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I. INTRODUCTION

Over the last two hundred years, the American business corporation has developed from a seldom-used method of doing business into the predominant economic actor in society.[1] Modern business corporations[2] are, on many levels, the most significant form of social organization, in many respects more influential and pervasive than even governmental entities. Yet, the corporate entity has consistently defied legal definition since America's founding.[3] The American legal tradition addresses legal relationships in terms of individual actors, and focuses primarily on interactions among individuals and between individuals and the government.[4] The Bill of Rights itself centers on protecting individuals from government action and discusses rights in terms of the "person" to whom they apply.[5] However, the American business corporation does not fit neatly into this framework, for a corporation is simply not a "person" as most understand the term. To overcome this dichotomy, corporate theorists have devised various metaphors to help

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1. *See infra* notes 19–22 and accompanying text (discussing how corporations have evolved into the preeminent actors of modern times).

2. For the purposes of this Article, "modern business corporation" means a large, hierarchically organized, publicly held, for-profit business corporation.

3. *See infra* Part II (discussing the various "personalities" corporations have taken throughout American history).

4. *See infra* note 24 and accompanying text (stating that the conflict between individuals and corporations has been a recurrent theme in modern corporate law and academic studies thereof).

5. *See, e.g.*, U.S. CONST. amend. XIV (discussing the rights of a "person" to due process of law).

supply a legal definition for the corporate entity.[6] The most common of these metaphors are the artificial entity theory, the aggregate entity theory, and the real entity theory, though each theory has its respective variants.[7] While these metaphors vary dramatically in their respective foci, they all have one thing in common: each attempts to force the corporate entity into a preexisting legal structure by way of analogy.

The use of metaphorical descriptions of the corporate entity is especially prevalent in the Supreme Court's corporate constitutional jurisprudence.[8] The Court's decisions in this area seem to assume that a corporation is a "person" under the Constitution and is thus entitled to many of the same rights as a natural person.[9] However, the Court has never established a test to determine what a constitutional person is or whether a corporation meets such a test. Instead, the Court has continually borrowed metaphors from corporate theory to analogize the corporate entity to the "person" protected by the Constitution.[10] These metaphors of corporate theory are frequently deployed in an ad hoc, arbitrary manner; different corporate metaphors have been used within the same case, even in interpreting different portions of the same Constitutional Amendment.[11] The result is a foundational problem in corporate constitutional law, for the Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them under the Constitution.

As a matter of law, the Court's jurisprudence relating to corporate constitutional rights is fundamentally flawed.[12] In its cases addressing corporate constitutional rights, the Court has failed to address the most important (and preliminary) question: whether a corporation should be entitled to the same rights as the natural person described in the Constitution. The Court's use of metaphors to analogize the corporate entity to a natural person ignores the most fundamental methods of constitutional interpretation. Moreover, the Court's current jurisprudence—with its reliance on metaphors rather than well-reasoned

6. *See infra* Part II (discussing several of the metaphors that commentators and jurists have devised).

7. *Id.*

8. *See infra* Part III (detailing the Supreme Court's view of metaphor and the corporate person).

9. *See infra* Part III.A (discussing how the Supreme Court has consistently held that a corporation is a "person" in constitutional analysis).

10. *See infra* Part III (showing that the Supreme Court has historically used metaphors in analyzing the constitutional protections afforded to corporations).

11. *Id.*

12. *See infra* Part IV (arguing that the question of constitutional personhood should be a threshold question in determining whether an entity is entitled to constitutional protection).

legal rules—is inherently unstable, for corporate theory itself is unstable. Despite hundreds of years of debate, corporate theorists have never agreed on the proper characterization of the corporate entity.

In essence, the Court has constructed a house of cards by relying on metaphors and theory to establish the basis of corporate constitutional rights. Rather than allowing such a legal fiction to provide the basis for corporate rights, the Court should examine the reasons a natural person is granted the right at issue and determine whether those justifications apply equally to the corporate entity.[13] In this manner, the Court would avoid the creation of a legal fiction by ensuring at the outset that the nature of the right is such that it logically extends to corporations.

Part II of this Article examines the use of corporate metaphors through America's history, tracing the development of corporate theory as well as the development of the corporate entity as a political and social actor.[14] Three distinct metaphors of the corporate entity are discussed: the artificial entity theory, the aggregate entity theory, and the real entity theory. These metaphors developed more or less coextensively and competed amongst each other in the academic literature around the turn of the century. The Court has adopted all three metaphors in addressing the constitutional rights of corporations, and all three metaphors (as well as their variants) can be seen in modern corporate constitutional jurisprudence.[15] By examining the nature of the theories, it becomes more apparent that a corporation is not the peer of a natural person and that the Court's use of corporate metaphors to analogize a corporation to a natural person is constitutionally unsound.

Part III examines corporate constitutional rights in depth, canvassing case law to demonstrate the manner in which the Court has found that corporations are entitled to various constitutional rights.[16] This Part addresses the Court's use of corporate theory to grant constitutional rights to corporations and demonstrates that the Court has continually failed to address the preliminary question of what it means to be a constitutional person.[17] In addition, this Part suggests a foundational

13. Though this Article explicitly argues that the current jurisprudence contains a doctrinal error, it does not necessarily follow that corporations are not entitled to constitutional rights. Rather, a corporation should be entitled to a constitutional right when the nature of the right at issue justifies its extension to a corporation for the same reasons it is extended to a natural person. This line of reasoning is taken up in further depth *infra* Part IV.

14. *See infra* Part II (providing an overview of the various theories and metaphors applied to corporations).

15. *See infra* Part III (demonstrating that the AE theory, AENTITY theory and the RE theory have all been adopted at some point by the Supreme Court).

16. *Id.*

17. *See infra* Part III.A (showing that the Court has never examined in detail the meaning of a

problem in the Court's corporate constitutional jurisprudence by using different corporate metaphors to force the corporate entity into the individualistic framework of the Constitution, the Court has adopted an ad hoc, result-oriented approach to corporate rights, which is difficult to reconcile with traditional modes of constitutional interpretation.

Finally, Part IV of this Article suggests an alternative framework for addressing corporate constitutional rights.[18] An examination of the values and policies underlying each constitutional right should be a threshold matter before a corporation is treated as a "person" under the Fourteenth Amendment. Such an examination would avoid the adoption of debated corporate metaphors into constitutional jurisprudence and would parallel traditional methods of constitutional interpretation. By examining the values and policies underlying each right, the Court would ensure that corporations are not granted constitutional rights meant only for individual citizens. Rather, a corporation would only be granted a constitutional right if the reasons a natural person is entitled to the right apply equally to a corporation. If this test were not met, constitutional rights could then be extended to corporations through the traditional amendment process, allowing for debate and discussion. This approach would prevent modern business corporations, which are simply not analogous to natural persons, from being treated in a manner not intended by the law.

II. CORPORATE PERSONALITY AND PERSONHOOD

Since our nation's founding, the development of corporate theory has dovetailed with the development of corporations as economic and social actors. At our nation's founding, corporations were viewed as mere legal creations of the state, with only the limited powers granted to them by the state.[19] Business was generally conducted by single proprietorships and partnerships; those corporations that did exist were those created by the state to accomplish public functions.[20] In contrast, modern business corporations are the preeminent economic actors in our society, operating largely in conformity with their own bylaws, rather

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corporate "person").

18. *See infra* Part IV (proposing that before treating a corporation as a person, courts should first identify the underlying purpose of the constitutional right sought).

19. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 292–93 (1990). In fact, no significant business corporations even existed until the railroad corporations became prominent late in the nineteenth century. *Id.* at 294.

20. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443–44 (1987) (footnote omitted) (discussing use of early corporations by the state to perform public functions such as construction projects).

than at the whim of the state. Corporations have attained such power in our modern political economy that "[t]he corporation, once the derivative tool of the state, ha[s] become its rival."[21] Modern business corporations "may be regarded not simply as one form of social organization but . . . as the dominant institution of the modern world."[22] Many commentators believe that the modern business corporation is such a powerful, pervasive entity that it should be viewed as a quasi-governmental body.[23] For example, Adolf Berle and Gardiner Means, who revolutionized corporate theory with their expansive view of the corporate entity during the late 1960s, state:

> The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state—economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state. The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization.[24]

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21. *Id.* at 1482.

22. ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 313 (rev. ed. 1968). *See also* Morton S. Baratz, *Corporate Giants and the Power Structure*, 9 W. POL. Q. 406, 413 (1956) ("[P]ublic policy necessarily tends to be oriented, especially over the long run, in a direction which is fundamentally in line with the interests of the great corporate enterprises . . . even if the interests of the giants are in conflict with other social goals."). Even those supporting an expansion of corporate rights do not deny the immense power of the modern business corporation. *See, e.g.*, Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 246 (1998) ("[I]t would be difficult to deny corporate activity's enormous impact on both the nation's welfare and the government's success.").

23. *See, e.g.*, CHARLES E. LINDBLOM, POLITICS AND MARKETS 172 (1977) (stating corporations have "become a kind of public official and exercise what, on a broad view of their role, are public functions").

24. BERLE & MEANS, *supra* note 22, at 313. This concern is a recurring theme in modern corporate law, especially following the corporate social responsibility movement, which occurred during the 1970s. *See, e.g.*, Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1211–16 (2002) (discussing power of modern business corporations); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1007 (1998) ("The modern publicly traded multinational corporation . . . appears to be as large and well organized, as in control of resources and potential instruments of coercion or power over individuals as are most local governments."). The contrary view is the law and economics movement, a variant of the aggregate metaphor, which views corporations as functions of the market and advocates corporate autonomy and regulatory restraint. Branson, *supra* at 1217 (footnote omitted). Law and economics largely swallowed the corporate social responsibility movement during its rise in the 1980s, and it remains a powerful influence in corporate theory today. *Id.* However, the 1990s saw the beginning of a new corporate social responsibility movement, "advocat[ing] a 'communitarian' model of the corporation." *Id.* This movement

The development of corporate power and the rise of the modern business corporation can be traced by examining the history of corporate personality doctrine.[25] The concept of a corporate entity has always been difficult for both economists and jurists to define, for the American legal system embodies "an ancient tradition of seeing the world as composed of private individuals and government entities . . . ."[26] It is in this tradition that the Constitution was founded; the Bill of Rights focuses primarily on relationships between the government and individuals.[27] It is also in this tradition that the American common law has evolved. A corporation, which is not an individual "person" by any stretch of the imagination, is nonetheless a legal actor in American society. Therefore, the law has been forced to determine how to treat corporations within a legal tradition that is not particularly well suited for the task.

In order to help the American legal tradition "see" corporations, corporate theorists have developed various metaphors to analogize the corporate entity to the individual actor which the law presumes.[28] This has resulted in a legal "personification" of corporations and the creation of corporate personality doctrine. In other words, the law's adoption of metaphors has produced a legal fiction by creating a corporate "person."[29] Corporate personality doctrine includes three major theories

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focuses on the role of corporations in the community, promoting corporate responsibility to "stakeholders." *Id.* In the broadest conception, "stakeholders" can mean society in general. *Id.* The rationale for this movement is well-expressed by Professor Lawrence Mitchell, who wrote:

> [N]o institution other than the state so dominates our public discourse and our private lives . . . . [C]orporations make most everything we consume. Their advertising and products fill almost every waking moment of our lives. They give us jobs, and sometimes a sense of identity. They define communities, and enhance both our popular and serious culture. They present the investment opportunities that send our children to college, and provide for our old age. They fund our research.

LAWRENCE E. MITCHELL, PROGRESSIVE CORPORATE LAW, at xiii (Lawrence E. Mitchell ed., 1995).

25. *See infra* Part II (discussing the various "personalities" corporations have taken throughout American history). While other legal developments—such as those in contract and tort law, which developed coextensively with corporate law—also contributed greatly to the rise of corporate power, they are beyond the scope of this Article and will not be addressed here.

26. Greenwood, *supra* note 24, at 1013; *see also* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 85–87 (1986) (discussing how to determine whether organizations are entitled to legal rights).

27. U.S. CONST. amend. I–X.

28. *See infra* Part II (showing how corporate theorists have used a variety of metaphors in evaluating the rights of a corporation).

29. This legal fiction is most prevalent in constitutional law, where the Court has created corporate "constitutional persons" through the adoption of corporate metaphors. The Court's use of these metaphors is discussed at length *infra* Part III (discussing the Supreme Court's view of metaphor and the corporate person).

of how a corporation should be viewed, though each theory has several variants. These three theories are the artificial entity theory,[30] the aggregate entity theory,[31] and the real entity theory.[32] Each view developed in light of the legal struggle to fit corporations into the American legal tradition.[33] The Court has adopted all three theories in addressing corporate constitutional rights, and all three theories are present in modern corporate theory.[34] However, the theories are vastly different in their respective foci, which illustrates the inherent problem with the Court's reliance on them as a basis of constitutional rights. Because each theory views the corporate entity differently, the Court, through its adoption of these metaphors, has created a corporate "person" that is schizophrenic in nature. To understand this point fully, it is necessary to examine the underpinnings of each theory.

A. Corporations as Artificial Entities

The corporate entity was not a novel concept in America at the time of the nation's founding, for corporate law was transplanted from England, where theories of the corporate entity were already being developed.[35] However, the conception and economic reality of the corporate entity was radically different from that which exists today. English commentators originally viewed corporations as "artificial person[s]," created by the state, with only those powers given to them by the state.[36] Corporations at this time existed only for the public

30. *See infra* Part II.A (discussing the corporation as an artificial entity).

31. *See infra* Part II.B (discussing the aggregate theory of corporations).

32. *See infra* Part II.C (discussing the rise of the real entity theory of corporations and charting the evolution of legal realism).

33. *See* Mark, *supra* note 20, at 1445 (discussing the difficulty of fitting corporations into the American legal system when corporations possess characteristics of both individuals and governments).

34. *See infra* Part III (reviewing how the Supreme Court has treated corporate metaphors over time). Though the debate over corporate personality ebbed for much of the twentieth century, over the last twenty years it has once again become a hot topic among corporate theorists. Corporate theory is currently in what has been phrased the "neoclassical" period, in which variants of all three major theories of corporate personality are competing in the academic literature. *See infra* Part II.D (discussing the resurgence of the debate over corporate personality).

35. *See infra* notes 36–38 and accompanying text (discussing early English notions of the corporate entity).

36. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 475–76 (1st ed. Oxford, Clarendon Press 1765); 2 SIR EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 250a (n.p. 1628); 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 69–70, 103 (London, J. Butterworth, Fleet Street) (1793) (discussing corporate empowerment under the laws of England and the powers, rights and capacities provided under certain laws); *see also* Case of Sutton's Hosp., 10 Coke 23a, 30b-32b, 77 Eng. Rep. 960, 970–73 (1612) (stating a corporation is "invisible, immortal, and rests only in intendment and consideration of the law").

good—to accomplish the public purposes for which they were created. Moreover, because corporations were creatures of the state, they existed at the pleasure of the state, and the state reserved the power to modify any of the rights granted to them, or even to remove their charter entirely.[37] Under this view, a corporation was a legal fiction, an artificial entity.[38]

The economic and social position of corporations during the early nineteenth century was also vastly different from today. During the early nineteenth century, business corporations were few and far between; "business was generally conducted by single proprietorships or partnerships rather than corporations."[39] This continued to be true throughout most of the nineteenth century. Corporations did not overtake partnerships as the most common method of doing business until nearly the turn of the century.[40] Private business corporations did not become prevalent until the end of the nineteenth century, and large institutional corporations were nonexistent until the railroad and bank conglomerates began to amass power in the latter half of the nineteenth century.[41] Because corporations were radically different economic and social actors, they did not invoke the "revolutionary republican fear of concentrated power and skepticism about the utility of large institutions" that many citizens held after the Revolutionary War.[42] As a

37. *See* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1456 (1992) (discussing how corporations' entitlement to constitutional rights were constrained by the state, which chose whether to grant a charter or not).

38. *See* Blumberg, *supra* note 19, at 292. While the artificial entity metaphor was the predominant theory at the time of our nation's founding, it was not the only metaphor used. The aggregate entity theory, which basically views a corporation as the product of its collective parts, was also present. *See* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989). Thus, early commentators stated that "the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it...." VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE § 1, at 2 (1882). While the artificial entity view dominated for most of the nineteenth century, the aggregate metaphor can also be seen in some of the Court's early cases. *See infra* note 71 and accompanying text (discussing the use of the aggregate entity metaphor in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809)); *see also* GERARD CARL HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 54–57 (1918) (commenting on *Deveaux*).

39. Mark, *supra* note 20, at 1444.

40. *See id.* (indicating that the change in the role of the corporation at the end of the nineteenth century was due, in part, to state support for economic development).

41. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1634–35 (1988) (indicating that during this time period the incorporation process was "democratized" and the enactment of state general incorporation acts allowed businesses to incorporate on their own, that is, without state interaction).

42. Mark, *supra* note 20, at 1443.

result, "[v]ery little tension arose between economic practice and individualist economic and legal theory in the early nineteenth century."[43]

The seminal Supreme Court case adopting the artificial entity theory is *Trustees of Dartmouth College v. Woodward*.[44] In that case, the Court considered whether a state could unilaterally modify a corporate charter that it had previously granted.[45] The case is noteworthy for two main reasons. First, it firmly established the artificial entity metaphor in constitutional jurisprudence.[46] The Court described the corporate entity as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[47] Second, the Court began to branch away from British corporate law by striking down the State's ability to amend a corporation's charter unilaterally. Relying on the Contract Clause, the Court held that a corporate charter was a contract between a corporation and the state, and the state therefore lacked the power to amend a previously granted corporate charter in the absence of express authority to do so contained within the charter.[48]

The impact of the *Dartmouth College* decision on the development of corporate law was substantial. First, the Court's explicit adoption of the artificial entity metaphor set the stage for the Court's subsequent use of metaphors in cases dealing with corporate constitutional rights.[49] The artificial entity metaphor remained the predominant view of the corporate entity through most of the nineteenth century. Second, the Court's holding, with its emphasis on protecting corporate property rights, proved equally powerful. While the Court defined a corporation as an "artificial being" created by the state, it held that corporate property could not be disposed of at the state's whim once it had been

43. Bratton, *supra* note 38, at 1483.

44. 17 U.S. (4 Wheat.) 518 (1819).

45. *Id.* at 637–38.

46. Although the Court did not consider whether a corporation was a "person" under the Constitution, the Court's use of the artificial entity metaphor is important to demonstrate the development of corporate personality theory, particularly in light of the frequent citation of Chief Justice Marshall's view of the corporate entity.

47. *Dartmouth Coll.*, 17 U.S. at 636.

48. *Id.* at 638. State legislatures reacted to the *Dartmouth College* decision by including clauses in corporate charters which expressly reserved to the state the ability to amend or repeal a corporation's charter. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 197–98 (2d ed. 1985). This circumvented the effect of the *Dartmouth College* holding and was in part the impetus for the passage of the general incorporation acts during the Jackson administration, discussed *infra* Part II.B.2.

49. *Dartmouth Coll.*, 17 U.S. at 636.

created.[50] This limit on the state's authority provided a basis for an expansion in corporate autonomy and power, especially as corporations began to see greater use as regular vehicles for doing business at the end of the nineteenth century.[51]

This departure from English corporate law did not go unnoticed. Many commentators disagreed with the Court's use of the Contract Clause to shield corporations from state interference. For example, Thomas Cooley noted:

> It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country and upon the legislation of the country than the states to which they owed their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretense—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless or corrupt legislation.[52]

Another commentator argued that the *Dartmouth College* rule should not have been applied to business corporations, and that the English rule should have been retained for these entities.[53] Yet another stated, "[t]o recognize in a legislature the power by a contract to tie the hands of all future legislatures, and deprive them of the power to interpose regulations that may become needful as a protection to the public against the aggressions . . . of the corporation[s], would be a specimen of political suicide."[54] These excerpts demonstrate that commentators as early as the nineteenth century saw the corporate entity's potential to

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50. *Id.*

51. *See infra* Part II.C (discussing the radical change in corporate theory at the turn of the century as corporations came to be seen as market and societal actors).

52. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 335 (2d ed. Boston, Little Brown & Co. 1871). According to Cooley, the result of *Dartmouth College* was that the Contract Clause, "whose purpose was to preclude the repudiation of debts," had been interpreted in such a manner as to perpetuate entrenched corporate authority. *Id.* at 167.

53. FRANCIS WHARTON, COMMENTARIES ON LAW 556–57 (1884) (noting the English rule, "that business franchises granted by the legislature can, in all cases, be recalled and modified when the public interests require, provided that in this way private property is not taken without adequate compensation," was preferable).

54. 2 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 959 (1900). Tiedeman felt that the state should retain authority and flexibility to control corporations, and believed that the emerging classical conception of the corporation, brought about by *Dartmouth College*, had resulted in a narrowing of the Contract Clause's application to corporations and an increase in substantive due process rights. *See id.* (discussing the danger of narrowing the application of the contract clause).

amass enough power and influence to merit treatment as a quasi-governmental institution.[55]

In summary, the artificial entity metaphor, as set forth in *Dartmouth College*, defines a corporation as an artificial being, intangible in nature and existing by virtue of the state's authority.[56] This theory was prevalent in British corporate law and was transplanted to America following the Revolutionary War.[57] The Court's adoption of the artificial entity metaphor in *Dartmouth College* provides an early example of the Court's use of corporate theory to adjudicate a corporation's constitutional rights.[58] The case also demonstrates, however, a break from the British tradition, which signaled a developing trend in favor of corporate autonomy.[59] The artificial entity metaphor remained the dominant view of the corporate entity through much of the nineteenth century, and it remains prevalent in corporate theory as well as constitutional law today.[60] As the nineteenth century progressed, the corporate entity continued to emerge as a dominant social and economic institution, having gained its toehold in *Dartmouth College*.

B. General Incorporation and Aggregate Entities

In addition to the artificial entity theory, the aggregate view of the corporate entity was also prevalent in corporate theory during the

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55. These commentators' general abhorrence of the powers being granted to corporations is instructive in considering the position of the modern business corporation. The corporate entity has generally gained more institutional power, and become less the subject of regulatory controls, since the early twentieth century. See *supra* note 23 and accompanying text (discussing quasi-governmental view of corporations). However, the Court did not view the corporate entity in this manner at the time *Dartmouth College* was decided. As Mark notes, "[t]hat a second set of public institutions could operate within the sovereignty of the state and federal governments was simply dismissed as beyond the bounds of acceptable thought." Mark, *supra* note 20, at 1447.

56. Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

57. *See supra* notes 36–38 and accompanying text (discussing early English notions of the corporate entity).

58. *See supra* notes 53–57, *infra* notes 59–61, and accompanying text (discussing the holding of *Dartmouth College* and the way in which the Court used the artificial entity metaphor to reach that holding).

59. *Dartmouth Coll.*, 17 U.S. at 636.

60. *See infra* notes 74, 77, 80 and accompanying text (listing several nineteenth-century cases in which the court relied on the artificial entity metaphor). The artificial entity theory of the corporation can still be seen in modern constitutional law. For example, in *First National Bank of Boston v. Bellotti*, a First Amendment case in which corporations challenged a Massachusetts statute that limited corporate spending for political speech, Justice Rehnquist stated, "I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation." 435 U.S. 765, 826–27 (1978) (Rehnquist, J., dissenting).

nineteenth century. This theory, which emerged early in corporate jurisprudence and became a dominant metaphor following Andrew Jackson's presidency, views a corporation as "an association of individuals contracting with each other in organizing the corporation."[61] The aggregate entity metaphor was a product of both Jacksonian era classicism—which strove to make the corporate entity available to all Americans through the general incorporation acts—and the corporate bar's push to equate corporations with partnerships during the latter half of the nineteenth century.[62] While the aggregate entity metaphor was first used by the Court during the Marshall era, it became a dominant metaphor during the latter half of the nineteenth century and was particularly instrumental in the Court's first cases dealing with corporate constitutional rights. The aggregate entity theory remains a dominant metaphor in modern corporate theory,[63] and it is present in the Court's modern cases as well.[64]

The aggregate entity theory has its roots in American associational activity. When Alexis de Tocqueville visited America in the early nineteenth century, the corporate entity had not yet become a prominent economic actor in American society.[65] Yet, de Tocqueville noted "that the right and ability of individuals to form voluntary associations constituted an integral part of the fabric of American society . . . ."[66] This included associating to form "commercial and manufacturing companies," which at that time meant small, unincorporated enterprises, as well as political activity groups.[67] Thus, while American citizens were generally distrustful of concentrated institutional power (a remnant of America's relationship with Britain), associational activity was seen as "necessary to enhance the powers of individually powerless citizens

61. Blumberg, *supra* note 19, at 293.

62. *See* Rivard, *supra* note 37, at 1458 (explaining that the "partnership analogy" is one school of thought pertaining to the aggregate entity theory); *see generally* Hovenkamp, *supra* note 41, at 1634–35 (noting the development of corporate theory during the Jacksonian era).

63. The theory has been revised by current law and economics scholars, who characterize the corporate entity as "a legal fiction that serves as a nexus for a set of contractual relationships among individual factors of production." Bratton, *supra* note 38, at 1471. *See generally* Melvin Aaron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 GEO. WASH. L. REV. 582, 582 (1984) (discussing contractual approach).

64. *See infra* notes 104, 108 and accompanying text (analyzing the Supreme Court's adoption of the aggregate entity theory and later confirmation of the theory).

65. *See supra* note 20 and accompanying text (discussing how corporations of the time were created by the state to serve the public).

66. Redish & Wasserman, *supra* note 22, at 252.

67. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 128, 140–41 (Henry Reeve trans., London, Longman, Green, Longman, & Roberts 1862).

by allowing them to unite in order to amass power."[68] It is from this line of reasoning that the aggregate theory of the corporate entity drew its strength.

1. Development in the Marshall Era

The aggregate entity metaphor of the corporation was first adopted by the Supreme Court during the Marshall era.[69] However, the associational view during that era was much more restrained than what is seen today.[70] For example, in *Bank of the United States v. Deveaux*,[71] the Court held that a corporation was not a "citizen" under the Constitution.[72] "As a result, diversity of citizenship for federal jurisdictional purposes was the citizenship of the corporation's shareholders rather than the state of incorporation or the corporation's principal place of business."[73] As a result, corporations were allowed easy access to federal courts because it was easy to demonstrate diversity of citizenship. This aggregate view of corporate citizenship persisted until the Court's decision in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*.[74] *Letson* reversed the rationale, adopting the artificial entity theory of the corporation to hold that a corporation would be deemed a "citizen" of the state of incorporation

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68. Redish & Wasserman, *supra* note 22, at 252 (footnote omitted). According to Redish and Wasserman:

> Absent the special economic and legal advantages of the corporate form, individual entrepreneurs who lacked personal fortunes were unable to compete effectively with those who possessed such wealth. Thus, the corporation's growth represented "the economic aspect of the policital [sic] and social forces that democratized the United States during the Age of Jackson.

Id. at 253 (citing RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784–1855 at 256 (1982)) ([sic] in original). Ironically, it was in part this social focus on associational activity that prompted the general incorporation statutes, which were the first major step toward the modern business corporation. *See infra* Part II.B.2 (discussing the emergence of general incorporation statutes during the Jacksonian era).

69. Notably, this was the same Court that adopted the artificial entity metaphor in *Dartmouth College*, reflecting the Court's difficulty in determining the proper way to define the corporate entity.

70. *See infra* Part II.D (discussing the modern associational view, which views corporations as a nexus of relationships among various units of production).

71. 9 U.S. (5 Cranch) 61 (1809).

72. *Id.* at 86.

73. Hovenkamp, *supra* note 41, at 1598. While this view departs from the artificial entity theory, "Chief Justice Marshall made it plain that the associational view was superimposed upon, rather than replacing, entity law." Blumberg, *supra* note 19, at 303. According to Blumberg, "[s]hareholder interests entered only to support the assertion of federal jurisdiction over corporate litigation . . . ." *Id.*

74. 43 U.S. (2 How.) 497 (1844).

for purposes of jurisdiction.[75] However, the Court retained the previous result: a "corporation received the jurisdictional opportunities open to citizens without the Court having to accord 'citizenship' to it."[76] Ten years later, in *Marshall v. Baltimore & Ohio Railroad Co.*,[77] the Taney Court reclarified that a corporation was not a constitutional citizen, yet adopted a legal presumption that a corporation's shareholders were citizens of the state of incorporation.[78] While the result is a complete legal fiction, it is still the governing law, though now under statute.[79]

The aggregate entity theory also appears in Chief Justice Marshall's dissent in *United States v. Dandridge*.[80] In that case, Marshall argued that a corporation could only sue on a bond if it spoke in "the aggregate voice. . . . These individuals must speak collectively to speak corporately, and must use a collective voice."[81] In this context, the aggregate entity view was widely rejected by the turn of the century as "[c]ourts began holding that shareholders ordinarily lacked standing to sue for injuries to the corporation."[82] The ultimate effect of these decisions was to separate the ownership of the corporate entity—the shareholders—from the control of the corporate entity—now effectively held by the corporate entity itself, usually exercised through the board of directors.[83] Thus, the property rights held by a corporation were effectively being separated from one another.[84]

2. Emergence During the Jacksonian Era

While the aggregate view of the corporation first appeared in the decisions of the Marshall Court, it became especially prominent during the period following Andrew Jackson's presidency. Influenced heavily by Adam Smith, the "founder of classical political economy,"[85]

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75. *Id.* at 558-59.

76. Blumberg, *supra* note 19, at 304.

77. 57 U.S. (16 How.) 314 (1853).

78. *Id.* at 328-29. Again, the result remained the same, though the rationale reversed.

79. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 149 (4th ed. 1983) (stating, in note 6, that except as modified by a 1958 statute, the doctrine is settled).

80. 25 U.S. (12 Wheat.) 64 (1827).

81. *Id.* at 92.

82. Hovenkamp, *supra* note 41, at 1600. This trend is illustrative of the inherent dichotomy in corporate theory; even as the aggregate metaphor was becoming the dominant theory through the end of the nineteenth century, it was being rejected by courts in this context.

83. *See id.* (stating that "[s]hareholder disqualification from direct participation in the classical corporation's legal affairs began the gradual separation of corporate ownership from its control").

84. The separation of ownership from control is one of the key features of the modern business corporation, and has been the subject of much discussion in corporate theory. This subject is given further attention *infra*, Part II.C.

85. Hovenkamp, *supra* note 41, at 1610.

Jacksonian era corporate theorists advocated a pro-industrial economy, believing that the market was self-regulating in terms of price-setting.[86] "Although Adam Smith distinguished between 'natural' and 'market' prices . . . by the time of John Stuart Mill, a 'just' price, if it existed, was nothing other than the price set by the market."[87] Recognizing the capability of the corporate entity as a market participant (especially as the country became increasingly industrial), Jacksonian era corporate theorists began advocating the availability of the corporate entity to every citizen as a means of conducting business.

The great innovation of Jacksonian era corporate theorists was to make the general business corporation available to all Americans. Under Jackson's administration, states promulgated general incorporation acts, which allowed individuals to incorporate their businesses without first seeking a special charter from the state legislature.[88] The general incorporation acts altered the legal conception of the corporate entity by undermining a central premise of both the *Dartmouth College* case and the artificial entity theory—that corporations were created by the state and existed only for the purposes contained in the charter granted by the state.[89] Free incorporation made the corporate entity "available by a simple procedure on equal terms to all who saw use for them in ordinary business associations."[90] "[T]he process of chartering ceased to be a legislative matter and became an administrative and procedural one."[91] The immediate effect of the general incorporation acts was to "move[] the predominant role in corporate organization from the state to the incorporators and shareholders."[92] Due to the general incorporation statutes, the corporate entity came to be seen "as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by

86. *Id.* at 1627.

87. *Id.* (citing ELLEN FRANKEL PAUL, MORAL REVOLUTION AND ECONOMIC SCIENCE: THE DEMISE OF LAISSEZ-FAIRE IN NINETEENTH-CENTURY BRITISH POLITICAL ECONOMY 155-67, 220 (1979)).

88. *See* Hovenkamp, *supra* note 41, at 1634 (discussing business corporations acts during the Jacksonian period).

89. The first large corporations to surface after the general incorporation acts were railroads and banks. These types of corporations were supervised by the States quite strictly because of their quasi-public nature. Mark, *supra* note 20, at 1444. Late in the nineteenth century, however, the use of corporations as a method of doing business exploded as individual citizens began taking advantage of the ready availability of the corporate entity. *Id.* at 1445.

90. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 32 (1970).

91. Mark, *supra* note 20, at 1454. In effect, citizens were able to incorporate their business ventures by simply filling out the necessary paperwork.

92. Blumberg, *supra* note 19, at 293.

individuals."[93] This made it difficult to ignore the individuals behind the corporate fiction. This concept of the corporate entity as a vessel for individual self-realization, coupled with the corporate bar's strong push for enhanced corporate rights, led to the adoption of the aggregate entity metaphor in corporate and constitutional jurisprudence.

3. The Artificial Entity and the Partnership Analogy

Corporate theory reached a crossroads at the end of the nineteenth century. The aggregate entity theory became more prevalent as individual citizens began taking advantage of the general incorporation statutes to form business corporations.[94] Yet, the artificial entity theory was still relied on by advocates of regulation, who used "conceptions of businesses 'affected with the public interest' to carve out a way to deal effectively with corporate power."[95] In response, the corporate bar began advocating an expansion in corporate rights by suggesting that corporations were similar to partnerships.[96] The goal was not to increase the liability of corporate actors, but to increase the freedom of corporations to act without state restraints. Advocates combined the *Dartmouth College* proposition that corporate private property was protected from state interference with the appealing concept of individual rights that had emerged during the Jacksonian era.[97] The result was the idea that "the rights and duties of an incorporated

93. Redish & Wasserman, *supra* note 22, at 254.

94. Around the turn of the century, the corporate entity replaced the partnership as the primary means by which American citizens did business. Many of the corporations formed during this period were not the large conglomerates that are present today, but were "close" corporations, usually small businesses. This made the individuals behind the corporations more difficult to ignore. It is noteworthy that the large corporate institutions which existed at the time, such as railroads and banks—the closest nineteenth century analogy to the modern business corporation—were viewed as quasi-public bodies, and were treated by the law as such. *See, e.g.*, Mark, *supra* note 20, at 1444 (discussing railroad and bank conglomerates in the late nineteenth century).

95. *Id.* at 1457. Such statements were generally made in relation to the large railroad corporations and banks, which undeniably served public purposes. The American public was especially skeptical of these types of corporations, particularly as monopolization became a major legal concern and the Sherman Antitrust Act was passed. *See* Sherman Antitrust Act, ch. 647, § 2, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 2 (West 2004 & Supp. 2005)) (regulating monopolies). However, these are much the same arguments that are being made by social responsibility theorists today: that modern business corporations exercise a great deal of power and influence over society, and should therefore be treated as quasi-public actors. This view is discussed in further depth *infra* Part II.D.

96. Mark, *supra* note 20, at 1457.

97. This idea also derived from the aggregate theories utilized by the Marshall Court, but was premised on notions of individual freedom as well. By persuading courts to look past the corporation to see the individual actors, as in a partnership, advocates attempted to demonstrate that corporations should have the same rights as a natural person.

association are in reality the rights and duties of the persons who compose it, and not of an imaginary being."[98] Thus, advocates argued that corporations should "operate with the flexibility of a partnership and the property protection of an individual, while remaining under the control of a relatively limited body of managers."[99]

Though the Court never fully adopted the partnership analogy, its reasoning was significant in persuading the Court to buy into the aggregate entity metaphor, particularly in decisions affecting corporate constitutional rights. In the *Railroad Tax Cases*,[100] Justice Field, then sitting on the circuit court, held for the majority that corporations could claim equal protection of the laws under the Fourteenth Amendment.[101] The court stated that "[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value."[102] Thus, the court imputed the corporation's constitutional personhood from that of the individuals who had formed the corporation. In a concurring opinion, Justice Sawyer went even further, stating "[t]he truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators."[103]

Four years after the *Railroad Tax Cases*, the aggregate entity metaphor of the corporation was adopted by the Supreme Court in *Santa Clara County v. Southern Pacific Railroad Co.*, a case that has proven to be a watershed moment for corporate constitutional rights.[104] In that case, the Court held for the first time that a corporation is a "person" under the equal protection clause.[105] The Court's holding contained no reasoning or analysis, but merely stated:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to those corporations. We are all of the opinion that it does.[106]

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98. MORAWETZ, *supra* note 38, § 1, at 2.

99. Mark, *supra* note 20, at 1459.

100. 13 F. 722 (C.C.D. Cal. 1882), *appeal dismissed as moot*, San Mateo County v. S. Pac. R.R. Co., 116 U.S. 138 (1885).

101. *Id.* at 744.

102. *Id.* at 747.

103. *Id.* at 758.

104. Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

105. *Id.*

106. *Id.* at 396.

While the opinion contains no constitutional interpretation or analysis of corporations' constitutional personhood, the presence of Justice Field, "the likeliest source[] for a new vision of the corporation," suggests that the Court likely based its decision on the aggregate entity theory present in the *Railroad Tax Cases*.[107] The Court confirmed this implication two years later in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,[108] where it stated, "[c]orporations are merely associations of individuals united for a special purpose. . . . The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State."[109]

Santa Clara may be viewed as the watershed case for corporate constitutional rights, for by holding that a corporation is a constitutional "person" under the Fourteenth Amendment, it provided the foundation for all corporate constitutional rights. However, the underpinnings of the decision demonstrate that the Court's analysis of the corporate "person" was faulty. The Court likely relied on the partnership analogy and the aggregate entity metaphor to look past the corporate shell to see the individual property rights.[110] In this sense, the Court likened the corporate entity to the natural "person" described in the Fourteenth Amendment by focusing on the rights of the natural persons who had founded the corporation.[111] However, the *Santa Clara* decision also implicates the artificial entity metaphor, for the effect was to allow a corporation, rather than its shareholders, to remain the named party in all corporate litigation.[112] Thus, a corporation was an artificial entity,

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107. Mark, *supra* note 20, at 1463.

108. 125 U.S. 181 (1888).

109. *Id.* at 189.

110. Roscoe Conkling, who argued the *Railroad Tax Cases* before the Supreme Court, advocated corporate personhood "to protect property, individual property held in corporate form, but not corporate autonomy per se." Mark, *supra* note 20, at 1462–63. Conkling was heavily influenced by John Norton Pomeroy, who also advocated individual property rights held in the aggregate. Pomeroy's aggregate entity theory was in part adopted by Justice Field in the *Railroad Tax Cases*, who wrote: "[T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name." *The Railroad Tax Cases*, 13 F. 722, 748 (C.C.D. Cal. 1882), *appeal dismissed as moot*, San Mateo County v. S. Pac. R.R. Co., 116 U.S. 138 (1885).

111. *See Pembina*, 125 U.S. at 189 (explaining that corporations are merely associations of individuals united for a special purpose—to do business).

112. *See, e.g.*, Hovenkamp, *supra* note 41, at 1643 (arguing that *Santa Clara* was decided based on convenience of naming corporation, rather than shareholders, in corporation's litigation). Hovenkamp argues that in *Santa Clara*, "the Court selected the shortest and most practical route to its end." *Id.* at 1645. Under the *Santa Clara* rule, corporate litigation would be approved by the board of directors, and carried on in a corporation's name, without the consent of the corporation's shareholder's. *Santa Clara* thus demonstrates the separation of ownership (the

recognized as a fictional legal "person" for purposes of litigation. In this sense, the *Santa Clara* Court used the aggregate entity metaphor to justify protecting corporate rights under the Fourteenth Amendment, and the artificial entity metaphor to justify constitutional litigation in a corporation's name. Thus, the legal "person" recognized by the Court was a complete legal fiction.

The inherent problem with the use of both metaphors in *Santa Clara* is that the Court granted constitutional personhood to corporations without inquiring whether corporations should be entitled to it as a matter of law. Corporate theorists at the time could not even agree as to whether the artificial entity metaphor or the aggregate entity metaphor properly defined the corporate entity. Yet, the Court drew on both metaphors within the same case to recognize the constitutional rights of corporations for the first time. Moreover, the Court's use of both metaphors to justify the result—that shareholders did not have authority to bring suit on a corporation's behalf—is indicative of the Court's generally ad hoc approach to corporate constitutional rights.[113] This injects a great deal of uncertainty into the constitutional validity of the decision, especially given the subsequent use of the *Santa Clara* holding as a basis for the expansion of corporate constitutional rights.[114]

In summary, the aggregate entity theory was the result of two important historical developments. First, the Jacksonian era saw the general incorporation acts replace the state as the fountainhead of

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shareholders)—from control (the board of directors). In essence, the shareholders were removed from the equation.

113. In the line of cases involving corporate constitutional rights, discussed *infra* Part III, the Court defines the corporate entity differently at each turn, seemingly adopting whatever metaphor favors the desired result.

114. The basis of the aggregate entity theory, used to extend constitutional "personhood" to corporations in *Santa Clara*, differs dramatically from the reality of the modern business corporation. Individuals today do not incorporate "to self-realize . . . and personally benefit[] from the political-economic system through the power of collective action." Redish & Wasserman, *supra* note 22, at 254. Rather, individuals simply buy shares in corporations to receive profits. Modern corporate law views shareholders as only "moments in the market, legal abstractions that have interests quite different from . . . real citizens." Greenwood, *supra* note 24, at 1003. As a result, "[b]oth the law and the market force the corporate actors to run the corporation on behalf of the interests of fictional shareholders." *Id.* at 1004. Generally, this means that the fictional shareholder is interested only in profits, and the managers' main duty is to profit-maximize. Also, the idea implicit in the aggregate entity theory—that individuals collectively hold property and rights under the corporate entity—is simply not present in modern corporate law. Shareholders in modern business corporations "have no right to withdraw money from the corporate treasury, and have no right to control its use." *Id.* at 1009 n.39. Shareholders in modern business corporations have few of the common law rights of property ownership, a point dramatically made by commentators since the early 1900s. *See, e.g.*, BERLE & MEANS, *supra* note 22, at 244–46 (discussing separation of ownership from control).

corporate existence with the American citizen.[115] This "played [a] major role[] in making the corporation appear to be a natural way to organize property."[116] The corporate entity became increasingly conceptualized as consistent with individual autonomy as individual citizens began using the corporate entity as a general means of doing business. Second, the corporate bar began advocating for recognition of individual rights held in collective form.[117] These two complementary lines of reasoning dovetailed in the emergence of the aggregate entity metaphor during the late nineteenth century, culminating with the Supreme Court's use of the metaphor to establish a corporate constitutional "person" in Santa Clara.

C. Real Entities, Market Regulation, and Managerialism

The "real entity" metaphor of the corporation first appeared around the turn of the twentieth century. The real entity theory generally views the corporate entity as a natural creature, to be recognized apart from its owners, existing autonomously from the state.[118] To elaborate, a corporation is "an organic social reality with an existence independent of, and constituting something more than, its changing shareholders."[119] The real entity theory emerged from several strains of corporate theory as the debate over corporate personification was "brought . . . to the forefront of juridical controversies" in the early 1900s.[120] First, the partnership analogy, which had resulted in partial judicial acceptance of the aggregate metaphor, proved to be counter to the realities of twentieth-century business corporations.[121] Second, corporations became management-dominated.[122] Finally, legal realism became the dominant strain of corporate theory, pushing the real entity theory to the forefront of the academic discussion.[123] The legal realism movement

115. *See supra* Part II.B.2 (discussing the aggregate entity view during the Jacksonian era).

116. Mark, *supra* note 20, at 1455.

117. *See supra* notes 98–99 (discussing rights of a corporation as actual rights of individuals who make up the corporation).

118. *See* Rivard, *supra* note 37, at 1459–61 (explaining the real entity theory).

119. Blumberg, *supra* note 19, at 295. This is particularly important given the fictional view of a modern shareholder, which assumes that shareholders are moments in the market, the product of a decision to buy or sell at any moment. Thus, the modern business corporation continues to exist even as its owners change on a daily basis through market trading.

120. Mark, *supra* note 20, at 1467.

121. *See infra* Part II.C.1 (discussing the decline of the partnership analogy and the emergence of the real entity metaphor).

122. *See infra* Part II.C.2 (discussing the growth of managerial corporations). This development was coextensive with the separation of ownership and control in large business corporations.

123. *See infra* Part II.C.3 (discussing the growth of legal realism and the emergence of the real

was so successful in establishing the corporate entity as a normal business model that by the 1930s the debate over corporate personality essentially disappeared. That a corporation was a legal actor, endowed with protectable interests, became accepted doctrine.[124]

1. The Decline of the Partnership Analogy

The partnership analogy advocated by the corporate bar in the late nineteenth century, while successful in gaining acceptance of the aggregate entity metaphor, also suffered several shortcomings. First, it did not recognize "that part of the value of corporate property was that corporations were ongoing operations premised on the ability to maintain property as a unit."[125] Second, shareholders, who were originally viewed as the owners of a corporation, did not have the common law rights of ownership.[126] Finally, an organicist view of society, which "saw society as a collection of collectivities, each a legitimate outgrowth of individuals," arose in corporate theory.[127] Under this view, corporations were natural entities, which were equally capable of participating in society as an individual person. The organicist theory thus bridged the gap between the aggregate metaphor and the search for corporate autonomy by making the corporate entity seem to be a natural way of conducting business. It was from this strain that the real entity metaphor grew.

2. The Growth of Managerial Corporations

The second key development in corporate law during this period, which complemented the organicist view, was the rapid growth of managerial corporations. The growth of managerialism has been explained in several different ways. According to Alfred Chandler, the corporate entity became a dominant economic and social actor by lowering costs; by internalizing production units it was able to cut transaction costs.[128] Such internalization required coordination and oversight, and management was the solution.[129] In essence,

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entity as the dominant theory).

124. Mark, *supra* note 20, at 1481.

125. *Id.* at 1464. *See also supra* note 112 (discussing separation of ownership from control in modern business corporations).

126. Rivard, *supra* note 37, at 1460. This phenomenon was intertwined with the rise of the managerial-centered model of the corporation, which became prevalent during the same period. Both features combined to take away the rhetorical bite of the aggregate metaphor.

127. Mark, *supra* note 20, at 1469.

128. ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 6–8 (1977).

129. *Id.*

managerialism simply won out in a Darwinian marketplace. Other commentators believe that managerialism became prominent because industry became increasingly specialized.[130] The resources had higher fixed costs, and the market was inefficient at determining prices.[131] Thus, management was needed to coordinate productive efforts in such an economy.[132] Whatever the reasons, the American economy grew rapidly at the beginning of the twentieth century, and the management corporation quickly became a prevalent economic actor.[133] The twentieth-century corporation was technically owned by shareholders but run by management; the separation of ownership from control was a reality.

3. The Growth of Legal Realism

The initial impact of the separation of corporate ownership from control was to undercut part of the justification for the aggregate entity theory. If corporate autonomy was initially premised on the notion that a corporation is a collective body of individual property rights—under the aggregate entity theory—what happened to that autonomy if shareholders did not have the ability to control their property? As management corporations became dominant, it became clear that the corporate entity itself, rather than individual shareholders, "guided the flow of goods through the processes of production and distribution."[134] Thus, "[t]he reality of the corporation apart from its members was becoming clearer as the relationship of the shareholders to the operations of the business became increasingly distant."[135] Because "[t]he 'life' of the corporation could no longer be identified with that of the corporators . . . [the corporation's actions] had to be recognized as autonomous, the product of its organization and management."[136] However, one central problem remained. American common law was premised on adjudicating the individual rights of natural persons; "[t]he irreducible unit of the common law was the individual person."[137] Thus, the legal system still faced the task of determining how to recognize a

130. *See* MICHAEL J. PIORE & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY 49–51 (1984) (establishing that modern corporations and their structures arose in response).

131. *Id.*

132. *Id.*

133. *See* CHANDLER, *supra* note 128, at 8 (discussing administrative coordination as a central function of the modern business enterprise).

134. Bratton, *supra* note 38, at 1488.

135. Mark, *supra* note 20, at 1472.

136. *Id.* at 1473.

137. *Id.* at 1472.

corporate legal actor. The legal realist movement developed in response to this problem.

The personification of the corporate entity continued to be an important subject of debate in corporate theory in the early twentieth century, even as managerialist corporations came to dominate the economy. While the artificial entity metaphor was no longer prevalent, a split formed in corporate theory. On one side, individualists advocated a contractual theory, which built on and refined the aggregate entity theory.[138] This approach continued the tradition of classical political economy in the Jacksonian vein, focusing on individuals combining for purposes of production.[139] The second approach was legal realism, which followed the organicist movement by focusing on the reality of the corporate actor.[140] To legal realists, "the management corporation reconstituted the classical profit maximizer in collective form."[141] This theory effectively turned the corporate entity into the individual actor the law sought to recognize. The result was an increasing acceptance of the corporate actor in legal doctrine. "[C]lassical notions no longer influenced the formation of corporate law; the emphasis in the discourse shifted to legitimization of the producing group."[142]

By the 1920s, the real entity view had transformed the state of corporate law. "The psychological assimilation of the corporation to the individual contained the connotative powers of personification . . . [and] provided a justification for management's assumption of control of corporate affairs."[143] The image of a corporation as a real entity persisted for most of the twentieth century, but corporate law turned its focus to management. Adolf Berle and Gardner Means drove this point home in their landmark treatise by stressing that with ownership and control completely separated in the modern business corporation, management exercised enormous power at the top of a dependent structure.[144] The predominant issue in corporate law became managerial

138. *See* 1 CHARLES FISK BEACH JR., THE LAW OF PRIVATE CORPORATIONS 1-4 (1891) (explaining the contractual capacity with which this aggregate "individual" was empowered). The contractual approach returned to prominence with the law and economics in the early 1980s; this period is discussed *infra* Part II.D.

139. *Id.*

140. *See* ERNEST FREUND, THE LEGAL NATURE OF CORPORATIONS 12–14, 48–50, 55–56, 77–83 (1884) (discussing organic theory, theoretical difficulties, corporate capacity, and the real nature of corporations).

141. Bratton, *supra* note 38, at 1490.

142. *Id.*

143. Mark, *supra* note 20, at 1477.

144. BERLE & MEANS, *supra* note 22, at 244–46. Berle and Means noted that the

legitimacy. Thus, in the 1930s, the federal government implemented the federal securities laws, which were centered on policing managerial discretion. Over the next fifty years, corporate theorists focused primarily on management rather than on corporate personality.[145] The market became the ultimate regulator of corporations, with the law as a backdrop to prevent the most egregious forms of self-interested conduct. Thus, the legal personality of the corporate entity ceased being the subject of debate in corporate theory until the 1970s.[146]

Though the debate over corporate personification had ebbed, the various corporate metaphors continued to be used by the Court, particularly in its cases concerning corporate constitutional rights.[147] The real entity theory in particular played a major role in recent constitutional developments, in which the Court has extended constitutional protection to corporations under numerous provisions.[148] The expansion of corporate constitutional rights has been so extensive that modern "corporations have, with isolated exceptions, the same constitutional status as natural persons."[149] The importance of the real entity theory in the development of corporate constitutional rights should not be overemphasized, for each of the major theories of corporate personality play a role in the Court's decisions even today.[150] However, the real entity theory has been applied by the Court numerous

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management corporation had become "the dominant institution of the modern world." *Id.* at 313.

145. Bratton, *supra* note 38, at 1493; *see also* Blumberg, *supra* note 19, at 296 (citation omitted) (noting that the legal realism movement "led to increasing recognition that, whatever its philosophical nature, the corporation was a 'means to achieve an economic purpose.'"). According to Blumberg, "the fundamental issue was not one of theoretical concept but the adaptation of the law to achieve an appropriate degree of control over the activities of the corporation in the light of the political values of the times." Blumberg, *supra* note 19, at 296.

146. Mark, *supra* note 20 at 1483.

147. *See infra* Part III (discussing cases illustrating the Court's corporate constitutional jurisprudence).

148. *See infra* Part III.B (discussing cases following *Santa Clara* that extended individual rights to corporations).

149. Blumberg, *supra* note 19, at 297.

150. For example, the artificial entity theory can still be seen in modern decisions such as *Bellotti*. In that case, Justice Rehnquist characterized the corporate entity as a "particular form of organization upon which the State confers special privileges." First Nat'l Bank v. Bellotti, 435 U.S. 765, 826–27 (1978) (Rehnquist, J., dissenting). The aggregate characterization is also prevalent, particularly in First Amendment cases involving rights of association and speech. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 431 (1963) (stating "association for litigation may be the most effective form of political association"); Fed. Election Comm. v. Mass. Citizens for Life, Inc., 479 U.S. 238, 260–61 (1986) (holding nonprofit organizations have more extensive rights to engage in political speech than individual actors). In modern cases, the Court continues to describe the corporate "person" using different corporate metaphors, and often contradicts itself by using multiple metaphors within the same case. *See supra* notes 104–14 and accompanying text (describing the lack of analysis in cases involving corporate constitutional personhood).

times in recent years to extend various constitutional rights to corporations. For example, in *United States v. Martin Linen Supply Co.*,[151] the Court relied on the real entity theory to extend Fifth Amendment double jeopardy protection to corporations.[152] The Court's description of the corporate entity as a natural person is particularly striking in this case, where the Court stated:

> The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.[153]

Likewise, in *Dow Chemical Co. v. United States*,[154] the Court relied on the real entity theory to extend the Fourth Amendment prohibition against unreasonable search and seizure to corporations.[155] The Court has also adopted the real entity theory of the corporation in certain cases addressing the free speech rights of corporations.[156]

In summary, the real entity theory became the most prominent definition of the corporate "person" in the early twentieth century. The real entity theory's emergence was the result of several interrelated factors. First, the partnership analogy, which had bolstered the aggregate entity metaphor, became inadequate as corporations developed into perpetual economic and social actors.[157] Second, corporations became management-dominated as the separation of corporate ownership from control became complete.[158] Finally, legal realism, drawing on the organicist movement, became the dominant strain of corporate theory.[159] These factors legitimized the corporate entity as an economic actor, thereby motivating the legal system to

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151. 430 U.S. 564 (1977).

152. *Id.* at 568–69.

153. *Id.* at 569 (internal citations and quotations omitted).

154. 476 U.S. 227 (1986).

155. *Id.* at 236. There, the Court stated, "Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe." *Id.*

156. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8–9 (1986) (using real entity theory to justify free speech rights for corporations); *see also* First Nat'l Bank v. Bellotti,, 435 U.S. 765, 784–85 (1978) (stating that corporations do not lose free speech rights because they are corporations).

157. *See supra* Part II.C.1 (discussing the shortcomings and decline of the partnership analogy).

158. *See supra* Part II.C.2 (commenting on the growth of management dominated corporations).

159. *See supra* Part II.C.3 (discussing the growth of legal realism and its effect on the real entity theory).

recognize the corporate entity as a legal actor as well. Acceptance of the real entity theory was so widespread that the debate over corporate personality disappeared for nearly fifty years.[160] In recent years the debate over corporate personality has been renewed by corporate theorists. It is to this debate that this Article now turns.

D. The Reemergence of Corporate Personality: Neoclassicism

Following the fervent academic debate over corporate personality in the early 1900s, the real entity theory dominated corporate theory for several decades. Because of the real entity theory's success in establishing the corporate entity as a recognized legal actor, corporate theorists ceased debating the proper personification of the corporate entity for nearly fifty years.[161] This stasis abruptly ended during the 1970s, as a resurgence in the debate focused on corporations' positions in the economy and in society as a whole.

The reemergence of the debate over corporate personality stems from the development of the corporate social responsibility movement during the 1970s. Social responsibility theorists began arguing that corporations lacked sufficient accountability, focusing on the separation of ownership and control in modern business corporations.[162] Supporters of these theories argued that "large corporations were no longer merely aggregations of private property . . . [but] had grown so large, and their behavior affected so many in society, that the law should regard them as public, or quasi-public, institutions and regulate them as such."[163] Social responsibility theorists believed that many ills of society were the result of corporate behavior—caused by the separation of ownership and control, which resulted in conflicting interests for corporate managers.[164] Accordingly, more extensive regulations were needed.

Corporate social responsibility theorists advanced several proposals to combat the perceived evil of the modern business corporation. Particularly intrusive was a proposal "to legislate federal chartering of large publicly-held corporations."[165] Professor William Cary promoted

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160. *See* Mark, *supra* note 20, at 1143 (noting that after the Second World War the place of the corporation in the law ceased to be controversial).

161. *Id.*

162. Branson, *supra* note 24, at 1211–12.

163. *Id.* at 1212. *See also* LINDBLOM, *supra* note 23 and accompanying text (addressing the increasingly prevalent view of the corporate entity as a quasi-governmental or quasi-public body).

164. Branson, *supra* note 24, at 1211.

165. *Id.* at 1208. This position was advanced by Ralph Nader, Mark Green, and Joel Seligman. *Id.*

federal standards for shareholder rights, directors' fiduciary duties, and litigation.[166] Others called for weighted voting schemes to give individual shareholders more power,[167] federal laws mandating public interest directors for major corporations,[168] and corporate social accounting.[169]

The radical nature of many of the proposed reforms drew an equally harsh response from advocates of corporate autonomy. In particular, the corporate social responsibility movement was quickly countered by the law and economics movement, which has been a pervasive influence in corporate law for at least the last twenty years.[170] Law and economics, the neoclassical version of corporate law, can be traced to Alchian and Demsetz' landmark 1972 article,[171] which drew "on neoclassical conceptions of contract to devise a radical rejection of the managerialist approach."[172] Law and economics scholars generally advocated that "market forces regulated corporate executives' behavior far better than laws and lawsuits ever could."[173] According to neoclassical scholars, "the firm is a legal fiction that serves as a nexus

166. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 705 (1974).

167. *See* David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1, 44–53 (1970) (advocating a one man, one vote policy in order to decentralize corporate power and redistribute it in the hands of individual stockholders).

168. *See* Detlev F. Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 50–53 (1966) (drawing ideas from the German management system in which a supervisory council is chosen by shareholders and workers together in order to watch over the management of the company, yet not interfere with it).

169. *See* Douglas M. Branson, *Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility*, 29 VAND. L. REV. 539, 580 (1976) (arguing that social accounting techniques need to be put into practice as opposed to just researched).

170. Branson, *supra* note 24, at 1215–16. As Branson notes, "[s]eldom will one ever witness such a jurisprudential shift as that from federal chartering of corporations to contractarianism." *Id.* at 1216.

171. Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972). Neoclassicism also had roots in institutional economics, which originated with Ronald H. Coase. Coase compared and contrasted firms and markets, and identified transaction costs as the major factor influencing the choice between the two. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–94 (1937). Coase's theory resurfaced in the institutional variant of the law and economics movement during the 1970s, also discussed *infra* notes 172–81 and accompanying text.

172. Bratton, *supra* note 38, at 1477.

173. Branson, *supra* note 24, at 1209; *see also* Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982) (discussing market regulation); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985) (advocating limited legal restraints on corporations); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (discussing market constraints on directors' actions).

for a set of contracting relations among individual factors of production."[174] The role of corporate management is to facilitate "a continuous process of negotiation of successive contracts."[175]

Within a corporation, "rational economic actors" attempt to avoid agency costs in contracting. Because agency costs are inefficient, "the party who most reduces agency costs has the edge," and "the lowest cost contract 'forms' survive."[176] Also, because "managers will maximize their own welfare," shareholders bid down the prices of securities, thus "[m]anagement thereby bears the cost of its own misconduct and has an incentive to control its own behavior."[177] Finally, because misconduct involves an agency cost, minimizing agency costs naturally occurs in the process of contracting, and the result is that the market effectively regulates corporate behavior. This implies an extremely limited role for corporate law, for there is little reason for the government to intervene.[178] In this manner, the neoclassical movement represents a refinement of both the artificial entity and aggregate entity metaphors; a corporation is a fiction and those who run it facilitate contracting among its various components.[179]

Law and economics theory proved an effective counterpoint to the social responsibility movement. In particular, it fit well with the general trend in the law favoring corporate autonomy. Because law and economics scholars viewed the corporate entity as contractual in nature, there was no need for government policing; "private actors do a better job at making contracts than do government officials . . . [so there is] little constructive role for public policy."[180] This approach harkens back to aggregate theory, but with even less need for administrative oversight.[181] If a corporation is a group of contracting economic actors, and the market now exists inside the firm, there is no need to interfere other than to protect the market's integrity.

While the law and economics movement dominated the academic literature during much of the 1980s, the corporate social responsibility movement is once again gaining momentum. Social responsibility advocates have responded to the unrestrained law and economics model

174. Bratton, *supra* note 38, at 1478.
175. *Id.*
176. *Id.* at 1479.
177. *Id.*
178. *Id.* at 1480.
179. *Id.* at 1478.
180. Bratton, *supra* note 38, at 1482.
181. *See supra* Part II.B (discussing the aggregate entity theory).

with a progressive ideology.[182] Modern theorists are increasingly beginning to look past attempts to fit the corporate entity into a preexisting legal framework and are focusing on the role of the corporate entity in society. Many theorists view the modern business corporation as a quasi-public actor. For example, some progressive scholars support a "communitarian" view of the corporation, focusing on the corporate entity's broader societal role.[183] As Professor Mitchell notes, "[t]he very power that corporations have over our lives means that, intentionally or not, they profoundly affect our lives."[184] Other progressive scholars have advocated federally mandated social auditing and disclosure.[185] This progressive ideology is motivated by the power and influence of the modern business corporation. Modern business corporations increasingly "operate as multi-tiered multinational groups,"[186] often with concentrated power exceeding that of individual nations. As Branson notes, "[t]he rapidly accelerating growth in number and in size of huge Multinational Corporations . . . poses pressing problems for the twenty-first century."[187] With the dramatic increase in multinational corporations, regulatory measures are becoming increasingly difficult to implement because corporate entities operate in so many different countries. Yet, the reality is that modern business corporations operate within the boundaries of nations and impact their citizens on a level that historically has only been matched by governmental institutions.

The resurgence in the debate over corporate personality during the last thirty years demonstrates that corporate theorists have still not settled on the proper way to characterize the corporate entity. The history of corporate personality doctrine reflects a struggle to fit the

182. *See infra* notes 183–87 and accompanying text (detailing the progressive ideology's position on corporate ethics).

183. Branson, *supra* note 24, at 1217.

184. MITCHELL, *supra* note 24, at xiii. *See also supra* note 22 and accompanying text (discussing pervasiveness of the modern business corporation).

185. *See* Branson, *supra* note 24, at 1221 (discussing a regulation or statute that would require a substantial degree of corporate social accounting and disclosure). *See also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1273–99 (1999) (advocating for a corporate social transparency statute). According to Bratton, the history of corporate law has a constant theme, "[t]he corporate entity rises, posing challenges to both economic and legal theory." Bratton, *supra* note 38, at 1482. The law must then attempt to deal with the new challenges. In this manner, the Sarbanes-Oxley Act can be seen as a progressive response to unbridled discretion on behalf of corporate managers. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

186. Blumberg, *supra* note 19, at 298.

187. Branson, *supra* note 24, at 1211.

corporate entity into traditional legal practices. This is no easy task, for corporations do not readily fit within the American legal tradition. Yet, the gradual acceptance of corporate personality by the Supreme Court has resulted in a modern business corporation that is treated like a natural person under the Constitution.[188] The pervasive power and influence of the modern business corporation makes this analogy inherently unstable, especially in light of the Court's refusal to examine properly what it means to be a constitutional person. The fact that corporate theory itself is unstable and includes many competing theories of the corporate entity, demonstrates that there is no one answer to the corporate personality debate. Therefore, the adoption of corporate personality in constitutional doctrine is especially troubling. The following Part examines the Court's use of the various corporate metaphors to grant constitutional rights to corporations.

III. CONSTITUTIONAL PERSONHOOD AND THE CORPORATE METAPHOR

Corporate theorists have attempted to analogize the corporate entity to the individual person presumed by the American legal tradition since America's founding.[189] This process has influenced the development of the law, for jurists have also struggled to fit the corporate entity into a preexisting legal framework. The problem presented by the corporate entity is particularly striking in constitutional law, for "the Constitution does not uniformly describe the parties it protects."[190] Rather, the Constitution "refers to 'person' or 'citizens' or 'people'" without specifically describing the characteristics each possesses, or whether the terms extend beyond their facial meanings.[191] Therefore, the Constitution contains the same inadequacies with respect to the corporate entity as does the common law, for it also describes legal relationships in terms of individuals. As a result, the Court has been forced to find the proper way to fit the corporate entity into a preexisting legal terminology.

In the Court's corporate constitutional jurisprudence, the Court has never set forth a specific test to determine what a constitutional "person" is. Legal personhood is often a conclusion rather than a threshold question. Instead, each of the previously discussed metaphors of the corporate entity have been used to justify different corporate

188. *See supra* Part II.C (explaining how the corporation as a legal actor, endowed with certain rights, became accepted doctrine).

189. *See supra* Part II (discussing the American legal tradition of personifying corporations and the resulting development of the corporate personality doctrine).

190. Blumberg, *supra* note 19, at 300.

191. *Id.*

constitutional rights. In fact, multiple theories have been invoked in the same case, and have even been applied in interpreting different clauses of the same Amendment.[192] By so doing, the Court has formulated a constitutional "person" that is distinguishable from the natural person to whom the terms used in the Constitution seem to refer.[193] This Part first addresses the Court's early cases involving corporate constitutional rights[194] and then examines modern corporate constitutional jurisprudence.[195]

A. The Foundation of Corporate Constitutional Rights

Corporate personality and the use of corporate metaphors are by no means a novel concept in constitutional jurisprudence. In fact, the use of different metaphors to justify different results can be traced back to the Court's earliest corporate cases.[196] For example, the Court's holdings with regard to diversity of citizenship jurisdiction embody the earliest example of this discrepancy.[197] These cases demonstrate that the Court has freely bought into corporate theory in addressing corporate rights under the Constitution for nearly two hundred years. The foundational cases thus create a problem for *stare decisis*, for the Court has consistently failed to engage in rigorous constitutional interpretation in determining corporate rights.

The term "citizens" was also the subject of the Court's interpretation of the Privileges and Immunities clauses of Article IV[198] and the Fourteenth Amendment.[199] In contrast with the Court's decisions with regard to the case or controversy clause, the Court has consistently

192. *See supra* Part II (detailing the theories behind the corporate personality doctrine: the artificial entity theory, the aggregate entity theory, and the real entity theory).

193. For example, the Fourteenth Amendment uses the terms "persons" and "citizens." U.S. CONST. amend. XIV, § 1. The Amendment begins with the phrase "[a]ll persons born or naturalized in the United States." *Id.* Nothing in the text implies that the terms were meant to apply to anything other than natural persons or human beings.

194. *See infra* Part III.A (discussing the Court's initial interpretation of corporate constitutional rights).

195. *See infra* Part III.B (examining the Court's recent interpretation of corporate constitutional rights).

196. *See supra* Part II (discussing the Court's adoption of the artificial entity theory, the aggregate entity theory, and the real entity theory, when addressing corporate constitutional rights).

197. *See supra* notes 43–52 and accompanying text (discussing how the Court switched from the aggregate entity metaphor to the artificial entity metaphor in its cases addressing corporate citizenship, but kept the same result). The diversity of citizenship requirement is contained in the "case or controversy" clause of the Constitution. U.S. CONST. art. III, § 2, cl. 1.

198. U.S. CONST. art. IV, § 2, cl. 1.

199. U.S. CONST. amend. XIV.

refused to recognize the corporate entity as a "citizen" under the Privileges and Immunities clauses. For example, in *Bank of Augusta v. Earle*,[200] the Taney Court used the artificial entity theory to hold that corporations were not citizens under Article IV.[201] Because a corporation was not a citizen, the Court affirmed a state statute that discriminated against foreign corporations.[202] While this decision came prior to the Taney Court's findings of corporate citizenship in *Letson* and *Marshall*, the rationale of *Earle* was later upheld in *Paul v. Virginia*.[203] In that case, Justice Field wrote for the majority that "[t]he term citizens . . . applies only to natural persons . . . not to artificial persons created by the legislature."[204] The Court's examination of the term "citizen" under the Fourteenth Amendment, also adopted in 1868, led to a similar conclusion.[205] In *Pembina Consolidated Mining & Milling Co. v. Pennsylvania*,[206] Justice Field, again writing for the Court, stated that the term "citizens" in the Fourteenth Amendment was similarly inapplicable to corporations.[207] As these decisions use the same artificial entity metaphor as *Letson*, they are indistinguishable conceptually and reflect a concern with shareholder liability rather than reasoned constitutional analysis.[208]

Though the use of corporate personality metaphors began with the Court's decisions regarding the interpretation of the word "citizen," corporate personality became a dominant theme in constitutional jurisprudence as the Court began considering the term "person." The term is used in several constitutional provisions, and has likewise been interpreted in a confusing and disparate manner. In contrast to the

200. 38 U.S. (13 Pet.) 519 (1829).

201. *Id.* at 587–88.

202. *Id.* Blumberg noted that the Court's decision was based on a concern "with the implications of a contrary decision resting on the associational theory for the limited liability of shareholders." Blumberg, *supra* note 19, at 306. By separating the corporation from its shareholders, the Court was able to protect limited liability, another ad hoc use of corporate personality.

203. Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); *see also supra* notes 74–79 and accompanying text (discussing the Court's decisions in *Letson* and *Marshall*).

204. *Paul*, 75 U.S. at 177.

205. The Fourteenth Amendment differs from Article IV in that it defines "citizen" as "persons born or naturalized in the United States." U.S. CONST. amend. XIV, § 1. This reflects the fact that the framers of the Fourteenth Amendment intended it to protect emancipated African-Americans from disparate government treatment. *See* Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 53 (1995) (discussing the Supreme Court deliberations during *Brown v. Board of Education*).

206. 125 U.S. 181 (1888).

207. *Id.* at 187–88.

208. *See supra* notes 104–09 (discussing result of *Santa Clara* and *Pembina*).

Court's decisions that a corporation is not a constitutional "citizen," the Court has consistently held since *Santa Clara* that a corporation is a constitutional "person" under the Fourteenth Amendment.[209] The Court's decisions in the *Santa Clara* line of cases are conclusory; the Court never addressed why a corporation should be treated as a person under the Fourteenth Amendment, but instead relied on corporate metaphors to analogize the corporate entity to the "person" described in the Fourteenth Amendment.[210] This lack of reasoning and analysis is troubling given that *Santa Clara* has proven to be a fountainhead for all other corporate constitutional rights. This suggests a foundational issue for later adjudications of corporate personhood.[211] This foundational problem becomes more apparent when considering the Court's use of corporate metaphors in other cases decided during this time period.

In *Pembina*, the Court extended the constitutional personhood recognized in *Santa Clara* to the Due Process Clause as well as the Equal Protection Clause, while at the same time declining to recognize a corporation as a "citizen" under the Privileges and Immunities Clause of the Fourteenth Amendment.[212] While stating that a corporation was an artificial person under the Privileges and Immunities Clause, and thus not a "citizen," the Court also held that corporations are "merely associations of individuals" for purposes of the Equal Protection and Due Process Clauses.[213] Thus, the Court used different corporate metaphors to justify different results in interpreting different clauses of the *same* amendment in the *same* opinion.

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209. *See supra* notes 100–09 and accompanying text (discussing the Court's use of corporate metaphors to find that a corporation is a "person" under the Fourteenth Amendment).

210. In *Santa Clara*, the Court stated that it did "not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to those corporations. We are all of the opinion that it does." Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886). In *Pembina*, decided two years later, the Court acknowledged its reliance on the aggregate entity metaphor in *Santa Clara*, stating "corporations are merely associations of individuals united for a special purpose . . . . [t]he equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State." *Pembina*, 125 U.S. at 189. However, the *Santa Clara* holding also reflects the Court's reliance on the artificial entity metaphor; the holding resulted in a legal fiction, for the corporate entity was able to conduct litigation in its own name. *See* Hovenkamp, *supra* note 41, at 1643 (avoiding naming the corporations' shareholders in the litigation).

211. This foundational issue is especially important given the radical difference between corporations, which existed at the time *Santa Clara* was decided and modern business corporations. *Santa Clara* is the basis of corporate constitutional rights, but the Court has never revisited the issue to determine whether the modern business corporation should be treated in such a manner. This issue is addressed further *infra* Part III.B.

212. *Pembina*, 125 U.S. at 188–89.

213. *Id.* at 189.

In *Covington & Lexington Turnpike Road Co. v. Sandford*,[214] the Court again addressed the applicability of the Fourteenth Amendment to corporations. In that case, the Court simply stated, "[i]t is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."[215] In 1910, the Court again changed its analysis with regard to corporations' Fourteenth Amendment status but kept the previous result. In *Southern Railway Co. v. Greene*,[216] the Court stated, "[t]hat a corporation is a person, within the meaning of the 14th Amendment, is no longer open to discussion."[217] The Court quoted *Pembina* for the proposition that a corporation is a "person," but omitted the portion of the *Pembina* opinion stating that corporations were "merely associations of individuals."[218] By doing so, the Court implicitly adopted the emerging theory of the corporate entity as a real person, entitled to the same rights as individuals.[219] Therefore, in the span of only twenty-two years, the Court used all three metaphors of corporate personality to interpret the corporate entity's constitutional rights under the Fourteenth Amendment. The result was essentially the same in each case, for corporations retained their constitutional rights throughout this line of cases; only the analysis changed.

The Court's decisions under the Fourteenth Amendment at the turn of the century affirmed "the developing judicial principle that the corporation and the sole proprietorship are merely alternative forms of business organization."[220] The recognition that a corporation was a constitutional person under the Fourteenth Amendment set the stage for increasing corporate rights through substantive due process, such that today, corporations have nearly all of the rights that individuals do.[221] Yet, the Court's willingness to rapidly change its analysis under the Fourteenth Amendment is troublesome, for it implies hasty and flawed constitutional interpretation. Moreover, the Court has never developed a test for what comprises a constitutional "person." It is well accepted

214. 164 U.S. 578 (1896).

215. *Id.* at 592.

216. 216 U.S. 400 (1910).

217. *Id.* at 412.

218. *Id.* at 412–13; *Pembina*, 125 U.S. at 189.

219. There are a few limited exceptions to corporations' constitutional rights, which will be discussed *infra* Part III.B. *See also supra* Part II.C (discussing the growth of the real entity theory and its recent role in the Court's expansion of corporate constitutional rights).

220. Hovenkamp, *supra* note 41, at 1641–42.

221. *See infra* Part III.B (examining the Court's modern jurisprudence allowing a corporation to be viewed as a constitutional person).

that the framers of the Fourteenth Amendment intended it to protect newly freed slaves and designed it to counteract the "black codes" passed by southern states in response to the passage of the Thirteenth Amendment.[222] Yet, under the Fourteenth Amendment the Court has created corporate constitutional rights not implied by the text of the Constitution or the intent of its framers.[223] Nowhere in the text or the history of the Fourteenth Amendment is there a suggestion that it was meant to create constitutional persons as opposed to natural persons, particularly legal fictions such as corporate persons.[224]

B. Modern Corporate Constitutional Rights

Although *Santa Clara* and its progeny contain no analysis of why a corporation should be viewed as a constitutional "person," they have proven to be the basis for the expansion of corporate constitutional rights. This creates an inherent problem in this body of law, for such rights do not follow under nearly any theory of constitutional interpretation. As noted, interpreting the text in accordance with its common usage and the intent of the Framers would not yield the rights which corporations have been granted.[225] If the Constitution is viewed as a living document, subject to changing interpretation as society develops, corporate constitutional rights still do not necessarily follow,[226] for this method of interpretation is usually focused on

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222. *See, e.g.*, EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863–1869, 109–13 (1990) (discussing the purpose of Fourteenth Amendment).

223. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169–70, 329–30 (1990) (examining the Court's expansion of protections guaranteed under the Fourteenth Amendment); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24–25, 39 (Antonin Scalia & Amy Gutmann, eds., 1997). Other substantive due process rights are beyond the scope of this Article, and will be discussed only where pertinent.

224. *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 578 (1949) (Douglas, J., dissenting) (stating that the Fourteenth Amendment was intended to protect African-Americans from white oppression, not to protect corporations).

225. *See* Scalia, *supra* note 223, at 47 ("If the courts are free to write the Constitution anew, they will . . . write it the way the majority wants . . . . This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority.").

226. Many commentators believe that the Framers' definitions of certain terms should not bind courts from interpreting the Constitution as the need for new applications develop. *See, e.g.*, Lawrence H. Tribe, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 223, at 85–86 (asserting that existing constitutional provisions may acquire new meaning when the Constitution is amended). For example, some advocate reading the Constitution "to respond to the existing and often changing social or economic conditions." BARRY R. SCHALLER, A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE, AND THE STORIES WE TELL 120–21 (1997).

expanding individual rights.[227] Reading the Constitution in a manner that grants individual rights to institutions, such as modern business corporations, which function as quasi-public entities, is counterintuitive even under a progressive approach to constitutional interpretation.[228] Yet, this is exactly the result the Court's decisions reach. The current doctrine merely builds upon the original cases, such as *Santa Clara*. No subsequent decisions have elaborated on corporate "personhood"; rather, the recent cases merely refer to the propositions established in the older cases.[229] Moreover, the constitutional personhood of corporations has rarely been challenged.[230] The Court seems simply to accept as a matter of *stare decisis* that corporations are persons under the Constitution.

Four years before *Greene* applied the real entity theory to corporations in the context of the Fourteenth Amendment, the Court considered whether corporations were entitled to the protections of the Fourth and Fifth Amendments in *Hale v. Henkel*.[231] In that case, the Court relied on the artificial entity theory to hold that corporations are not protected by the Self-incrimination Clause of the Fifth Amendment.[232] The Court stated that "the corporation is a creature of the State . . . presumed to be incorporated for the benefit of the

227. *See, e.g.*, Tribe, *in* A MATTER OF INTERPRETATION, *supra* note 223, at 86 n.50 (citing numerous examples of expansions of individual rights that alter existing constitutional provisions after the enactment of various amendments).

228. To do so would be to continue the current trend in corporate constitutional jurisprudence, for the corporate entity would still have to be analogized to, and reconciled with, an individual person.

229. *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 (1985) ("It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment."). In *Bellotti*, the Court considered whether a state statute restricting corporate funds spent for the purpose of influencing voters was constitutional under the First Amendment. First Nat'l Bank v. Bellotti, 435 U.S. 765, 779 (1978). While the Court focused on the speech at issue rather than the speaker, *see* Greenwood, *supra* note 24, at 1014, the Court did include a footnote discussing personhood. The Court noted that "purely personal" guarantees were unavailable to corporations "because the 'historic function of the particular guarantee has been limited to the protection of individuals." *Bellotti*, 435 U.S. at 779 n.14. The Court went on to state "[w]hether or not a particular guarantee is 'purely personal' . . . depends on the nature, history, and purpose of the particular constitutional provision." *Id.* However, the Court has never elaborated on this test, or applied it in other circumstances.

230. *See* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576–81 (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."); Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938) (Black, J., dissenting) ("I do not believe the word 'person' in the Fourteenth Amendment includes corporations.").

231. Hale v. Henkel, 201 U.S. 43 (1906).

232. *Id.* at 70; U.S. CONST. amend. V.

public."[233] Yet, in the same case, the Court used the aggregate theory to protect corporations from unreasonable search and seizure under the Fourth Amendment.[234] That portion of the opinion states, "[a] corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity."[235] The Court's distinctions do not turn on different terminology in the text of the Amendments; both use the word "persons."[236] Thus, the Court used two different metaphors of the corporation in the same case to justify different results, a mere four years before adopting the real entity approach in *Greene*. The decision remains good law, for the Court still holds that corporations do not have a right against self-incrimination,[237] but do have a right against unreasonable search and seizure.[238]

Particularly interesting with regard to the Court's decisions on the Fifth Amendment is the manner in which it has applied the Double Jeopardy Clause[239] to corporations. The Double Jeopardy Clause contains the same reference to the term "person" as the Self-incrimination Clause, follows immediately after it in the constitutional text, and is in fact part of the same clause.[240] In addition, the Double Jeopardy Clause seems to refer also to natural persons, for it discusses "jeopardy of life or limb";[241] it would take quite an imagination to envision a corporation in danger of being deprived of either literally. Yet, despite its refusal to grant protection against self-incrimination to corporations, the Court has consistently held that corporations are entitled to double jeopardy protection.[242] The Court has never explained why a corporation is a person for purposes of double jeopardy, but not for purposes of self-incrimination, despite the fact that the use of the term "persons" in the clause is analytically indistinguishable. While the

233. *Hale*, 201 U.S. at 74.

234. *Id.* at 71; U.S. CONST. amend. IV.

235. *Hale*, 201 U.S. at 76.

236. U.S. CONST. amend. IV, V.

237. *See, e.g.*, United States v. White, 322 U.S. 694, 698 (1944) ("The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.").

238. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986) ("Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings . . . .").

239. U.S. CONST. amend. V.

240. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

241. *Id.*

242. *See, e.g.*, United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (reasoning that policies underlying the Double Jeopardy Clause, to protect accused from "embarrassment, expense and ordeal," apply to corporations as well (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)).

artificial entity theory used in the context of the Self-incrimination Clause would appear to be equally applicable to the Double Jeopardy Clause, the Court has declined to use the metaphor in that context.

In a recent line of cases, the Court has extended First Amendment protection to corporations as well. In *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*,[243] the Court held that commercial speech is protected under the First Amendment, noting that the First Amendment applies to communication generally.[244] This case signaled a "transformation of the First Amendment to a protector of 'speech' rather than 'freedom' . . . [and] ease[d] the simple extension of First Amendment rights to corporations."[245] Two years later, in *First National Bank v. Bellotti*,[246] the Court explicitly dealt with the question of corporate free speech rights. In that case, the Court held that a Massachusetts statute restricting political spending by corporations to influence public referenda was unconstitutional.[247] The majority refused to focus on corporate personality, noting "[t]he proper question is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons."[248] Rather, the question the Court considered was "whether [the statute] abridges expression that the First Amendment was meant to protect."[249] By focusing on "the right of public discussion," the Court avoided addressing corporate personality theory entirely.[250]

The Court's reasoning in *Bellotti*, focusing on the speech itself rather than the nature of the speaker, has been expanded in subsequent decisions. For example, in *Pacific Gas & Electric Co. v. Public Utilities Commission*,[251] the Court again focused on the public's interest in the free dissemination of information rather than the speaker.[252] However, the Court soon began to narrow the application of the corporate speech doctrine, emphasizing the potential of powerful corporations to dilute the marketplace of ideas. In *Federal Election*

243. 425 U.S. 748 (1976).

244. *Id.* at 756.

245. Greenwood, *supra* note 24, at 1015.

246. 435 U.S. 765 (1978).

247. *Id.* at 795.

248. *Id.* at 776.

249. *Id.*

250. *Id.* at 792. However, Justice Rehnquist engaged in such a discussion, characterizing the corporation as an artificial entity, subject to State constraints. *Id.* at 823 (Rehnquist, J., dissenting).

251. 475 U.S. 1 (1986) (plurality opinion).

252. *Id.* at 8.

Commission v. Massachusetts Citizens for Life,[253] the Court struck down a federal law prohibiting corporate spending in connection with a federal election because it applied to for-profit and nonprofit corporations alike.[254] The Court noted that the restriction might have been constitutional if designed to combat the "corrosive influence of concentrated corporate wealth," but could not be upheld as applied because the same dangers did not exist with regard to nonprofit corporations.[255] In *Austin v. Michigan Chamber of Commerce*,[256] the Court expanded on this reasoning, upholding a similar state law as applied to a nonprofit corporation whose members were for-profit corporations. The Court stated that the restriction was focused on "a different type of corruption in the political arena: the corrosive and 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."[257]

In the development of corporate free speech rights, the Court seems to be toeing the line between allowing a free marketplace of ideas and preventing that marketplace from becoming diluted by corporate power. The Court's decisions suggest that the primary concern is the speech itself, not the speaker. However, commentators have suggested that the lack of concern regarding the speaker is inappropriate, for the speaker certainly does matter when the speaker is a modern business corporation.[258] Moreover, it is impossible to detach all aspects of corporate personality even if the Court purports to be focused on the speech itself. Free speech protection focuses, at least in part, "on the positive role of the free speech guarantee as a catalyst in tapping and developing the uniquely human creative and intellectual capacities of the individual."[259] While free speech is often phrased as a negative right, protecting the individual from government interference, it is equally true that free speech is intrinsic to "the very exercise of one's freedom to speak, write, create, appreciate, or learn [and] represents a

253. 479 U.S. 238 (1986).

254. *Id.* at 241.

255. *Id.* at 257–59.

256. 494 U.S. 652, 655 (1990).

257. *Id.* at 660.

258. *See, e.g.*, Greenwood, *supra* note 24, at 1067–69 (arguing that corporations have a distinctive viewpoint created by the "law of fiduciary duties to fictional shareholders and enforced by market and legal pressures that do not need to reflect the view of any human being at all").

259. Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618, 627 (1987–1988).

use, and therefore a development, of an individual's uniquely human faculties."[260] Thus, the Court's willingness to grant corporations free speech rights, while limited, implicitly suggests a continuance of the real entity theory, placing corporations on a level playing field with individuals. The Court does not hesitate to referee when a corporation's intrinsic power begins to skew the field. However, the Court's corporate First Amendment jurisprudence also represents a continuance of its generally ad hoc approach to corporate constitutional rights.

In summary, the Court's development of corporate constitutional rights reflects the Court's willingness to adopt various corporate metaphors in its attempts to analogize the corporate entity to a person. *Santa Clara*, the first decision to recognize a corporation as a "person," contained no analysis as to why this analogy was proper. In the Court's subsequent cases, the Court has adopted all three of the major corporate metaphors in granting corporations individual rights, often describing the corporate entity with different metaphors in the same case. The fact that all three metaphors are still debated in corporate theory demonstrates that the doctrine is inherently unstable. Thus, the Court's willingness to use these corporate metaphors is particularly flawed in light of their use as a basis for constitutional rights. To date, the Court has still not defined what a constitutional "person" is. The following Part sets forth a framework for examining the corporate rights consistent with the Constitution and suggests that these rights should not be extended to corporations absent a finding that the corporate entity should be entitled to the right at issue for the same reasons a natural person would be entitled to such rights.

IV. A NEW ANALYTIC APPROACH TO CONSTITUTIONAL PERSONHOOD

The question of constitutional personhood should be a threshold question in determining whether an entity is entitled to constitutional protection. Most of the protections guaranteed in the Bill of Rights were designed as barriers between the government and individual citizens. Though it is beyond debate that the corporate entity is an important participant in the American sociopolitical process, it should never be assumed that such an entity is entitled to constitutional protections equal to an individual citizen without detailed analysis. Modern business corporations have the capacity to aggregate enough power and influence to rival governmental institutions. Given the pervasiveness of modern business corporations, it is "difficult to deny corporate activity's enormous impact on both the nation's welfare and

260. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 21 (1984).

the government's success."[261] As such, they have "become a kind of public official, and exercise what, on a broad view of their role, are public functions."[262] Such public entities simply do not stand in the same position as individual citizens in relation to government. Therefore, the Court should consider carefully the basis of such entities' claims to a constitutional right before assuming that they are equally entitled to constitutional protection.

A. Interpreting the Constitutional "Person"

As a matter of ordinary constitutional interpretation, a corporation is simply not a "person." Under the Fourteenth Amendment, a "person" is entitled to "due process" and "the equal protection of the laws."[263] This clause has generally been interpreted to grant those deserving of its protection the same rights against state interference as the Bill of Rights guarantees with relation to the federal government. Because corporations are largely governed by state law, the practical effect of declaring corporations "persons" under the Fourteenth Amendment is to grant them the protections contained within the Bill of Rights. This has indeed been the result of *Santa Clara* and its progeny, as corporations have gradually been granted individual rights and today claim almost all of the constitutional rights that natural persons have.[264]

It is beyond debate that the Fourteenth Amendment does not apply to corporations on its face.[265] There is no reference in the text of the Amendment to corporations, nor is "person" defined to include anything other than a natural person.[266] It is also beyond debate that the history of the Fourteenth Amendment is devoid of any intent to include corporations within its protections.[267] Instead, the history of the Fourteenth Amendment demonstrates that its Framers intended it to provide protections, procedural and substantive, for newly freed slaves.[268] For more than a century, these protections have been extended

261. Redish & Wasserman, *supra* note 22, at 246.

262. LINDBLOM, *supra* note 23, at 172.

263. U.S. CONST. amend. XIV, § 1.

264. For example, corporations have not yet been granted the right against self-incrimination. *See* Braswell v. United States, 487 U.S. 99, 99 (1988) (holding that corporations have no privilege against self-incrimination under the Fifth Amendment).

265. U.S. CONST. amend. XIV.

266. *Id.*

267. *See* Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (stating that the Fourteenth Amendment should not be construed as applying to corporations because the history of the amendment indicated that it was only to apply to the protection of former slaves).

268. *See* MALTZ, *supra* note 222, at 109–13 (discussing the purpose of the Fourteenth

to protect other groups of people, particularly "discrete and insular minorities."[269]

Considering the Court's approach to the Fourteenth Amendment since the early twentieth century, it is beyond dispute that the Fourteenth Amendment's protections reach beyond its literal interpretation. However, its expansion must be placed into context. Modern substantive due process, for example, "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty[,]' such that 'neither liberty nor justice would exist if they were sacrificed. . . .'"[270] Presupposed in most modern substantive due process cases is the fact that the litigant is a "person" as defined in the Fourteenth Amendment. For example, in *Roe v. Wade*,[271] the Court addressed under the Fourteenth Amendment the constitutional validity of a state law prohibiting abortions. Responding to the argument that a fetus was a "person" entitled to due process protection, the Court held that a fetus is not a "person" under the Fourteenth Amendment.[272] Subsequent cases involving abortion rights have affirmed this distinction.[273] However, the Court rarely draws such a distinction in discussing a corporation's rights under the Fourteenth Amendment.[274] Given that much of the expansion in the Fourteenth Amendment's meaning has involved individual rights that apply only to *natural* persons, it would be improper to infer that its expansion to include the rights of corporations is similar. Even accepting without argument that the Court's expansion of the substantive due process rights of natural persons is constitutionally supportable, the Court has never attempted to explain why corporations should be treated as "persons" under the Constitution.

B. A Foundational Problem and Stare Decisis

The Court's holdings in cases addressing corporate constitutional rights demonstrate that there is a foundational problem with corporate

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Amendment).

269. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

270. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of Cleveland, Ohio, 431 U.S. 494, 503 (1977) (plurality opinion) and Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

271. 410 U.S. 113 (1973).

272. *Id.* at 158.

273. *See* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 846 (1992) (reaffirming the essential holding of Roe v. Wade).

274. *See, e.g.*, Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 ("It is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment.").

constitutional rights.[275] In *Santa Clara* and its progeny, the Court established that a corporation is a "person" under the Fourteenth Amendment. In subsequent cases, the Court has expanded on this proposition to extend nearly all rights contained within the Bill of Rights to corporations.[276] However, the Court has never engaged in any preliminary analysis of what it means to be a constitutional "person," and whether a corporation should be treated as one. Moreover, the Court has used all three metaphors of corporate theory in this line of cases to analogize the corporate entity to a natural person. Corporate theory has yet to settle on the proper method of viewing corporate personality, yet the Court has relied on these metaphors as a basis of constitutional rights. These metaphors are conclusory, and serve as a mere justification rather than a method of analysis.

Given the faulty basis for corporate constitutional rights, the Court has no obligation to adhere to *stare decisis* in this area of law. In *Casey*, the Court set forth "a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law . . . ."[277] For example, the Court stated that a prior holding should be overruled when "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine."[278] The Court also considered "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[279]

Under this test, the Court should dramatically revise its method of addressing the constitutional rights of modern business corporations. *Santa Clara* did not contain *any* reasoning or analysis as to why a corporation should be treated as a person. The use of corporate metaphors as a method of determining corporate constitutional rights should be deemed "abandoned doctrine," for corporate theorists have not agreed on the proper conception of the corporate entity in over two hundred years of debate.[280] In addition, the reality of the corporate

275. *See supra* Part IV.A (finding that corporations do not have explicit protection under the Fourteenth Amendment nor was the amendment intended to include them as "persons").

276. *See infra* Part IV.B (illustrating that the Court has relied on precedent to expand the application of "personhood" and its related protections to corporations).

277. *Casey*, 505 U.S. at 854.

278. *Id.* at 885.

279. *Id.*

280. In addition, these theories have developed coextensively with the economic and social development of the social entity. This creates a chicken and egg dilemma. Because the theories are always changing, they are inherently unreliable as a basis of constitutional rights. Justice Douglas recognized this problem in his dissent in *Wheeling Steel Corp.*, where he stated: "It requires distortion to read 'person' as meaning one thing, then another within the same clause and

entity has changed drastically since the time the Court first granted corporations constitutional personhood. The modern business corporation does not need protection from government any more than the government itself does.[281] Given this, the Court should stop following the conclusory analysis of the older cases and begin asking a fundamental, preliminary question: when is a corporation like an individual person, and when is it not?

C. A Proper Analysis of Constitutional "Persons"

The adjudication of corporate constitutional rights, as with all other rights, should begin with proper constitutional interpretation. While the Court has bypassed the question of whether a corporation is a constitutional "person" in most of its cases, that question should always be preliminary to the grant of a specific constitutional right. Given that the intent to include corporations within the Constitution's purview cannot be found anywhere in the text or the history of the document, a more refined method of constitutional interpretation is needed in this instance. The Constitution is a foundational document, and it should not be interpreted to preclude the granting of any right not envisioned by its Framers. American society has changed much since the time of the Constitution's adoption, and any document, which is to govern such a society properly must be flexible to a certain extent. The Constitution should not be interpreted in so strict a manner as to preclude corporations from receiving constitutional recognition. However, the manner in which they are recognized must be consistent with the purpose of the right at issue.

To interpret a corporation's rights properly under the Constitution, the Court should examine the right at issue "in light of the values and policies that are thought to underlie it."[282] Such a method of interpretation is not without Supreme Court precedent, even in the context of corporate constitutional rights. In *United States v. White*,[283] the Court used such an analysis in determining whether a corporation should be granted the Fifth Amendment privilege against compulsory self-incrimination. There, the Court considered whether the "historic

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from clause to clause." Wheeling Steel Corp. v. Glander, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting).

281. The Court itself has acknowledged the expansive power of the modern business corporations in its First Amendment cases. *See supra* notes 22–24 and accompanying text (discussing potential corrosive effect of corporate speech). This reasoning should be expanded, for it is not only in the area of speech that corporations wield power and influence.

282. DAN-COHEN, *supra* note 26, at 86.

283. 322 U.S. 694 (1944).

function" of the protection was such that it should only apply to individuals.[284] This line of reasoning was expanded in *Bellotti*, where the Court considered whether a state statute restricting corporate funds spent for the purpose of influencing voters was constitutional under the First Amendment.[285] In a footnote, the Court cited *White*, noting that "purely personal" guarantees were unavailable to corporations "because the 'historic function of the particular guarantee has been limited to the protection of individuals.'"[286] The Court went on to state, "[w]hether or not a particular guarantee is 'purely personal' . . . depends on the *nature, history, and purpose* of the particular constitutional provision."[287]

While the *Bellotti* test corresponds with more traditional methods of constitutional interpretation, it is contradicted by another case decided only one year earlier. In *United States v. Martin Linen Supply Co.*,[288] the Court considered whether the Double Jeopardy Clause, also found in the Fifth Amendment, applied to corporations. There, the Court held that corporations were indeed entitled to the protection, noting that the "purpose" of the clause is to prevent the state from making "repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ."[289] This language suggests the presence of the real entity metaphor, not a true analysis of the purpose of the clause. Thus, while the word "person" in the Fifth Amendment applies to both the Double Jeopardy Clause and the Self-incrimination Clause (which are contained within the same textual sentence), the Court reached a different result in each instance. In light of the *Bellotti* test, set forth one year later, it remains unclear why the right against self-incrimination is "purely personal," while the right against double jeopardy is not.

Despite the internal inconsistency in the Court's holdings, the Court's focus in *White* and *Bellotti* is on the proper preliminary question: when should a corporation be deemed a "person" under the Constitution, and when should it not? For this reason, the analysis in *White* and *Bellotti* should be expanded, thus providing a precedential "hook" for a new analytical approach. The focus in those cases properly centers on the historical background and purpose of the provision at issue, thus

284. *Id.* at 698–701.

285. First Nat'l Bank v. Bellotti, 435 U.S. 765, 767 (1978).

286. *Id.* at 778 n.14 (quoting *White*, 322 U.S. 694, 698–701).

287. *Id.* (emphasis added).

288. 430 U.S. 564 (1977).

289. *Id.* at 569 (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)).

corresponding with traditional methods of constitutional interpretation. By addressing the values and policies underlying each right, the Court would ensure that the corporate entity actually *should be* entitled to the right at issue at the outset. More explicitly, a corporation would only be entitled to a constitutional right if the values and policies underlying the right are such that the reasons a natural person is entitled to the right apply equally to a corporation. Thus, a corporation would only be granted constitutional personhood under the Fourteenth Amendment if the application of that Amendment to the specific right at issue satisfies this threshold requirement. This would prevent corporations being granted constitutional rights on the basis of debatable theories of personhood and ensure that the guarantees contained within the Constitution apply only to those entities deserving of them.[290] By applying this test, the Court could place the modern business corporation in its proper societal context.

The application of this threshold test does not necessarily mean that corporations are not entitled to constitutional rights. An application of the test to the privilege against self-incrimination is illustrative. In *White*, the Court stated that the Fifth Amendment privilege "grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity, and impartiality."[291] If the purpose of the clause—as determined by examining the values and policies that the right is premised upon—is to provide procedural impartiality and fairness, the corporate entity should be entitled to it equally as an individual person. This is because, under this rationale, the right is not based on its application to a certain type of actor. Rather, it is based on providing a certain type of legal system. The purpose of the right itself would not be compromised if the corporate entity were entitled to it as well as natural persons.

To provide another example, it would likewise seem inherently unfair to suggest that a corporation is not entitled to trial by jury under the Sixth or Seventh Amendments.[292] This right appears to be equally focused on procedural fairness, not the actor to whom the right applies. A corporation is not required to have "personality" to deserve the right. Rather, the procedural safeguards of the right to a jury trial are meant to ensure that the actor subject to the legal processes is given an

290. The amendment process provides an additional (and more traditional) route for the expansion of corporate rights, should a certain right be found inapplicable to corporations under the above test.

291. United States v. White, 322 U.S. 694, 698 (1944).

292. U.S. CONST. amend. VI, VII.

appropriate hearing before legal rights are taken away. As a corporation certainly has legal rights under state law, a corporation is equally deserving of the right.

To provide a contrary example, if the purpose of the Double Jeopardy Clause is to prevent the accused from being subjected to "'"embarrassment, . . . anxiety and insecurity[,]"'"[293] the right would not seem to apply to a corporation. Absent an attempt to personify a corporation, it is difficult to see how a corporation can experience these emotions equally as a natural person. On the other hand, if the purpose of the clause were to prevent "expense and ordeal,"[294] a corporation would seem to be entitled to the right. A corporation can certainly be burdened by financial expense and lengthy trial proceedings.

Finally, the Court's current trend in corporate free speech doctrine demonstrates how this test may be applied as well. The Court's current focus in free speech cases is on the integrity of the marketplace of ideas.[295] Under this focus, the purpose of the Free Speech Clause is to allow the public free access to ideas.[296] Therefore, a corporation would be equally entitled to disseminate its ideas to the public as an individual person; the underlying purpose of the clause does not require that the right remain exclusive to individual citizens. The Court's recent decisions indicate that it is beginning to inquire whether the speaker matters. The Court has even discussed the quasi-public nature of the corporate entity in this context.[297] The Court's decisions reflect its willingness to examine whether the reasons a natural person is entitled to free speech rights apply equally to a corporation. A corporation is entitled to free speech rights because it is equally capable of contributing to the marketplace of ideas as an individual citizen. However, because its contributions are more capable of diluting the marketplace (and thus undermining the purpose of the right), the government may regulate the corporate entity's contributions more stringently.[298]

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293. *Martin Linen Supply Co.*, 430 U.S. at 569 (quoting *Green*, 355 U.S. at 184, 187–88).

294. *Id.*

295. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) (focusing on the public's interest in the free dissemination of information rather than the speaker).

296. *Id.* The counterpoint is the idea that free speech exists to allow individuals to develop their human capacities; absent free expression and exposure to ideas, humans would be stunted educationally. *See supra* notes 259–60 and accompanying text (addressing developmental aspect of free speech). Under this point of view, the purpose of the free speech clause would preclude its application to corporations, for applying it would require personifying the corporate entity.

297. *See supra* notes 251–57 and accompanying text (discussing the problems with granting modern business corporations unlimited access to free speech).

298. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 660 (1990) (stating that

In summary, an examination of the values and policies underlying each constitutional right should be a threshold matter before a corporation is deemed to be a "person" under the Fourteenth Amendment. Such an examination would avoid the adoption of debated corporate metaphors into constitutional jurisprudence, and would parallel traditional constitutional interpretation. By examining the values and policies underlying each right, the Court would ensure that corporations are not granted constitutional rights meant only for natural persons in our system of government. Under this test, a corporation would only be granted a constitutional right if the reasons an individual person is entitled to the right apply equally to a corporation. This test would strengthen corporate constitutional jurisprudence by preventing corporations from being presumptively granted constitutional rights absent a showing that they are actually entitled to them.

V. CONCLUSION

In conclusion, the development of corporate personality doctrine has had a dramatic effect on our America's economic system, legal system, and society in general. Once conceived as a creature of the state, the modern business corporation is now the ultimate legal actor, endowed with most of the rights of individual citizens, yet with control over more resources than any individual. This development occurred as the law struggled to fit the corporate entity into the American legal tradition, which focuses on individual relationships.

The Court has been engaged in the task of determining the proper role and conception of the corporate entity since America's founding. As the three major strains of corporate personality doctrine and their variants have developed, the Court has shown an increasing willingness to use them to analogize the corporate entity to the natural person presumed by the Constitution. The Court has thus used these metaphors to assimilate the corporation into the American legal tradition and to grant corporations increasing constitutional rights. However, the Court's methodology is inherently flawed, for the application of these metaphors is a conclusion rather than a test. The foundational cases contained no analysis of *why* a corporation should be treated as a natural person. Moreover, the Court has never developed a satisfactory test to address this preliminary question. Given these circumstances, the Court should decline to adhere to *stare decisis* and should adopt a new test to analyze corporations' constitutional rights.

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the restriction focused on the distorting effects of immense aggregations and wealth through the corporate entity).

Before granting corporations a constitutional right, the Court should examine the specific right at issue to discern the underlying values and policies. After determining the purpose of a given right, the Court should decline to grant corporations constitutional rights absent a finding that corporations are entitled to the right for the same reasons an individual person is. This test more closely parallels traditional methods of constitutional interpretation and prevents constitutional rights from being premised on debatable theories of corporate "personality." This would strengthen the constitutional doctrine. By following this analysis, the Court would ensure that corporations are only granted constitutional rights when they are actually entitled to them. In this manner, the Court can draw the appropriate distinction between modern business corporations and individual citizens, thus recognizing the proper place of the corporate entity in American society.