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Corporate Personhood and Limited Sovereignty

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This Article, written for a symposium celebrating the work of Professor Margaret Blair, examines how corporate rights jurisprudence helped to shape the corporate form in the United States during the nineteenth century. It argues that as the corporate form became popular because of the way it facilitated capital lock-in, perpetual succession, and provided other favorable characteristics related to legal personality that separated the corporation from its participants, the Supreme Court provided crucial reinforcement of these entity features by recognizing corporations as rights-bearing legal persons separate from the government. Although the legal personality of corporations is a distinct concept from their constitutional treatment, the Court's nineteenth-century rulings bolstered key features created by corporate law and simultaneously situated the corporation as subordinate to the state in a system of federalism. And, finally, the Article suggests that the balance of power struck in the first century of Supreme Court jurisprudence on corporate rights has been eroded in the modern era. The Supreme Court's failure to develop a consistent approach to corporate rights questions and its tendency to reason based on views of corporations as associations of persons have exposed a significant flaw in the Court's evolving corporate personhood jurisprudence: it lacks a limiting principle.

* Professor of Law, University of Pennsylvania Law School. This Article was written for the *Vanderbilt Law Review* symposium on "Professor Margaret Blair's Contributions to Understanding the Role of Corporations in the Economy." Thanks to Margaret Blair for a rich and inspiring body of work on corporations and the great honor and privilege to collaborate on projects inquiring into the history and future of corporate personhood and rights. For valuable comments on this Article, thanks to Evelyn Atkinson, Margaret Blair, Claire Hill, and symposium participants.

INTRODUCTION

Corporate personality and personhood comprise a few conceptually distinct notions or issues. There is the issue of the entity status of corporations under the law, or what might be called legal personality. This concept is core to what corporations are and what they are able to do. It predates the founding of the United States by more than a century, and, by some measures, has ancient roots.[1] In addition, there are statutory issues of whether corporations are intended to be included when a statute refers to "persons," "people," or the like. Statutory laws, both state and federal, have often included corporations in "definitions" sections, either expressly referring to corporations in the relevant statutory text or defining the term "person" to include corporations, to make clear that the statute applies to corporations.[2] Statutes that do not expressly include corporations or define "person" to include corporations may give rise to ambiguity that must eventually be interpreted by courts.[3] Further, there is the issue of the treatment of corporations under the U.S. Constitution.

Each of these three contexts or sets of issues regarding corporate personality and personhood have engendered significant scholarly inquiry and debate, particularly the treatment of corporations under

1. *See* JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 37–40 (Bos., Little, Brown & Co. 10th ed. 1875) (discussing the history of the corporate form); *see also* Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1354–74 (2006) (describing antecedents to the corporate form in the Roman Empire and medieval Italy); Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 529–32 (2011) (describing the early Roman association of the "universitas").

2. *See, e.g.*, Dictionary Act, 1 U.S.C. § 1 ("[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

3. *See, e.g.*, FCC v. AT&T Inc., 562 U.S. 397 (2011) (interpreting whether corporations have a right of "personal privacy" for purposes of the Freedom of Information Act's exemption 7(C)); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (interpreting whether a business corporation constitutes a "person" who can "exercise religion" under the Religious Freedom Restoration Act of 1993).

the U.S. Constitution, which does not specifically mention corporations. As a matter of constitutional text, no explanation is provided regarding whether a corporation constitutes a "person" or should be counted among "the people" and in what capacity.[4] Despite the lack of explicit reference to corporations, the Supreme Court has long recognized that they can be the subject of constitutional protection or holders of constitutional rights, and this longstanding notion has become known as the doctrine of corporate personhood.

The doctrine does not itself establish which rights corporations hold, or how to determine which rights they should hold.[5] It recognizes corporations as legal entities that can have a particular constitutional right or protection—such as a due process right protecting the corporation from a government taking of corporate property without compensation. And although the Supreme Court has recognized that corporations can hold rights, it has never broadly ruled that corporations are entitled to all of the constitutional rights and protections that individuals enjoy, coextensive with individual rights and protections.[6]

Scholars, advocates, and other legal observers have long tried to answer questions of corporate rights, both statutory and constitutional, by inquiring into the nature of corporations.[7] These inquiries ask whether corporations are the kinds of entities, or legal persons, that can or should have rights.[8] Answers have often focused on notions of corporations as artificial persons created by the state with only the powers and rights so conceded, aggregations of persons, or real entities capable of exercising rights separate and apart from those of their members.[9]

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4. *See, e.g.*, ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 10–15 (2010) (noting the absence of textual reference or explanation of the treatment of corporations in the Constitution).

5. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1675.

6. *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1678 (2015) (tracing "the two-hundred-year history of corporate rights jurisprudence to show that the Supreme Court has long accorded rights to corporations based on the rationale that corporations represent associations of people from whom such rights are derived").

7. *See* Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 346 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) (describing longstanding debate "about the ontology of corporations, nonprofits, churches, and associations" and "their status as moral and legal rights-holders").

8. *Id.* at 345.

9. *See* Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 799–808; William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1475 (1989); Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British*

This Article takes a different approach to the subject. Instead of asking what the nature of the corporation tells us about the rights that corporations should have, it examines how corporate rights jurisprudence shaped the corporate form itself in the United States during the nineteenth century, when the Supreme Court began to address these matters of constitutional interpretation.[10]

Specifically, this Article argues that as the corporate form became popular in the United States in the nineteenth century because of the way it facilitated capital lock-in and provided other favorable characteristics related to legal personality that separated the corporation from its participants, the Supreme Court provided crucial reinforcement of these entity features by recognizing corporations as rights-bearing legal persons separate from the government. The Court's nineteenth-century rulings provided access to federal courts and protected contract and property rights against the government, bolstering the utility of the corporate form in the United States during a critical time in its history and development. Although the legal personality of corporations is a separate and distinct concept from their constitutional treatment, the latter issue presented opportunities to strengthen the key characteristics associated with legal personality for U.S. business corporations.

Furthermore, the Court's nineteenth-century rulings not only granted rights to corporations that solidified the utility of the legal entity created by the corporate charter—they also established a hierarchy that subordinated corporations to the state. Corporations have a limited form of sovereignty in the sense of authority and autonomy—they have, to a degree, discretion over their internal governance and protectible interests in their property. The Supreme Court gave its imprimatur to this understanding during a key period for the development and spread of business corporations in the United States. But this measure of sovereignty was tightly limited and derivative of the state. In the first century of Supreme Court jurisprudence on corporate rights, the Court consistently denied corporations status as "citizens," recognized that states granted limited concessions to them and could retain control over them, and rejected

Political Pluralism and American Big Business, 63 WASH. & LEE L. REV. 1421, 1423–24 (2006); Pollman, *supra* note 5, at 1630.

10. This inquiry is an extension or twist on the question that Margaret Blair and I asked in work that explored how the Supreme Court understood the nature and function of corporations in the economy and society as it was deciding key early cases on the constitutional rights of corporations. *See* Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 245 (Naomi R. Lamoreaux & William J. Novak eds., 2017); *see also* Blair & Pollman, *supra* note 6, at 1678.

the notion of business corporations having liberty rights. This Article thus explores the contribution of corporate rights jurisprudence to the utility of the corporate form, bolstering the key features created by corporate law and simultaneously situating the corporation as subordinate to the state in a system of federalism.

And, finally, the discussion also suggests that the balance of power struck in the first century of Supreme Court jurisprudence on corporate rights has been eroded in the modern era. Whereas nineteenth-century case law denied rights to corporations that were not closely aligned with carrying out the key functions related to legal personality, subsequent case law has dramatically expanded expressive rights to a broad spectrum of corporations, including large multinationals that rival governments in power. Business corporations remain structurally subordinate to the state yet have increased their ability to influence and opt out of laws. The Supreme Court's failure to develop a consistent approach to corporate rights questions and its tendency to reason based on views of corporations as associations of persons have exposed a significant flaw in the Supreme Court's evolving corporate personhood jurisprudence: it lacks a limiting principle.

This Article, written for the *Vanderbilt Law Review* Symposium celebrating the work of Professor Margaret Blair, proceeds as follows. Part I summarizes the literature on the characteristics of the modern business corporation, highlighting the important work of Professor Blair, which provides a framework for understanding the history and key functions of legal personality for corporations. Part II argues that nineteenth-century Supreme Court jurisprudence on corporate rights bolstered these key functions or characteristics and contributed to the utility of the corporate form in the United States. Part III explores how the dramatic expansion of corporate rights in the past half century has revealed the lack of a limiting principle to the doctrine of corporate personhood.

I. KEY CHARACTERISTICS RELATED TO LEGAL PERSONALITY FOR CORPORATIONS

The entity status of corporations under the law—legal personality—was established long before the question arose as to how to treat corporations under the U.S. Constitution. This Part begins by examining the historical roots of legal personality, and specifically the key functions or characteristics of business corporations that developed by and during the nineteenth century, to lay the foundation for then turning to an examination of Supreme Court jurisprudence.

To start, when a corporate charter is granted, "the law immediately recognizes the existence of a new legal entity that is separate from the organizers and investors, an entity that can carry out certain business activities as a 'person.' "[11] The separate legal personality of a "corpus," or corporate body, evolved in Europe out of laws and practices for municipalities, religious institutions, charitable organizations, and ecclesiastical bodies, such as during the Middle Ages concerning churches and universities.[12] During this early period, legal status as a corporation generally required a charter from the King or Parliament.[13]

By at least as early as the eighteenth century, English law had established corporations as having certain abilities to act as an entity under the law. Blackstone noted that when members "are consolidated and united into a corporation, they and their successors are then considered as one person in law."[14] And, "as one person, they have one will, which is collected from the sense of the majority of the individuals . . . for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies."[15]

In concrete terms, the characteristics or abilities that flowed from legal personality at common law included the ability to contract, to own property, and to sue and be sued in the corporate name.[16] And, as Blackstone noted, it also included a conception of the corporation as

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11. Blair, *supra* note 9, at 786.

12. *Id.* at 788–89; RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 16–17 (2000) (explaining that by the sixteenth century, corporations were used for "the King himself, cities and boroughs, guilds, universities and colleges, hospitals and other charitables, bishops, deans and chapters, abbots and convents, and other ecclesiastical bodies").

13. PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 4 (1993) (noting that seventeenth-century jurists described the corporation as "a legal unit with its own legal rights and responsibilities" that "was a creation of the law and could achieve legal status only by act of the king or Parliament").

14. 1 WILLIAM BLACKSTONE, COMMENTARIES *468.

15. *Id.* In 1612, Lord Coke noted a corporation was "invisible, immortal, and rest[ed] only in intendment and consideration of the law." Case of Sutton's Hospital (1612) 77 Eng. Rep. 960, 973; 10 Co. Rep. 23 a, 32 b.

16. The corporate ability to own property and to sue and be sued were considered incident to the corporate form at common law. *See, e.g.*, Van Allen v. Assessors, 70 U.S. (3 Wall.) 573, 584 (1865) (referencing as established law that "[t]he corporation is the legal owner of all of the property . . . and . . . can deal with the corporate property as absolutely as a private individual can deal with his own"); 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (London, J. Butterworth 1793) (describing a corporation as "vested, by the policy of the law, with the capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, of contracting obligations, and of suing and being sued"); 9 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4226 (West 2020) ("The power to sue and be sued is one of the inherent powers of a corporation and is among the incidental or implied powers that have been attributed to corporations from the earliest period.").

potentially having a perpetual existence, or at least an existence that was not tied to the lifespan of its participants, in contrast to the partnership form of business.[17] Limited liability for corporate shareholders subsequently developed over time.[18]

These entity characteristics or abilities of the corporation were crucial to establishing the usefulness of the corporate form for raising capital from a broad group of investors and building lasting institutions. Recognizing the importance of understanding the nature of the corporation and its core features, corporate law theorists have identified and debated lists of "essential" characteristics or functions.[19] One of the most notable treatments is Professor Margaret Blair's identification of four key functions of legal personality for corporations:

1. providing continuity and a clear line of succession in property and contract,
2. providing an "identifiable persona" to serve as a central actor in carrying out the business activity,
3. providing a mechanism for separating pools of assets belonging to the corporation from those belonging to the individuals participating in the enterprise, and

17. *See* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 407–10 (2003) (explaining how a partnership, as compared to a corporation, could be terminated by any partner "at any time and for any reason" and would be automatically dissolved upon a partner's death, bankruptcy, or loss of mental capacity); Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, *in* CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 29, 34 (Kenneth Lipartito & David B. Sicilia eds., 2004).

18. *See* Lamoreaux, *supra* note 17, at 32; ROBERT CHARLES CLARK, CORPORATE LAW 7 (1986); BLUMBERG, *supra* note 13, at 3–20. For a discussion of how "corporate separateness" is not absolute and "the actual insulation between the legal sphere of the company and that of shareholders can take different forms and serve distinct functions," see Mariana Pargendler, *The Fallacy of Complete Corporate Separateness*, *in* HIDDEN FALLACIES IN CORPORATE LAW AND FINANCIAL REGULATION (Alexandra Andhov & Saule Omarova eds.) (manuscript at 5) (on file with author).

19. *See* Lynn A. Stout, *On the Nature of Corporations*, 2005 U. ILL. L. REV. 253, 253–54 (describing debate about the essential characteristics of the business corporation); *see also* CLARK, *supra* note 18, at 2 (identifying limited liability, centralized management, perpetual life, and transferability of shares as key features of the corporate form); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393–98, 432–38 (2000) (identifying the essential functions of organizational law as asset partitioning, facilitating contracting, and establishing transferability of ownership and withdrawal rights); John Armour, Henry Hansmann, Reinier Kraakman & Mariana Pargendler, *The Foundations of Corporate Law* § 1.2 (John M. Olin Ctr. for L. Econ. & Bus., Discussion Paper No. 902, 2017) http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_902.pdf [https://perma.cc/DE94-9AT9] (identifying legal personality, limited liability, transferable shares, delegated management with a board structure, and investor ownership as the "five core structural characteristics of the business corporation").

4. providing a framework for self-governance of certain business or commercial activity.[20]

The first key function concerns the creation of a separate legal person for contract and property purposes. This practice dates back to early religious institutions that were granted charters with the ability to contract and hold property in their own names, which "ensured that the property would not be handed down to heirs of individual persons who controlled and managed the property on behalf of the institutions (such as bishops or abbots)."[21] Further, this avoided the possibility that "the property [would] revert to the estate of the lord or be heavily taxed when those controlling persons died or were replaced."[22] This function was closely tied to the notion of perpetual existence, allowing a group of people to act together over time and for changes in membership to occur without disturbing the corporate property.[23]

The idea was subsequently applied to a wide range of institutions, including business or commercial organizations by the seventeenth century, although charters for these purposes were relatively rare.[24] When a single individual such as the King or a bishop operated through the corporate form, this was referred to as a "corporation sole," conveying that the human individual was separate from the official office and that the property they controlled did not belong to them personally.[25] By contrast, any other institution using the corporate form was referred to as a "corporation aggregate," in recognition that the separate legal personality was created from a group of people.[26]

The second key function is that the corporate form facilitates the creation of an "identifiable persona" that serves as "a central actor."[27] This point closely follows from the first—that is, the corporation not only has the ability to contract and hold property in its own name, but its very existence as a separate legal person allows it to serve as the counterparty to "all contracts that the corporation enters into with its various participants (managers, employees, customers, suppliers, and investors), and that it can sue and be sued in its own name, and that it can do things and take on characteristics that distinguish it from any

20. Blair, *supra* note 9, at 787–88. Professor Blair refers to these as functions of "corporate personhood." *Id.* at 796–97.

21. *Id.* at 789.

22. *Id.*

23. *Id.*

24. *See id.* at 789–90.

25. *Id.*

26. *Id.* at 790.

27. *Id.* at 787.

of its participants."[28] Put differently, legal personality serves the function of establishing a separation between the entity and its participants and the capacity for the entity to act in its own name. Professor Blair developed this concept with the term "identifiable persona" and described the importance of this function for developing intangible assets such as goodwill, reputation, and brand.[29] Other scholars have used other terms such as a "nexus of imputation" and "nexus for regulation" and have explored the corporation as a distinct nexus for imputing both legal rights and detriments and for creating separate "legal spheres."[30]

The third key function in Professor Blair's articulation is the separation of assets belonging to the corporation from those of the individual participants. The separate legal existence of the corporation allows equity investors to commit assets to the enterprise that neither they, nor their creditors, can unilaterally withdraw. Whereas partners in an at-will partnership have, by default, the ability to withdraw and force the dissolution and liquidation of the business, shareholders do not have such right.[31] Their capital, once invested, becomes the property of the corporation, and shareholders hold transferable shares in the corporation.[32]

Scholars have used a variety of terms to refer to this function, such as "lock-in"[33] and "asset partitioning,"[34] and have traced the various ways in which the legal personality of the corporation establishes a separate pool of corporate assets, thereby helping the corporation to draw in firm-specific assets and resources for long-term success as well as bond the corporation's contract commitments as credible.[35] Professors Henry Hansmann and Reinier Kraakman have distinguished "affirmative" and "defensive" asset partitioning. The

28. *Id.* at 797.

29. *Id.* at 798.

30. *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 50 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1997) (describing this function as establishing not only a corporate nexus for contractual relationships with private parties but also as a nexus for the imputation of regulation by the state); Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717, 720 (2021) (arguing the corporate form provides for regulatory partitioning and a separation of "legal spheres").

31. Stout, *supra* note 19, at 255; *see also* REVISED UNIF. P'SHIP ACT § 801(1) (amended 2020) (providing that notice of a partner's express will to withdraw is an event causing dissolution).

32. Armour et al., *supra* note 19, § 1.2.3 (describing transferable shares as a basic characteristic of the business corporation and noting "transferability permits the firm to conduct business uninterruptedly as the identity of its owners changes").

33. Blair, *supra* note 17, at 388.

34. Hansmann & Kraakman, *supra* note 19, at 393.

35. *Id.* at 393–95; Blair, *supra* note 17, at 390–94; Armour et al., *supra* note 19, § 1.2.1 & n.13.

former term refers to the establishment of priority for corporate creditors and liquidation protection of corporate assets, and the latter term refers to the shielding of shareholders' personal assets from the creditors of the corporation, often referred to as limited liability.[36]

The fourth key function that Professor Blair identifies is providing a framework for self-governance. The creation of a separate corporate entity necessitates some mechanism for decisionmaking to determine who can take actions on the corporation's behalf and how the corporation is to be operated.[37] This structure can vary widely between different types of organizations that use the corporate form—the fundamental point is that the grant of legal personality necessitates and provides for some measure of self-governance. This concept is centuries old—for example, some municipal corporation charters dating back to the Middle Ages explicitly provided for self-governance.[38] Similarly, the famous seventeenth-century trading companies of England and the Netherlands were chartered to "create a separate entity that could administer the monopoly rights granted over the spice trade on behalf of a group of merchants."[39] The Dutch East India Company, for instance, was originally organized as a combination of smaller spice trading merchants who formed a "Council of Seventeen" with representatives from different regions and served as a governing board.[40] Its letters patent granted the company the ability to establish and enforce its own governance rules and the power to engage in war with other nations and other state-like functions.[41] And, at least since the early nineteenth century, corporate law has prescribed a standard governance structure for business corporations: "a managerial hierarchy topped by a board of directors that is distinct from

36. Hansmann & Kraakman, *supra* note 19, at 393–94 (explaining that asset partitioning results in the "assignment to creditors of priorities in the distinct pools of assets that result from the formation of a legal entity").

37. Blair, *supra* note 9, at 788.

38. *Id.* at 790; *see also* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1428 (2021). For a historical account of the origin of the board of directors as a corporate governance structure, see Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89 (2004).

39. Blair, *supra* note 9, at 791.

40. STEPHEN R. BOWN, MERCHANT KINGS: WHEN COMPANIES RULED THE WORLD, 1600–1900, at 27 (2009).

41. The Dutch East India Company, also known as the "VOC," was "a private commercial corporation operating free from the direct control of the government of the United Netherlands, yet it [had] the authority to make decisions in the name of that government." BOWN, *supra* note 40, at 28 ("The VOC could make treaties and declare war or peace in the name of the States General . . . establish colonies, dispense justice and enact laws, even issue its own currency . . . . The VOC would essentially operate as a state within a state.").

shareholders, managers, and employees, and that has fiduciary duties to the corporation itself as well as to shareholders."[42]

II. LIMITED SOVEREIGNTY AS A KEY CHARACTERISTIC OF U.S. CORPORATIONS

Just as the common law was recognizing these key functions of legal personality in the early nineteenth century, the Supreme Court was asked to rule on the treatment of corporations under the U.S. Constitution. The path that the Court would take in these early cases was far from clear—the Constitution includes no specific reference to corporations.[43]

This Part argues that the Court made two key moves in deciding these nineteenth-century cases that have had an enduring impact on the corporate form and its utility for U.S. business corporations. First, the Supreme Court bolstered the entity status of the corporation as separate not only from its participants, but also from the government.[44] Although in hindsight this point may be taken as given, the Court's rulings were novel at the time and developing on an ad hoc basis while its view of corporations was still in flux, corporations were primarily used for quasi-public purposes, and corporate law was on the cusp of a series of innovations.[45] Corporate law literature does not typically identify the separation and protection of the corporation from the

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42. Blair, *supra* note 9, at 788.

43. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 4 (1970). A small number of corporations existed and played a role in the American colonial period. *Id.* at 7, 14; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 188–89 (2d ed. 1985).

44. In earlier work, I observed but did not fully develop this point. *See* Pollman, *supra* note 5, at 1639:

> [E]arly corporate personhood cases are . . . akin to the concept of legal personality insofar as the constitutional jurisprudence bolstered the corporation as a separate entity from its shareholders and protected the property interests of the shareholders in the corporate property. Recognizing the corporate charter as covered by the Contract Clause and the corporation's property as protected by the Due Process Clause stabilized the corporate form as a viable organization for long-term private investment.

45. *See* HURST, *supra* note 43, at 17 (describing corporations organized with a quasi-public function); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 110 (1888) ("But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency . . . ."); Robert B. Thompson, *Why New Corporate Law Arises: Implications for the Twenty-First Century*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 3 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (discussing nineteenth-century innovations in corporate law including limited liability, general incorporation statutes, and a shift to director-centric corporate governance).

government as a function of legal personality[46]—and yet without this development, the utility of the corporate form for pursuing large-scale profitmaking purposes would be in doubt. The source of law for this point is constitutional rather than corporate; the function is closely connected to the concepts of capital lock-in and constructing an identifiable persona discussed in Part I.

Second, in granting rights, the Supreme Court recognized and protected corporations, but it simultaneously subordinated them to the state—thus treating the corporation as a limited and derivative sovereign at best. The extension of corporate rights was paradoxically an opportunity to constrain corporations and their competing claims to authority during a period in which sovereignty was "diffuse" and increasingly becoming "concentrated in the hands of only two legitimate sovereigns"—federal and state governments.[47] The Court's early distinction of municipal corporations from other corporations put the former on a path of particularly diminished power,[48] but, as this Part shows, the potential for other types of corporations to serve as rival powers to the state was also curbed during the nineteenth century.[49]

A. Separating the Corporation from the Government and Bolstering Legal Personality for Business Corporations

The very first Supreme Court case on the constitutional rights of corporations, in 1809, involved federalism battles faced by the Bank of the United States, the institution famously championed by Alexander Hamilton and created by Congress, and its desire to access federal courts to adjudicate them.[50] The Bank refused to pay a tax that populist state lawmakers levied on a bank branch in Savannah, Georgia. The bank headquarters in Philadelphia instructed the Savannah branch to

46. Some discussions treat the corporation as a "nexus for imputation" or "nexus for regulation," *supra* note 30, with a focus on the entity as a locus for government imposition of laws and regulations.

47. *See* Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1796 (2019) (describing the post-Revolution period as having "power rested with a complex patchwork of local institutions with independent authority" and noting that through the 1780s, state legislatures "sought to wield [their] newfound sovereignty against the competing claimants to authority within state borders—corporations, local institutions, Native nations, separatist movements").

48. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1060–62 (1980) (describing the "powerlessness" of American cities and their legal status as subject "to absolute state control"); Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 604–13 (2020) (discussing municipal corporation rights).

49. For a history of corporations, local institutions, Native nations, and separatist movements as "competing claimants to authority within state borders" see Ablavsky, *supra* note 47.

50. Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

refuse to comply with the state tax, hoping to "bring the question before the Supreme Court of the United States."[51] Subsequently, a Georgia tax collector, "with 'force and arms,' " entered the Savannah branch and took two boxes of silver coins.[52] The case made its way to the Supreme Court on the threshold issue of whether the corporation could sue or be sued in federal court pursuant to diversity jurisdiction. Article III, Section 2, Clause 1 of the Constitution, together with the Judiciary Act of 1789, provides that the federal judiciary may hear "cases" or "controversies" between "citizens" of different states.[53]

The Court observed that the "mere legal entity, a corporation aggregate is certainly not a citizen," but it was willing to look to English common law precedent for the notion of looking to the "members" composing the corporations and to extend this principle for purposes of determining whether complete diversity of state citizenship existed.[54] There was, of course, no obligation on the Supreme Court to look to existing English common law on this issue, and as historian James Willard Hurst has pointed out, "we built public policy toward the corporation almost wholly out of our own wants and concerns, shaped primarily by our own institutions."[55] The case illustrates how the Court was willing to interpret the Constitution to strengthen the existing common law right to sue and be sued in the corporate name and bolster this function by extending a pathway to federal courts, yet did so in language that did not recognize corporations as "citizens." The latter point was likely the subject of careful consideration, as the case portended larger challenges ahead in chartering battles and debates about the effect of corporations on the balance of power in a relatively new system of federalism.

Following *Bank of the United States v. Deveaux*, the next early cases concerning corporate constitutional rights involved rights associated with contract and property interests. They spanned a time from when corporations served a quasi-public function to the start of

51. ADAM WINKLER, WE THE CORPORATIONS 41 (2018) (quoting W. Calvin Smith, *Banks, Law, and Politics: The Origins, Outcome and Significance of the* Deveaux *Case*, *in* THE PROCEEDINGS OF THE SOUTH CAROLINA HISTORICAL ASSOCIATION 9, 11 (Peter Becker ed., 1991)).

52. *Id.*

53. *Deveaux*, 9 U.S. (5 Cranch) at 87–88.

54. *Id.* at 86–87. The Court later changed its approach to diversity jurisdiction but continued to allow diversity jurisdiction for corporations. *See, e.g.*, Louisville, C. & C.R. Co. v. Letson, 43 U.S. 497 (1844).

55. HURST, *supra* note 43, at xxiv. Due to the Bubble Act in England, from about 1780, the United States developed dramatically more experience with using the corporate form for business. *Id.* ("For 100 years, we proceeded to use the corporate instrument on a scale unmatched in England.").

the transformation to the modern business corporation.[56] These cases coincided with incremental changes occurring in corporate law over the nineteenth century as various states evolved from a system of special legislative chartering of each corporation to general incorporation laws, adopted limited liability for shareholders, and generalized use of centralized management.[57]

In the 1819 case of *Trustees of Dartmouth College v. Woodward*, the Supreme Court recognized that corporations were protected by the Contract Clause of the Constitution, which forbids a state from impairing existing contractual obligations.[58] The Court reasoned that the corporate charter represented a contract between the individuals who incorporated the entity and the state, and therefore the state could not unilaterally amend the charter of a private college and effectively convert it into a public institution.[59] In the words of Chief Justice Marshall, the charter of Dartmouth College, granted in 1769, "is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution . . . ."[60] For Contract Clause purposes, this recognized the corporation as a contract creating a separate entity through which people carried on business or their identified objectives, and it protected the interests of individuals who had contributed to the entity.[61]

The protection afforded by the decision resembles the function of capital lock-in or asset partitioning insofar as it shields the corporate assets—the difference is that it protects them from government interference, rather than from private parties such as shareholders or

56. *See* Blair & Pollman, *supra* note 6, at 1697–1706; Thompson, *supra* note 45, at 4.

57. Thompson, *supra* note 45, at 4–8.

58. 17 U.S. (4 Wheat.) 518, 650 (1819).

59. *Dartmouth College*, 17 U.S. (4 Wheat.) at 650.

60. *Id.* at 644.

61. *See* Charles R. T. O'Kelley, *What Was the* Dartmouth College *Case Really About?*, 74 VAND. L. REV. 1645, 1722 (2021):

> Marshall saw . . . that Dartmouth College as an institution never would have existed but for the entrepreneurial efforts of Eleazar Wheelock, and that the institution that had evolved over time was a result of the contractual bargain made by Wheelock and John Wentworth, acting as agent of King George III;

see also Margaret M. Blair, *How* Trustees of Dartmouth College v. Woodward *Clarified Corporate Law* 3 (Vanderbilt Univ. L. Sch. Legal Stud. Rsch. Paper Series, Working Paper No. 21-19, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830603 [https://perma.cc/GDZ6-K6SS] (arguing that *Dartmouth College* "strengthened the power of corporate charters granted to organizers by recognizing the charter as a contract not only among the private citizens organizing the firm, but between the organizers and the state").

their creditors.[62] And like capital lock-in or asset partitioning, constitutional protection under the Contract Clause added to the stability of the business enterprise by enabling the corporation to make credible commitments and helping to ensure that firm-specific investments would be protected.

Furthermore, the *Dartmouth College* decision reflects respect for a sphere of self-governance for the institution that was beyond ex post governmental interference. As Hurst explained, "[the] decision extended the protection of the contract clause of the Federal Constitution not only over a donor's gift and the college's existing assets but also over the frame of organization and powers of the institution as created by the original charter, as against later intruding legislation."[63] This separation of the corporation from the government is, I argue, another key aspect of legal personality for U.S. business corporations—the source of the law has simply been federal and constitutional in contrast to state and corporate.

Yet the degree to which the grant of the corporate charter accords any sovereignty for the corporation from the government was tightly limited and derivative from the state. In the wake of *Dartmouth College*, following a suggestion in Justice Joseph Story's concurrence, most states passed general incorporation statutes that reserved the power to change the terms of corporate charters after they had been issued.[64] As Professor Herbert Hovenkamp has observed, during the mid-nineteenth century, "the general reservation clause or statute, giving the state the power to amend corporate charters, became the principal mechanism by which states hedged on commitments to business corporations."[65] At the same time that states adapted their statutes to maintain control in this way, they also facilitated widespread adoption of the corporate form. A special charter from the state legislature was no longer required to incorporate, and

62. *Cf.* Blair, *supra* note 17, at 454 ("[The ability to lock in capital] grew out of the fact that a corporate charter created a separate legal entity, whose existence and governance were separate from any of its participants.").

63. HURST, *supra* note 43, at 4–5; *see also* Alyssa Penick, *From Disestablishment to* Dartmouth College v. Woodward*: How Virginia's Fight over Religious Freedom Shaped the History of American Corporations*, 39 LAW & HIST. REV. 479, 484 (2021) (observing that a pre-*Dartmouth College* decision from Virginia's highest court "offered a glimpse of an alternate legal landscape where American corporations existed as fundamentally communal institutions at the discretion of the legislature and charters were negotiable and revocable").

64. 17 U.S. (4 Wheat.) at 675 (Story, J., concurring) ("Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter . . . ."); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1605, 1616 (1988) (discussing *Dartmouth College* and reservation clauses).

65. Hovenkamp, *supra* note 64, at 1616.

corporations could be formed for a wide variety of purposes, including the manufacturing that spurred the Industrial Revolution.[66] The number of corporations increased significantly as states began to provide general access and liberalize their corporate laws.[67]

It was also in the nineteenth century that the Supreme Court established constitutional protection for corporate property.[68] Most famously, in 1886, in *Santa Clara County v. Southern Pacific Railroad*,[69] Chief Justice Waite stated from the bench before argument:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[70]

This pronouncement responded to the defendant railroad's brief, which argued that a provision of the California constitution violated the Fourteenth Amendment by excluding corporations from a certain property tax deduction, thereby imposing "unequal burdens" on corporations and denying them "equal protection of the laws."[71] The defendant's argument focused on property rights: "The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations IS the property of the individual corporators."[72] The Court's opinion was based on a more narrow ground—that the state board lacked jurisdiction to assess the value of the railroad fences—and expressly stated that "it [wa]s not necessary to consider any other questions raised by the pleadings and the facts found by the court."[73]

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66. HURST, *supra* note 43, at 18; David F. Linowes, *The Corporation as Citizen*, *in* THE UNITED STATES CONSTITUTION: ROOTS, RIGHTS, AND RESPONSIBILITIES 345, 346 (A.E. Dick Howard ed., 1992); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 73 (1992).

67. Whereas by 1800 there were about 300 corporations, mostly vested with a public or quasi-public purpose, by the turn of the twentieth century, there were approximately 500,000 business corporations. Blair, *supra* note 17, at 389 n.3; HURST, *supra* note 43, at 17.

68. *See* Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1460–63 (1987); *see also* Hovenkamp, *supra* note 64, at 1641 (describing the doctrine of corporate personhood as "the Supreme Court's solution to two problems" as it "guarantee[d] that the owners of property held in the name of a corporation would receive the same constitutional protections as the owners of property held in their own name" and "determin[ed] how to assign the power to assert constitutional rights in corporately held property").

69. 118 U.S. 394 (1886).

70. *Id.* at 396.

71. *Id.* at 409.

72. HORWITZ, *supra* note 66, at 70 (emphasis omitted) (quoting Argument for Defendant, San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1885)).

73. *Santa Clara*, 118 U.S. at 416.

As the Court avoided the constitutional question in the *Santa Clara* opinion, it did not explain the basis for its pre-argument statement that corporations are persons within the meaning of the Fourteenth Amendment.[74] Not long after, however, the Court stated in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*:

> Under the designation of 'person' [under the Fourteenth Amendment] there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution.[75]

Further, in *Minneapolis & St. Louis Railway Co. v. Beckwith*, the Court cited *Santa Clara* and *Pembina Mining* in holding that corporations could invoke Fourteenth Amendment due process protections.[76] The Court reiterated that "corporations are persons within the meaning of the [Fourteenth Amendment]" and explained, "corporations can invoke the benefits of provisions of the Constitution and laws which guaranty to persons the enjoyment of property, or afford to them means for its protection, or prohibit legislation injuriously affecting it."[77] The Court also extended Fifth Amendment due process protection to corporate property in a case in which an act of the secretary of the interior would have revoked and annulled a grant of public lands to a railroad corporation.[78] By this time, these constitutional protections for property were no small matter—corporations were estimated to control four-fifths of the wealth of the United States by 1890,[79] and popular discourse reflected rising concern about the wealth and power of corporations in society.[80]

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74. For a discussion of the *Santa Clara* case and the debate surrounding its unusual circumstances, including a conspiracy theory that arose and was discounted, see Pollman, *supra* note 5, at 1642–44 nn.79–92 and accompanying text.

75. 125 U.S. 181, 189 (1888). Like *Santa Clara*, the case concerned the assessment of a tax against a corporation. For a more recent case recognizing a corporate equal protection right under the Fourteenth Amendment in the context of a discriminatory state tax, see Metro. Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

76. 129 U.S. 26, 28 (1889).

77. *Id.*

78. Noble v. Union River Logging R. Co., 147 U.S. 165, 176 (1893) ("A revocation of the approval of the secretary of the interior, however, by his successor in office was an attempt to deprive the plaintiff [railroad corporation] of its property without due process of law, and was, therefore, void."); *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that regulation of a coal corporation's mining activity under a state statute could be so pervasive as to constitute a taking); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (allowing a foreign corporation to claim a takings violation).

79. Blair, *supra* note 9, at 809 (citing 1 SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS, at v–xi (1896)).

80. Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. (forthcoming 2022) (manuscript at 32–33) (on file with author).

In sum, in the nineteenth century, the Court enabled corporations to access federal courts through diversity jurisdiction and recognized corporations as having the protection of the Contract Clause, as well as the Fourteenth and Fifth Amendments in the context of protecting corporate property.[81] These constitutional rulings played an underappreciated role in bolstering the key functions of legal personality created by corporate law.

B. Subordinating Competing Corporate Power

The historical background on corporations in which the nineteenth-century Supreme Court jurisprudence arose is more complex than often acknowledged, and it helps to shed light on another important aspect of what the Court achieved through its rulings.

According to some accounts, in the early nineteenth century, corporations were seen as "agencies of government . . . for the furtherance of community purposes."[82] In exchange for the privilege of incorporation and some measure of profit, the corporation was also expected to serve public need. As one treatise explained, "a state would have accomplished but little in the way of banking and insurance, and in turnpike and railroads, had not the absence of great capitalists been remedied by corporate associations, which aggregate the resources of many persons."[83] In some regard, these new corporations serving quasi-public purposes were "the states' servants."[84]

Yet, as legal historian Greg Ablavsky explains: "[E]arly American law afforded corporations many of the attributes of sovereignty. Authorized to craft and enforce their own legal orders, corporations looked and acted a lot like states."[85] Indeed, many states had evolved from chartered colonies, and the "governance technology" of a written charter was used for what we would now consider both public and private uses.[86] The "company-states" of the late eighteenth

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81. Linowes, *supra* note 66, at 346–47.

82. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 55 (1993); *see also* ANGELL & AMES, *supra* note 1, at 7–8:

> The object in creating a corporation is . . . to gain the union, contribution and assistance of several persons for the successful promotion of some design of general utility . . . [and] the corporation may, at the same time be established for the advantage of those who are members of it.

83. JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 48 (Bos., Little, Brown & Co. 9th ed. 1871).

84. Ablavsky, *supra* note 47, at 1816.

85. *Id.* at 1817.

86. *See* David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418, 419 (2017) ("The corporation and the modern constitutional state embody a common governance technology—a technology that began

century such as the British East India Company, which claimed sovereignty over vast territories, were commonly known.[87] The fact that charters, granted by a sovereign, were used for both trading and political or governmental purposes "itself heightened the notion that incorporation had a peculiarly close tie to the sovereign."[88] And, in the late eighteenth century, it was not clearly settled whether corporate authority, once granted pursuant to a written charter from a sovereign, was subject to state legislative control.[89] As such, "[t]o many in the early United States, then, corporations looked less like creatures of the states than rivals for their power."[90]

Put into this context, another important aspect of what the Supreme Court's corporate rights jurisprudence achieved during the nineteenth century, therefore, was a reordering or clarification that constrained corporations and their competing claims to authority as rivals to the state. The Court granted rights that enabled corporations to benefit from their key features of legal personality while at the same time bringing clarity to the hierarchy of institutions—corporations were separate from, and subject to, state authority, and not citizens from whom power derived. And, particularly compared to the hundred years that followed, it is remarkable the extent to which the Court rejected claims of corporate citizenship and power while at the same time strengthening the corporate form.

This project began in the Court's first decision interpreting the status of corporations under the Constitution in *Bank of the United States v. Deveaux*.[91] As discussed above, the Court rejected the notion that the corporation itself could be deemed a "citizen"—it was plainly inapt in the eyes of the Court, which recognized that incorporating forms a separate legal personality.[92] It nonetheless found a way to apply diversity jurisdiction to corporations, which were understood to have common law rights to sue and be sued. And the Court notably persisted

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with the corporation and passed over to the state, and the heart of which is the delegation of authority by written charter."); Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1407, 1481–84, 1503 (2019) (describing states that evolved from chartered colonies and examining U.S. history on corporate and government use of written charters).

87. Ablavsky, *supra* note 47, at 1817.

88. HURST, *supra* note 43, at 2.

89. *See* Ablavsky, *supra* note 47, at 1818; GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, at 185–204 (1997) (discussing the "vested rights" debate).

90. Ablavsky, *supra* note 47, at 1818.

91. 9 U.S. (5 Cranch) 61 (1809).

92. *Id.* at 86 ("That 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.").

over the nineteenth century in rejecting corporate claims to citizenship. For example, in the 1839 case *Bank of Augusta v. Earle*, the Supreme Court ruled that corporations are not "citizens" for the purposes of the Privileges and Immunities Clause of Article IV.[93] The Court reasoned that the Privileges and Immunities Clause never intended to give citizens privileges and at the same time exempt them from liabilities, as would occur if corporations, with limited liability, enjoyed citizen status.[94] And the Court reaffirmed this ruling as corporations raised the issue over time.[95]

Dartmouth College perhaps did the most work to conceptually separate corporations from the state and reinforce their property and contract rights—but also highlighted the path for states to retain their power over them. One of the most lasting impacts of the decision was the reservation of power in general incorporation statutes suggested in Justice Story's concurrence.[96]

And, after *Dartmouth College*, the Court further constrained corporations with strict readings of corporate charters and analysis that balanced a corporation's interests against that of the public. Against the backdrop of public controversy over special franchises, particularly concerning banks, railroads, and insurance companies, as well as infrastructure such as bridges and turnpikes, the Court explicitly confronted balance-of-power issues. In 1837, in the *Charles River Bridge* case, the Court strictly construed a corporate charter against the grantees in favor of preserving public rights.[97] The Court rejected the notion that the charter granted an implied monopoly on the basis that the overriding concern was to instead protect "the power of the several states, in relation to the corporations they have chartered," for the issues were "pregnant with important consequences; not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist."[98] The Court observed: "While the rights of private property are sacredly guarded, we must not forget, that

93. 38 U.S. (13 Pet.) 519, 586–87 (1839).

94. *Id.* at 586.

95. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888).

96. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819) (Story, J., concurring); *see* Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 563 (1830) (upholding reservation of state legislature's right to alter a corporate charter).

97. Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420, 536, 546–48 (1837).

98. *Id.* at 536; *see also* HURST, *supra* note 43, at 37–38 (discussing the *Charles River Bridge* case).

the community also have rights; and that the happiness and well-being of every citizen depends on their faithful preservation."[99]

Furthermore, the Court's jurisprudence surrounding the famous *Santa Clara County v. Southern Pacific Railroad* case indicated that it did not consider corporations to hold Fourteenth Amendment protections coextensive with that of natural persons. In *Northwestern National Life Insurance Company v. Riggs*, for example, the Court explained that the liberty protected by the Fourteenth Amendment was "[t]he liberty of natural, not artificial, persons."[100] In addition, just two years after *Santa Clara*, the Court upheld a statute making railroads liable for injuries to workers caused by the mismanagement or negligence of other employees.[101] The Court acknowledged that "corporations are persons within the meaning" of the Fourteenth Amendment, but observed that when legislation imposes "additional liabilities" on "particular bodies or associations," it does not deny them "the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."[102] The "hazardous character of the business of operating a railway would seem to call for special legislation . . . having for its object the protection of their employees as well as the safety of the public."[103] The Court's Fourteenth Amendment jurisprudence at the time thus concerned property protections, not liberty, for corporations, and the Court subsequently applied the rulings so as to uphold regulation of corporations by the government.[104]

Finally, in the early years of the twentieth century, the Court recognized corporate criminal liability and denied corporations the Fifth Amendment right against self-incrimination. Early common law did not impose criminal responsibility on corporations as courts struggled with the conceptual difficulty of attributing an act and intent to a corporation.[105] By the early twentieth century, however, courts had

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99. *Charles River Bridge*, 36 U.S. (11 Pet.) at 548.

100. 203 U.S. 243, 255 (1906).

101. Mo. Pac. Ry. Co. v. Mackey, 127 U.S. 205 (1888).

102. *Id.* at 209–10.

103. *Id.* at 210.

104. *See id.*; *see also* Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26 (1889) (upholding a law mandating railroads that failed to erect fences along their right of ways to reimburse farmers for livestock injured or killed by trains); Charlotte, Columbia & Augusta R.R. Co. v. Gibbes, 142 U.S. 386 (1892) (upholding a law imposing a special tax on railroads to pay the costs of the commission the state had created to regulate them).

105. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909) (citing Chief Justice Holt and Blackstone and explaining that early common law held a corporation could not commit a crime); 1 WILLIAM BLACKSTONE, COMMENTARIES *476 ("A corporation cannot commit treason, or felony, or other crime, in it's [sic] corporate capacity."). For a more detailed history of corporate criminal liability in England and America, see Kathleen F.

taken a broader approach by importing tort and agency principles to hold corporations vicariously liable for criminal acts performed by corporate agents.[106] In addition, federal regulation of economic activity through criminal statutes, such as antitrust laws, had grown by this time and queued up issues concerning the government's power to prosecute corporations.[107] In 1909, in *New York Central & Hudson Railroad Co. v. United States*, the Supreme Court definitively recognized corporate criminal liability based on the doctrine of respondeat superior.[108]

Also around this time, the Court held in *Hale v. Henkel* that a corporation had a Fourth Amendment right against unreasonable searches and seizure but could not assert a Fifth Amendment right against self-incrimination.[109] Pragmatism may have driven the decision as granting corporations the privilege against self-incrimination could have significantly impeded corporate criminal prosecutions that were growing at the time, whereas recognizing corporations as holding some right against unreasonable government searches and seizures would not entirely shield corporations from such enforcement.[110]

Although much had changed for corporations and their role in society, the larger picture of these early twentieth-century cases was one that generally fit the trend of the corporate rights jurisprudence that had come before—the Court recognized limited rights that reinforced the corporation against government interference with its property, but did so while balancing considerations of the public interest and rejecting more expansive corporate claims. In sum, the nineteenth and early twentieth-century case law achieved a balance that simultaneously strengthened the functional utility of the

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Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 396–400, 404–15 (1982).

106. *See, e.g.*, United States v. Van Schaick, 134 F. 592, 609 (C.C.S.D.N.Y. 1904); United States v. John Kelso Co., 86 F. 304, 308 (N.D. Cal. 1898); *see also* Brickey, *supra* note 105, at 404–15 (discussing history of corporate accountability in the United States).

107. Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 814–16 (1996).

108. 212 U.S. 481, 494–95 (1909).

109. 201 U.S. 43 (1906) (considering challenges by a corporate officer who had immunity as an individual but refused to testify or comply with a grand jury subpoena for corporate records in connection with a criminal antitrust investigation of the tobacco industry). The Court's rationale for denying corporations the privilege against incrimination was that it "is purely a personal privilege of the witness," and a corporation can testify only through agents. *Id.* at 69–70; *see also* Braswell v. United States, 487 U.S. 99 (1988) (holding that the principal shareholder of a closely held corporation could not assert privilege against self-incrimination in response to a subpoena for corporate documents).

110. Henning, *supra* note 107, at 797.

corporate form and legal personality while defusing the threat of corporate sovereignty.

III. THE EXPANSION OF CORPORATE RIGHTS AND THE FORGOTTEN PATH OF LIMITED SOVEREIGNTY

The foregoing discussion is aimed at highlighting the role that constitutional protections related to corporations' abilities to sue and be sued, contract, and hold property played in bolstering similar functions that were established as a matter of common law principles. Although corporate law scholars rarely point to nineteenth and early twentieth-century constitutional law as part of the foundational body of law establishing key functions or characteristics for corporations, it has played a profoundly important role in solidifying the utility of the corporate form in the United States.[111] The corporate personhood doctrine concerning the constitutional treatment of corporations added dimension to basic features related to legal personality—for example, contract protections for the corporation are not an ahistorical function of legal personality but are embedded in the U.S. system of federalism. Further, during this period of jurisprudence, in shaping notions of the private sphere inhabited by corporations, the Court did much to defuse their potential as rivals or competitors to the state and temper the threat of corporations as *imperium in imperio*—a state within a state.[112]

In this final part, I reflect on a critique that Margaret Blair and I levied against the Court's modern trend of corporate rights jurisprudence in cases such as *Citizens United v. FEC*, and pursue a related point.[113] Despite the significant benefits provided by the nineteenth and early twentieth-century Supreme Court jurisprudence on corporate rights that this Article has explored, this jurisprudence came with a significant flaw that Professor Blair and I have earlier identified: it lacked a consistent method of reasoning that adequately evolved in its application over time as corporations changed.[114] As we showed, the Court has long accorded rights to corporations based on the rationale that corporations represent associations of people from whom such rights are derived or on an instrumental basis to protect the rights of parties outside the corporation.[115] By the late nineteenth century, however, we argued that this associational view was already becoming

111. *See* Part II.A.

112. *See* Part II.B; Ablavsky, *supra* note 47, at 1816–19, 1848–51.

113. Blair & Pollman, *supra* note 6, at 1734.

114. *Id.* at 1708–31.

115. *Id.* at 1680–96, 1713–31.

a poor fit for some corporations.[116] Where the Court has gone wrong in recent case law such as *Citizens United*, we argued, was in ruling broadly as to all corporations as "associations of citizens."[117] We observed that, if the Court were to continue to use this method of reasoning, a more principled path forward requires the Court to carefully determine whether there is a factual foundation to support an extension of a right to the corporation at hand.[118] Difficult line-drawing questions inevitably follow and the corporate rights case law would improve by addressing these questions forthrightly and with committed attention to real-world facts about the wide spectrum of corporations.[119]

We did not focus on a related line of critique—that the Supreme Court's corporate rights jurisprudence since the nineteenth century has dramatically expanded and revealed that the Court does not observe a limiting principle to the doctrine of corporate personhood. All corporations ultimately have natural persons involved in some respect—even shell corporations are created by natural persons for some objective that ultimately serves human ends. If a derivative approach to corporate rights is taken without serious effort to distinguish between the kinds of organizations that further the purpose of the right at issue from those which do not, then it is meaningless as a method of determining corporate rights.

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116. *Id.* at 1707 (noting that by the end of the nineteenth century "changes in the population of corporations were taking place that were at odds with the idea that business corporations were just associations of people").

117. *Id.* at 1734.

118. *Id.* at 1733 ("[T]he Court [must] pay attention to distinctions" and should "explicitly acknowledge that, for some purposes, some corporations can usefully and functionally be regarded as aggregates of their members from whom rights could be derived, while other corporations serve other purposes, and cannot be regarded as representing any particular natural person or group of natural persons.").

119. John Dewey famously argued nearly a century ago for this approach. *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 673 (1926) (arguing for questions of corporate personhood to be answered by facing the "concrete facts and relations involved"). For a sampling of work exploring questions of line drawing and corporate rights, see Margaret M. Blair, *Corporations and Expressive Rights: How the Lines Should Be Drawn*, 65 DEPAUL L. REV. 253 (2016) (arguing that at least two dimensions should be important to the Court in determining expressive rights for corporations: people and purpose); James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015) (exploring the for-profit/nonprofit distinction as a basis for line drawing in corporate claims for freedom of association); James D. Nelson, *Facts and Values in Corporate Legal Theory*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 240 (Elizabeth Pollman & Robert B. Thompson eds., 2021) (exploring a realist method for corporate rights determinations based on facts and values); Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 602 (2016) (arguing that "existing lines drawn between corporations" such as for-profit/nonprofit, public/private, and closely held "may be a useful starting place for analysis, but caution must be used because the lines drawn in other areas were done for various policy reasons in different contexts that may not map onto the corporate rights determination").

Neither denying corporations all rights because they have separate legal personality, nor granting all rights to all corporations because they bear some connection to human interests, is a coherent approach. Admittedly, from time to time, the Court has reasoned or simply noted in passing that corporations are not entitled to "purely personal guarantees"[120]—but it has not consistently used this as a limiting principle or fleshed out its content.[121] Instead, the Court has tended to grant corporations' claims for protections based on derivative and instrumental rationales with little clarity on a means of analytical line drawing.[122]

Using this flawed approach, the Court's expansion of corporate rights has furthered the trends of increasing corporate influence over the regulatory state and the rise of rival powers, subjects of concern that had troubled early American jurists, lawmakers, and citizens. Whereas the Court in the nineteenth century denied claims for corporate rights on multiple occasions, this pattern shifted in the twentieth century, particularly since the 1970s.[123] Although many factors have contributed to increasing economic concentration and corporate power in recent decades, the Court's corporate political spending jurisprudence has allowed corporations to use their money and influence in a variety of ways that impact the very political and regulatory environment in which they act.[124]

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120. Hale v. Henkel, 201 U.S. 43, 70 (1906) (holding corporations cannot claim a Fifth Amendment privilege against self-incrimination); First Natl. Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978) ("Certain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals.").

121. Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 50, 52–53 (2014) (noting that the Court "has not consistently used this approach [of reasoning based on "purely personal" guarantees] or shown that it would be possible to do so in the context of corporations").

122. For example, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court determined that a business corporation can constitute a "person" who can "exercise religion" under the Religious Freedom Restoration Act of 1993 ("RFRA"). 573 U.S. 682, 719 (2014). Further, it concluded that RFRA applied to the corporate litigants in the case claiming a religious exemption from providing certain contraceptive coverage to their employees under the Patient Protection and Affordable Care Act. The Court's extension of RFRA protection to business corporations to protect the religious liberty of those who "own and control" the corporation did little to explain which corporate participants count and the method for determining which corporations have taken sufficient steps to demonstrate a religious purpose or identity—the Court seemingly just looked through the corporations to their shareholders who asserted religious belief. *See* Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

123. *See* Blair & Pollman, *supra* note 6, at 1719–31 (discussing expansion of corporate rights since 1970s).

124. *See, e.g.*, Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 342 (2015) (arguing that *Citizens United* "undermines . . . reliance upon the regulatory

Recent years have highlighted the perils of this dynamic. Some of the world's largest companies also appear to be some of the biggest political spenders. We cannot accurately determine the precise contours of corporate political spending because of the lack of transparency,[125] but we can observe, for example, that Facebook and Amazon were at the top of the list in 2020 for federal lobbying expenditures.[126] These companies, and others that bear resemblance in their size or social footprint, are global behemoths that scholars have indeed likened to "private governments,"[127] harkening back to concerns about *imperium in imperio* and rivals to states that could erode democratic governance.[128]

And, finally, the Court's failure to set out a limiting principle to its derivative and instrumental approach looms large on the horizon as the Court appears poised to hear claims for expanded speech and religious liberty rights, as well as claims for rights previously denied to business corporations, such as the Fifth Amendment privilege against self-incrimination and privacy rights.[129] It cannot be enough to simply locate natural persons involved in the corporate claimants as a basis for granting rights. For a derivative approach to have meaning, the facts on the ground must be confronted, such as the nature of the

process as an adequate safeguard against corporate overreaching" because "the wealth impounded in corporations can be used in unlimited amounts to influence who is elected to the offices that determine the 'rules of the game' ").

125. For a sampling of literature on the lack of transparency of corporate political spending, see Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 925 (2013); Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1 (2020); Sarah Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 262 (2016) and Sarah Haan, *Opaque Transparency: Outside Spending and Disclosure by Privately-Held Business Entities*, 82 U. CIN. L. REV. 1149 (2014).

126. Ryan Tracy, Chad Day & Anthony DeBarros, *Facebook and Amazon Boosted Lobbying Spending in 2020*, WALL ST. J. (Jan. 24, 2021), https://www.wsj.com/articles/facebook-and-amazon-boosted-lobbying-spending-in-2020-11611500400 [https://perma.cc/7NSP-AF9D].

127. *See, e.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017) (describing employers as "private governments" with sweeping power over workers' lives); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (describing how Facebook, Twitter, and YouTube moderate content and act as "new governors" of online expression).

128. *See, e.g.*, Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (examining Amazon's dominance in the internet economy); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37 (2014) (examining how the exercise of power by large corporations functions as a form of private governance); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 15 (2018) ("Many fear Google, Amazon, and Facebook, and their power over not just commerce, but over politics, the news, and our private information.").

129. *See, e.g.*, Miriam H. Baer, *Law Enforcement's* Lochner, 105 MINN. L. REV. 1667 (2021) (exploring how constitutional developments and challenges on the horizon threaten to undermine government's enforcement power against corporations).

participants' relationships to the corporation, the corporation's purpose and its governance, among other considerations, in determining if it serves the purpose of the right to extend it to a particular corporation.[130] As the Court continues to hear claims for rights beyond those incidental to basic features of legal personality, these decisions hold the potential to shape not only the continued utility of the corporate form but also the role of corporations in society and the means by which we hold them accountable.

CONCLUSION

For ages, distinguished corporate law scholars have attempted to shed light on thorny issues of corporate personhood and legal personality. Many able minds have been put in knots or distracted by rhetoric. Professor Margaret Blair's work on the key functions of legal personality for corporations shines as an example of clarity on the subject, highlighting elementary or core principles that have been borne out through centuries of corporate use and development. This Article has aimed to show that the Supreme Court's nineteenth-century case law on the treatment of corporations under the U.S. Constitution paralleled in many ways the topics of these key functions and strengthened the corporate form by shaping it as a rights-bearing entity vis-à-vis the government. Notably, during this period of jurisprudence, the Supreme Court simultaneously protected corporations but also treated them as having a limited and derivative measure of sovereignty, at best, that was subordinate to the state, and it reflected concern for the interests of communities and the public at large. The balance of power struck in the first century of jurisprudence on corporate rights has been lost, however, as the Court failed to develop a consistent method of reasoning that fit the evolving spectrum of corporations. Instead, the Court's tendency to grant rights on a derivative and instrumental basis has revealed that it lacks a limiting principle—when presented with a wide variety of corporations, it tends to see the interests of natural persons.

130. *See supra* note 119.