, a protection for consumers against unconscionable arbitration agreements and properly recognized corporations for what they were: entities against which protection for natural persons was needed.[274]

D. A New Call for an Old Framework

The Supreme Court and legislators should adopt the traditional liberal democratic view of the public-private distinction.[275] Consistency and clarity require it. Many municipalities are corporations, yet courts routinely hold that they may not infringe on the speech of natural persons and that they have no speech rights themselves against the states that incorporated them.[276] The liberal democratic framework, which groups corporations and governments together on the public side, is more consistent with the republican views that shaped the Constitution.[277] Like governments, corporations are structures that have little in common with natural persons.[278] To take seriously the political

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272. *See* Palefsky, *Separate and Unequal*, *supra* note 171.

273. *See id.* Palefsky explained:

> An agreement to arbitrate involves the waiver of several constitutional rights: the First Amendment right of petition, the Fifth Amendment right to due process and the Seventh Amendment right to a jury trial. And to be sure, there are numerous statutes that expressly provide for the right of access to a federal court, which is obligated to follow the law. But incredibly, the Supreme Court has never acknowledged the waiver of constitutional rights inherent in an agreement to arbitrate and has never specifically considered the constitutionally required standard for such a waiver.

Id. This is significant because, as a statute, the FAA cannot waive constitutional rights. *Id.* Furthermore, arbitrators and arbitration panels are not necessarily bound by Supreme Court precedent. *Id.*

274. *Id.*

275. *See also* Dibadj, *supra* note 4, at 729 (suggesting a constitutional amendment explicitly precluding corporations from constitutional protection).

276. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 552-53 (1975) (holding that a city municipal board's refusal to allow the production of a play violated the First Amendment).

277. *See* Greenwood, *Fictional Shareholders*, *supra* note 91, at 1028-29 (arguing that corporations "belong closer to the governmental side, as elaborate human creations, meant to promote human happiness but potentially taking on a life and mission of their own"); *The Corporation and the Constitution*, *supra* note 91, at 1857 (providing an example of a "democratic town meeting" where selling time to speak would be inconsistent with democratic principles).

278. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978) (White, J., dissenting) ("The State need not permit its own creation to consume it."); ROUSSEAU, *supra* note 19, at 148.

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legacy running from Hobbes, Locke, and Rousseau through the Constitution requires pursuit of their common goal: safeguarding the rights of citizens.[279]

The criticism of the FTC's proposed guidelines to advertisers of children's cereal focuses on violations of the corporations' First Amendment rights.[280] Since corporations do not have First Amendment rights under the liberal democratic framework, the force of their criticism evaporates.[281] The food industry wanting to insulate itself from government interference is, like AT&T in *FCC v. AT&T*, for its own benefit and nothing more.[282] The resistance to legislation, like AT&T's resistance to the FOIA request by invoking FOIA Exemption 7(C), is an attempt to bypass the marketplace forces that would occur if consumers had more complete access to information.[283] Like the mandatory bilateral arbitration clauses soon to flood the cell phone industry as a result of *Concepcion*, consumers would be left with a "take it or leave it" choice with their cereal.[284] Instead of voting with their dollars in a marketplace guided by regulation designed to encourage healthier breakfast choices, consumers would be forced to accept the products given to them—not because they were successful in the marketplace but because the industry was immune from it.[285] In asking for protection under the First Amendment for its advertising speech, the food industry is in effect asking to regulate itself—to act as a government would.[286] It is asking to spend corporate money to bypass government regulation and act according to its own self-regulating impulses.[287] This behavior does not stimulate industrial growth or innovation, but merely aims to retain the status quo.[288] Free advertising speech is itself a limit on consumers' access to information.[289] The goal is for the industry to remove itself

279. *See, e.g.*, Dibadj, *supra* note 4, at 729-30.

280. Redish, *supra* note 2, at 1.

281. Greenwood, *Fictional Shareholders*, *supra* note 91, at 1028; *see The Corporation and the Constitution*, *supra* note 91, at 1838 (explaining the difficulty in finding a balance between the "extent the defense of private rights should restrain the legislature from seeking whatever degree of social equality is necessary to allow less powerful members of society actually to enjoy the benefits of those same private rights").

282. *See supra* Part IV.B.

283. *See* FISS, *supra* note 53, at 57 (discussing "the public's right to be properly informed about issues of public importance"); *supra* Part IV.B.

284. *See supra* Part IV.C.

285. *See supra* Part IV.C.

286. *See* Greenwood, *Essential Speech*, *supra* note 13, at 1062.

287. *See id.* at 1055.

288. *See* Greenwood, *The Idolatry of Corporations*, *supra* note 59.

289. Notice also that the content of advertising is not the view of any particular person but rather speech written by an agent for the corporation. *See* Greenwood, *Essential Speech*, *supra* note 13, at 1038.

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from the market by limiting information that might cause consumers to make alternative purchases or alternative choices.[290] Just as government officials may not use their department budgets for their reelection campaign, corporations ought not to use their net profits to amplify their rights.[291] Corporations are a government-like power against which the Constitution affords natural citizens protection.[292] The food industry's strategy to shield itself under the First Amendment is wise given the current corporate rights doctrine the Supreme Court has adopted, but examination within the liberal democratic framework reveals the move to be nothing more than an artificial entity utilizing its profits to change the regulatory environment in order to make more profits.[293] The profit does not come without two costs. The first is the health of citizens, which the IWG believed to be at stake when it issued its report.[294] The second cost is to democracy, since an artificial entity's ability to dodge regulation necessarily means a corresponding decrease in the ability of natural persons to govern themselves.[295]

Grouping corporations and governments together better preserves democratic values.[296] Corporations, like governments, exercise disproportionate power as opposed to natural persons.[297] Their actions affect the lives of multitudes of individuals.[298] They wield influence through an immense store of wealth, compelled to act in such a way to remove regulation to maximize their profits and continue a cycle of growing influence.[299] The same cannot be said of the inverse.[300] The

290. *See id.* at 1055.

291. *See id.* at 1062.

292. *See id.* at 1063.

293. *See id.* at 1062 ("[T]he more a corporation is permitted to modify the law to allow it to profit-maximize at the expense of others, the more money it will have with which to pursue more such modifications.").

294. INTERAGENCY WORKING GRP. ON FOOD MARKETED TO CHILDREN, *supra* note 188, at 1.

295. *See* Greenwood, *Essential Speech*, *supra* note 13, at 1062 ("Permitting the fiction to manipulate the legal system reduces the likelihood that the citizenry will be able to self-govern.").

296. *See* EMERSON, *supra* note 228, at 682; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 39 (1948) ("The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare."); Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 540 (1982) ("As a business begins to acquire more characteristics of a corporate bureaucracy and fewer of a family enterprise, however, the employer's interest in privacy diminishes proportionally.").

297. *See* Kens, *supra* note 42, at 417-18.

298. *See* Abrams & Neuborne, *supra* note 121, at 22 ("In the world the Supreme Court has built, the very rich enjoy massively disproportionate political power.").

299. Greenwood, *Essential Speech*, *supra* note 13, at 1055.

300. *See* Abrams & Neuborne, *supra* note 121, at 22.

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strength of the traditional liberal democratic framework is not simply that it once influenced the Constitution, but that it still speaks today in the way it envisioned a society coping with large power structures, whether we call them governments or modern corporations.[301]

The danger of eschewing conceptual progress and retaining the current, regressive framework is the failure of our justice system to protect the rights of natural citizens.[302] Civilizations are judged "by the quality of their civil justice systems,"[303] and which framework we adopt determines that quality.[304] The proper viewpoint that best clarifies the current relationships between the empowered and those wearing the yoke is the traditional liberal democratic framework.[305] Without this, the inconsistency is jarring: corporations have government-like powers yet we protect them as if they were individuals.[306] Citizens will get lost in the shuffle if judges and legislators enforce corporate protectionism to the point that individual rights are subject to "secret corporate tribunals."[307] Even so, George Orwell's vision of the future may yet be prophetic: "If there was hope, *it must* lie in the proles, because only there . . . could the force to destroy the Party ever be generated . . . . Until they become conscious they will never rebel, and until after they have rebelled they cannot become conscious."[308]

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301. *See* LOCKE, *supra* note 19, at §§ 3–4; ROUSSEAU, *supra* note 19, at 141; Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982).

302. Palefsky, *Closing Thoughts*, *supra* note 178 ("It is important that judges, academics, and lawyers of conscience . . . continue to speak up for the fundamental constitutional right of American citizens to access [the] public justice system . . . .").

303. *Id.*

304. *See supra* notes 71-73 and accompanying text.

305. *See* Palefsky, *Closing Thoughts*, *supra* note 178.

306. *See* Goodman, *supra* note 74, at 1344, 1347; Greenwood, *Essential Speech*, *supra* note 13, at 1062.

307. Palefsky, *Closing Thoughts*, *supra* note 178 ("We can no longer lecture the world on the 'rule of law' when American citizens don't have the right to have the laws passed for their protection enforced correctly and are instead relegated to secret corporate tribunals with no right of appeal."); *see also* Sternlight, *supra* note 112 ("We should not allow companies to shortcut the legislative process by using arbitration to abolish class actions.").

308. GEORGE ORWELL, 1984 61-62 (Plume 1983) (1949). In the cacophonous din of what passes for contemporary journalism, consciousness may be a tall order: "The citizen of Oceania is not allowed to know anything of the tenets of the other two philosophies, but he is taught to execrate them as barbarous outrages upon morality and common sense. Actually, the three philosophies are barely distinguishable." *Id.* at 174-75.

V. CONCLUSION

The Constitution did not spring from a virgin birth. It had parents. It descended from a group of thinkers including Hobbes, Locke, and Rousseau.[309] This Note encourages legislators and judges not to ignore the Constitution's family tree.[310] Legislators and the Supreme Court should craft their respective legislation and decisions regarding constitutional protections for corporations under the lens of the liberal democratic public-private framework.[311] Doing so ensures consistency with traditional liberal democratic theory and better preserves the democratic values that shaped our Constitution.

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309. Mayer, *supra* note 10, at 578.

310. *See supra* text accompanying notes 275-79.

311. *See supra* Part IV.D.

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