

## “A Capitalist Joker”: Corporations, Corporate Personhood, and the Constitution

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### Introduction

The Constitution was written to protect the fundamental rights of living Americans and never mentions corporations. Even so, this Term, in *Citizens United v. FEC*, the Supreme Court stands on the verge of holding that the Constitution gives the same fundamental rights to corporations as it does to individuals, and that governments have no greater interest in regulating corporate conduct, despite the wealth of special privileges government grants to them to succeed as business entities. Far from extending to corporations all the rights and freedoms people enjoy, under the Constitution from the founding on, corporations have been treated as uniquely powerful artificial entities – created to fuel economic growth – that necessarily must be subject to substantial government regulation in service of the public good. Many of our greatest Presidents, from the founding on – including James Madison, Andrew Jackson, Abraham Lincoln, Teddy Roosevelt, and Franklin Delano Roosevelt – have objected to treating corporations the same as American citizens and made it clear that governments have and must exercise broad authority to regulate corporate affairs to ensure they do not abuse the special privileges they receive to succeed in business.

For most of our Nation’s history, Supreme Court doctrine comported with the Constitution’s text and history. Governments created corporations and conferred on them special privileges to encourage investment and economic growth, but, in the words of Chief Justice Marshall in the famous *Trustees of Dartmouth College v. Woodward* case, corporations were “artificial being[s], invisible, intangible, and existing only in the contemplation of the law.”<sup>1</sup> Corporations were neither “citizens” nor part of “We the People.” A corporation was a “creature of the law” that did not possess inalienable human rights, but rather “only those properties which the charter of creation confer on it.”<sup>2</sup> Corporate interests were protected in some ways, of course—for example, corporations could assert rights under provisions like the Constitution’s Contract Clause, which prohibits states from “impairing” private contracts – but corporations could be extensively regulated to ensure that they did not abuse the special privileges and protections governments conferred on them that were not shared by individuals. This was the settled understanding both before the Civil War, and after, when the Fourteenth Amendment was added to the Constitution, requiring states to respect the fundamental rights of all Americans.

This settled understanding was thrown into question in 1886 when the Court’s decision in *Santa Clara v. Southern Pacific Railroad Co.*<sup>3</sup> appeared to announce—because of the court reporter’s note—that corporations were “persons” within the meaning of the Fourteenth Amendment’s Due Process and Equal Protection Clauses. The Supreme Court’s actual opinion never reached the constitutional question in the case, but the court reporter – himself a former railroad man – took it upon himself to insert into his published notes Chief Justice Waite’s oral argument statement that the Fourteenth Amendment

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<sup>1</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

<sup>2</sup> *Id.* at 636.

<sup>3</sup> 118 U.S. 394 (1886).

protects corporations. Through this highly irregular move, bereft of any reasoning or explanation, the idea that corporations had the same rights as individuals – for some purposes at least – was introduced into constitutional law. In the 1920s and 1930s – as the nation was roiled by the Great Depression – many speculated that the framers of the Fourteenth Amendment had “smuggled” into the Amendment “a capitalist joker,”<sup>4</sup> giving corporations special rights and protections under an Amendment ratified to secure equal citizenship for living Americans, but it is now clear that this joker was created by the court reporter and developed by the *Lochner*-era Supreme Court.

Nothing changed immediately after *Santa Clara*, reflecting the limited nature of the Court’s actual ruling. But 11 years after *Santa Clara*, in *Gulf, C. & S.F. Ry. Co v. Ellis*,<sup>5</sup> the Court ruled that a state law that required only railroads to pay the attorneys fees of plaintiffs who succeed in a lawsuit against them violated the Equal Protection Clause. Citing *Santa Clara*, the Court declared it “well settled” law that “corporations are persons within the provisions of the fourteenth amendment,” and, because of this, “a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.”<sup>6</sup> For the very first time, the Supreme Court ruled that corporations have the same constitutional rights as individuals. This ruling, combined with other important rulings that same year, ushered in the *Lochner* era, a period today almost universally condemned as one of the low points in the Supreme Court’s history. For the next forty years, the Supreme Court repeatedly ignored constitutional text and history – including the Sixteenth and Seventeenth Amendments ratified during this same period at least in part to enhance government control over corporations – in service of its own constitutional vision in which equal corporate rights and the liberty of contract were a cornerstone of constitutional law.

In 1937, the Court recognized its errors, and the *Lochner* era’s constitutional revolution came crashing to a halt, the poverty of its vision laid bare by the stock market crash of 1929 and the suffering brought on by the Great Depression that followed. Virtually every aspect of the *Lochner*-era’s protection of corporate constitutional rights was repudiated, with the Court ultimately declaring in 1973 that the idea of equal rights for corporations, first recognized in *Gulf*, was “a relic of a bygone era.”<sup>7</sup>

In the face of these losses, corporations started aggressively fighting back. In 1971, Lewis Powell – a Virginia corporate lawyer who would soon be nominated to the Supreme Court – urged the Chamber of Commerce to engage more in political debates and focus on the courts, noting that “the judiciary may be the most important instrument for social, economic and political change.”<sup>8</sup> Powell’s strategy came to fruition just five years later in *First National Bank of Boston v. Bellotti*,<sup>9</sup> when Powell – now Justice Powell – authored a 5-4 ruling for the Court holding that limits on a corporation’s ability to oppose a ballot initiative violated the First Amendment. Justice Powell had slipped the “capitalist joker” of

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<sup>4</sup> E.S. BATES, THE STORY OF CONGRESS 233-34 (1936).

<sup>5</sup> 165 U.S. 150 (1897).

<sup>6</sup> *Id.* at 154.

<sup>7</sup> *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).

<sup>8</sup> See Confidential Memorandum from Lewis F. Powell to Eugene B. Sydnor, *Attack on the American Free Enterprise System* (Aug. 23, 1971), at 10.

<sup>9</sup> 435 U.S. 765 (1978).

corporate personhood back into the Court's deck, ignoring a powerful dissent by then-Justice Rehnquist, who explained why the ruling was inconsistent with the Constitution's text and Marshall Court-era opinions.

Though deeply problematic, *Bellotti* was expressly limited to a narrow category of cases involving ballot initiatives, and the Court has thus far refused to extend Justice Powell's analysis. In 1990, in *Austin v. Michigan Chamber of Commerce*,<sup>10</sup> and in 2003, in *McConnell v. FEC*,<sup>11</sup> the Supreme Court held that the Constitution does not grant corporations the same rights to spend money to advocate the election or defeat of candidates for office as citizens have. Echoing Justice Rehnquist's *Bellotti* dissent, *Austin* and *McConnell* explained that governments have broader powers to restrict the rights of corporations because with special government-conferred corporate privileges comes greater government oversight and regulation. But this return to first principles may prove short lived.

Last June, in *Citizens United v. FEC*, the Justices took the rare step of calling for a second oral argument and asking the parties to brief whether the Court should overturn *Austin* and *McConnell*. *Citizens United* has taken up the Court's suggestion and is arguing for a sweeping ruling that overrules *Austin* and *McConnell* and holds that corporations should have the same First Amendment right as individuals to spend money on elections. A ruling for *Citizens United* on these grounds would mean that corporations would have a constitutional right to spend unlimited amounts of money – perhaps millions or even billions of dollars – to elect candidates beholden to their special interests and willing to extend their special privileges. The case, thus, reopens truly fundamental questions about the place of corporations in our constitutional order.

Our Constitution's text and history admit of only one answer in *Citizens United*: the Constitution does not give corporations the same fundamental rights it extends to the American people. On the contrary, constitutional first principles make clear that federal and state governments retain broad authority to regulate corporate affairs to ensure that corporations do not abuse the special privileges they receive from the government. At the September 9 oral argument in *Citizens United*, some members of the Court, including Justice Ginsburg and the newest Justice, Sonia Sotomayor, got this text and history exactly right, pushing the plaintiffs and their *amici* to explain how the broad ruling they were seeking – a holding that corporations have the same First Amendment right as individuals to spend money on elections – squared with constitutional text and history. Justice Sotomayor, in her very first argument on the Supreme Court bench, even reached back 120 years and questioned the origins of the idea of corporate personhood – that court reporter's joker that plagues our law to this day.

But other Justices, perhaps a majority on the Court, seemed eager to turn their backs on text and history. For these Justices, this case is about the First Amendment and the protection of speech. But far from demanding equal rights for corporations, our Constitution's first principles are that corporations do not have the same constitutional freedoms as living persons, the "We the People" of the Constitution's opening words. Hopefully, the Justices will get this text and history right in its much anticipated ruling in *Citizens United*. If not, the Court's ruling will be destructive of our democracy and, like the Court's

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<sup>10</sup> 494 U.S. 652 (1990).

<sup>11</sup> 540 U.S. 93 (2003).

previous folly into corporate equal rights during the *Lochner* era, it will probably be short lived. Because past may well be prologue here, the history told in this narrative is essential as we wait for and evaluate *Citizens United* and as we more broadly assess the Supreme Court under Chief Justice Roberts.

**I. Corporations and the Constitution at the Founding**

From the very beginnings of our Nation and the Constitution, the legal protections afforded to living persons and corporations have been fundamentally different. As its opening words reflect, the Constitution was written for the benefit of “We the People of the United States”<sup>12</sup> and never specifically mentions corporations. Shortly thereafter, the framers of the Constitution added the Bill of Rights to the original Constitution to protect the fundamental rights of the citizens of the new nation, reflecting the promise of the Declaration of Independence that all Americans “are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness.”<sup>13</sup>

Corporations stood on an entirely different footing. A corporation, in the words of Chief Justice Marshall, “is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the creature of the law, it possesses only those properties which the charter of creation confer on it.”<sup>14</sup> As early as the 1<sup>st</sup> Congress, James Madison summed up the founding-era vision of corporations: “[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed.”<sup>15</sup> In short, corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity. To be sure, they had special privileges and protections that enabled them to succeed as economic enterprises, but such corporate attributes subjected them to greater government scrutiny, not less.

Indeed, in the founding era, corporate activities were significantly limited. Corporations existed only at the behest of, and by the creation of, the government, to serve public purposes, such as “supplying transport, water, insurance, or banking facilities,”<sup>16</sup> and had only the legal rights provided by the government in the corporate charter. To serve these governmental purposes, corporations received special privileges, the most important being perpetual life, limited liability, and the right to operate as an artificial entity, not simply a collection of individuals. “[O]nly corporate status conferred assured immunity of investors for debts of an enterprise; only corporate status offered a ready means of

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<sup>12</sup> U.S. Const., Preamble.

<sup>13</sup> Decl. of Independence. On the Bill of Rights, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 3-133 (1998).

<sup>14</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); *Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch.) 127, 167 (1804) (describing a corporation as a “mere creature of the act to which it owes its existence”); see also JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, at 15 (1970) (“Knowing their Coke and Blackstone, lawmen in the United States could thus readily accept the established seventeenth-century English doctrine that only the sovereign’s act might make a corporation.”).

<sup>15</sup> Annals of Congress, 1<sup>st</sup> Cong., 3<sup>rd</sup> Sess. 1949 (1791).

<sup>16</sup> HURST, *supra*, at 15.

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obtaining group capacity to sue or be sued as one.”<sup>17</sup> Indeed, at the founding, it was common ground that corporations should be created and granted special privileges only for the purposes of promoting the public good. As the Virginia Supreme Court put it in an 1809 ruling, “acts of incorporation ought never to be passed, but in consideration of services to be rendered to the public. . . . It may often be *convenient* for a set of associated individuals, to have the privileges of a corporation bestowed upon them; but if their object is merely *private* or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privilege.”<sup>18</sup>

The Constitution’s text reflects this fundamental difference between corporations—which were created as artificial entities to serve the public good – and the “We the People” identified in the Preamble – for whom the Constitution created a government to preserve and protect inalienable rights. The individual-rights provisions of the Bill of Rights – designed in James Madison’s words “to declare the great rights of mankind”<sup>19</sup> – use words that, on their face, make little sense as applied to corporations. As artificial entities, it is awkward, if not nonsensical, to describe corporations engaging in the “freedom of speech,” practicing the “free exercise” of religion, or “peaceably . . . assemble,”<sup>20</sup> and “keep[ing] and bear[ing] Arms.”<sup>21</sup> The framers who drafted the Fourth Amendment to protect the “right of the people to be secure in their persons”<sup>22</sup> and the Fifth Amendment to secure to all “person[s]” rights against “be[ing] twice put in jeopardy of life or limb,” being “compelled in any criminal case to be a witness against himself,” and being deprived of “life” and “liberty . . . without due process of law”<sup>23</sup> used language that refers to living human beings, not to corporations. The text of the Constitution thus fully supports the idea that the Constitution guarantees fundamental rights for living persons, not corporations.

While the Constitution “declare[d] the great rights of mankind,” in the Bill of Rights, the one attempt to make specific provision in the Constitution for corporations, a proposal to give Congress an enumerated power to charter corporations, was defeated. In voting down the proposed incorporation power, the framers voiced worries that giving the federal government the power to create corporations, and confer on them special privileges denied to the rest of the citizenry, would lead to corporate monopoly power.<sup>24</sup> Rufus King of Massachusetts objected that the grant of such a power to Congress would lead to “mercantile monopolies,” and George Mason of Virginia agreed, noting that “[h]e was afraid of monopolies of every sort . . . .”<sup>25</sup>

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<sup>17</sup> *Id.* at 19; see also *Dartmouth College*, 17 U.S. at 646 (“They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand.”).

<sup>18</sup> *Currie’s Administrator v. Mutual Assurance Soc’y*, 14 Va. 315, \_\_\_ (Va. 1809).

<sup>19</sup> Annals of Congress, 1<sup>st</sup> Cong., 1<sup>st</sup> Sess. 449 (1789).

<sup>20</sup> U.S. CONST., amend., I.

<sup>21</sup> U.S. CONST., amend., II.

<sup>22</sup> U.S. CONST., amend., IV.

<sup>23</sup> U.S. CONST., amend., V.

<sup>24</sup> For a discussion of the proposal and the surrounding debates, see Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 7-10 (2008).

<sup>25</sup> 2 The Records of the Federal Convention of 1787, at 616 (Max Farrand ed. 1911).

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James Madison succinctly summarized the founders' concerns about corporations during the 1791 debate over the bill to charter the First Bank of the United States as a private commercial corporation. Madison noted that chartering a corporation was an "important power" – not only did it "create[] an artificial person previously not existing in law and confer[] important civil rights and attributes which could not otherwise be claimed" but it "involves a monopoly which affects the equal rights of the citizen."<sup>26</sup> Madison's worry, shared by many of his contemporaries, was that, in any corporate charter, the government confers on artificial entities special privileges denied to the rest of the citizenry. As one framing era constitutional court put it in a 1795 ruling: "Because all incorporations imply a privilege given to one order of citizens which others do not enjoy, and are so far destructive of that principle of equal liberty which should subsist in every community; and though respect for ancient rights induced the framers of the Constitution to tolerate those that existed; nothing but the most evident public utility can justify a further extension of them."<sup>27</sup> Given these far-reaching implications, Madison, the Constitution's leading draftsman, argued that the power to create a corporation "could never be . . . deduced by implication, as a means of executing another power; it was in its nature . . . an independent and substantive prerogative, which not being enumerated in the Constitution . . . could never be rightfully exercised."<sup>28</sup>

Madison's objections to chartering the the First Bank of the United States did not carry the day and several decades later, in Chief Justice Marshall's landmark opinion in *McCulloch v. Maryland*,<sup>29</sup> the Supreme Court recognized congressional power to charter a banking corporation in service of regulating the national economy. But the wisdom of Congress' decision to charter the Bank remained deeply contested. To many observers, the Bank was a menace, "adverse to free government, mingling in the elections and legislation of the country, corrupting the press; and exerting its influence in the only way known to the moneyed power – corruption."<sup>30</sup>

Forty-one years after Madison raised his objection to the chartering of the Bank, President Andrew Jackson vetoed the renewal charter of the Second Bank of the United States.<sup>31</sup> Jackson's 1832 veto message famously condemned the Bank's corporate charter and grant of exclusive special privileges as a violation of the equal rights of all Americans. "In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to the protection of the law but when the laws undertake to add . . . artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humbler members of society . . .

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<sup>26</sup> Annals of Congress, 1<sup>st</sup> Cong., 3<sup>rd</sup> Sess. 1950 (1791).

<sup>27</sup> See ALFRED B. STREET, *THE COUNCIL OF REVISION OF THE STATE OF NEW YORK* 261 (1859); see also GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 319-20 (1992) (discussing this and other critiques of corporate special privileges at the founding).

<sup>28</sup> Annals of Congress, 1<sup>st</sup> Cong., 3<sup>rd</sup> Sess. 1950 (1791). Madison was hardly alone amongst the framers in these views. Indeed, other leaders of the framing generation went even further in voicing suspicions of corporations. Thomas Jefferson, for example, called on Americans to "crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." Letter from Thomas Jefferson to George Logan (dated Nov. 12, 1816).

<sup>29</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>30</sup> 1 THOMAS HART BENTON, *THIRTY YEARS' VIEW* 225 (1854).

<sup>31</sup> The First Bank of the United States expired in 1811, and the Second Bank was chartered by Congress in 1816.

who have neither the time nor the means of securing like favors, have a right to complain of the injustice of their government.”<sup>32</sup> While President Jackson agreed with Madison’s judgment that passage of a federal bank charter was “palpably unconstitutional”<sup>33</sup> because the Constitution did not expressly grant Congress such a power, his main argument was political. President Jackson called on all Americans to “take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few and in expense of the many . . . .”<sup>34</sup>

Even after the 1832 veto, Jackson continued to attack misuse of corporate special privileges. In 1833, Jackson condemned the Bank’s political spending on elections as a violation of the corporate charter.<sup>35</sup> Opposing the bank’s role as a “vast electioneering engine with means to . . . , and under cover of expenditures in themselves improper, extend its corruption through all ramifications of society,”<sup>36</sup> President Jackson made clear that corporations like the bank should have no role in the nation’s political life. The question, he put it, was “whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.”<sup>37</sup> For Jackson the answer was obvious, the specter of a corporation “with candidates for all offices in the country from the highest to the lowest” was anathema to our constitutional system.<sup>38</sup> Jackson eventually succeeded in removing all federal funds from the bank, and its charter expired in 1836.

President Jackson’s views reflected growing fears about the chartering process for creating corporations, and the outsize influence of corporations in American politics. In the forty or so years since the founding, corporations had grown by leaps and bounds, as Americans recognized that corporations could be a powerful engine of economic growth. “Between 1800 and 1817, the [states] granted nearly 1,800 corporate charters. Massachusetts alone had thirty times more business corporations than the half dozen or so that existed in all of Europe. New York . . . issued 220 corporate charters between 1800 and 1810.”<sup>39</sup> Jackson and his supporters did not oppose corporations outright; indeed, they recognized how corporations were important to the growth of the nation’s economy, and supported general incorporation laws that made it easier for Americans to form corporations.<sup>40</sup> What disturbed them was how corporations, all too often used the legislative chartering process to secure for themselves special privileges available to few others. For Jackson and other corporate critics of the era, the problem was that the wealthy and the powerful could game the system to secure special rights and

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<sup>32</sup> 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908, at 590 (James D. Richardson ed. 1908).

<sup>33</sup> *Id.* at 584.

<sup>34</sup> *Id.* at 591.

<sup>35</sup> See 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 30 (James D. Richardson ed. 1898) (“An official report establish[ed] beyond question that this great and powerful institution had been actively engaging in attempting to influence the elections of the public officers by means of its money, and that, in violation of the express provisions of its charter, it had . . . placed its funds at the disposition of the president to be employed in sustaining the political power of the bank.”).

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.* at 30.

<sup>38</sup> *Id.*

<sup>39</sup> WOOD, *supra*, at 321.

<sup>40</sup> On the general incorporation laws of the 1830s, see Crane, *supra*, at 11-12.

benefits that were generally unavailable to the rest of the populace. Building on Jackson's veto message, democratic opponents of corporate special privileges overwhelmingly objected to this violation of equal rights. "Every corporate grant is directly in the teeth of the doctrine of equal rights, for it gives to one set of men the exercise of privileges which the main body can never enjoy."<sup>41</sup> While such special privileges were appropriate to encourage economic growth, they needed to be carefully regulated to prevent against abuse.

## **II. Corporations in the Supreme Court of the Early Republic**

*McCulloch* was one of the first of many cases in the early years of the American republic in which the Supreme Court had to address claims involving corporations and confront the fact that the Constitution never mentions these "mere creatures of law." These rulings provided limited protection for corporations, chiefly in matters relating to property and commerce, while consistently reaffirming a fundamental distinction between corporations and natural persons.

One of the thorniest early questions concerned how to treat corporations under Article III of the Constitution, which defines the jurisdiction of the federal courts. A primary attribute of the corporate form is that it allows the corporation itself to sue and be sued for matters related to corporate rights and duties. But Article III repeatedly refers to "citizens" in defining the types of cases that can be heard by the federal courts, including cases involving "citizens of different states." In *Bank of the United States v. Deveaux*,<sup>42</sup> Chief Justice Marshall first addressed this question, holding:

[t]hat invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members in this respect can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.<sup>43</sup>

Marshall concluded that the term "citizen" "ought to be understood as it is used in the Constitution and as it is used in other laws – that is, to describe the real persons who come into court, in this case, under their corporate name."<sup>44</sup> Thus it was held that courts had to "look

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<sup>41</sup> See THEODORE SEDGWICK, *WHAT IS MONOPOLY* 12-13 (1835); see also WILLIAM LEGGETT, *DEMOCRATICK EDITORIALS, ESSAYS IN JACKSONIAN POLITICAL ECONOMY*, II.3.3-3.4 (1834) ("All corporations are liable to the objection that whatever powers or privileges given to them, are so much taken from the government of the people. . . . [Creating a corporation] is an invasion of the grand republican principle of Equal Rights – a principle which lies at the bottom of our constitution . . . . Every charter of incorporation . . . is, to some extent, either in fact or in practical operation, a monopoly; for these charters invariably invest those upon whom they are bestowed with powers and privileges which are not enjoyed by the great body of the people.")

<sup>42</sup> 9 U.S. (5 Cranch) 61 (1809).

<sup>43</sup> *Id.* at 86-87.

<sup>44</sup> *Id.* at 91.

beyond the corporate name and notice the character of the individual,” for purposes of determining whether the parties in a case were in fact “citizens of different states.”<sup>45</sup>

Marshall’s interpretation of Article III quickly proved unworkable, however, mainly because it allowed corporations to evade the jurisdiction of the federal courts whenever it had members that resided in many states. Noting widespread dissatisfaction with *Deveaux*, the Court overruled the decision three decades later in *Louisville, Cincinnati, & Charleston R. Co. v. Letson*,<sup>46</sup> holding that “[a] corporation created by a state to perform its functions under the authority of that state . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state.”<sup>47</sup>

Nine years later, in *Marshall v. Baltimore & Ohio Railroad Company*,<sup>48</sup> the Court emphasized *Letson*’s point that treating a corporations as a “citizen,” resident in the state of its incorporation for jurisdictional purposes, was a legal fiction, required mainly to protect citizens wishing to sue out of state corporations in federal court.<sup>49</sup> Members of a corporation, the Court held:

should be estopped in equity from averring a different domicile against those who are compelled to seek them there, and can find them nowhere else. If it were otherwise it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege [to sue in the federal courts], and compel them to resort to State tribunals in cases in which, of all others, such privilege may be considered most valuable.<sup>50</sup>

Article III’s diversity jurisdiction provisions would be the one place in which corporations were treated as citizens under the Constitution. In 1839, in *Bank of Augusta v. Earle*,<sup>51</sup> the Court held that even if corporations were to be considered “citizens” in federal court for jurisdictional purposes to ensure that corporations remained accountable in federal court to those they had wronged, corporations were not protected by the substantive guarantees of the Constitution that apply only to “citizens.”

In *Earle*, the Court held that corporations were not entitled to the protection of the Privileges and Immunities Clause of Article IV, which provides that “Citizens of each State shall be entitled to all

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<sup>45</sup> *Id.* at 90.

<sup>46</sup> 43 U.S. (2 How.) 497 (1844).

<sup>47</sup> *Id.* at 555.

<sup>48</sup> 57 U.S. (16 How.) 314 (1853).

<sup>49</sup> “Nor is it reasonable that representatives of numerous unknown and ever-changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff’s privilege [to sue in federal courts].” *Id.* at 328.

<sup>50</sup> *Id.*

<sup>51</sup> 38 U.S. (13 Pet.) 519 (1839).

Privileges and Immunities of Citizens in the several States.” The Court reasoned that a corporation could not claim both the special privileges that inhere in corporate status and the individual-rights protections the Constitution guarantees to living persons. “If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in a like manner.”<sup>52</sup> A corporation, in short, could not have its cake and eat it too. Having accepted special privileges from the state, including limited liability unavailable to citizens, it could not turn around and claim the substantive constitutional protections granted in the Constitution to citizens.

*Earle* settled that the foundational document setting out a corporation’s rights was the corporate charter, not the Constitution. While the Constitution spelled out the fundamental rights of all Americans, the “only rights [a corporation] can claim are the rights given to it in that character, and not the rights that belong to its members as citizens of a state.”<sup>53</sup> Thus, while a citizen had a right under Article IV to leave his or her state and travel to another state and avail him or herself of all the rights and privileges available there, corporations possessed no necessary right to do business throughout the fifty states. Rather, as *Earle* held, “a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created . . . . It must dwell in the place of its creation, and cannot migrate to another sovereignty.”<sup>54</sup> As a consequence, states could set the terms on which corporations chartered in other states did business in their own. A contrary reading of the Constitution – treating corporations as citizens – “would deprive every state of all control over the extent of corporate franchises to be granted in the state; and corporations would be chartered in one to carry on their operations in another.”<sup>55</sup>

Finally, in *Trustees of Dartmouth College v. Woodward*,<sup>56</sup> the Supreme Court dealt with corporate rights under the Contracts Clause, which forbids state impairment of contracts and does not limit its protection to “persons” or “citizens.” Chief Justice Marshall’s opinion for the Court held that the Contracts Clause protected corporate charters from state impairment. At the same time it extended this protection, Chief Justice Marshall recognized the fundamental differences between corporations and living persons. Corporations do not have constitutional rights in the same manner as citizens do; unlike a citizen, a corporation is the “mere creature of law” and “possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence.”<sup>57</sup>

The constitutional protection afforded by *Dartmouth College* for vested charter rights were narrow in several respects. First, Justice Story’s concurring opinion in *Dartmouth College* recognized that a government that chartered a corporation could reserve the right to alter or amend the corporate charter, and many states took advantage of this option to maintain full regulatory authority over the

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<sup>52</sup> *Id.* at 586.

<sup>53</sup> *Id.* at 587.

<sup>54</sup> *Id.* at 588.

<sup>55</sup> *Id.* at 586-87.

<sup>56</sup> 17 U.S. (4 Wheat.) 518 (1819).

<sup>57</sup> *Id.* at 636.

corporations they created.<sup>58</sup> Even before *Dartmouth College*, Massachusetts and Virginia had enacted such reservation clauses; after the decision, many more states followed course, many even going so far as to put reservation clauses in their State Constitutions.<sup>59</sup> Indeed, almost half a century later at the time of the Civil War, fifteen states had enacted state constitutional provisions that reserved a power to alter or amend the charter in every single corporate charter created by the state.<sup>60</sup> These clauses – whether found in the charter, statute, or constitutional provision – recognized that corporations were “creature[s] of law” that could be extensively regulated to ensure they did not abuse their state-conferred special privileges. “Effectively . . . states were able to continue to regulate corporate affairs with vigor.”<sup>61</sup>

Second, the Supreme Court read narrowly the rights and powers granted to corporations in their charters. In the famous 1837 *Charles River Bridge* case,<sup>62</sup> the Court held that because corporate charters give corporations special privileges not available to individuals, the only rights courts would enforce were those explicitly conferred in the charter. “[I]n grants by the public, nothing passes by implication. . . . ‘The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation.’”<sup>63</sup> This rule, the Court found, served the valuable goal of “restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in the nature of monopolies,” and ensured that charters would not be read to oust broad legislative power over corporations.<sup>64</sup> “While the rights of private property are sacredly guarded, we must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation.”<sup>65</sup> Applying these principles, the Court held that the Charles River Bridge had no right to a monopoly over the operation of a bridge – since the charter conferred no such explicit right – and that the legislature could charter a company to create a second bridge, even though the result was to greatly reduce, and possibly even destroy, the business of the initial bridge. This rule of narrow construction blunted *Dartmouth College*’s protective principle.<sup>66</sup>

Combined, these early cases can be distilled into four general rules. First and foremost, every one of these early cases emphasizes that corporations are “mere creatures of law” that are not and should not

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<sup>58</sup> *Id.* at 712 (Story, J., concurring).

<sup>59</sup> See Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1616 (1988); see also Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 864 (2007) (“States easily maneuvered around the *Dartmouth College* decision by adding to new corporate charters provisions permitting the states to revise their bargains. . . .”).

<sup>60</sup> Hovenkamp, *supra*, at 1617.

<sup>61</sup> Winkler, *supra*, at 864.

<sup>62</sup> *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

<sup>63</sup> *Id.* at 546 (quoting *Beaty v. Lessee of Knowler*, 29 U.S. (4 Pet.) 152, 168 (1830)); see also *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830) (“Any privileges which may exempt it from the burthens [sic] common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.”).

<sup>64</sup> *Charles River Bridge*, 36 U.S. at 545.

<sup>65</sup> *Id.* at 548.

<sup>66</sup> Corporations, of course, could still successfully challenge state action when states sought to alter unambiguous charter protections, and a series of Supreme Court cases in the 1850s – all emanating from battles over taxation of banks in Ohio – affirmed this protection. See *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855); *Piqua Branch of the State Bank v. Knoup*, 57 U.S. (16 How.) 369 (1853); Hovenkamp, *supra*, at 1615-1616 (discussing these cases).

be treated the same as “We the People” who drafted and ratified the Constitution. Second, corporations can sue and be sued in federal court as citizens, in large part to protect living persons from being cheated by out-of-state corporations. Third, corporations are not citizens within the meaning of provisions that confer substantive constitutional protections on American citizens, such as Article IV’s Privileges and Immunities Clause. Finally, while corporations can invoke limitations on governmental authority, such as the Contracts Clause and the Commerce Clause, government retains considerable authority to regulate corporate activity, both to protect its citizens and to ensure corporations do not abuse their state-granted privileges.

Thus, from the founding and throughout the days of the early republic, the constitutional place of corporations was well settled. The Constitution was written first and foremost for living persons, the “We the People” mentioned in the Constitution’s first words. The Constitution protected the fundamental rights of American citizens; the rights of corporations were spelled out mainly in their own constitutive document – the corporate charter – and the government had broad authority over the rights given to corporations in their charters.

### ***III. Corporations and the Text and History of the Fourteenth Amendment***

While corporations grew in size and stature in the period before and during the Civil War, with northern steel mills and railroads greatly fueling the Union war effort, the three Amendments ratified after the War did nothing to change the constitutional first principles about corporations. Indeed, if anything, the three Civil War Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments – adopted in the wake of the Union’s victory in the Civil War sharpened the Constitution’s focus on protecting the fundamental rights of living persons. The Civil War Amendments were added to the Constitution to ensure that the newly freed slaves were equal citizens in the reconstructed Nation. The Thirteenth Amendment abolished slavery, the Fourteenth protected the liberty and equality of all Americans, and the Fifteenth established political equality, forbidding racial discrimination in voting.

Corporations simply did not figure in the text and history of the Civil War Amendments. This is utterly uncontroversial with respect to the Thirteenth Amendment’s ban on slavery and the Fifteenth Amendment’s guarantee of the right to vote – corporations were not held as slaves and cannot vote. The Fourteenth Amendment is far more sweeping in its coverage, adding new guarantees of liberty and equality to the Constitution, and corporations quickly sought to take advantage of these new broadly-worded guarantees. But even with respect to the Fourteenth Amendment, the argument for conferring on corporations the same constitutional rights as living persons is exceptionally weak. The Amendment was written to protect the liberty and equality of living persons, both citizens and aliens residing in the United States, not corporations. While corporations might have some claim to protection for charter and other state-conferred property rights, they had no tenable claim to sharing equally in the constitutional rights of living persons secured by the Fourteenth Amendment.

From the very first words of the Fourteenth Amendment, citizenship is the key constitutional value. The Amendment begins by guaranteeing citizenship as a birthright of all Americans. These first words were intended to protect the full and equal citizenship of all Americans, but the framers did not stop

there. To ensure that the citizenship they created was no empty promise, the Privileges or Immunities Clause of the Fourteenth Amendment guarantees that citizens would enjoy substantive fundamental rights and liberties.<sup>67</sup> The words of the Fourteenth Amendment refute any suggestion that corporations share in these protections. The Citizenship Clause provides that “[a]ll persons born or naturalized in the United States” have, as a constitutional right, both federal and state citizenship. Corporations, of course, cannot either be “born or naturalized” and thus cannot be citizens as the term is defined in the Citizenship Clause. This plain text is exactly in line with the Supreme Court’s 1837 ruling in *Earle* that corporations do not share in the substantive constitutional protections of citizens in the Privileges and Immunities Clause of Article IV. Corporations are not citizens, and thus are not entitled to the substantive fundamental rights that come with citizenship. In the 1850s, corporations had hoped to overturn *Earle*<sup>68</sup> – a strategy that went nowhere – and the text of the Fourteenth Amendment effectively embraces *Earle*’s distinctions between citizens and corporations, limiting citizenship to living persons and granting substantive fundamental rights to citizens.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment both have wider coverage, extending their guarantees to all persons, but the reason for this expansion of coverage has nothing to do with corporations. Instead, the framers of the Fourteenth Amendment repeatedly explained that the Fourteenth Amendment’s protections of “persons” were written to protect both citizens and aliens. Discussing an early draft, Rep. John Bingham, the main author of the Amendment, explained that “no man, no matter what his color, no matter beneath what sky he may have been born . . . shall be deprived of life, liberty, or property without due process of law . . .”<sup>69</sup> He demanded that “all persons, whether citizens or strangers, within this land, . . . have equal protection in every State of the Union in the rights of life, liberty and property.”<sup>70</sup>

The wording of the Fourteenth Amendment, like the wording of the original Bill of Rights, confirms the constitutional focus on securing the liberty and equality of living persons. The Fourteenth Amendment protects the “life” and “liberty” of all persons – rights of fundamental importance for humans, but not for corporations.<sup>71</sup> While the Fourteenth Amendment also protects property, the framers of the Fourteenth Amendment never manifested any concerns with securing constitutional rights to corporations. In all the lengthy debates over the Fourteenth Amendment, there is not so much as a single mention of the protection of corporations under the Fourteenth Amendment.<sup>72</sup> “Although

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<sup>67</sup> See DAVID H. GANS & DOUGLAS T. KENDALL, *THE GEM OF THE CONSTITUTION: THE TEXT AND HISTORY OF THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT* (2008).

<sup>68</sup> See Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment, Part II*, 48 *YALE L.J.* 171, 177-78 (1938).

<sup>69</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1094 (1866).

<sup>70</sup> Cong. Globe, 39<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1090 (1866).

<sup>71</sup> Within two years of the ratification of the Fourteenth Amendment, one circuit court recognized this clear textual point: “[O]nly natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so it is clear that artificial persons are excluded from the provisions of the first two clauses . . .” *Insurance Co. v. New Orleans*, 13 F. Cas. 67, 68 (C.C.D. La. 1870).

<sup>72</sup> See Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 *YALE L.J.* 371 (1938); Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment, Part II*, 48 *YALE L.J.* 171(1938); Louis B. Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 *N.Y.U. L. Q.* 19 (1938).

corporations were widespread and well known at the time, the Framers of the Fourteenth Amendment did not intend to grant corporations [due process and equal protection] rights.”<sup>73</sup> All of the framers’ debates on the Fourteenth Amendment focused on the protection of the liberty and equality to “natural ‘persons,’ never to artificial ones.”<sup>74</sup>

Sixteen years after Congress passed the Fourteenth Amendment, Roscoe Conkling – who in 1866 had served as a member of the Joint Committee on Reconstruction that drafted the Fourteenth Amendment – served as counsel to a railroad in a Supreme Court case dealing with the tax on railroads that ultimately led to the *Santa Clara* opinion discussed below. In a famous presentation to the Justices high on theatrics, Conkling produced a copy of the Journal of the Joint Committee’s deliberations and quoted heavily from the then-unpublished Journal to suggest that the framers of the Fourteenth Amendment had used the phrase “person” in the Fourteenth Amendment to protect the rights of corporations. Conkling’s argument has been called a “masterpiece of inference and suggestion.”<sup>75</sup> For example, Conkling created the false impression that corporations were the framers’ concern by observing that “[a]t the time the Fourteenth Amendment was ratified . . . individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes.”<sup>76</sup> Conkling forgot to mention to the Justices that the Reconstruction Congress had rejected the companies’ pleas.

In the 1920s and 1930s – as the nation was roiled by the Great Depression – Conkling’s argument, and the resulting rulings by the Court in *Santa Clara* and in the *Lochner*-era, gave fuel to the suggestion that the framers of the Fourteenth Amendment had engaged in a conspiracy to give corporations fundamental constitutional rights, all under the guise of an amendment designed to secure equal citizenship to the newly freed slaves. Critics charged that John Bingham and Roscoe Conkling had “smuggled” into the Fourteenth Amendment “a capitalist joker.”<sup>77</sup> But with a more complete historical record, we now understand the fraud Conkling perpetrated on the Supreme Court, especially with the subsequent publication of the Journal of the Joint Committee, which showed that “the word ‘corporations’ never once occurs in the entire Journal of the Committee on Reconstruction.”<sup>78</sup> The consensus view today of Conkling’s performance is nothing short of devastating: “he deliberately misquoted the Journal and even so arranged his excerpts as to give listeners a false impression of the record”<sup>79</sup>; “[m]isquotation, equivocal statements, and specious distinctions suggest an inherently weak case – even point toward deliberate fabrication of arguments”<sup>80</sup>; “Conkling . . . preferred to bamboozle the Court by an argument of questionable value at best, and coming pretty near to falsification by the manner in which its portions were used, misused, and juggled.”<sup>81</sup>

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<sup>73</sup> Winkler, *supra*, at 865.

<sup>74</sup> See Graham, *Conspiracy Theory*, *supra*, at 390.

<sup>75</sup> See *id.* at 378.

<sup>76</sup> *Id.* (quoting Conkling’s argument).

<sup>77</sup> E.S. BATES, *THE STORY OF CONGRESS* 233-34 (1936).

<sup>78</sup> Boudin, *supra*, at 26.

<sup>79</sup> Graham, *Conspiracy Theory*, *supra*, at 379.

<sup>80</sup> *Id.* at 384.

<sup>81</sup> Boudin, *supra*, at 29.

In short, there is nothing in the text or history of the Fourteenth Amendment that suggests the new guarantees of citizenship, liberty, and equality – all protected in service of securing equal citizenship to all Americans – were provided equally to corporations.

**A. The Fourteenth Amendment and Corporations: From Ratification to *Santa Clara***

For nearly two decades after the ratification of the Fourteenth Amendment, the Supreme Court recognized that the constitutional place of corporations was where the Nation’s founders had left it, and that the Fourteenth Amendment had not changed settled principles of constitutional law so far as corporations were concerned.

In 1868, the year the Fourteenth Amendment was ratified, the Court in *Paul v. Virginia*<sup>82</sup> reaffirmed *Earle*’s holding that the protections guaranteed to citizens in the Privileges and Immunities Clause do not apply to corporations. “The term citizens,” the Court held, “applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.”<sup>83</sup> Observing that a corporation is a “mere creation of local law” that exists by virtue of a “grant of special privileges,” the Court held that a corporation had no constitutional right to transact business in any state but that of its creation.<sup>84</sup> Thus, States “may exclude the foreign corporation entirely; they may restrict its business to particular localities. . . . The whole matter rests in their discretion.”<sup>85</sup>

In 1872, in *Tomlinson v. Jessup*,<sup>86</sup> the Court applied the well-settled principle that States enjoy broad regulatory powers over corporations and their affairs, holding that a state law reservation of power to alter or amend corporate charters “affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities, derived by its charter directly from the State.”<sup>87</sup> While these powers were not unlimited – judicial review was available to prevent “sheer oppression and wrong”<sup>88</sup> – state power over corporations bordered on plenary.

Similarly, in 1878, in the *Sinking Fund Cases*,<sup>89</sup> the Court rejected a corporation’s constitutional challenge to a federal statute requiring a railroad to keep a portion of its income in a fund to meet certain debts. Noting that the “corporation is a creature of the United States . . . subject to legislative control so far as its business affects the public interests,”<sup>90</sup> the Court found no constitutional objection to the requirement. The Court reasoned that Congress had reserved a right to amend plaintiff’s charter, and that power easily sustained the statute. “[W]hatever rules Congress might have prescribed in the

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<sup>82</sup> 75 U.S. (8 Wall.) 168 (1868).

<sup>83</sup> *Id.* at 177.

<sup>84</sup> *Id.* at 181.

<sup>85</sup> *Id.*

<sup>86</sup> 82 U.S. (15 Wall.) 454 (1872).

<sup>87</sup> *Id.* at 459. See also *Greenwood v. Freight Co.*, 105 U.S. (15 Otto) 13, 17-22 (1881) (discussing broad legislative power to control corporate affairs, including repeal of corporate charter, under state statute reserving power to alter or amend corporate charter).

<sup>88</sup> See *Shields v. Ohio*, 95 U.S. (5 Otto) 319, 324 (1877).

<sup>89</sup> 99 U.S. (9 Otto) 700 (1878).

<sup>90</sup> *Id.* at 719.

original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment.”<sup>91</sup> Although the Court assumed that the corporation’s interest in managing its own property was protected by the Fifth Amendment’s Due Process Clause, the Court held that this constitutional protection did not alter the broad legislative powers over corporations – powers that easily sustained the requirement of keeping a sinking fund “to protect investments . . . from loss through improvident management.”<sup>92</sup> In an ominous sign of things to come, three Justices – Field, Bradley, and Strong – bitterly dissented, arguing that the statute exceeded Congress’ powers and violated the Fifth Amendment by taking the corporation’s property and violating its due process rights.<sup>93</sup>

Finally, in 1879, in *Stone v. Mississippi*,<sup>94</sup> the Court upheld a state constitutional provision prohibiting lotteries. Although the plaintiff had previously been given a corporate charter to run a lottery, the Court rejected its claim that the Contracts Clause gave it a constitutional right to run a lottery that trumped the State Constitution’s ban on lotteries, noting that “the legislature cannot bargain away the police power of the state.”<sup>95</sup> The Court explained that “the power of governing is a trust committed by the people to the government, no part of which can be granted away . . . . The [government] may create corporations . . . but . . . these creatures of the government creation are subject to such rules and regulations as may be from time to time ordained and established for the preservation of health and morality.”<sup>96</sup>

### **B. Santa Clara and the Creation of Corporate Constitutional Rights**

Justice Field’s arguments for corporate constitutional rights failed in the *Sinking Fund Cases*, but they would gain traction in a set of famous cases about the taxing of railroads in California, including one of the most famous cases about corporations, *County of Santa Clara v. Southern Pac. R. Co.*<sup>97</sup> Field’s opening was a massive change in the Court’s membership. Between 1880 and 1882, four of the six Justices who made up the Court’s majority in the *Sinking Fund Cases* left the Court, and were replaced by Republican business-friendly Presidents Rutherford B. Hayes, James Garfield and Chester Arthur.

The story begins with Justice Field’s 1882 decision – sitting on a Circuit Court in California – in the *Railroad Tax Cases*,<sup>98</sup> to this day the most sustained and comprehensive effort to justify reading the Constitution to grant corporations the fundamental constitutional rights possessed by living persons. In those days, Supreme Court Justices would frequently “ride circuit,” serving as judges in the lower courts, and in the *Railroad Tax Cases*, Justice Field was part of a two-judge court that heard a case coming from San Mateo County, California. The railroad argued that California’s tax scheme – which permitted individuals, but not corporations, to deduct the value of their mortgages from the total value of their

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<sup>91</sup> *Id.* at 721.

<sup>92</sup> *Id.* at 722-23.

<sup>93</sup> *Id.* at 736-43 (Strong, J., dissenting); *id.* at 744-50 (Bradley, J., dissenting); *id.* at 759-67 (Field, J., dissenting).

<sup>94</sup> 101 U.S. 814 (1879).

<sup>95</sup> *Id.* at 817.

<sup>96</sup> *Id.* at 820.

<sup>97</sup> 118 U.S. 394 (1886).

<sup>98</sup> 13 F. 722 (C.C.D. Cal. 1882).

property in computing taxes – violated the Equal Protection Clause by discriminating in taxation between corporate and living persons.

Justice Field wrote a lengthy opinion for the panel holding both that a corporation is a person within the meaning of the Fourteenth Amendment and that the tax violated the railroad’s right to equal protection. His opinion is light on constitutional text and history – he conceded that much of the text of the Bill of Rights seemed to “apply only to natural persons”<sup>99</sup> – and heavily influenced by his views about the necessity of protecting the property rights of corporations given the predominance of corporations in both the state and the nation. He reasoned: “[N]early all enterprises in this state . . . are undertaken by corporations. . . . There are over 500 corporations in this state; there are 30,000 in the United States, and the aggregate value of their property is several thousand millions. It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.”<sup>100</sup> Thus, Field’s argument was less that a corporation itself was a person under the Fourteenth Amendment but that “courts will always look beyond the name of the artificial being to the individuals whom it represents.”<sup>101</sup> In Field’s view, corporations could have their cake and eat it too – accepting state-conferred special privileges given only to corporations, while claiming constitutional rights of living persons. This, of course, was the view rejected by the Supreme Court in *Earle*, an opinion Field never discussed or cited.

The most objectionable part of Justice Field’s analysis was his refusal to recognize that whatever claim a corporation has to constitutional protection for property rights must be considered against the backdrop of the history of broad governmental powers to regulate corporations. As chronicled above, the Court’s Contracts Clause jurisprudence beginning in *Dartmouth College* had announced limited protections for property rights promised in the corporate charter, and it was already settled law that states did not have carte blanche to regulate corporations in any manner they so desired.<sup>102</sup> These precedents afforded a basis for providing limited protections to corporations. But Field’s opinion swept far more broadly, announcing not merely that corporations were entitled to some measure of constitutional protection, but that they were due the same constitutional safeguards as individuals, something completely contradicted by constitutional text and history. Field viewed the starting point of analysis – whether corporations were within the protected class of persons – as the end point as well. Having concluded that the Fourteenth Amendment protected corporations, Field insisted that they were entitled to the highest level of constitutional protections.

Justice Field’s opinion – revolutionary in suggesting a constitutional mandate to treat corporations the same as individuals with respect to taxation of property – was nonetheless limited in the range of constitutional rights it protected. Corporate property rights were protected, but nothing else was. He conceded that the Due Process Clause’s protection of life and liberty does not apply to corporations

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<sup>99</sup> *Id.* at 746.

<sup>100</sup> *Id.* at 744.

<sup>101</sup> *Id.*; see also *id.* at 743 (“Private corporations are . . . artificial persons, but . . . they consist of aggregations of individuals united for some legitimate purpose.”).

<sup>102</sup> See *supra* text accompanying note \_\_\_\_.

“because . . . the lives and liberties of the individual corporators are not the life and liberty of the corporation.”<sup>103</sup> Likewise, Justice Field agreed that the “privileges and immunities of citizenship” do not “attach to corporations. These bodies have never been considered citizens for any other purpose than the protection of their property rights of the corporators. The status of citizenship . . . does not belong to corporations.”<sup>104</sup>

While the appeal from the *Railroad Tax Cases* was pending before the Supreme Court, a similar case challenging taxes due to Santa Clara County was filed in the Circuit Court for the District of California. The case again was heard by Justice Field, and, in late 1883, Justice Field again set aside the tax on the railroad company, citing similar reasoning.<sup>105</sup> Ultimately, the Railroad paid the taxes due San Mateo County, mooting the *Railroad Tax Cases*, and clearing the way for the *Santa Clara* case to become the lead challenge to the California tax.<sup>106</sup>

The oral argument in *Santa Clara* – held in early 1886 – is just as infamous as Roscoe Conkling’s 1882 argument, but not because of anything the advocates said. Indeed, details of what actually happened at the oral argument remain a mystery; what we know comes mainly from the court reporter’s description of the case: “MR. CHIEF JUSTICE WAITE said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment . . . which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion it does.”<sup>107</sup> Whatever was said at oral argument, the Court never actually reached the constitutional questions in its final opinion, much to the disappointment of Justice Field.<sup>108</sup> Instead, the Court vacated the tax assessment on a narrow state law ground and found “no occasion to consider the grave questions of constitutional law upon which the case was determined below.”<sup>109</sup> Undeterred, the court reporter – who was once the President of the Board of a New York railroad corporation himself<sup>110</sup> – included the report of oral argument, even after Chief Justice Waite noted to the reporter that “we avoided meeting the constitutional question in the decision.”<sup>111</sup> Thus, “corporate personhood was established – without argument, without justification, without explanation, and without dissent.”<sup>112</sup>

The problem with this resolution of the case is that there is no attempt to square the idea of corporate personhood under the Fourteenth Amendment with nearly a century of prior rulings by the Court that established clear guidelines regarding the treatment of corporations under our founding document. Had the Court in fact considered the “grave questions of constitutional law” raised in Justice

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<sup>103</sup> *Railroad Tax Cases*, 13. F. at 747.

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

<sup>105</sup> *County of Santa Clara v. Southern Pac. R. Co.*, 18 F. 385 (C.C.D. Ca. 1883).

<sup>106</sup> *County of San Mateo v. Southern Pac. R. Co.*, 116 U.S. 138 (1885).

<sup>107</sup> *Santa Clara*, 118 U.S. at 396 (reporters’ notes).

<sup>108</sup> See *County of San Bernadino v. Southern Pac. R. Co.*, 118 U.S. 417, 422 (1886) (Field, J., concurring) (“I regret that it has not been deemed consistent with its duty to decide the important constitutional questions involved . . . .”)

<sup>109</sup> *Santa Clara*, 118 U.S. at 411.

<sup>110</sup> See THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 119 (2002).

<sup>111</sup> See Howard Jay Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525, 531 (1964).

<sup>112</sup> Winkler, *supra*, at 865.

Field's opinion riding circuit, it probably would have come to the same conclusion that the Court had reached again and again prior to *Santa Clara*: that corporations received protection under the Constitution, particularly for their contracts and property rights, but these corporate rights were defined by taking into account the differences between individuals and corporations and the special benefits corporations enjoyed. Instead, the court reporter announced corporate personhood, and we've been wrestling with this nonsensical and ahistoric idea ever since.

For all the hoopla around Chief Justice Waite's oral argument statement, however, the Court refused to accept the bold equal protection theory that Justice Field had urged riding circuit in the *Railroad Tax Cases*, and change came slowly. Indeed, after *Santa Clara*, the Court repeatedly sustained state legislation challenged by corporations. In 1886, in *Fire Ass'n of Philadelphia v. New York*,<sup>113</sup> and, in 1888, in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*,<sup>114</sup> the Court rejected corporations' Equal Protection challenges to state tax schemes applicable to out-of-state corporations. Reaffirming the precedents in *Earle* and *Paul*, the Court in both cases refused to permit corporations to rely on equal protection principles to make an end-run on settled first principles that give states broad discretion to regulate the affairs of out-of-state corporations.<sup>115</sup> In 1889, in *Minneapolis & St. L. Ry. Co. v. Beckwith*,<sup>116</sup> the Court rejected a railroad's substantive due process challenge to a statute making railroads liable for damages for failing to fence in their property, affirming the breadth of state police power to regulate corporate affairs. "[T]he fourteenth amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just."<sup>117</sup> One Term later, in 1890, in *Home Insurance Co v. New York*,<sup>118</sup> the Court again emphasized the breadth of state power over corporations in upholding a state corporate franchise tax, explaining that the grant of corporate rights "rests entirely in the discretion of the state, and of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and power . . . .The power of the state over its corporate franchise, and the conditions upon which it shall be exercised, is . . . ample and plenary. . . ."<sup>119</sup> In short, with special corporate privileges comes special corporation regulation. "If the grantee accepts the boon, it must bear the burden."<sup>120</sup>

Thus, as the nineteenth century was nearing an end, it could still be said in the United States that "a corporation . . . is not endowed with the inalienable rights of a natural persons," but is "an artificial person, created and existing only for the convenient transaction of business,"<sup>121</sup> and, as such, state legislatures and Congress had broad powers to regulate corporate affairs to ensure that corporations did

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<sup>113</sup> 119 U.S. 110 (1886).

<sup>114</sup> 125 U.S. 181 (1888).

<sup>115</sup> *Fire Ass'n*, 119 U.S. at 116-20; *Pembina*, 125 U.S. at 188-89. See also *Horn Silver Mining Co. v. New York*, 143 U.S. 305, 314 (1892) (reaffirming *Paul* and observing that "[t]his doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion").

<sup>116</sup> 129 U.S. 26 (1889).

<sup>117</sup> *Id.* at 33.

<sup>118</sup> 134 U.S. 594 (1890).

<sup>119</sup> *Id.* at 600, 601.

<sup>120</sup> *Id.* at 602.

<sup>121</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 362 (1904) (Brewer, J., concurring).

not abuse the wealth of powers and privileges given to them. But there was now a “capitalist joker” – the idea of corporate personhood – in the deck, put there by a court reporter, and just over a decade later, with the onset of the 40-year *Lochner*-era, that joker would become a trump card for the corporations and robber barons of the Gilded Age.

#### **IV. The Populist and Progressive Challenge to Corporations**

At the same time Justice Field, Chief Justice Waite and the court reporter in *Santa Clara* were advancing the idea that corporations were entitled to “equal” constitutional rights, many observers from Presidents on down worried about the growing power of corporations and the outsized influence they already had on our nation. Far from applauding the Supreme Court’s recognition that corporations are constitutional persons, Americans argued for new constitutional amendments and other legal measures to *restrain* the power of corporations. Two social movements – the Populist in the 1880s and 1890s and the Progressive in the 1900s and 1910s – made the power of corporations a prime issue, leading to two constitutional amendments both motivated by worries about excessive corporate power.

In 1864, President Lincoln presciently predicted that, “as a result of the war, corporations have been enthroned, and an era of corruption in high places will follow.”<sup>122</sup> Ten years later, Thomas Cooley, a famous jurist and author of one of the most important treatises on constitutional law, sounded the alarm that “the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually have greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence.”<sup>123</sup> As corporations continued to grow and grow in the 1880s, these voices, if anything, grew louder. In 1885, David Dudley Field – Justice Field’s brother – worried that “[w]e have created a new class of beings . . . [and] individuals find themselves powerless before these aggregations of wealth . . . [for] we have neglected to fence them about with . . . restraints.”<sup>124</sup> In 1894, economist Henry Carter Adams argued that corporations were to blame for massive wealth concentrated in but a few hands, observing that “[a]t the bottom of every monopoly may be traced the insidious influence of the peculiar privileges which the law grants corporations.”<sup>125</sup> These observers all agreed it was anathema to treat corporations the same as living persons. As one New York paper put it in a 1905 editorial, “[a] corporation is not a citizen. . . . It is an artificial creation brought into existence by the favor of the state . . . and attempts by it to exercise the fundamental rights of citizenship are fundamentally a perversion of its power.”<sup>126</sup>

The Populist movement – a farmer-led movement that originated in the South and West in the 1880s and became one of the most powerful third parties in American history – drew on these fears in arguing that the Constitution and the nation were in crisis from corporate domination, what the Populists called the “money power.” As Populists saw it, America’s “constitutional crisis was two-fold.

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<sup>122</sup> See MELVIN I. UROFSKY, *MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS* 7 (2005).

<sup>123</sup> THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST ON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION* 279 n. 2 (3<sup>rd</sup> ed. 1874).

<sup>124</sup> See David D. Field, *Industrial Cooperation*, 140 N. AM. REV. 411, 412 (1885).

<sup>125</sup> Henry Carter Adams, *Publicity and Corporate Abuses*, in 1 PUBLICATION OF THE MICH. POL. SCI. ASS’N 109, 116 (1894).

<sup>126</sup> N.Y. TRIBUNE, Sept. 18, 1905, at 6.

'Equal rights' and the very standing of farmers and workers as citizens were in jeopardy because of corporate power . . . ; corporate power had combined with an overweening judiciary and corrupt party system to shatter the sovereign people's control of the state and the federal government that were meant to carry out their will."<sup>127</sup> Harkening back to Jacksonian-era critiques, the Populists charged that corporate special privileges ran counter to the Constitution's promise of equality. The "development of corporations," one leading Populist argued, "has created special advantages for the accumulation of property in the hands of a favored class . . . and increased the[ir] political and social power," violating the "principle of equality" inscribed in the Constitution "to secure a general diffusion of wealth and maintain the practical equality of all people."<sup>128</sup> Texas Populist James Davis made a similar point, observing that "[e]very definition given says a corporation is a special privilege, yet we understand that our government was formed on the theory of equal right to all, and special privileges to none."<sup>129</sup>

To meet these evils, Populists called both for a revision of basic constitutional structure as well as for extensive federal regulation of corporations. Populists demanded that the Constitution be amended to give the American people the right to vote for Senators directly. The great Populist leader William Jennings Bryan argued that this constitutional fix was necessary to prevent corporations from dominating and controlling the appointment of Senators in state legislatures. "We know that today great corporations exist in our States, and that these corporations . . . are able to compass the election of their tools and agents through the instrumentality of Legislatures, as they could not if Senators were elected directly to the people."<sup>130</sup>

Populists did not call for amendments to give any further powers to Congress. Rather, they insisted that the Commerce Clause – the "power that served as the mainspring to build up our government . . . and gave birth to this Constitution"<sup>131</sup> – gave Congress the powers to regulate the national economy, and that power (combined with the Taxing Power) was all that Congress needed to strictly regulate corporations.<sup>132</sup> One of the few areas in which Populists saw their proposals become law was in the area of corporate taxation. In 1894, Populists in Congress led by William Jennings Bryan passed a federal income tax bill, which provided for a 2% flat tax on corporations.

Although the tax was modest, opponents denounced it as "class legislation of the worst kind" unjustly "pressed on Congress by a lot of Populists, Socialists, cranks, and disturbers."<sup>133</sup> Represented by leaders of the corporate bar, Joseph Pollock, a small shareholder who owned ten shares of stock of a Massachusetts corporation, filed suit against the corporation, arguing that the tax was an unapportioned "Direct Tax" forbidden by Article I of the Constitution, which the corporation had no business paying. Two Supreme Court cases, one from 1796, the other from 1881, made Pollock's claim a

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<sup>127</sup> William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 43 (1999).

<sup>128</sup> See Jas. F. Hudson, *Railways: Their Uses and Abuses, and their Effect Upon Republican Institutions and Productive Industries*, NAT'L ECONOMIST, May 11, 1889, at 113, 114 (quoted in Forbath, *supra*, at 46).

<sup>129</sup> JAMES H. DAVIS, A POLITICAL REVELATION 174 (1894).

<sup>130</sup> 26 Cong. Rec. 7775 (1894).

<sup>131</sup> DAVIS, *supra*, at 72.

<sup>132</sup> See Gerard Magliocca, *Constitutional False Positives and the Populist Moment*, 81 NOTRE DAME L. REV. 821, 840-44 (2006).

<sup>133</sup> See Magliocca, *supra*, at 865.

loser,<sup>134</sup> but in a stunning turn, a sharply divided Supreme Court invalidated the tax and overruled these long-standing precedents,<sup>135</sup> viewing it as their mission to stamp out what Justice Field called “the present assault against capital,” lest it become “a war of the poor against the rich.”<sup>136</sup> As the Court’s four dissenters rightly charged, the Court’s ruling was “a surrender of the taxing power to the moneyed class,”<sup>137</sup> which “practically destroys the power of government to reach incomes from real and personal estate,”<sup>138</sup> and thus “cripples the just powers of the government in the essential matter of taxation.”<sup>139</sup>

*Pollock* did not last long – in less than twenty years, the American people would overrule it in the Sixteenth Amendment – but the Populists would not last to see their push for corporate taxation vindicated. The 1896 presidential elections – in which William Jennings Bryan, the Populist candidate for President, lost in a landslide – brought the collapse of the Populist movement and party. It fell to the Progressive movement of 1900s and 1910s to complete the work begun by the Populists.

The Progressive movement – dominated by urban professionals in the North – emerged against the back drop of tremendous changes in corporate law of the States. General incorporation laws had first been enacted beginning in the 1830s – fueled by Jacksonian attacks on corruption in the special charter system – and had always come with important limits on the power of corporations, including limits on the scale, scope, and purpose for which corporations could be formed. Beginning in the late 1880s and 1890s and continuing into the early 20<sup>th</sup> century, states sought to attract corporations by offering increasingly generous general incorporation laws, permitting businesses to incorporate for any purpose with virtually no restrictions. New Jersey led the way in this “race to the bottom,” with state after state giving up any effort to limit the powers or privileges of corporations.<sup>140</sup> As Justice Brandeis would later put it, “[t]he race was not one of diligence but of laxity. . . . [T]he great industrial states yielded in order not to lose . . . the prospect of revenue . . . .”<sup>141</sup>

Not surprisingly, with the States adopting an anything-goes attitude toward corporations, the Progressive Movement looked to the federal government to regulate corporations, and ensure they did not abuse their state-conferred special privileges. On taking over the presidency in 1901, Theodore Roosevelt made control of corporations a central part of his first annual message to Congress. “Great corporations,” Roosevelt argued, “exist only because they are created and safeguarded by our institutions; and it is therefore our right and duty to see that they work in harmony with these institutions.”<sup>142</sup> The importance of federal regulation of corporations was a theme to which Roosevelt would consistently return over the course of his presidency. In 1905, he underscored the point in his

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<sup>134</sup> See *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796); *Springer v. United States*, 102 U.S. 586 (1881).

<sup>135</sup> *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895) (“Pollock I”); *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601 (1895) (“Pollock II”).

<sup>136</sup> *Pollock I*, 157 U.S. at 607 (Field, J., concurring).

<sup>137</sup> *Pollock II*, 158 U.S. at 695 (Brown, J., dissenting).

<sup>138</sup> *Id.* at 704-05 (Jackson, J., dissenting).

<sup>139</sup> *Id.* at 685 (Harlan, J., dissenting).

<sup>140</sup> See Crane, *supra*, at 12-13; Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. LAW. 323 (2007).

<sup>141</sup> *Liggett v. Lee*, 288 U.S. 517, 559-60 (1933) (Brandeis, J., dissenting).

<sup>142</sup> EDMUND MORRIS, *THEODORE REX* 73 (2001).

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annual message to Congress: “The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a . . . necessity to give to the sovereign . . . some effective power of supervision over their corporate use. . . . Experience has shown conclusively that it is useless to try to get any adequate regulation and supervision of these great corporations by State action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations – that is by the National Government.”<sup>143</sup>

Roosevelt and other Progressive-era Presidents signed into law a number of new federal statutes regulating corporations. In 1907, Congress passed the Tillman Act, which made it illegal for corporations to make political contributions to candidates for federal office, a law Roosevelt had suggested should be the “first item of congressional business”<sup>144</sup> in his 1906 message to Congress.<sup>145</sup> This statute – the first campaign finance measure to single out corporations for special regulation – rested on the judgment that corporations should not be permitted to use the wealth they amassed in the economic system to corrupt the political system. In 1909, Congress enacted a new federal corporate tax.<sup>146</sup> In 1914, Congress passed the Clayton Act, which strengthened and expanded the existing federal antitrust laws aimed at corporations, and the Federal Trade Commission Act, which created a new federal agency to enforce the federal antitrust laws and root out unfair methods of competition.<sup>147</sup>

As important as these policy innovations were the Sixteenth and Seventeenth Amendments, which were added to the Constitution in 1913, both the culmination of battles first waged by the Populists. These Amendments successfully wrote into the text of the Constitution the Populists’ demands for progressive income taxation and direct election of Senators by the people. The Sixteenth Amendment overruled *Pollock*, writing into the Constitution that the federal government had the power to tax incomes, including those of corporations. “The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived . . . .” As the debates reflect, the Sixteenth Amendment vindicated the arguments of Populists, such as Williams Jennings Bryan, who had been responsible for pushing for progressive taxation of corporations.<sup>148</sup> That very same year, the States ratified the Seventeenth Amendment, ending the power of state legislatures to appoint Senators. In providing that members of the U.S. Senate would be elected “by the people,” Congress and the States sought to eliminate corporate domination of the electoral process. Direct election of Senators, in their view, “would result in cleaner, less corrupt government, and would counter the undue effects of large corporations, monopolies, trusts, and other special-interest groups in the Senate election process.”<sup>149</sup> Together, the amendments changed the makeup and powers of the federal government and helped to

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<sup>143</sup> 1 THEODORE ROOSEVELT, *THE ROOSEVELT POLICY* 323, 324-25 (1908).

<sup>144</sup> 41 Cong. Rec. 22 (1906).

<sup>145</sup> For discussions of the Act’s history, see Adam Winkler, “*Other People’s Money*”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871 (2004); Adam Winkler, *The Corporation in Election Law*, 32 LOY. L. REV. 1243, 1245-47, 1254, 1262-63 (1999).

<sup>146</sup> For discussion, see Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53 (1990).

<sup>147</sup> See Crane, *supra*, at 21.

<sup>148</sup> 44 Cong. Rec. 4397, 4423 (1909).

<sup>149</sup> See AMAR, *supra*, at 412.

pave the way for a whole host of modern financial, economic, and civil rights legislation aimed at corporations and other businesses.<sup>150</sup>

The Populists and Progressives had strong views on the meaning of the Constitution and equal rights (which they believed were being violated by the special privileges granted to corporations), and through decades of political mobilization they changed the Constitution the hard (and most appropriate) way: the Article V amendment process set out in the Constitution. Corporations and their allies have never once seriously proposed an Amendment to protect corporations for a reason that is painfully obvious: at no time in American history would such an Amendment have had a chance of passing. Rather, corporations have relied upon business-friendly Presidents, who have nominated business-friendly Justices to the Supreme Court, who have invented concepts such as corporate personhood and equal corporate constitutional rights. That is precisely what happened during the *Lochner* era, now universally condemned as among the darkest periods in Supreme Court history.

#### **V. *The Lochner Era and the Expansion of Corporate Constitutional Protections***

As the Populists and Progressives changed the law and Constitution to provide greater regulation of corporations and limit corporate influence on the electoral process, the Supreme Court pulled the country in the opposite direction. Beginning in 1895, when the Court decided *Pollock*, and continuing for the next forty-two years, the Supreme Court transformed the Constitution, rapidly expanding the constitutional rights of corporations across a dizzying number of doctrinal areas. Fearful of what Justice Field called the “present assault against capital,” the Supreme Court invested corporations with many new individual rights and gave them new weapons to strike down federal efforts to regulate corporations, ignoring first principles that gave government broad authority to regulate corporations.

Three Supreme Court decisions of 1897 mark the beginning of the transformation. In *Gulf, C. & S.F. Ry. Co v. Ellis*,<sup>151</sup> the Court held that a state law that required railroads to pay the attorneys’ fees of prevailing plaintiffs for certain claims violated the Equal Protection Clause. Citing *Santa Clara*, the Court declared it now “well settled” law that “corporations are persons within the provisions of the fourteenth amendment.”<sup>152</sup> Echoing Justice Field’s opinion riding circuit in the *Railroad Tax Cases*, Justice Brewer wrote that “a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.”<sup>153</sup> Declaring that under the statute railroads “do not stand equal before the law” and “do not receive its equal protection,” the Court invalidated the statute as an arbitrary discrimination against railroads.<sup>154</sup> The majority did not even deign to answer Justice Gray’s powerful

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<sup>150</sup> See Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1029 (2005) (“Franklin Roosevelt built his New Deal and Lyndon Johnson built his Great Society with money that was raised under the Sixteenth Amendment, and they got their “Big Government” legislation approved by a Senate that was far less protective of federalism than the Founder’s Senate. . . . [T]he Progressive Era amendments . . . are the key texts that dictated the outcome of the great constitutional struggle of 1937.”) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)).

<sup>151</sup> 165 U.S. 150 (1897).

<sup>152</sup> *Id.* at 154.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 153.

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dissent, which argued that the fee-shifting was justified by the fact that “railroad corporations . . . unconscionably resist the payment of paying petty claims with the patience of exhausting the patience and means of the claimants . . . .”<sup>155</sup>

The cruel irony of this ruling is palpable. Just one year after the Court’s horrifically wrong opinion in *Plessy v. Ferguson*,<sup>156</sup> in which the Court drained the Equal Protection Clause’s promise of racial equality of any force, the Supreme Court turned around and, supported mainly by the notes of the Court’s reporter, used the Clause to protect railroads, even where there were strong reasons for treating these corporations differently. A capitalist joker indeed.

The railroads won again in *Chicago, B. & Q. R. Co. v. City of Chicago*,<sup>157</sup> in which the Court held that the Fourteenth Amendment’s Due Process Clause requires states to respect the Takings Clause of the Fifth Amendment. During the same period when the Court was holding that States were free to violate the fundamental rights set out in the Bill of Rights with impunity,<sup>158</sup> the Takings Clause received noticeably different treatment. As Justice Harlan would later observe, “it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.”<sup>159</sup> The year after *Chicago, B. & Q.* the Court expanded the reach of the newly-incorporated Takings Clause, reading it as a license for courts to second-guess state statutes regulating the maximum rates railroads could charge.<sup>160</sup>

In the final of this trio of corporate constitutional victories, *Allgeyer v. Louisiana*<sup>161</sup> struck down a state law regulating insurance contracts as a violation of the liberty of contract protected by the Due Process Clause of the Fourteenth Amendment. *Allgeyer* led to *Lochner v. New York*,<sup>162</sup> which invalidated a New York law setting the maximum hours a baker could work, and *Adair v. United States*,<sup>163</sup> which held that the corporate agent of a railroad had a constitutional right to fire an employee for his membership in a union.

These decisions read the Due Process Clause broadly to protect economic liberties, and viewed governmental interests in business regulation with heavy skepticism. Although not every liberty of contract claim of the era was a winner,<sup>164</sup> the Court’s substantive due process protection of economic liberty gave corporations a powerful tool to challenge a wide array of federal, state, and local economic regulations. In striking down regulation of corporate conduct, in cases like *Adair*, the Justices simply ignored the long tradition of broad government power to adjust the rights and obligations of

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<sup>155</sup> *Id.* at 167 (Gray, J., dissenting).

<sup>156</sup> 163 U.S. 537 (1896).

<sup>157</sup> 166 U.S. 226 (1897).

<sup>158</sup> *E.g. United States v. Cruikshank*, 92 U.S. 542 (1876); *Hurtado v. California*, 110 U.S. 516 (1884); *O’Neill v. Vermont*, 144 U.S. 323 (1892).

<sup>159</sup> *Maxwell v. Dow*, 176 U.S. 581, 614 (1900) (Harlan, J., dissenting).

<sup>160</sup> *Smythe v. Ames*, 169 U.S. 466 (1898).

<sup>161</sup> 165 U.S. 578 (1897).

<sup>162</sup> 195 U.S. 45 (1905).

<sup>163</sup> 208 U.S. 161 (1908). *See also Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating a similar state law).

<sup>164</sup> *See* David Bernstein, *Lochner Era Revisionism Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 8 & n.24 (2003) (collecting cases).

corporations in service of the public interest,<sup>165</sup> an about face from longstanding and well settled law that affirmed the breadth of legislative power over the terms of corporate charters.<sup>166</sup> Dissents in *Lochner* and *Adair* condemned the Court for reading into the Constitution “an economic theory which a large part of the country does not entertain”<sup>167</sup> and overriding state and federal governments’ broad authority to regulate business “in the interest of the public”<sup>168</sup> and “for the lives, health, and wellbeing of their citizens.”<sup>169</sup> Contemporary court watchers, too, loudly seconded these arguments,<sup>170</sup> and could not help but see the obvious distortion of first principles: “[t]he same Constitution which is unable to protect the life and liberty of innocent persons is quick to guard the property of public service corporations. Were the Constitution and its amendments written this way? Or has someone inserted a ‘joker’ clause which favors privilege?”<sup>171</sup>

While the Court called corporate personhood “well-settled” in 1897 in *Gulf*, the reality was the doctrine was never fully explained, or even thought through by the Court. Thus, thorny problems arose in cases like *Hale v. Henkel*,<sup>172</sup> in 1906, in which a corporation sought to stymie a grand jury investigation of violations of federal antitrust law. Despite *Gulf*, the *Hale* Court denied corporations any protection under the Fifth Amendment’s Self-Incrimination Clause, which protects “any person” from being “compelled in any criminal case to be a witness against himself.” In holding this part of the Fifth Amendment inapplicable, the Court echoed the Marshall Court in distinguishing between the constitutional rights of citizens and corporations. “The individual,” the Court reasoned, “may stand upon his constitutional rights as a citizen . . . His rights are such as existed by the law of the land long antecedent to the organization of the state, and can be only be taken from him by due process of law, and in accordance with the Constitution.”<sup>173</sup> A corporation, however stood on very different footing, “being a creature of the state . . . incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and the limitations of its charter. Its right to act as a corporation are only preserved so long as it obeys the laws of its creation.”<sup>174</sup> Having accepted special privileges from the government, a corporation could not invoke the Fifth Amendment to keep the government in the dark about criminal acts the corporation committed using those special privileges.

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<sup>165</sup> See Hovenkamp, *supra*, at 1645-49.

<sup>166</sup> See *St. Louis I.M. & S Ry. Co. v. Paul*, 173 U.S. 404, 408-09 (1899); *County of Stanislaus v. San Joaquin & King’s River Canal & Irrigation Co.*, 192 U.S. 201, 211-15 (1904); *Fair Haven & Westville Railroad Co.*, 203 U.S. 379, 388-90 (1906); *Berea College v. Kentucky*, 211 U.S. 45, 54 (1908).

<sup>167</sup> *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

<sup>168</sup> *Adair*, 208 U.S. at 190 (McKenna, J., dissenting).

<sup>169</sup> *Lochner*, 198 U.S. at 73 (Harlan, J., dissenting).

<sup>170</sup> See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lessons of Lochner*, 76 N.Y.U. L. REV. 1383, 1402-1446 (2001).

<sup>171</sup> Jesse Orton, *An Amendment by the Supreme Court*, 73 INDEPENDENT 1284 (1912) (quoted in Friedman, *supra*, at 1421).

<sup>172</sup> *Hale v. Henkel*, 201 U.S. 43 (1906).

<sup>173</sup> *Id.* at 74.

<sup>174</sup> *Id.* at 74-75.

The Court then turned around in the very same case and found corporations were protected under the part of the Fourth Amendment that protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Relying on the decisions of 1897, the Court explained that “[a] corporation is an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law and is protected . . . against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has been the source of nearly all great enterprises.”<sup>175</sup> Finding the subpoena of corporate books and papers “too sweeping,”<sup>176</sup> the Court overturned the subpoena. Justice Harlan dissented from this part of *Hale*, asserting that “a corporation – ‘an artificial being, invisible, intangible, and existing only in the contemplation of the law,’ – cannot claim the immunity given by the Fourth Amendment; for it is not part of the ‘people’ within the meaning of that Amendment.”<sup>177</sup> The majority never explained the different treatment of the Fourth and Fifth Amendments in the two parts of its opinion.

Likewise, in a pair of decisions released in 1906 and 1907, the Court retreated from a view that corporations enjoyed the same constitutional rights as natural persons. Speaking through Justice Harlan, the Court affirmed the fundamental constitutional difference between corporations and citizens and other living persons residing in the country, holding that the “liberty referred to in th[e Fourteenth] Amendment is the liberty of natural, not artificial, persons”<sup>178</sup> and that “a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution . . . which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state.”<sup>179</sup> Under these cases, corporations do not share in the substantive fundamental rights of liberty that belong to all Americans; in the words of another famous case of the era, *Northern Securities Co. v. United States*, they are “artificial person[s], created and existing only for the convenient transaction of business,” and, as such, “not endowed with the inalienable rights of . . . natural person[s].”<sup>180</sup> While corporations would be protected in their property rights, fundamental rights of liberty were for the living.<sup>181</sup>

This retreat from *Gulf* and *Lochner* continued in 1917, in *Bunting v. Oregon*,<sup>182</sup> in which the Court appeared to jettison *Lochner*’s protection of economic liberty *sub silentio*, rejecting a corporate

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<sup>175</sup> *Id.* at 76.

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

<sup>177</sup> *Id.* at 78 (Harlan, J., concurring in part and dissenting in part).

<sup>178</sup> *Northwestern Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

<sup>179</sup> *Western Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907); *see also Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 126 (1912).

<sup>180</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 362 (Brewer, J., concurring); *see also id.* at 398 (White, J., dissenting) (“[T]he corporation is created by the state, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the state, may lawfully impose on its creature, the corporation”).

<sup>181</sup> *See Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 536 (1922) (“[T]he right to conduct business in the form of a corporation . . . is not a natural or fundamental right. It is a creature of law; and a state . . . may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient . . .”).

<sup>182</sup> 243 U.S. 426 (1917).

employer's attack on an Oregon statute setting the maximum hours an individual could work in a mill, factory, or other manufacturing plant in any one day.<sup>183</sup> Although *Lochner* had condemned a maximum hour law for bakers, *Bunting* upheld a similar statute as a reasonable regulation designed to promote the health and well-being of employees.<sup>184</sup> Amazingly, the Court did not even mention *Lochner*. Three Justices dissented without opinion – presumably they thought the statute was invalid under *Lochner*.

*Lochner*, however, would soon return stronger than ever. After winning the 1920 presidential election, President Warren Harding appointed four conservative Justices to the Court, installing a solidly conservative majority. The new majority increasingly equated the rights of corporations and natural persons and revived *Lochner's* protection of economic liberty, reading the Constitution to benefit corporations at the expense of the public good.<sup>185</sup>

In 1923, in *Adkins v. Children's Hospital*,<sup>186</sup> the Court reaffirmed *Lochner* and *Adair* and applied those cases to invalidate the District of Columbia's minimum wage law, holding that Children's Hospital, a corporation that maintained a hospital in the District, had a constitutional right to "obtain . . . the best terms . . . as the result of private bargaining,"<sup>187</sup> even if that meant that the hospital's female workers received wages insufficient to maintain a decent standard of living. To the five-Justice majority, the Constitution's protection of liberty of contract was the same for both corporations as for individuals. In a strongly-worded dissent, Justice Holmes argued that "[l]iberty of [c]ontract . . . is not specifically mentioned in the text" of the Constitution, and that Congress had ample power to prohibit "employment at rates below those fixed as the minimum requirement of health and right living."<sup>188</sup> Holmes made explicit what was implied in *Bunting*: *Lochner* should have "a deserved repose."<sup>189</sup>

In 1928, the Court reaffirmed *Gulf* in *Quaker City Cab Co. v. Pennsylvania*,<sup>190</sup> holding again that the Equal Protection Clause demanded equal treatment of corporations and individuals. Although the Court had earlier upheld a federal tax aimed at corporations,<sup>191</sup> *Quaker City* held that the Equal Protection Clause did not permit a State to impose a tax on corporations, but not individuals and partnerships. Citing the equal protection argument Justice Field had urged a half-century earlier in the *Railroad Tax Cases*,<sup>192</sup> the Court held that a corporation "is entitled . . . to the same protection of equal laws that natural persons . . . have a right to demand,"<sup>193</sup> and invalidated the corporate tax, finding no basis to tax

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<sup>183</sup> See Jack M. Balkin, "Wrong the Day it Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 684 (2005) (noting that *Bunting* "overruled *Lochner* sub silentio").

<sup>184</sup> *Bunting*, 243 U.S. at 437-39.

<sup>185</sup> See Bernstein, *supra*, at 47 ("In the 1920s, the conservative wing of the Court, bolstered by four Harding appointees, took firm control. The conservative majority . . . expanded *Lochnerian* jurisprudence . . .").

<sup>186</sup> 261 U.S. 525 (1923).

<sup>187</sup> *Id.* at 545.

<sup>188</sup> *Id.* at 405, 406 (Holmes, J., dissenting).

<sup>189</sup> *Id.* at 405 (Holmes, J., dissenting); see also *id.* at 564 (Taft, C.J., dissenting) ("It is impossible for me to reconcile the *Bunting* Case and the *Lochner* Case, and I have always supposed that the *Lochner* case was thus overruled sub silentio.").

<sup>190</sup> 277 U.S. 389 (1928).

<sup>191</sup> *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910).

<sup>192</sup> *Quaker City*, 277 U.S. at 402 (citing Field's opinion in the *Railroad Tax Cases*).

<sup>193</sup> *Id.* at 400.

a business differently “merely because the owner is a corporation.”<sup>194</sup> Justice Holmes and Justice Brandeis wrote stinging dissents, taking the majority to task for making equal treatment of corporations and living persons a constitutional mandate. Justice Holmes argued that it was perfectly lawful to single out corporations for taxes “to discourage this form of activity in corporate form,”<sup>195</sup> while Justice Brandeis emphasized that states could impose heavier taxes on corporations “for the privilege of doing business in the corporate form” and in recognition of “the advantages inherent in corporate organization.”<sup>196</sup>

Justice Brandeis again criticized the Court’s corporate constitutional jurisprudence for lacking proper constitutional foundation in a monumental dissenting opinion in the 1933 case of *Liggett v. Lee*,<sup>197</sup> in which the Court once again struck down a corporate regulation on the grounds that “[c]orporations are as much entitled to the equal protection of the laws . . . as are natural persons.”<sup>198</sup> Brandeis’ dissent was a tour de force of history, thoroughly debunking the idea that “the privilege of doing business in corporate form” was “inherent in the citizen,”<sup>199</sup> and thus that “the evils of free and unrestricted use of the corporate mechanism . . . were the inescapable price of civilized life . . . to be borne with resignation.”<sup>200</sup> Brandeis observed that (1) at the nation’s founding, “there was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations,”<sup>201</sup> (2) for most of the nation’s history, state laws “had long embodied severe restrictions upon size and upon scope of corporate activity,”<sup>202</sup> and (3) these state restrictions had been undone in a fight among states over corporate revenue dollars, a “race . . . not of diligence but of laxity.”<sup>203</sup> From this history, Justice Brandeis drew two conclusions. First, “[t]he Federal Constitution does not confer on corporations . . . the right to engage in intrastate commerce . . . . The privilege of engaging in such commerce in corporate form is one which the state may confer or may withhold as it sees fit.”<sup>204</sup> In other words, corporations do not have any fundamental constitutional right of economic liberty; their right to do business exists at state discretion. Second, the Equal Protection Clause does not require equal treatment of living persons and corporations; quite the opposite, “the difference in power between corporations and natural persons is ample basis for placing them in different classes.”<sup>205</sup>

The views of Holmes and Brandeis – long expressed in dissent – were soon to become settled constitutional law. During the New Deal, President Franklin Delano Roosevelt and the Court he refashioned in his image would bring constitutional law back in line with first principles, reaffirming once again broad legislative power to regulate corporations.

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<sup>194</sup> *Id.* at 402.

<sup>195</sup> *Id.* at 403 (Holmes, J., dissenting).

<sup>196</sup> *Id.* at 408, 409 (Brandeis, J., dissenting).

<sup>197</sup> 288 U.S. 517 (1933).

<sup>198</sup> *Id.* at 536.

<sup>199</sup> *Id.* at 548 (Brandeis, J., dissenting in part).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 549 (Brandeis, J., dissenting in part).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 559 (Brandeis, J., dissenting in part).

<sup>204</sup> *Id.* at 544 (Brandeis, J., dissenting in part).

<sup>205</sup> *Id.* at 572 (Brandeis, J., dissenting in part).

## VI. Corporations and The New Deal Constitution

Elected in 1932 against the backdrop of the worst economic depression in the nation's history, Franklin Delano Roosevelt (FDR) demanded the federal government act boldly to save the American economy and end the suffering brought on by the Great Depression. Central to FDR's recovery plan was federal control over corporations. He recognized how corporations "had become great uncontrolled and irresponsible units of power within the State" and how "the growing corporation, like the feudal baron of old, . . . threaten[ed] the economic freedoms of individuals to earn a living."<sup>206</sup> Corporations had become "the despot of the twentieth century, on whom great masses of individuals relied for their safety and their livelihood, and whose irresponsibility and greed (if they were not controlled) would reduce them to starvation and penury." In the face of their great concentrations of wealth "equality of opportunity as we have known it no longer exists."<sup>207</sup> The answer to this "economic oligarchy"<sup>208</sup> was not to rid the nation of corporations but to embrace the federal power of "modifying and controlling" corporations, recognizing that "private economic power" is "a public trust . . ."<sup>209</sup> Corporations would still dominate the economy, but they would be strictly regulated.

At first, FDR's New Deal for America – his plan to end the Great Depression through reform, recovery, and reconstruction of the American economy – ran headlong into the Court's narrow reading of federal power and broad reading of constitutional protection for economic liberty. In a series of sharply divided rulings, the Court invalidated critical aspects of the New Deal even as the nation continued to be ravaged by the Great Depression. In *Railroad Retirement Bd. v. Alton R.R. Co.*,<sup>210</sup> the Court held that the Railroad Retirement Act, which created a pension and retirement plan for employees of the nation's railroads, violated the property rights of the railroad companies and could not be justified as proper regulation of interstate commerce. In *Carter v. Carter Coal Co.*,<sup>211</sup> by a vote of 5-4, the Court invalidated legislation designed to stabilize the bituminous coal mining industry, again finding the statute void for lack of federal power and for trampling on corporate constitutional rights. In another 5-4 ruling, *Morehead v. New York ex rel. Tipaldo*,<sup>212</sup> the Court invalidated a New York minimum wage law designed to ensure women a living wage as a violation of constitutional protection for liberty of contract, loudly reaffirming its 1923 decision in *Adkins*. The result, FDR complained, was to create a "no-man's-land"<sup>213</sup> where no government, whether state or federal, had any power to ensure that the nation's workers could wring a living wage out of corporations and other employers.

Against the backdrop of these rulings, Roosevelt campaigned for re-election in 1936, winning a second term in a landslide victory. Lashing out at corporations – "a new despotism . . . wrapped . . . in the robes of legal sanction,"<sup>214</sup> – FDR called on American people to take back their Constitution. As he

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<sup>206</sup> See 1 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 749 (1938).

<sup>207</sup> *Id.* at 749, 750.

<sup>208</sup> *Id.* at 751.

<sup>209</sup> *Id.* at 752, 753.

<sup>210</sup> 295 U.S. 330 (1935).

<sup>211</sup> 298 U.S. 238 (1936).

<sup>212</sup> 298 U.S. 587 (1936).

<sup>213</sup> See 5 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 192 (1938).

<sup>214</sup> *Id.* at 232.

had in 1932, FDR again argued that corporate power was destroying the constitutional rights to liberty and equality: “A small group had concentrated into their hands an almost complete control over other people’s property, other people’s money, other people’s labor – other people’s lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.”<sup>215</sup> To combat “economic tyranny such as this,” FDR argued, “the American citizen could only appeal to the organized power of Government.”<sup>216</sup> But corporations – “the royalists of the economic order” – backed by the Supreme Court were standing in the way, maintaining that “economic slavery was nobody’s business” and “den[ying] that the Government could do anything to protect the citizen in his right to work and his right to live.”<sup>217</sup> FDR vehemently rejected this view of the Constitution, insisting that “freedom is no half and half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place.”<sup>218</sup>

One year later, in 1937, Roosevelt’s understandings of governmental power over corporations and other businesses would be the Supreme Court’s official doctrine. With FDR triumphant after the 1936 election sweep, the economy still in shambles, labor strikes breaking out nationwide, and a court-packing plan in the offing, Justice Owen Roberts – in the now famous “switch in time that saved the nine” – joined the four pro-New Deal dissenters in a series of landmark 1937 rulings.

In *West Coast Hotel Co. v. Parrish*,<sup>219</sup> the Court upheld Washington’s minimum wage law and overruled both *Adkins* and *Morehead*, effectively ending the *Lochner* era and interring the notion that the Constitution affords special protection to liberty of contract. Several weeks later, in another 5-4 opinion, the Court in *NLRB v. Jones & McLaughlin Steel Corp.*<sup>220</sup> upheld the constitutionality of the National Labor Relations Act, holding that Congress had the power under the Commerce Clause to forbid corporations and other employers from discriminating against workers who wanted to join a union. *Jones & McLaughlin*’s holding that Congress had a broad federal power to regulate the national economy gave the federal government a powerful tool to regulate corporate affairs, and paved the way for numerous other decisions upholding federal regulation of corporations and other economic actors.<sup>221</sup>

In 1938, *United States v. Carolene Products Co.*,<sup>222</sup> which rejected a corporation’s constitutional attack on yet another federal statute designed to further public health, spelled out the new constitutional regime in the most famous footnote in the history of constitutional law. Courts would presume statutes to be constitutional; “more searching review” would only be called for in cases in which the law violates “a specific prohibition on the Constitution, such as those of the first ten Amendments,” infringes on the right to vote or otherwise “restricts those political processes which can

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<sup>215</sup> *Id.* at 233.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 233, 234.

<sup>218</sup> *Id.* at 234.

<sup>219</sup> 300 U.S. 379 (1937).

<sup>220</sup> 301 U.S. 1 (1937).

<sup>221</sup> *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

<sup>222</sup> 304 U.S. 144 (1938).

ordinarily be expected to bring repeal of undesirable legislation,” or is directed against “particular religious . . . or racial minorities” or “against discrete and insular minorities . . . .”<sup>223</sup> Footnote Four’s message was clear. Legislatures rightly had broad powers to regulate corporate affairs, and corporations should not ask the courts to second-guess legislative judgments on the basis of now-discarded notion of liberty of contract or equal protection for corporations.

The New Deal Court also tacked back towards the pre-*Lochner* regime in which corporations were treated fundamentally differently than individuals.<sup>224</sup> In 1944, *United States v. White* reaffirmed *Hale*’s holding that the Self-Incrimination Clause does not protect corporations, observing that the rule that the privilege “is essentially a personal one, applying only to natural individuals . . . . The framers, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.”<sup>225</sup> Six years later, in 1950, *United States v. Morton Salt Co.*<sup>226</sup> cut back on *Hale*’s Fourth Amendment holding and recognized that the Fourth Amendment rights of corporations are necessarily less extensive than those of living persons. In rejecting a corporation’s Fourth Amendment challenge to an administrative order requiring production of documents relevant to an agency investigation of the corporation’s trading practices, the Court unanimously held that:

corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities . . . Favors from government often carry with them an enhanced measure of regulation. . . . [L]aw enforcement agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and public interest.<sup>227</sup>

While heeding *Hale*’s holding that corporations are protected by the Fourth Amendment, *Morton Salt* moved the Court’s doctrine back into line with first principles affirming broad governmental power to regulate corporations.

During the New Deal and in the decades that followed, equal protection claims urging that government had to afford equal treatment to corporations and living persons became virtually non-existent, hardly a surprise given the Supreme Court’s focus on the protection of “discrete and insular minorities,” a category that could hardly be applied to corporations wielding massive economic power. Many years later, the doctrine finally caught up. In *Lehnhausen v. Lake Shore Auto Parts Co.*,<sup>228</sup> the Court unanimously held that the Equal Protection Clause permits states to single out corporations for

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<sup>223</sup> *Id.* at 152 n.4.

<sup>224</sup> Justices Black and Douglas would have gone further, arguing that corporations were not persons under the Fourteenth Amendment, and that the *Santa Clara* oral argument statement reported by the court reporter should be overruled. See *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 83-90 (1938) (Black, J., dissenting); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576-81 (1949) (Douglas, J., dissenting).

<sup>225</sup> *United States v. White*, 322 U.S. 694, 698, 700 (1944).

<sup>226</sup> 338 U.S. 632 (1950).

<sup>227</sup> *Id.* at 368-69; see also *California Bankers’ Ass’n v. Schultz*, 416 U.S. 21, 65-67 (1974) (reaffirming *Morton Salt*).

<sup>228</sup> 410 U.S. 356 (1973).

special taxation, and explicitly overruled *Quaker City Cab*, concluding the dissents in that case better understood constitutional first principles. Heeding the teachings of *Carolene Products'* Footnote Four, the Court upheld a state tax on the personal property of corporations against an equal protection challenge, refusing to “substitute[] our judgment on the facts which we can only be dimly aware for a legislative judgment that reflects a vivid reaction to pressing fiscal problems.”<sup>229</sup> The Court cast aside *Quaker City Cab* as “a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review, which is an important part of our constitutional tradition.”<sup>230</sup>

Thus, by the early 1970s, virtually every aspect of the *Lochner*-era’s protection of corporate constitutional rights had been overthrown – federal and state governments now, once again, had broad powers to regulate corporate affairs; constitutional protection of liberty of contract was recognized as a disastrous departure from first principles; corporations had no claim under the Equal Protection Clause to equal treatment with citizens and other living persons residing in the country; the rights corporations had under the Bill of Rights<sup>231</sup> were tempered by the understanding that corporations did not have the same set of rights as individuals, and that governments had a much wider latitude to regulate corporations to ensure that they did abuse their state-conferred special privileges.

#### **VII. Corporate Constitutional Rights in the Modern Age: Politics and Free Speech**

The 1970s saw a second wave of federal regulation of corporations and other economic actors – the Clean Air Act, the Federal Pollution Control Act, the Occupational Health and Safety Act, to name but a few – designed to protect the environment, worker health and safety, and consumers. These new regulations hit corporate bank accounts hard, imposing compliance costs that, by some estimates, were as high as \$200 billion dollars per year.<sup>232</sup> With the Court no longer responsive to assertions that the Constitution protects corporations’ rights to economic liberty, corporations looked for a new constitutional strategy to respond to increasing federal regulation.

In 1971, Lewis Powell – a Virginia corporate lawyer who would soon be nominated to the Supreme Court – wrote a now famous memorandum urging the Chamber of Commerce to play a greater role in politics, including in promoting the election of candidates who would see eye-to-eye with corporations and would oppose Ralph Nader and others bent on limiting corporate power. In Powell’s words, “political power is necessary” and “must be assiduously cultivated” to respond to what Powell saw as a

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<sup>229</sup> *Id.* at 365.

<sup>230</sup> *Id.* After *Lehnhausen*, corporations would only invoke the Equal Protection Clause to challenge discrimination among corporations doing business in the state, typically higher taxes assessed against out-of-state corporations. See, e.g. *Western & So. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 656-668 (1981).

<sup>231</sup> With the growth of corporate criminal liability, the Court recognized that corporations indicted on criminal charges could invoke certain of the protections of the Bill of Rights applicable in criminal trials. See, e.g. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (holding, without analysis, that a corporation was entitled to invoke the Double Jeopardy Clause of the Fifth Amendment). Although the Court has not specifically considered other aspects of the Bill of Rights, corporations today enjoy most of the protections of the Bill of Rights when charged with criminal acts.

<sup>232</sup> See Winkler, *supra*, at 933.

“massive assault” on corporations’ “right to manage its own affairs.”<sup>233</sup> And, Powell urged corporations to focus on a “neglected opportunity in the courts,” noting that “the judiciary may be the most important instrument for social, economic and political change.”<sup>234</sup>

Powell’s strategy of using the judiciary to promote the political power of corporations hit paydirt in *First National Bank of Boston v. Bellotti*,<sup>235</sup> when Powell – now Justice Powell – authored the Court’s majority opinion holding that limits on the political speech of corporations violated the First Amendment. Speaking for five Justices, Powell’s opinion invalidated a Massachusetts statute that forbade banks and business corporations from spending money to influence the vote of referenda elections, except on referenda that materially affect the corporation’s business or property. The bank, the Court held, had a constitutional right protected by the Fourteenth Amendment to use its treasury funds to advocate the defeat of a proposal for a constitutional amendment providing for an income tax on individuals. Justice Powell slipped the capitalist joker back into the Court’s deck.

Reflecting the Court’s past precedents, Justice Powell’s opinion for the Court was skittish about holding that corporations are protected outright by the First Amendment. Dismissing that issue, Powell argued that “the Constitution often protects interests broader than those of the party seeking their vindication” and thus the “proper question” is whether the Massachusetts law “abridges expression that the First Amendment was meant to protect.”<sup>236</sup> Powell argued that the First Amendment gave its highest protection to political speech, and that the identity of the speaker – whether individual or corporation – was essentially irrelevant. “The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation . . . or individual.”<sup>237</sup> Justice Powell brushed off precedents dating back to the beginning of the 20<sup>th</sup> century that had held that the Fourteenth Amendment protected the liberty of individuals, not corporations,<sup>238</sup> disparaging these holdings as “an artificial mode of analysis.”<sup>239</sup> On the merits, Powell’s majority opinion found little basis for the ban on corporate spending on referenda, finding no basis for believing that the ban on corporate referenda was necessary to protect shareholders or prevent corrupting the electoral process.

Powell’s audience-based analysis succeeded in cobbling together a majority, but begged a number of key questions. If corporations had a right to engage in political speech because of the rights of hearers, why wouldn’t the protection of the speech of corporate CEOs as individuals be sufficient to ensure all points of view were heard? Why did the First Amendment rights of the audience give corporate directors a constitutional right to spend shareholders’ money on political matters – such as the individual income tax amendment – that did not concern the corporations’ business or property? As

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<sup>233</sup> See Confidential Memorandum from Lewis F. Powell to Eugene B. Sydnor, *Attack on the American Free Enterprise System* (Aug. 23, 1971), at 3, 10.

<sup>234</sup> *Id.* at 10.

<sup>235</sup> 435 U.S. 765 (1978).

<sup>236</sup> *Id.* at 776.

<sup>237</sup> *Id.* at 777.

<sup>238</sup> See *supra* at p. \_\_\_\_.

<sup>239</sup> *Id.* at 779.

one corporate scholar put it, “A’s rights to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.”<sup>240</sup> What justified giving short shrift to concerns – dating all the way back to Andrew Jackson’s struggle with the Bank of the United States in the 1830s – that corporate political participation would corrupt the electoral process? Most important, what was the justification for overthrowing a century of precedent – going all the way back to Justice Field’s statement in the *Railroad Tax Cases* – recognizing that rights to liberty were for the living?

Dissents by Justice White – joined by Justices Brennan and Marshall – and then-Justice Rehnquist took the Court to task for these gaping holes in the majority opinion’s logic. Justice White’s dissent accepted that “corporate communications come within the scope of the First Amendment,” but denied that corporations had the same First Amendments rights as individuals. Indeed, Justice White explicitly recognized that corporations are properly subject to speech “restrictions which individual expression is not” because corporate speech may pose “threat[s] to the functioning of a free society.”<sup>241</sup> As Justice White explained, “[c]orporations are artificial entities created by law,” and the beneficiary of all sorts of “special rules” that not only “increase their economic viability,” but “place[] them in a position to control vast amounts of economic power which may . . . dominate not only the economy but also the very heart of our democracy, the electoral process. . . . The State need not permit its own creation to consume it.”<sup>242</sup> In any event, White argued, the statute’s ban did not silence anyone. “Even the complete curtailment of corporate communications . . . would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts.”<sup>243</sup>

Justice Rehnquist went even further, showing how the Court’s recognition – for the first time in history – of a business corporation’s rights to spend money on elections was fatally inconsistent with constitutional text and history. As Justice Harlan had in his dissent in *Hale v. Henkel*, Justice Rehnquist looked to Chief Justice Marshall’s foundational opinion in *Dartmouth College*, which recognized the differences between living persons – who possessed fundamental rights under the Constitution as their birth right – and corporations, whose rights depended on a grant from the government.<sup>244</sup> This fundamental difference meant that corporations were entitled to constitutional protection for their property – after all, states chartered corporations to succeed in business – but were not entitled to the full range of substantive fundamental liberties, including rights of political expression, that citizens had under the Constitution. As Rehnquist recognized, corporate special privileges – such as “perpetual life and limited liability” – that are “beneficial in the economic sphere” to help corporations make money “pose special dangers in the political sphere.”<sup>245</sup> Thus, corporations “like any particular form of organization upon which the State confers special privileges . . . different from natural persons,” were

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<sup>240</sup> Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235, 247 (1981).

<sup>241</sup> *Bellotti*, 435 U.S. at 804 (White, J., dissenting).

<sup>242</sup> *Id.* at 809-10 (White, J., dissenting).

<sup>243</sup> *Id.* at 807 (White, J., dissenting).

<sup>244</sup> *Id.* at 823 (Rehnquist, J., dissenting) (discussing *Dartmouth College*).

<sup>245</sup> *Id.* at 825, 826 (Rehnquist, J., dissenting).

subject to government regulation to ensure that they did not use their special privileges to dominate unfairly the political process and “obtain further benefits beyond those already bestowed.”<sup>246</sup>

*Bellotti*'s embrace of corporate constitutional rights to spend money on elections – though a radical departure from constitutional text and history – was limited to a narrow set of elections. In an important footnote, Justice Powell expressly disclaimed any right of corporations to spend money on the election of candidates for political office. Noting the long history of regulation designed to prevent “corruption of elected representatives through the creation of political debts,” Justice Powell’s *Bellotti* majority opinion explained that “our consideration of a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.”<sup>247</sup> Powell’s five-Justice majority was not willing to throw out seventy years of federal campaign finance regulation, beginning with the Tillman Act and extended by Congress in the 1920s, 1940s, and 1970s.<sup>248</sup>

Cases decided in the wake of *Bellotti* confirmed the narrowness of the Court’s holding. In 1982, in *FEC v. National Right to Work Committee*,<sup>249</sup> the Court unanimously rejected a constitutional challenge to a federal election law that permitted corporations to raise money for election-related purposes solely from its members. Speaking through Justice Rehnquist, the Court held that the federal government could regulate corporations to root out political corruption and prevent corporate domination of the electoral process, “reflect[ing] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.”<sup>250</sup> Examining Congress’ long history of strictly regulating corporate electoral activity – dating all the way back to the Tillman Act of 1907 – the Court unanimously recognized Congress’ weighty interest in “ensur[ing] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form . . . should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”<sup>251</sup>

In 1990, in *Austin v. Michigan Chamber of Commerce*,<sup>252</sup> the Court applied this same logic in upholding a state law barring corporations from using their general treasury funds to advocate the election or defeat of candidates for statewide office. The Court, once again, emphasized that the government had a compelling interest in regulating corporate spending on elections to ensure corporations did not use their special privileges – given to help them operate efficiently in the marketplace – to dominate the electoral process. “State law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment . . . of assets – that enhance their ability to attract capital . . . . These state-created advantages not only allow corporations to play a dominant

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<sup>246</sup> *Id.* at 826, 827 (Rehnquist, J., dissenting).

<sup>247</sup> *Id.* at 787 n.26.

<sup>248</sup> For a review of the history of these statutes, see Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 603-14.

<sup>249</sup> 459 U.S. 197 (1982).

<sup>250</sup> *Id.* at 209-10.

<sup>251</sup> *Id.* at 207.

<sup>252</sup> 494 U.S. 652 (1990).

role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage.'<sup>253</sup> In short, Michigan's limit on corporate political spending was necessary to prevent corporations from exploiting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," to "unfairly influence elections."<sup>254</sup> Three Justices dissented, arguing for a substantial expansion of the First Amendment rights of corporations. While *Bellotti* had been careful to limit its holding to referenda, dissents authored by Justice Scalia and Kennedy argued that corporations, like individuals, had an unlimited constitutional right to spend money on all elections.<sup>255</sup> It was unconstitutional censorship, in their view, to demand that corporations surrender their First Amendment rights simply because they received special benefits from the government.<sup>256</sup>

In 2003, in *McConnell v. FEC*,<sup>257</sup> the Supreme Court reaffirmed that *Austin* got the Constitution right in recognizing that governments have broad authority to regulate corporate election spending to ensure that corporations do not exploit their special privileges to corrupt our democratic political system. *McConnell* upheld a new federal statute – the Bipartisan Campaign Reform Act ("BCRA") – banning corporations from spending treasury funds on corporate electioneering advertisements broadcast shortly before a federal primary or general election. Faced with overwhelming evidence that corporations had spent millions and millions of dollars on attack ads that all but advocated the election or defeat of candidates, Congress passed BCRA to close the loop hole in existing federal law that corporations had used to dominate the electoral process. Under *Austin*, the Court found this additional restraint on corporate speech clearly constitutional, at least when the speech in question is functionally equivalent to express advocacy of the election or defeat of specifically named candidates.<sup>258</sup> Led again by Justices Kennedy and Scalia, four dissenting Justices refused to bow to the force of stare decisis, and called for the overruling of *Austin*.<sup>259</sup>

While the Court in *Austin* and *McConnell* turned back corporations' constitutional claims to spend money on the same basis as citizens who have a right to vote in elections, in many other areas of constitutional law, corporations were gaining ground. First, the Court's cases gave strong protection to the First Amendment rights of corporations to engage in commercial speech, placing significant limits on government regulation of business in the name of ensuring that corporations and other businesses may inform the public about the products they wish to sell, whether they be medical supplies, tobacco, alcohol, or casino gambling.<sup>260</sup> Second, the Court came to the rescue of corporations that had committed unquestionably tortious conduct, inventing new substantive due process limitations on state

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<sup>253</sup> *Id.* at 658-59 (quoting *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986)).

<sup>254</sup> *Id.* at 660.

<sup>255</sup> *Id.* at 679-95 (Scalia, J., dissenting); *id.* at 695-713 (Kennedy, J., dissenting).

<sup>256</sup> *Id.* at 680-82 (Scalia, J., dissenting); *id.* at 711-12 (Kennedy, J., dissenting).

<sup>257</sup> 540 U.S. 93 (2003).

<sup>258</sup> *Id.* at 203-09.

<sup>259</sup> *Id.* at 257-58 (Scalia, J., concurring in part and dissenting in part); *id.* at 273-75 (Thomas, J., concurring in part and dissenting in part); *id.* at 322-37 (Kennedy, J., concurring in part and dissenting in part).

<sup>260</sup> See, e.g. *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

juries' power to award punitive damages to individuals wronged by corporate misconduct.<sup>261</sup> While the Constitution was written to ensure that individuals had a right to redress illegal acts in front of a jury,<sup>262</sup> the Court in a series of cases held that corporations could appeal to the courts to throw out the jury's award based on the courts' judgment that the jury's award was excessive in relation to the harm inflicted by the defendant, creating limits on punitive damages with no real basis in constitutional text and history.<sup>263</sup> In all of these areas, the Court appears to be moving back towards the *Lochner* era, when corporations were treated identically to – and in some cases more favorably than – individuals when it comes to the fundamental rights the Constitution secures to the American people.<sup>264</sup>

Corporate efforts to advance their legal agenda in the courts appear to have received a significant boost when President George W. Bush replaced Chief Justice Rehnquist and Justice O'Connor – who emerged in *McConnell* as the fifth vote in favor of limits on corporate campaign expenditures<sup>265</sup> – with Chief Justice John Roberts and Justice Samuel Alito. Since joining the Court, Roberts and Alito have advocated cutting back on *Austin* and *McConnell*, though, to date, they have stopped short of calling to overrule these rulings. Most significantly, in *FEC v. Wisconsin Right to Life, Inc.*<sup>266</sup> a sharply divided Court held that corporations have a First Amendment right to pay for advertisements on the political issues of the day, and that any individual political issue ad should be treated as protected “unless [it is] susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>267</sup> Chief Justice Roberts' opinion – joined only by Justice Alito – dismissed *Austin's* rationale as limited only to speech about candidates, not issue ads.<sup>268</sup> The *Austin* and *McConnell* dissenters – Justices Scalia, Kennedy, and Thomas – again advocated going further and actually overruling these important rulings. In their view, *Bellotti* delivered the “coup de grace to the argument that corporations

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<sup>261</sup> See, e.g. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>262</sup> See AMAR, BILL OF RIGHTS, at 81-119.

<sup>263</sup> *BMW*, 517 U.S. at 598-602 (Scalia, J., dissenting); *State Farm*, 538 U.S. at 430-31, 438-39 (Ginsburg, J., dissenting).

<sup>264</sup> E.g. *BMW*, 517 U.S. at 585 (“The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice . . . . Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.”). These constitutional rulings are just the tip of the iceberg in terms of the ways that the Supreme Court has rewritten the law to favor corporations. Across a wide slew of areas, the Court's statutory rulings have closed the courthouse door to plaintiffs seeking to hold corporations accountable for wrongdoing, inventing new obstacles to filing suit, limiting judicial remedies, and narrowly construing critical anti-discrimination and environmental protections. For discussion of these court-closing rulings, see Andrew Siegel, *The Courts Against the Court: Hostility to Litigation as an Enduring Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006).

<sup>265</sup> By the time of *McConnell*, Chief Justice Rehnquist had backed away from the strong, pro-regulatory approach he had staked out in *Bellotti* and *Austin*. Although Chief Justice Rehnquist's dissent did not address the issue specifically, the Chief Justice joined Justice Kennedy's dissent, which argued that *Austin* should be overruled as inconsistent with *Bellotti's* protection of the First Amendment rights of corporations. Given Rehnquist's silence on the issue, it is impossible to tell whether Rehnquist had abandoned the arguments he had made in dissent in *Bellotti*, or simply accepted that *Bellotti* was the law, and that his dissenting views had not carried the day.

<sup>266</sup> 551 U.S. 449 (2007).

<sup>267</sup> *Id.* at 470.

<sup>268</sup> *Id.* at 480-81.

can be treated differently”<sup>269</sup> than individuals when it comes to First Amendment rights of political expression, and both *Austin* and *McConnell* should both be overruled as fatally inconsistent with *Bellotti’s* protection of corporate constitutional rights of political expression.<sup>270</sup> The four remaining members of the *McConnell* majority dissented.

That brings us to *Citizens United v. FEC*, now pending before the Court, which tees up the argument that *Austin* and *McConnell* should be overruled and could usher back the era of *Gulf* and *Quaker City Cab*, when corporations were viewed as having the same constitutional rights as “We the People.” *Citizens United* began as a fairly sleepy case very much in the mold of *Wisconsin Right to Life*. During the 2008 presidential primary season, Citizens United planned to release a film critical of Sen. Hillary Clinton – *Hillary: The Movie* – through video-on-demand, a pay-per-view service. Initially, Citizens United argued that it had a First Amendment right to broadcast the film because a feature-length film, which would be seen only by viewers willing to pay, was fundamentally different from the 30- or 60-second broadcast advertisements that Congress had targeted in passing BCRA. The case, thus, gave the Court the opportunity to carve out a further exception to BCRA’s ban on corporation electioneering. This June, however, the Court transformed the case, asking for additional briefing and argument on whether to overrule both *Austin* and *McConnell*, making the case one of constitutional first principles about the place of corporations in our constitutional scheme.

At oral argument, the Court’s liberal Justices strongly defended *Austin* and *McConnell*. Led by Justices Ginsburg and Sotomayor, these Justices forcefully argued that *Austin* and *McConnell* were correct as a matter of constitutional first principles, exposing how the broad ruling *Citizens United* was seeking – a holding that corporations have the same First Amendment rights as individuals to spend money on elections – was a betrayal of constitutional text and history. At the very beginning of oral argument, Justice Ginsburg reminded Ted Olsen, counsel for Citizens United, that it is living persons, not corporations, which are “endowed . . . with unalienable rights.”<sup>271</sup> Justice Sotomayor, too, picked up on this theme in her questions, asserting that if we are looking to constitutional first principles and considering toppling precedents, we should look instead at the cases that invented corporate constitutional personhood and “imbued a creature of State law with human characteristics.”<sup>272</sup> Near the end of the argument, Justice Breyer joined in too, emphasizing that corporations are artificial state-created entities – a view tracing all the way back to Chief Justice Marshall’s 1819 opinion in *Dartmouth College* – and that in exchange for their special privileges, they may legitimately be subject to disabilities to which citizens are not.<sup>273</sup>

But the Court’s conservative Justices seemed to show little interest in following text and history wherever they lead. Instead, at oral argument, these Justices, led by Justices Scalia and Kennedy, brimmed with hostility toward the federal ban on corporate electioneering. And if in fact there is a majority on the Court supporting the views expressed by Justices Scalia and Justice Kennedy in dissent in

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<sup>269</sup> *Id.* at 488 (Scalia, J., concurring).

<sup>270</sup> *Id.* at 489-91, 500-04 (Scalia, J., concurring).

<sup>271</sup> *Citizens United v. FEC*, Transcript of Oral Argument, at 4 (Sept. 9, 2009).

<sup>272</sup> *Id.* at 33.

<sup>273</sup> *Id.* at 81-82.

*McConnell*, *Citizens United* may become of the most far-reaching precedents on the rights of corporations under the Constitution in Supreme Court history, going well beyond *Bellotti*, which avoided the questions whether corporations are directly protected by the First Amendment, or even the opinions of the *Lochner*-era, when the Court, for all its betrayals of text and history, repeatedly reaffirmed that substantive constitutional protections for liberty were for the living. The Roberts Court, thus, stands on the verge of a corporate constitutional revolution with only Chief Justice Roberts' professed commitment to judicial restraint and minimalism potentially standing in the way. Even if the Court rules more narrowly in *Citizens United*, and leaves *Austin* and *McConnell* on the books, critical questions about equal constitutional rights for corporations will linger until the Court faces these questions head on.

A broad ruling that corporations have the same First Amendment right as individuals to spend money to support or oppose candidates of their choice could transform our electoral politics. In 2007 and 2008, Barack Obama broke every political fundraising record, raising a total of more than \$750 million from more than a million contributors during the course of his historic run to the presidency. During 2008 alone, Exxon Mobil Corporation generated profits of \$45 billion. With a diversion of even two percent of these profits to the political process – a sensible investment for the company given Obama's commitment to shift our economy away from its dependence on oil and gas – this one company could have outspent the Obama campaign and fundamentally changed the dynamic of the 2008 election.

A broad ruling in favor of corporate free speech rights would also trigger an avalanche of additional lawsuits. Corporations can be expected to immediately file constitutional challenges to the federal ban on corporate contributions that dates all the way to the Tillman Act. After all, if corporations have the same right to spend money on elections as individuals, it is doubtful that the Roberts Court would look favorably on the century-old ban that singles out corporations and prevents them making political contributions to candidates from their treasuries. Corporations would not only demand their speech be protected, but that it be anonymous, preventing the people of the nation from tracing the flood of money that would come into the political process. New corporate free speech claims would certainly be filed in others arenas as well – indeed, days before the *Citizens United* oral argument, Floyd Abrams filed suit on behalf of big tobacco companies to invalidate new FDA limits on tobacco marketing.<sup>274</sup> Corporations might use their new, stronger First Amendment protections to attack a host of SEC rules that regulate the information corporations disclose to their investors.<sup>275</sup> It is even possible, as John McCain recently noted, that corporations would assert a constitutional right “to refuse to testify under oath and to keep documents from lawful investigations”<sup>276</sup> and demand the Supreme Court overrule a

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<sup>274</sup> Duff Wilson, *Tobacco Firms Sue to Block Marketing Law*, New York Times, Aug. 31, 2009.

<sup>275</sup> See Winkler, *supra*, at 871.

<sup>276</sup> Statement of Sen. John McCain on *Citizens United v. FEC*, Oct. 21, 2009, at 12 (available at <http://electionlawblog.org/archives/014645.html>).

century of precedent rejecting corporations' claims under the Fifth Amendment's Self-Incrimination Clause.<sup>277</sup>

### **Conclusion**

Citizens United and its supporters portray the case as a fight over the meaning of the First Amendment, but this obscures the far more fundamental question that underlies their claim. In arguing that there is no difference between corporate speech and the political speech of We the People, Citizens United seeks a radical constitutional result, one that the framers of the Constitution and the successive generations of Americans who have amended the Constitution and fought for laws that limit the undue influence of corporate power would find both foreign and subversive. The inalienable, fundamental rights with which individuals are endowed by virtue of their humanity are of an entirely different nature than the state-conferred privileges and protections given to corporations to enhance their chances of economic success and business growth. The Constitution protects these rights in different ways, and equating corporate rights with individual rights can threaten the latter, as will be the case if the treasuries of corporations such as Exxon can be tapped to overwhelm the voices of Americans in the electoral process.

We have been down this road before. In the *Lochner* era, a conservative Supreme Court delayed many of the reforms enacted by the elected representatives of the Populist and Progressive eras. At the heart of the Court's thinking in the *Lochner* era was the rule, first announced for the Court in *Gulf*, that "a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens." The Supreme Court's first experimentation with equal rights for corporations did not end well for the conservatives on the Court. Just about every aspect of the *Lochner* era Court's jurisprudence has subsequently been overruled and it remains an era that is reviled by liberals and conservatives alike. Yet at its core, the claim pending before the Court in *Citizens United* is identical to that at the center of the *Lochner*-era decision in *Gulf*, the idea that corporations must be treated identically to individuals when it comes to fundamental constitutional rights. And the Court appears prepared to overrule the compromise fashioned by the Court in *Austin* and *McConnell*, which provides protection to corporations under the First Amendment, but also gives Congress greater authority to control the speech by corporations, given the special privileges corporations enjoy, and the limited role they are created to play in this nation. *Austin* has only been on the books for nineteen years, but it built directly off a line of cases such as *Dartmouth College* and *Earle* that date to the earliest days of our Republic.

Justice Sotomayor is right then in posing the question about whether we really should be revisiting the idea of corporate personhood – the "capitalist joker" that was inserted into our law by a self-

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<sup>277</sup> Indeed, in *Braswell v. United States*, 487 U.S. 99 (1988) the most recent of the Court's cases to reaffirm that corporations have no constitutional privilege against self-incrimination, Justice Kennedy dissented, arguing that "the nature of the entity is irrelevant to determining whether there is ground for the [Fifth Amendment] privilege," *id.* at 124 (Kennedy, J., dissenting), an argument eerily similar to Kennedy's argument for overturning *Austin* and *McConnell*. It is not hard to imagine that, with the right case, Justice Kennedy's dissent could become the view of the majority.

interested Court reporter more than a century ago. The Court has never provided a basis for this idea in our Constitution's text or history, nor could it, and never truly taken this idea seriously. Corporations have always been treated differently under our Constitution for many purposes, even during the heart of the *Lochner* era. Yet we find the joker turning up again and again, whenever the Court seeks to protect corporations against the will of the people.

Rejecting corporate personhood would not mean that corporations have no constitutional rights, only that the constitutional protections afforded to living persons and corporations would be recognized as appropriately different. Corporations do not vote, they cannot run for office and they are not endowed by the Creator with inalienable rights. "We the People" create corporations and we provide them with special privileges that carry with them restrictions that do not apply to living persons. These truths are self-evident, and it's past time for the Court to put this issue to rest, once and for all.