EXAMINING *CITIZENS UNITED*'S EXPANSIVE REACH: LOOKING THROUGH THE LENS OF MARKETPLACE OF IDEAS AND CORPORATE PERSONHOOD

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I. INTRODUCTION

In *Citizens United v. Federal Election Commission* ("*Citizens United*"),[1] the Supreme Court established that corporations and unions have the same political speech rights as individuals under the First Amendment. By rejecting the government's compelling interest[2] in prohibiting corporate electioneering communication, the Court ruled in favor of corporate use of treasury funds on indirect support of political candidates. This constitutional mandate of broadening corporate political speech rights beyond justifiable rational limits[3] must be evaluated in full—a process still unfolding.[4] The Court's ruling proceeded along two predominant threads. In the first, the Court revived the corporate personhood doctrine in order to acquire a newer meaning of corporation replete with a broader assortment of rights than before. In the second, the Court granted a broader measure of political speech rights to corporations by invoking the First Amendment doctrine of the

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1. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (Stevens, J., dissenting).

2. Justice Stevens on the contrary examined the various characteristics of corporations, such as their being foreign-owned, "'hav[ing] limited liability', [and] 'perpetual life,'" and do not engage in self-expression the way human beings do, and observed that expanding corporate political speech rights were "more likely to impair compelling governmental interests." *Id.* at 970-72.

3. Throughout this essay I use the terms "expansion of corporate rights" and "broadening corporate power" interchangeably to convey the message that there has been an effort in the constitutional jurisprudence to expand the powers of corporations, oftentimes in detriment to either public interest or governmental interest. *Citizens United* is no exception. By the end of the article it will become evident why the Court's broadening of corporate rights in this case must be viewed as having breached rational limits.

4. Here I refer to post-*Citizens United* legal scholarship. For the most part, the scholars are apprehensive of *Citizens United*'s deleterious impact and, in some cases are waiting to see whether the aftermath will unfold via legislative remedies or judicial invalidation. *See infra* note 17.

marketplace of ideas.[5] While the opinion's prudence has already been the subject of multiple inquiries,[6] my current analysis focuses on two distinct areas. First, I examine whether the majority's advancement of a corporate personhood doctrine is necessarily a prudent constitutional methodology for expanding corporate speech rights. Second, I shed revelatory light on the novel approach the Court has undertaken in embracing the marketplace of ideas doctrine for broadening the scope of corporate political speech. Posterity will indeed decide whether or not *Citizens United* was wrongly decided on both of these grounds. However, in its quest for corporate speech rights expansion, the Court might have engaged in incoherent jurisprudence. Therefore, this article examines the *Citizens United* Court's trajectory along the First Amendment jurisprudence to its rationale for seeking a new corpus in American corporate law.[7]

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5. I argue that the marketplace of ideas doctrine was wrongly applied in *Citizens United*, as the Court did not fully explain the procedural details and safeguards that must accompany the doctrine for it to be fully illuminated within First Amendment jurisprudence. In Part IV of this article, I discuss both the historical context of the doctrine and how it was misapplied in *Citizens United*. According to Professor Robert Post, the marketplace of ideas doctrine was introduced in the constitutional jurisprudence by Justice Holmes: Post noted, "in a remarkable series of opinions in 1919, Justice Oliver Wendell Holmes virtually invented both First Amendment theory and First Amendment doctrine. He advanced the theory of the marketplace of ideas, and he demonstrated how doctrine would have to evolve to correspond to this new theory." Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence,* INSTITUTE OF GOVERNMENTAL STUDIES, Working Paper No. 2000-9, at 2 (2000) *available at* http://escholarship.org/uc/item/5c9725w5; *see also* Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

6. Criticism surrounding the ruling in *Citizens United* has come from scholars, journalists, and various newspaper editorials. The critics were swift and questioned the clarity and basis for the ruling. For a sample of some of the critics, consider the following: Richard L. Hasen, *Money Grubbers: The Supreme Court Kills Campaign Finance Reform*, SLATE (Jan. 21, 2010), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_grubbers.html; Jeffrey Toobin, *Bad Judgment*, NEW YORKER (Jan. 22, 2010), *available at* http://www.newyorker.com/online/blogs/newsdesk/2010/01/campaign-finance.html; Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 39, *available at* http://www.nybooks.com/articles/archives/2010/feb/25/the-devastating-decision/; N.Y. Times Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30, *available at* http://www.nytimes.com/2010/01/22/opinion/22fri1.html; N.Y. Times Editorial, *The Court, Money and Politics*, N.Y. TIMES, Apr. 20, 2010, at A20, *available at* http://www.nytimes.com/2010/04/20/opinion/20tue2.html.

7. Here I draw attention to the corpus of legal rules revealed through the panoply of legal and regulatory standards. These include state corporation law, federal securities law, securities exchange standards, and SEC regulations, which are used primarily to regulate

Delving into the long history of constitutional jurisprudence, I see how corporate law evolved within an emerging political economy. Similarly, noting how the corporate personhood doctrine has been intertwined within this narrative allows me to understand its significance for enhancing the meaning of "modern corporate entity." While reading *Citizens United* through Justice Holmes' doctrinal achievement in *Abrams v. United States*,[8] I have become acutely aware of the current ruling's methodological confusion. Accordingly, this article is structured as follows: in Part II, I trace the origin of corporate personhood in the U.S. Constitution and examine its subsequent evolution into the present context. Despite emerging from the Fourteenth Amendment and receiving embellishment from the broader prohibition of the Bill of Rights, corporate personhood continues to exist in myth. Accordingly, I observe that corporate personhood doctrine's erroneous conception might have emanated from the folly of applying the Bill of Rights to give broader meaning to "corporation," as the Bill of Rights can never bridge the gap between a natural person and a legal person.

In Part III, I examine the existing conception of corporate personhood through an evolving framework. I concede that corporate personhood has attained heightened status in American constitutional jurisprudence, in part due to the judiciary's evolutionary rationale, and in part driven by corporations' existential needs. I am further prompted to analyze the fundamental difference between "artificial" and "natural" persons[9] within corporate law's journey through the evolving political and economic landscape. Judicial decisions spanning the last century-and-a-half present the narrative of a tension[10] between corporate desire to extract maximum gain from society and government's regulatory response to control such rent-seeking behavior.[11] This narrative also informs us how, through design, form, and function, corporations have evolved from mere legal entities to entities approaching personhood with various rights conferred upon them. In this journey of analyzing jurisprudence, I therefore see a transformation of corporations from soulless entities into something akin to natural persons. However, as Part

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the internal and external activities of corporations. *See e.g.*, Shareholder Agreements, 17 C.F.R. § 240.14a-8 (2011).

8. 250 U.S. 616, 630 (1919).

9. See *infra* Part III.A (noting the difference between artificial entity and real entity and the meaning of those terms in describing a corporation).

10. Here I generally refer to the perennial conflict between the rent-seeking behavior of corporations and governmental response in the form of regulation. *See* Redish, *supra* note 5, at 430 (noting the Court's role in balancing a speaker's desire to improve economic position with a regulation's purpose to curb this behavior).

11. *See id.*

III of the article examines, there remains a set of threshold issues whose definitive bright lines remain unexplored. For example, who owns the corporation? Who gives the corporation its speech? And, how and when does the corporation get the right to speak? Clearly, these unanswered questions bring up more confusion than they actually clarify and thus, I conclude in Part III that corporate personhood is nothing but an illusion.

In Part IV, I delve into an anatomical dissection of how the *Citizens United* Court resorted to the marketplace of ideas doctrine to confer upon corporations expanded rights to political speech under the First Amendment.[12] By finding the distinction between a corporation and a natural person, I trace the source of conflict in assigning and asserting certain rights within this doctrine. Indeed, I am guided by an understanding of the main objective of this doctrine as espoused by Justice Holmes, which helps me conclude in Part IV that the core fundamentals of the doctrine are in conflict with the Court's construction in *Citizens United.* I then analyze how this poses problems for the overall free speech jurisprudence.[13] For example, embracing the Court's rationale in *Citizens United* might have an attenuating impact in relation to corporate shareholders' rights precisely because minority rights may not necessarily converge with those of the majority. The same can be inferred for the rights of shareholders in general, as their rights might diverge from those of the corporate managers. The Court has never articulated how the marketplace of ideas doctrine is able to reconcile these competing presumptive rights under the First Amendment.

In Part V, I examine how the Court's opinion contributes a general contraction of political speech rights for various other entities. This loss of rights by the minority shareholders, the general public and, in most instances, the corporate shareholders can significantly weaken democratic integrity. Here, I seek to show that modern corporations, suddenly endowed with expanded constitutional rights, can further evolve into tyrannical elitism[14] by consolidating expression rights only for a limited few, while depriving the majority of the same rights. This leads me to observe in Part VI that *Citizens United*'s expansive invocation of corporate political speech rights does not necessarily come

12. *See* Post, *supra* note 5 and accompanying text.

13. I generally argue that the Court's doctrinal adoption of the marketplace of ideas is fraught with interpretive fallacy because the doctrine's objective is neither fully evaluated nor is it illuminated in *Citizens United.* This development is not an isolated incident, but a long line of faulty rule-making by the Court, evident in the Court's line of reasoning. *See infra* Part IV for an in-depth discussion of this contention; *see also supra* text accompanying note 5; *but see* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

14. This line of reasoning is analyzed in-depth *infra* Part V.

without a reciprocal retraction of some presumptive liberty from people.[15] Here, the Court's construction of corporate rights does not fully account for possible contraction of rights for non-corporate persons involved in the process.[16] I am convinced, however, that without further legislative action,[17] *Citizens United* holds the potential for transmogrification into a dilution of the democratic process.[18] In this context, it is important to recognize that exploring the First Amendment's intersection with campaign finance jurisprudence might help resolve some of the unanswered questions of *Citizens United*—a direction this article seeks to follow. These issues have largely been kept out of contemporary discourse, yet they provide significant guideposts in our understanding of corporate constitutional jurisprudence.[19] Some of these issues range from the tension between Justice Kennedy's majority opinion and Justice Stevens' dissent, to the future of corporate personhood,[20] to corporate laws' renewed interest in the nexus of contracts model of the corporate person.[21] This article concludes by making meaningful observations to generate consensus along that direction while staring at the specter of destruction of democratic integrity.

II. EVOLUTION OF CORPORATE RIGHTS IN UNITED STATES JURISPRUDENCE

Historically, the Supreme Court has given both corporations and individuals very wide latitude in protecting their political expressions.[22]

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15. Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 4-5 (2004) (noting that free speech rights seek a balance or equilibrium, among actors, especially in the marketplace of ideas doctrine).

16. I draw attention to the fact that excessive corporate spending may be disproportionately deleterious to the public's political speech rights. *Citizens United*, 130 S. Ct. at 970.

17. For an excellent discussion of this viewpoint, see Lucian A. Bebchuk & Robert J. Jackson, *Corporate Speech: Who Decides?*, 124 HARV. L. REV. 83, 93 (2010).

18. *See infra* Part V.

19. *See infra* Part VI.

20. Corporate personhood is the focal point of this article. Despite the existence of its invocation throughout more than one-and-a-half centuries of development of constitutional jurisprudence, its adoption remains hopelessly incoherent. Thus, I conclude that corporate personhood remains an illusory construct in jurisprudence.

21. *See infra* Part III.

22. Throughout the history of constitutional jurisprudence, the Supreme Court has been more protective of political speech in comparison to the protection it has given commercial speech. It was therefore understood that individuals have greater latitude in expressing their opinion on politics than they would have on other issues such as libel or slander. As a result, the Court has provided expanded protection for expressions used

While the Court was much more protective of political speech, it was generally less protective of corporations' commercial speech. As a result, campaign finance jurisprudence suffered through inconsistencies as campaign finance laws were on a constant collision course with corporate political speech.[23] Through its overruling[24] of both *Austin v. Michigan Chamber of Commerce*[25] and *McConnell v. Federal Election Commission*,[26] the Court in *Citizens United* once again accentuated this tension. Although premised on illuminating campaign finance law,[27] *Citizens United* draws its significance proportionately more from its

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during the course of a political campaign, whether such expressions constitute verbal, written, or broadcast forms of communication. In 1974 Congress reacted to the Court's broad overtures by allowing candidates the right to spend as much of their own money as they choose. By passing the Federal Election Campaign Act, Congress intended to set limits on candidate expenditures. *See* 2 U.S.C. § 431 (1971). Prompted by this restriction, several candidates brought suit against the bill. This resulted in a unanimous Court noting in *Buckley v. Valeo* that, "in the free society ordained by our Constitution, it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." Buckley v. Valeo, 424 U.S. 1, 57 (1976).

23. *See generally* Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679 (2010).

24. The leading campaign jurisprudence case before *Citizens United* was *Austin v. Michigan Chamber of Commerce*, in which the Supreme Court upheld corporate spending limits in candidate elections against a First Amendment challenge. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668-69 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010). More specifically, *Austin* held that "anti-distortion" was a compelling government interest that justified a ban on independent election expenditures. *Id.* at 660. The force of this anti-distortion rationale was prominent in the Court's observation of the government's interest in curbing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 659-60. Amazingly, however, the Court did an about-face in *Citizens United*, invalidating *Austin* based on a number of reasons, including that *Austin* was a radical outlier in First Amendment and campaign finance jurisprudence, and its interference with the open marketplace of ideas doctrine of the First Amendment. *Citizens United*, 130 S. Ct. at 882. The Court also invalidated part of *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003), addressing the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b.

25. 494 U.S. 652 (1990).

26. 540 U.S. 93 (2003).

27. The Court's main findings in *Citizens United* revolved around invalidating two prior campaign finance cases, *Austin* and part of *McConnell*. These campaign finance cases were invalidated based on settled campaign finance laws. To invalidate these, the Court had to look for authority in corporate constitutional jurisprudence, which turned *Citizens United* into a constitutional case. *See Citizens United*, 190 S. Ct. at 876; *see also Austin*, 494 U.S. at 660.

expansion of corporate rights than from its purported revision of campaign finance laws.[28] Therefore, *Citizens United* should be seen as another source of acquiring a new meaning of corporate law, while the Court struggles to advance a coherent rationale for its embrace of an expansionist corporate rights paradigm.[29] In this article I draw attention to a broader conglomeration of corporate laws revealed through the panoply of legal and regulatory standards that include state corporation law, federal securities law, securities exchange standards, and SEC regulations, all of which are used primarily to regulate the activities of corporations internally and externally.[30] Thus, in the current discussion, corporate law stands for the broader bodies of law that illuminate both the behavior of a corporation with respect to internal allocation of authority, resources, and power, and its normative relationship with its shareholders.[31]

Literature suggests both the scope of the relationships and the nature of resource allocation mechanisms were shaped by the evolution of corporate governance rules,[32] which, in turn, are shaped by the nature of political discourse.[33] Corporations with significant corporate capital invested in the United States are naturally inclined to shape the political discourse through direct and indirect expression of their political desires.

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28. I argue that *Citizens United*'s broader impact can be felt more through the Court's construction of corporate rights than through its reformulation of campaign finance jurisprudence.

29. The expansionist corporate rights paradigm is the focal point of this article and I focus on its origin, evolution, and justifiability. In addition, I argue that the Court's suggestion that existing rules of corporate law are adequate to protect shareholders from this expansionist paradigm is unfounded. *See Citizens United*, 130 S. Ct. at 916.

30. *See* Shareholders Proposals, 17 C.F.R. § 240.14a-8 (2011).

31. *See id.*

32. *See generally* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS, 13-25 (1986); *see also* OLIVER WILLIAMSON, THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM (Univ. of Penn. ed., 1964) ("operating rules and operating behavior, other than opinion, [is] the basis for evaluating business behavior."); Oliver Williamson, *The Modern Corporation: Origins, Evolution, Attributes*, 19 J. ECON. LIT. 1537 (1981).

33. For an excellent discussion of how the nature of political discourse can shape the evolution of law by making a concerted effort toward a deliberative process, ensuring the voice of the people does not get submerged under the dominant forces of powerful corporations, interest groups and other private sectors, see Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter *Naked Preferences*] (examining the jurisprudential history of the Court's interference in preventing symmetric distribution of opportunities on the grounds of accumulation of predatory political power); *see also* Cass Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) [hereinafter *Legal Interference*] (arguing for social justice fundamentals by proposing governmental regulation to curb corporate dominance, thereby creating a leveling playing field for all involved).

In this article, by "political speech" I refer to the political decisions of expressed advocacy made by large, publicly-traded corporations. Typically, the term "political speech" must therefore be construed as a broader expression. This expression is given life either by means of direct expressed advocacy or via making sources available for candidates within the political process indirectly, with a view toward influencing and enabling the decision-making process of the domestic political process. Therefore, discussions of corporate political speech rights cannot be adequately framed for the purpose of First Amendment protection without discussing such rights within the proper context of their underlying rationale of having a stake in the outcome of the political process. Justice Kennedy's opinion in *Citizens United*, however, may have overlooked this underlying rationale. In proceeding along his view of constitutional adjudication to address whether an identity-based delineation between corporation and natural person is allowed under the First Amendment,[34] the Justice observed:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.[35]

Justice Kennedy's conviction that political speech of corporations or other associations should not be treated differently under the First Amendment for not being "natural persons"[36] is the strongest indication of the *Citizens United* Court's desire to re-inject the corporate personhood doctrine back into constitutional jurisprudence. Focused on tracing the contours of the last century-and-a-half's constitutional jurisprudence to reveal corporate rights evolution, Section A presents both a historical background of relevant political economy[37] and

34. *Citizens United*, 130 S. Ct. at 899.

35. *Id.*

36. *Id.* at 900.

37. Here I refer to the process by which political discourse attempts to shape the law's trajectory. *See id.*

exigencies of circumstances[38] that have allowed the proliferation of substantive due process rights within the corpus of corporate law. Section B describes how corporate rights have evolved from the due process rights of the Fourteenth Amendment[39] to find their strength within the Bill of Rights[40] in an attempt to level the playing field with rights of natural persons,[41] albeit under erroneous assumptions as I

38. Through exigencies of circumstances I generally draw attention to the fact that laws' transformative effect and jurisprudential evolution are mostly felt when some pressing issues emerge in society. Thus, political, judicial, and legislative actors react based on such needs of the hour.

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

40. The Bill of Rights contains numerous rights called enumerated rights, which are different than unenumerated rights. Unlike unenumerated rights, enumerated rights are explicitly mentioned in the Constitution. The unenumerated rights have not been explicitly mentioned, but the Supreme Court has long held that the Constitution protects those rights. Unenumerated rights are retained by the people. The difficulty in distinguishing between enumerated rights and unenumerated rights has created significant constitutional confusion. Commenting on unenumerated rights, Randy Barnett says, "[t]he purpose of the Ninth Amendment was to ensure that all [enumerated and unenumerated] individual natural rights had the same stature and force after some of them were enumerated as they had before; and its existence argued against a latitudinarian interpretation of federal powers." Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 2 (2006); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (2006) (asserting that these rights come from a broad principle of equality and democratic process). The Ninth Amendment to the United States Constitution addresses rights of the people that are not specifically enumerated in the Constitution. *See* U.S. CONST. amend. IX. As part of the Bill of Rights, the Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* Justice Arthur Goldberg, Chief Justice Warren, and Justice Brennan expressed the opinion that the Ninth Amendment is relevant to the interpretation of the Fourteenth Amendment in the case of *Griswold v. Connecticut*:

[T]he Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights . . . .

I do not mean to imply that the . . . Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government . . . . While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement.

Griswold v. Connecticut, 381 U.S. 479, 490, 492-3 (1965).

41. The doctrine of "equal protection" states that any law that is otherwise constitutional is a valid law and, therefore, must be applied equally to all persons.

examine here. The exposition of Section B allows us to understand how First Amendment political speech rights for the corporation have evolved from expansive rights already granted under the Bill of Rights during the first three decades of the nineteenth century. This will help to draw the connecting lines within the narrative of scattered isolation[42] to better understand how corporate personhood became a recurring theme within constitutional jurisprudence,[43] especially since the Court has not provided a robust jurisprudence from which we can understand the meaning of corporate personhood.[44] *Citizens United*'s sudden embrace of that doctrine once again reminds us that the Supreme Court is still working on a cogent doctrine with which to illuminate its understanding of corporate rights.[45]

A. Evolution of Corporate Rights—the Early Era

Since the beginning of the 1880s, two competing themes have shaped the Supreme Court's understanding of corporate rights.[46] In the

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Sometimes, however, this equal application of law results in asymmetrical and unequal outcomes for various identifiable groups. A question that has repeatedly arisen is how to best achieve the intended meaning of "equal protection" so that everyone is entitled to the same outcome. In this context, the Court struggled in finding a proper description for the corporate entity to adequately find meaning within the Fourteenth Amendment. As a result, use of metaphorical descriptions of corporations became part of the Court's corporate constitutional jurisprudence. The Court adopted these metaphors in an arbitrary and inconsistent manner, often times using different metaphors within the same opinion. Without devising an appropriate "test," the Supreme Court's corporate jurisprudence has been relegated to an inconsistent exercise in deciding cases on an ad hoc basis. *See* Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach on the First Amendment*, 48 WM. & MARY L. REV. 613, 635 (2006). Along these lines, the Court's decisions in corporate rights cases seem to suggest that a corporation is construed as some form of "person" under the Constitution, not from a functional perspective, but rather in an attempt to grant the corporation many of the same rights as a "natural person." Indeed, this is a confusing phenomenon.

42. *See* sources cited *supra* note 41 and accompanying text.

43. *Id.*

44. *Id.*

45. *Citizens United*, 130 S. Ct. at 970-72.

46. *See* sources cited *supra* note 40 and accompanying text. I draw attention to the tension in jurisprudence driven by the Court's inability to devise a proper test for determining "personhood" for rights assertion purposes. Yet, the Court felt it necessary to endow corporate entities with some of the constitutional rights reserved for natural persons. In this context, the Bill of Rights focuses primarily on relationships between the government and individuals. As the influence of corporate power evolved, the courts were called upon to determine how to treat corporations within the common law legal tradition of American jurisprudence. The dilemma for the courts came from the fact that corporations are not human "persons," and the legality of their actions must be understood from the perspective of "legal actors." Clearly, this has caused confusion

first framework, corporations are seen as artificial entities,[47] subject to governmental regulations. This fact has not, however, prevented them from asserting their constitutional rights against the government's incursion to restrict their expansionist agenda on society.[48] In the second

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because courts have been forced to determine how many rights the corporations must be granted within a rights doctrine based on the Bill of Rights—something for which they are not particularly well designed.

47. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Oxford ed., 1765). The metaphor of "artificial entity" was introduced in response to the law's inability to deal with the growing influence of corporations. The connotation resonates with the early form of corporations in the colonial era, where the Framers viewed corporations with apprehension and therefore did not intend the corporate entity to evolve with expanded power. They viewed corporations as "artificial person[s]," created by the state, with only those powers given to them by the state. *Id.* at 475-76. This artificial entity view of corporations continued to be part of the jurisprudential discourse until the *Santa Clara* case of 1886, when the corporate personhood doctrine emerged to transcend "artificial entity" views into the realms of "personhood." Santa Clara Cnty. v. S. Pac. R.R., 118 U.S. 394 (1886). However, other developments besides the need for jurisprudence shaped the corporate narratives during the nineteenth century. Scholars have pointed out some of the reasons why artificial entity theory continued to be part of the discussion of corporate theory. Carl Mayer observed, "the use of the artificial entity theory in the private law context insulates current management from takeovers; its rejection in the Bill of Rights context permits managers to use the corporate form to promote their own views and political agenda." Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 639 n.297 (1990). Despite years of silence in jurisprudence, the concept gained prominence in contemporary discourse during the late twentieth century. It was first invoked in *First National Bank of Boston v. Bellotti*, a First Amendment case in which corporations challenged a Massachusetts statute that limited corporate spending for political speech. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 826-27 (1978). Justice Rehnquist stated, "I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation." *Id.* at 826-27 (Rehnquist, J., dissenting). Subsequently, it was invoked by Justice Powell when he noted in *CTS Corp. v. Dynamics Corp. of America*, "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law . . . A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law . . . ." CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987) (quoting Trustees of Dartmouth College v. Woodward, 4 U.S. (Wheat.) 518, 636 (1819); *Bellotti*, 435 U.S. at 823 (Rehnquist, J., dissenting)); *see also* Donald C. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96 (1987) (commenting on the Court's rationale which was premised on takeover fundamentals from the corporate law context). Additionally, this view of corporations as "the creature," "concession," "fiction," or "artificial entity" can be further traced to European and Christian history. *See* OTTO FRIEDRICH VON GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 27-33 (1977).

48. *See* Sunstein, *Naked Preferences*, *supra* note 33; *see also*, Sunstein, *Legal Interference*, *supra* note 33.

framework, corporations are given a status equivalent to that of a natural entity.[49] In this construction, a corporation is construed as a real entity with independent rights, a line of reasoning that began to obtain firm roots by the end of the twentieth century, more as a response to the nineteenth century's difficulty in reconciling between artificial entity designation and expansive constitutional rights.[50] Riding this palpable tension of corporate designation in the nineteenth century,[51] corporations began emerging as embodiments of personhood, first under an expanded construction of the Fourteenth Amendment in *Santa Clara County v. Southern Pacific Railroad Company.*[52] Although that case dealt with taxation of railroad properties,[53] a routine tax dispute on the surface, the ruling became significant in its conferral of Fourteenth Amendment protection to a business entity for the first time. Despite being path-breaking in its transformative impact by granting rights based on the corporate personhood doctrine, this case is also memorable for the editorial written by court reporter J.C. Bancroft Davis. His summary note about *Santa Clara* resulted in a misunderstanding of the decision. He opined that corporations did have the same rights as natural persons under the Fourteenth Amendment, however no such opinion is found in

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49. *See* Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886). The concept of "natural entity" originated in constitutional jurisprudence from *Santa Clara*, thereby beginning a new phase in jurisprudence in which the Court began to expand corporate constitutional rights under the premise that a corporation can be construed as a natural person under the Fourteenth Amendment. *Id.* at 396. This is a faulty construction, as the Court neither devised a test to determine who can be a natural person for the application of constitutional rights, nor did the Court stay on a predictable trajectory as the idea of corporate personhood evolved in jurisprudence. The Court's inconsistent application makes me question whether adoption of "corporate personhood" is the same as embracing "natural entity" theory. Fundamentally, they appear equivalent, but we might want to be aware of the differences in their applicability. The Court at times used the natural entity theory to construe rights for corporations. For example, in *Pembina Consolidated Silver Mining*, the Court used a metaphor to draw attention to the rights of the natural persons who had founded the corporation. *See* Pembina Consol. Silver Mining Co. v. Penn., 125 U.S. 181, 189 (1888) (asserting that corporations are merely associations of individuals united for the special purpose of conducting business activities). Thus, the Court's diverging justifications for invoking "natural entity" theory indicate the inherent problem in the construction, and show further evidence of the Court's arbitrariness in arguing for corporate constitutional rights. In this sense, the natural entity theory is also viewed as a "legal fiction," constructed for the purpose of justifying giving rights to corporations without having consistent jurisprudence to support that act. *See* Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 581 (1987).

50. *See* Schane, *supra* note 49, at 568.

51. *Id.*

52. 118 U.S. 394 (1886).

53. *Id.* at 396.

the actual language of *Santa Clara*.[54] This erroneous editorial set in motion the concept of corporations' rights under the Fourteenth Amendment. Although the Court's actual decision was not controversial and never hinged on equal protection claims,[55] the note opened the door for corporations to assert equal protection under the Fourteenth Amendment.[56] Corporations continued to enjoy such rights for more than a half-century, thereby expanding corporate rights against state regulations through a series of constitutional opinions, punctuated at times by dissents.[57] For example, in 1938, Justice Hugo Black commented on the Court's opinion in *Santa Clara* by reminding the Court that the purpose of the Fourteenth Amendment was to protect

54. *Id.* (noting the unanimous opinion of the Justices on the application of the Fourteenth Amendment to corporations).

55. *Id.*

56. *See* Schane, *supra* note 49.

57. Although the history of constitutional jurisprudence in the nineteenth century would indicate a gradual broadening of corporate rights through invocation of the Constitution's various amendments, both the existence of an incoherent jurisprudence of corporate rights and the judiciary's difficulties in grappling with the understanding of corporate persona are seen through various dissents. In some cases, these dissents pave the way for future invalidation of constitutional cases while, in other cases, these dissents signal the emergence of an incomplete doctrine of corporate rights. Some of the significant dissents on expansive corporate rights include dissents by Justices Black and Douglas, who suggested that *Santa Clara* was decided wrongly and that the legislative history of the Fourteenth Amendment did not support the proposition that corporations were meant to be included under its protections. *See* Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 82 (1938) (Black, J., dissenting); *see also* Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), *vacated by* United States Gypsum Co. v. Glander, 337 U.S. 951 (1949), *rev'd*, 337 U.S. 951 (1949) (Douglas, J., dissenting). On a similar vein, in 1986 in *Dow Chemical Corp. v. United States*, the corporation confronted the Court by challenging the state's regulatory power on grounds of modern property rights. While granting expansive corporate right of protection under the Fourth Amendment, the Court once again equated a real person's reasonable and legitimate expectation of privacy with the expectations of corporations. *See* Dow Chemical Corp. v. United States, 476 U.S. at 277, 235 (1986) (Powell, J., dissenting in part) (citing Oliver v. United States, 466 U.S. 170, 171 (1984)). This expansive view of constitutional grants did not resonate well with Justice Powell, who challenged the Court's holding on the ground that it did not follow its earlier findings in *Katz v. United States*. *Dow*, 476 U.S. at 244; *see also* Katz v. United States, 389 U.S. 347 (1967). *Katz* held that the Fourth Amendment protects people, not places, and therefore Justice Powell concluded that what a person knowingly exposes to the public in his office is not protected by the Fourth Amendment. *Katz*, 389 U.S. at 371; *see also Dow*, 476 U.S. at 244. This once again presents a paradox, as the Fourth Amendment's ambit of protecting a "real person" from an unreasonable search and seizure may have been wrongly extended to protection of "place," as a way to incorporate corporate entities within broader constitutional protection. *See* U.S. CONST. amend. IV; *see also Dow*, 476 U.S. at 239.

weak and helpless persons.[58] He rejected the notion of corporations' equal rights by observing that the language of the amendment does not resonate with the assertion that the Fourteenth Amendment applies equally for the benefit of business corporations.[59] Echoing a similarly dissenting mood, in 1949, Justice Douglas observed that *Santa Clara* enabled corporations to have newly minted constitutional protections not originally intended by the Framers.[60]

Although *Santa Clara* opened the door, albeit somewhat inadvertently, to endow corporations with rights akin to those normally conferred upon natural persons,[61] its effect began to resonate through subsequent cases as it became the foundational case from which all corporate rights flowed. For example, in *Noble v. Union River Logging Railways Company*,[62] the Court allowed corporations to significantly expand its activities in interstate commerce by encroaching upon the state's regulatory reach. This was followed by the landmark 1905 Supreme Court case of *Lochner v. New York*.[63] This case further

58. *See Conn. Gen. Life Ins. Co.*, 303 U.S. at 85-90 (Black, J., dissenting) ("Neither the history nor the language of the fourteenth amendment justifies the belief that corporations are included within its protection.").

59. *See id.*

60. *See id.* Reflecting upon the history of the Framing period, I do not doubt that the Framers ever intended for corporations to have rights equal to individuals. They held very different views about the nature of rights to be bestowed on corporations. This is evident from archived documents consisting of individual correspondences that shine light on the correspondences amongst the Framers. Thomas Jefferson had deep rooted apprehension about the intent of corporations. He noted, "I hope we shall . . . 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 (12 Nov. 1816), THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, at 43 (Paul Leicester Ford ed., Fed. Ed. 1905). John Adams harbored similar sentiments: "All the perplexities, confusion and distress in America arise, not from defects in the Constitution or Confederation, not from a want of honor or virtue, so much as from downright ignorance of the nature of coin, credit and circulation." Letter from John Adams to Thomas Jefferson (25 Aug. 1787), THE WORKS OF JOHN ADAMS, at 447 (Charles Francis Adams ed., 1853). Scholars observed that the Framers construed corporations' powers and purposes to serve a social function for the state. Thus, corporations "were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare." RONALD E. SEAVOY, ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784–1855, 5 (1982); *see also* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 775 (1995) ("In the intellectual heritage of the eighteenth century, the idea that free speech was individual and personal was deeply rooted and clearly manifest in the writings of Locke, Milton, and others on whom the framers of the Constitution and the Bill of Rights drew.").

61. *Santa Clara*, 118 U.S. at 396.

62. 147 U.S. 165 (1893).

63. 198 U.S. 45 (1905).

solidified the corporate grip on the Fourteenth Amendment's substantive rights by asserting the "liberty of contract"[64] rights of due process. By rejecting the worker's argument on health protection grounds, the Court invalidated a New York State law limiting the number of hours that a baker could work each day.[65] The Court found the state law to be an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract."[66] *Lochner*'s constitutional rejection of progressive federal and state statutes seeking to regulate corporate labor practices signaled the Court's refusal to allow social justice fundamentals to take root within the jurisprudence, in part based on its highly controversial[67] and significantly expansive[68] understanding of the Fourteenth Amendment. If the goal of the Fourteenth Amendment was to protect the weak and helpless,[69] granting a corporation a domineering

64. *Lochner* has come to symbolize the quintessential corporate framework to invalidate government regulation under the doctrine of substantive due process. Here, the Court invoked the idea of a "liberty of contract" to acquire an expansionist meaning of corporate power. *See* Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

65. *Lochner*, 198 U.S. at 45-46.

66. *Id.*

67. The controversy of *Lochner* arises from the conflict in viewpoints between the majority's opinion and the dissent. In his strong rebuke of the majority's judicial activism, Justice Holmes pointed to the majority's faulty construction of the case, observing that the case was "decided upon an economic theory which a large part of the country does not entertain." *Id.* at 75 (Holmes, J., dissenting). He rejected the majority's expansionist construction of the Fourteenth Amendment premised on the liberty of contract, observing to the contrary, "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory." *Id.* On a similar vein, Justice Harlan rejected the invalidation of state regulation on grounds of liberty to contract under the Due Process Clause of the Fourteenth Amendment, by offering the following rule for constructing an unconstitutional argument: "the power of the courts to review legislative action in respect of a matter affecting the general welfare exists *only* 'when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" *Id.* at 68 (Harlan, J., dissenting) (quoting Jacobson v. Mass., 197 U.S. 11, 31 (1905)).

68. *Id.* at 45-46.

69. Dissenting in the 1938 case *Conn. Gen Life Ins. Co. v. Johnson*, Justice Hugo Black observed, "in 1886, this Court in the case of *Santa Clara County v. Southern Pacific Railroad*, decided for the first time that the word 'person' in the amendment did in some instances include corporations . . . . The history of the amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments . . . . The language of the amendment itself does not support the theory that it was passed for the benefit of corporations." *See Conn. Gen. Life. Ins.*, 303 U.S. at 87 (Black, J., dissenting).

status in its contractual arrangement with workers could never fulfill the Framers' intention for the Fourteenth Amendment.[70] The history of the Court's jurisprudence in the nineteenth century is inundated with many such perplexing interpretations of corporate rights.[71] Mired in dichotomous incoherency, this type of interpretation would continue to shape the contour of allocated rights of workers and shareholders within the corpus of corporate law.

In attempting to outline the meaning of due process rights according to the Fourteenth Amendment, the Court may have introduced more confusion than clarity.[72] In articulating how procedural right guarantees emanate from the Fourteenth Amendment, the Court alluded to the type of control the government may exercise over its subjects with substantive limitations. However, in the Court's understanding of the Fourteenth Amendment, corporate entities may have been benefitted more than their non-corporate counterparts.[73]

This confusing conundrum of the Fourteenth Amendment has a much deeper significance today. The palpable tension between *Citizens United*'s main holding and its dissent has roots within a similar discord as *Lochner*.[74] In his dissent in *Lochner*, joined by Justices White and Day, Justice Harlan rejected the Court's weakening stance on the government's regulatory power by observing that, "liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society."[75] The reasoning for the Supreme Court's encroachment into government's regulatory power in expanding corporations' rights is perhaps best explained by Justice Oliver Wendell Holmes, who noted in a dissent that, "The case was decided upon an economic theory which a large part of the country does not entertain."[76] More than a century later, reflecting upon the Court's overtures in *Citizen United*, opinion polls and scholarly dissents reveal

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70. *Id.* at 85-86.

71. *See* BLACKSTONE, *supra* note 47; *see also Conn. Gen. Life Ins. Co.*, 303 U.S. 77. In his excellent article chronicling the constitutional journey of corporate personhood, Mayer noted this jurisprudential view that he termed as schizophrenic, *See Mayer*, *supra* note 47, at 622.

72. *See Conn. Gen. Life Ins. Co.*, 303 U.S. at 85-86.

73. *See id.*

74. The tension in constitutional cases illuminated through the divergently different constructions attempted by the majority opinion and the dissent is a strong indication of an incoherent jurisprudence at work. In this context, *Citizens United* and *Lochner* have strikingly similar parallels. *Compare Citizens United*, 130 S. Ct. at 970, *with Lochner*, 198 U.S. 45.

75. *Lochner*, 198 U.S. at 68 ("as the State may reasonably prescribe the common good and well being of society").

76. *Id.* at 75.

that an overwhelming majority of the country does not support the Court's contention that corporations have the rights of personhood as enshrined in the *Citizen United* case.[77]

B. Expansion of Fourteenth Amendment Rights

In the history of U.S. constitutional jurisprudence, the Bill of Rights can be seen as the invocation of a more fundamental and sublime right reserved for natural persons.[78] By granting corporations these expansive rights at a time when the country was moving beyond The New Deal era,[79] the Supreme Court's corporate rights jurisprudence began to evolve from the "artificial entity theory" into the realm of "real entity theory" of corporations.[80] As the country began to grapple with the complexities of life in the modern industrial era, the Supreme Court, whether willingly or not, became a participant in the major structural changes in corporate-society dynamics.[81] In the tension between a corporation's intention to expand its tentacles in shaping consumer behavior and the state's desire to thwart such corporate intrusion via regulation, the Court intervened on corporations' behalf with expansive jurisprudence—an act, in my view, that has permanently shaped the demographic and economic bases of American civilization.[82]

As the governmental effort to achieve economic reform via regulation, taxation, and social insurance began to be seen as overly intrusive in some parlances,[83] the Court embarked on a pro-corporate

77. *See* Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST, Feb. 17, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html.

78. *See* Barnett, *supra* note 40.

79. *See* Schane, *supra* note 49.

80. Mayer, *supra* note 47, at 580.

81. I refer in general to the evolution of law where jurisprudence advances in response to state regulations that attempt to significantly curb corporate power. In this context, determining how many rights to be given to the corporate entity depends on the judiciary's construction of the corporate rights doctrine against the framework of an acceptable rights mechanism within the Constitution. The danger in the adoption of such a constructionist paradigm by the Court lies in its faulty construction by the Court, where the voice of the people may become submerged under the dominant forces of powerful corporations, interest groups, and other private sector players. *See* Sunstein, *Naked Preferences*, *supra* note 33 (noting the political loss of minority views in the corporate context); *see also* Bebchuk & Jackson, *supra* note 17 (calling for legislative action to protect individual political speech in the face of greater corporate dominance).

82. *See* Mayer, *supra* note 47, at 598-615 (referring to the deliberative process of jurisprudence construction by the Court).

83. *See id.* (referring to the triggers which prompt the Court to embark on such construction).

social construction of reality. In this new construction of constitutional jurisprudence, a majority of the Justices began to focus on corporate rights from a property rights perspective.[84] As the government's regulatory focus changed to non-economic areas, corporations looked for newer sources to acquire more rights. Corporate rights jurisprudence signaled a shift from substantive due process guarantees of the Fourteenth Amendment to the secure sanctum of the Bill of Rights.[85] The Court invalidated more than two hundred economic regulations by the state and federal government during the period between 1905 and 1930.[86] In the process, the Court transitioned from Fourteenth Amendment based corporate rights jurisprudence to a property-oriented doctrine finding strength in the Bill of Rights.[87]

In the 1906 case of *Hale v. Henkel*,[88] the Court for the first time used two constitutional amendments to determine the corporate entity's rights threshold. While rejecting the corporation's Fifth Amendment protection, the Court favored the corporation on the ground of a Fourth Amendment violation.[89] By noting that issuing a subpoena for corporate documents constitutes an unreasonable search and seizure in the government's overzealous contemplation of a federal statute's implementation under the Fourth Amendment, the Court demolished the clear distinction between an individual and a corporation.[90]

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84. *See Lochner*, 198 U.S. at 53-54.

85. *See supra* note 40.

86. *See* Mayer, *supra* note 47, at 589.

87. *See id.* at 590-91.

88. 201 U.S. 43 (1906).

89. *Hale* is significant on two grounds. First, it began with the Court's foray into an invocation of the Fifth Amendment, where, for the first time, the Court invoked both the Fourth Amendment and the Fifth Amendment in constitutional jurisprudence for corporations. *Id.* Second, *Hale* can be seen as the trailblazer case in which the Court catapulted its corporate personhood doctrine from the fuzziness of *Santa Clara* and began acquiring Bill of Rights guarantees for corporations exclusively in terms of personhood theory. *Id.* There may be little practical significance to *Hale*'s holding from the Fifth Amendment perspective, as the Court relied on the artificial entity theory to hold that corporations are not protected by the self-incrimination clause of the Fifth Amendment. In addition, since a corporate entity can never take the stand to use the privilege, we do not need to delve into details from its Fifth Amendment significance in modern times; rather, we should see the case from its broader jurisprudential value of solidifying a corporation's rights paradigm. *Hale*'s Fourth Amendment significance is derived from the threshold question raised as to whether a corporation is entitled to Fourth Amendment protections, which the Court decided in favor of the corporate entity. *Id.* at 78; *see also* Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After U.S. v. Hubell—New Production for Private Papers?*, 29 AM. J. CRIM. L. 123, 133-36 (2002) (discussing the significance of *Hale* as applied to collective entities and personal rights).

90. *Hale*, 201 U.S. at 78.

Within broader corporate rights jurisprudence, *Hale*'s significance should be understood as a quintessential example of the Supreme Court's difficulty in finding a consistent meaning of 'corporation.' Despite observing that "the corporation is a creature of the State"[91] and is to be construed as "an association of individuals under an assumed name and with a distinct legal entity,"[92] the Court still felt that they were entitled to immunity under the Fourth Amendment's unreasonable search and seizure clause.[93] Clearly, *Hale* will go down as the case that catapulted rights of corporations into a higher echelon than the cases from the previous quarter of a century.

Thus, the first half of the twentieth century's constitutional jurisprudence has indicated a general tendency toward developing expansive corporate rights. Often times, however, this tendency was either punctuated by strong dissents or perforated by isolated invalidations of precedents, signaling consistency in the Court's corporate rights doctrine. The divergence among the Justices in propagating a theory of corporate personhood based on indistinguishability between the law's protections for real persons and corporations did not escape Justice Hugo Black's strong rebuke in 1938.[94] He underscored the fact that a staggering fifty percent of the opinions in the first fifty years after the adoption of the Fourteenth Amendment granted substantive due process guarantees to corporations, whereas only a mere one percent of the cases extended such guarantees to "the negro race."[95] This strong admonition is but a stark reminder, perhaps not of the Justices' inability to grapple with an acceptable form for the corporation to adequately express rights under the Constitution,

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91. *Id.* at 74. One of the more famous invocations of this metaphor occurred in *Hale* where the Court held that a corporate entity is created for the benefit of the public. *Id.* More than a century later, this metaphor found use in Justice Stevens' dissent in *Citizens United*, 130 S. Ct. at 949 (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819)) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . .").

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

93. *Id.*

94. Schane, *supra* note 49.

95. *Conn. Gen. Life Ins. Co.*, 303 U.S. at 90 (Black, J., dissenting). Against the backdrop of an excessive usurpation of corporate rights premised under the majority's fanciful construction of the Fourteenth Amendment protection for corporations, this came as the harbinger of reason amongst corporate excess. Justice Hugo Black was astonished in his observation that, in the Court's half-century of constitutional jurisprudence since the adoption of the Fourteenth Amendment, "less than one-half of 1 percent invoked it in protection of the negro race, and more than 50 percent asked that its benefits be extended to corporations." *Conn. Gen. Ins. Co.*, 303 U.S. at 90 (Black, J., dissenting).

but more of their lack of awareness in anticipating the outcomes of creating an asymmetric rights paradigm between corporate and non-corporate citizens.

C. Continuing the Journey of Corporate Rights—Growth of Commercial Speech

Basking in its continued empowerment and endowment of expansive constitutional rights, the 1970s saw more judicial decisions favoring corporate rights. In its effort to further reshape corporate rights jurisprudence, the Court began to confer constitutional protection on both commercial and political corporate speech. Commercial speech is generated as an expressive mechanism for corporations' business activities that are geared toward bringing economic efficiency in the business process. Such speech can be construed as the conglomeration of all corporate decisions undertaken in the normal business decision-making process. Thus, corporate commercial speech exists in conferring and propagating benefit for the corporate entity. Clearly, speeches made under normal business decision-making processes are geared toward facilitating such corporate benefit by means of economic activity. Commercial speech protection, in essence, can then be equated to an act against governmental regulation.[96] This was especially true in the context of the 1970s explicit promise of social justice, where the protection of corporate speech was constructed by the Court as a much needed bulwark against a perception of governmental intrusion via regulation.[97] This opened the door for the Court to incorporate commercial speech under the broader protective umbrella of the First Amendment. Now, a broader usurpation of such corporate rights to commercial speech protection would eventually develop into a paradigm for political speech protection.

Political speech rights found a permanent foothold through *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* ["*Virginia Citizens*"],[98] where the Court observed, "commercial speech is not so far removed from the 'exposition of ideas' and that it should be denied the first amendment protection, though of a lesser degree than 'core' political speech."[99] Tracing more than three decades of corporate speech jurisprudence, I see *Citizens United* not in its "isolated

96. *See* Mayer, *supra* note 47, at 598-604.
97. *See id.*
98. 425 U.S. 748 (1976).
99. *Virginia Citizens*, 425 U.S. at 771; *see also* Mayer, *supra* note 47, at 612.

suddenness"[100] but rather within a predictable contour along the judiciary's building block approach of bringing legitimacy to corporate personhood. *Virginia Citizens'* commercial speech doctrine was somewhat of a watershed moment as it opened the flood gate for multiple decisions by the Court to establish commercial speech protection based on property rights. Indeed, businesses welcomed this protection as a guarantor of their property rights by becoming overtly aggressive in the assertion of their commercial speech rights,[101] best seen in the case *Philip Morris.*[102] In the annals of corporate speech jurisprudence, *Philip Morris* was a trailblazing opinion on two grounds. First, the Court legitimized the Bill of Rights for corporations by constructing the right to advertise as a protected mechanism under modern property rights.[103] Second, the Court bolstered such protection by developing a bulwark against regulation on the grounds of First Amendment protection of individual liberty.[104] Constitutional invalidation of social regulation premised on protection of modern property rights is a significant development in the modern political economy. Besides running concurrent to the Court's expansion of its political speech jurisprudence, it presented us with a revealing truth about constitutionalism. First, this judicial tinkering with both the orderly confluence of market forces and the political process may have the unintended consequence of asymmetric consolidation of power in a specific sector of society. Second, such overtures by the Court would indeed not find resonance with the original intent of the Framers of the Constitution.[105]

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100. Despite having periodic twists and turns in the Court's invocation of the corporate personhood doctrine, its embrace in *Citizens United* did not come in isolation, as throughout the last one-and-a-half centuries of corporate constitutional jurisprudence, the doctrinal underpinnings of this metaphor have been significantly prominent, as I have shown in this article.

101. Mayer, *supra* note 47, at 614.

102. Philip Morris USA v. Williams, 549 U.S. 346 (2007). The year 1987 witnessed an extreme form of corporate assertion of First Amendment rights. Empowered by *First National Bank of Boston v. Bellotti*'s property rights-based construction of the commercial speech protection framework, the tobacco giant Philip Morris embarked on an aggressive assertion of its rights to advertise, despite finding evidence of adverse health consequences of such advertisement. When Congress introduced a bill to ban all forms of cigarette advertisement, an extremely adversarial public debate ensued over Phillip Morris' right to commercial speech. *See generally* Ross D. Petty, *Advertising and the First Amendment: A Practical Test for Distinguishing Commercial Speech from Fully Protected Speech*, 12 J. PUB POL'Y 170, 170-77 (1993).

103. Mayer, *supra* note 47, at 615.

104. *See* Health Protection Act of 1987, H.R. 1272, 100th Cong., 1st Sess. (1987); *see also* H.R. 1532, 100th Cong., 1st Sess. (1987).

105. *See* Schane, *supra* note 49.

D. Property Rights Doctrine—Paving the Way for First Amendment Rights

Invocation of modern property rights, as revealed through the Court's granting of rights to advertise as a means of increasing revenue, evolved into other areas[106] as corporations began expanding the property right in contemplation of a desire to spend money to influence political referenda.[107] The new found ability to spend money to shape the outcome of political process thus can be seen as an outgrowth of modern property rights.[108] Guaranteed by the judiciary's promise of protection, property rights found their way into the creation of new First Amendment political speech rights for corporations in 1978 in *First National Bank of Boston v. Bellotti*.[109] This property rights interest seems to have dominated judicial discourse of corporate rights throughout the last three decades of the twentieth century, during which the Court has invalidated a plethora of regulations using First Amendment rights, from SEC disclosures,[110] to speech rights,[111] to protecting the extra space in an envelope,[112] all under the guise of protecting important property rights of the corporation.

The degree to which a highly abstract and supremely sacrosanct First Amendment right surfaced at the epicenter of corporate economic expansion provides an important looking glass through which the evolution of the corporate personhood doctrine must be understood. That

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106. I draw attention to the evolution of law from commercial speech protection to political speech protection, while embracing the empowerment derived from the First Amendment's broader interpretation.

107. Generally, I am referring to the transition in corporate aspiration where modern corporations, empowered by broader constitutional rights granted by the Supreme Court, in part via the Bill of Rights' protective umbrella, in part through extracting property rights protection, began encroaching into the political arena for the express purpose of influencing the political landscape. As corporations began asserting their rights to political speech under First Amendment jurisprudence, questions of whether expanded corporate rights violate shareholders' or the public's right to political speech began to emerge. Designing a proper allocation of political speech rights must be premised on balancing the rights of both corporations and the general public, an area the Court began developing post-*Bellotti*, giving rise to the modern campaign finance jurisprudence.

108. McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

109. 435 U.S. 765 (1978).

110. *See generally* NICHOLAS WOLFSON, THE MODERN CORPORATION: FREE MARKETS VERSUS REGULATION (1984); *see also* Nicholas Wolfson, *Use First Amendment To Call Off the SEC Censors*, WALL ST. J., Aug. 9, 1988, at 26.

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

112. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986) (observing how the abstract concept of the First Amendment evolved to solidify the property right concept, in that property is being construed in the air in an envelope, acquiring its meaning through intangible entities like ideas).

is why, although *Citizens United* evolved from the invalidated cases *Austin v. Michigan Chamber of Commerce*[113] and *McConnell v. Federal Election Commission*,[114] as the base line, *Citizens United* is an emboldened step by the judiciary to both expand constitutional rights of the corporation and stabilize the doctrine of corporate personhood—areas I dissect in the next section.

III. TO EMBRACE, OR NOT TO EMBRACE: CORPORATE PERSONHOOD DECONSTRUCTED

A. Citizens United*'s Erroneous Attempt to Revive Corporate Personhood*

"To be, or not to be: that is the question."[115] These were words that Prince Hamlet spoke as he pondered killing himself. Hamlet contemplated the existential nature of his action by discussing what it takes to be a human being. Just as Hamlet struggled with the ideas surrounding the meaning of "life" and "death,"[116] vacillating between his notions of "being" and "not being," the U.S. Supreme Court has struggled with the idea of corporate "personhood," shifting between the ideas of "artificial entity" and "real entity."[117] The *Citizens United* Court likewise may have struggled in finding this existential meaning of corporate personhood within its continuing constitutional journey.[118]

Empirical evidence indicates that personification of business corporations has been a highly controversial issue.[119] Since its introduction in the 1880s[120] and through its conflicting yet evolving interpretation over the last 130 years, constitutional interpretation of corporate personhood has gone through various incarnations. Despite finding support in its earlier jurisprudence,[121] and gradual incorporation of the Bill of Rights into the corporate rights framework,[122] the Court eventually transitioned away from its corporate personhood theory.[123] The shift came as the Court began infusing the constitutional discourse

113. 494 U.S. 652 (1990).

114. 540 U.S. 93 (2003).

115. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, act 3, sc. 1.

116. *See id.*

117. *See* Schane, *supra* note 49.

118. *See supra* note 20; *see also infra* Part III.B.

119. *See generally* Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443–44 (1987).

120. *See Santa Clara*, 118 U.S. 394.

121. *Id.*

122. *See* Barnett, *supra* note 40.

123. *See Conn. Gen. Life Ins. Co.*, 303 U.S. 77.

with a strong aura of property rights, which may be an indication of the Court's own confusion over corporate personhood. Corporate personhood may have been constructed by the Court to authenticate its findings on expanded corporate rights. But, as soon as the Court found a way to place corporate rights under a supportable legal rationale through the expanded provisions of the Bill of Rights, the Court spared no time in abandoning its embrace of the doctrine.[124]

This is indeed problematic. The Bill of Rights conveys the conception of a broader array of profound and inviolable rights that are strictly inherent within human persons.[125] Imposition of such rights upon non-human entities becomes profoundly confounding. Therefore, within the intent of the *Citizens United* Court, I see the potential for further muddying the corporate rights jurisprudence. It is inconceivable to associate an entity with the Bill of Rights without the characteristics of personhood. Just as the Bill of Rights has been enshrined in the Constitution as the suite of rights associated with the natural person,[126] similarly contained within the body of the Fourteenth Amendment is the word "person".[127] This compels me to question whether the Court's explicit assertion of corporations' Fourteenth Amendment rights is indeed grounded on solid fundamentals.

In my view, constitutional interpretation of corporations can be seen as a narrative of irony. This irony has been unfolding since the early years of the Constitution through a story of conflict—conflict between denial and assertion of personhood under the law. Here, the insertion of the word "person" within the body of the Fourteenth Amendment caused confusion over defining who is a person.[128] Early jurisprudence grappled

124. In general, I draw attention to the Court's "Teflon" constructionist jurisprudence. Instead of developing robust jurisprudence based on broad rules, the Court continues to trace a shallow constructionist path.

125. *See* Barnett, *supra* note 40.

126. *Id.*

127. *See supra* note 39.

128. As I have shown in this article, Justices continued to grapple with the idea of "corporate personhood," as seen by multiple dissents, conflicting usage of the metaphor, and periodic change of course by the Court. In my view, part of the confusion is borne out of difficulties in determining who has the authority, in terms of structuring the act of speaking. *See infra* Part III.B. In his dissent in *Citizens United*, Justice Stevens seemed to struggle with this idea as well, even though he ultimately rejected the concept. As he noted, "it is an interesting question 'who' is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds

with whether or not women, poor people, or slaves qualified as persons.[129] Along similar lines, the confusion over the determination of whether a business corporation can be a person continues. So, one of the threshold questions of *Citizens United* revolves around whether the Court's opinion embraced the idea of corporate personhood. I see the *Citizens United* Court's struggle with this concept in its vacillation on the idea. In various invocations, the Court brings up the issue of granting parity between corporation and person. As Justice Kennedy observed, "political speech does not lose First Amendment protection simply because its source is a corporation."[130] "The identity of the speaker is not decisive in determining whether speech is protected."[131] In falling short of explicitly declaring the corporation a person, the Court emerged with a quasi-personhood concept[132] in extending the protection of First Amendment political speech to corporations and organizations.

Such association between a natural right of speech and a legal entity prompted some commentators to see the existence of a corporate personhood doctrine.[133] I see it differently. The opinion in *Citizens United* points to neither an explicit invocation of corporate personhood, nor an implicit embrace of the doctrine. For example, in Justice Scalia's concurrence, he makes explicit reference to "associational speech" and "the right to speak in association with other individual persons."[134] This is not an explicit endowment of corporate personhood, but it draws attention to a characteristic of corporate speech. By observing that corporate speech is something akin to the speech made in association with other entities having the characteristics of personhood, conclusions are drawn that the judiciary is embracing the very idea of corporate

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for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use the general treasury funds for some of these ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least." *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in park and dissenting in part).

129. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISES OF LEGAL ORTHODOXY 1870-1960 (Oxford, 1992) (discussing the idea of "personhood" within the context of competing strains of jurisprudence).

130. *Citizens United*, 130 S. Ct. at 972 (Stevens, J., concurring in park and dissenting in part).

131. *Id.* at 900 (quoting *Bellotti*, 435 U.S. at 784).

132. I draw this conclusion in *infra* Part III.C.

133. *See* Mark, *supra* note 119.

134. *Citizens United*, 130 S. Ct. at 927-28 (Scalia, J., concurring).

personhood.[135] In this assertion of speech rights by the *Citizens United* Court, the Court at best is invoking a quasi-personhood. By so doing, however, the Court may be heading towards an incoherent jurisprudence regarding its corporate personhood theory, an area I illuminate further next.

B. Inconsistent Jurisprudence Seen Through Periodic Abandonment

Jurisprudence has given various interpretations to the corporate being. One construction defines a corporation as "[a] creature of the state," not a natural creature given life by the Creator, and entitled to the rights of flesh and blood of natural human persons.[136] In this conception, a corporate entity does not have the inviolability of a natural being and thus loses its personhood. Since the corporate entity acquires meaning through association with other entities, it ceases to be a full person. In this incarnation, the entity embodies a modified version of personhood, such as a quasi-personhood. Such imposition of divergent strands of quasi-personhood upon the corporate entity has been the recurring theme in American jurisprudence. Perhaps the view of a corporation as a non-natural entity, not created by a Creator, resonates more through the myriad dissenting opinions that have a more established footing in the Constitution.[137] Justice Harlan saw a corporation within the meaning of the Fourth Amendment as "an artificial being, invisible, intangible and existing only in contemplation of law 'not a part of the people.'"[138] In advancing his theory of artificial entity, Justice Jackson allowed the Federal Trade Commission (FTC) broader authority to inspect a corporation's price list in *United States v. Morton Salt Co.*[139] This problem within the corporate personhood theory has also been revealed through the Court's granting various Bill of Rights protections to corporations. In *Hale*, the Fourth Amendment protection was granted via the construction of corporations as associations of individuals having a

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135. *See infra* Part III.B; *see also* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1455-56 (1992) (discussing how despite judiciary's acceptance of expansive corporate entitlement to constitutional rights, the path to full attainment was constrained by myriad difficulties).

136. *Hale*, 201 U.S. at 75.

137. Despite gradual broadening of corporate rights through various amendments, the judiciary's difficulties in dealing with the idea of expanded corporate rights found its voice at times through vigorous dissents, which would eventually evolve in reshaping the constitutional jurisprudence by invalidation of precedents.

138. *Hale*, 201 U.S. at 78 (Harlan, J., concurring).

139. 338 U.S 632 (1950).

distinct legal entity,[140] thereby drawing Fourth Amendment protection.[141] Similarly, the Court granted Fifth Amendment protection via the construction of corporations as artificial entities,[142] yet invoked the privilege against self incrimination.[143]

This "confusion worse confounded"[144] continued in *Hague v. CIO*, where Justice Stone asserted that, "[t]he corporations cannot be . . . deprived of civil rights of freedom of speech and of assembly . . . ."[145] By relying on the invocation of "persons" for the Fourteenth Amendment protection under natural entity theory,[146] the Court observed, "liberty . . . embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well."[147] Clearly, the corporate personhood doctrine has been taken in and out of the discussion, embraced and abandoned as the exigencies of the issue warranted. In its confusing construction of a constitutional operationalism,[148] the Court invoked corporate personhood theory at times to support its objective of invalidating states' regulatory rights[149]

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

141. *Id.*

142. *Id.*

143. *Id.*

144. The saying "confusion worse confounded" implies confusion made even worse. This term was made famous from an epic poem of the seventeenth century written by John Milton. JOHN MILTON, PARADISE LOST, bk. ii, line 995 (1667).

145. Hague v. Comm. for Indus. Org., 307 U.S. 496, 527 (1939) (Stone, J., concurring).

146. Grosjean v. Amer. Press Co., Inc., 297 U.S. 233, 244 (1936) (citing Allgeyer v. La., 165 U.S. 578, 589 (1897)).

147. *Id.*

148. By "constitutional operationalism," I refer to the method of construction with which the Supreme Court has embarked on developing its corporate constitutional jurisprudence, in which the outcome of the case is validated by the method with which the case was arrived at. In other words, in relation to corporate rights, a corporation's protection under a particular amendment is validated by the method with which such corporation is defined. Carl Mayer introduced this concept in constitutional construction, noting, "[t]he Court engages in Constitutional Operationalism by suggesting that a corporation is only entitled to the guarantees of a certain amendment if, by so awarding the protection, the amendment's purposes are furthered. Therefore, the corporation is defined by the operation it performs. This pragmatic methodology obscures the antecedent, and theoretical, question of what is the nature and purpose of a corporation. Behind doctrines of commercial property and the free market of ideas is hidden the tacit acceptance of the corporation as a person, entitled to all the rights of real humans. Under this methodology of constitutional operationalism, the rationale for equating corporations and persons is not stated specifically, however, so it cannot be rebutted. There is no opportunity for denial; sub silentio the corporation is legitimated as a constitutional actor." Mayer, *supra* note 47, at 650.

149. *Conn. Gen. Life Ins. Co.*, 303 U.S. 77.

and abandoned it at times to support its objective of expansion of corporate rights via a different invocation of constitutional grant.[150]

The dissonance in law surrounding corporate personhood perhaps finds the greatest confusion in the association of corporate rights under the Bill of Rights.[151] The consistency argument demands that, if corporations are considered real persons, then they must enjoy the entire Bill of Rights. In reality however, nowhere in the long history of constitutional jurisprudence are corporations given the full quota of Bill of Rights in its equivalent proportion to the rights granted to natural persons. Corporations were given such rights only in the contemplation of law as warranted and required by the specificity of the cases that have come before the Supreme Court.

C. Is Corporate Personhood Justified Under Constitutional Thought Process?

Despite being one of the dominant metaphors of jurisprudence, as revealed through explicit invocation in some of the constitutional decisions by the U.S. Supreme Court, there is hardly any evidence that federal courts have embraced the idea of corporate personhood. In a similar vein, legislative processes have never conferred upon the corporation equivalent rights of personhood as granted to a natural person.[152] Legislative apprehension of granting too many rights to the corporation, as seen through the early legislative history,[153] was rooted on concerns surrounding the domineering impact of corporations in society. The history of corporations in America suggests the legal process never allowed the legislature to grant corporations rights of personhood.[154] Neither were the Framers of the Constitution interested in granting constitutional rights to the corporations.[155] This is evidenced

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150. Carl J. Mayer notes, "Important challenges to traditional corporate theory, posed by Legal Realists and economists, undoubtedly influenced the Court. Simultaneously, the invocation by corporations of more intangible rights -- of association, privacy, and speech -- in response to Modern Regulation, and in defense of Modern Property, severely strained the argument that corporations are "persons." Moreover, the need to legitimize the judicial creation of new constitutional persons underlies the Court's pragmatic, anti-theoretical approach." Mayer *supra* note 47, at 638-39.

151. *See supra* note 40.

152. *See* Schane, *supra* note 49.

153. *See Conn. Gen. Life Ins. Co.*, 303 U.S. at 85-86 (Black, J., dissenting) (noting that the legislative history of the Fourteenth Amendment did not support corporate entities to be included under the Amendment's protection); *see also* Sunstein, *Naked Preferences, supra* note 33.

154. *See generally* Schane, *supra* note 49.

155. *Id.*

through various founding documents,[156] historical letters, and correspondences.[157] As some of the highly enlightened individuals in the Western world, the Framers had inculcated in their construct a robust meaning of democracy, acquiring an awareness of the real threat of corporations depriving individuals of their liberty.[158] A litany of negative experiences in colonial times had shaped their understanding of the corrosive impact of corporation[159] and thus the term "corporation rights"[160] or "corporate personhood"[161] never adorned the texts and amendments of the Constitution. As a result, when the Constitution was drafted, corporations were left out of specific identification and thus the creation of corporations through chartering and enactment of law were given to the states.[162] This is seen in the explicit mention of only two

156. *Id.*

157. *Id.*

158. As Justice Stevens noted in his dissent in *Citizens United*, "The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends." *Citizens United*, 130 S. Ct. at 949-50 (Stevens, J., dissenting) (footnote omitted); *see also* Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law*, 2 HARV. STUD. IN JURISPRUDENCE 1 (1918); J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, 13-28 (1970) (observing the Framers' awareness of a corporations' negative impact on common citizens' rights). In 1795, during the Framing era, a constitutional court observed, "[b]ecause 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." 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 (Alfred A. Knopf ed., 1992) (discussing corporate special privileges at the founding).

159. James Madison 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." ANNALS OF CONG., 1ST CONG., 3RD SESS. 1950 (1791); For a discussion of the proposal and the surrounding debates, see Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 7-10 (2008); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169–70, 329–30 (Erwin Glikes ed., 1990).

160. *See* ANNALS OF CONG., *supra* note 159.

161. *Id.*

162. *Id.*

entities in the evolution of the Constitution—"We the People"[163] and "government."[164] Both entities were placed across an invisible line as two counter-balancing forces, working in equilibrium to protect a democratic framework. Corporations should therefore find a more regulated role, not the elevated one contemplated in *Citizens United.*

Indeed, the corporation was created as an artificial entity that, at the beginning of the Republic, had very few of the powers with which it has now been endowed.[165] The last two centuries' sustained assertion of rights by the corporation shaped the judiciary into at least accepting the corporation as a quasi-person entity[166] with all operational rights of real persons.[167] The granting of an elevated status from the rights perspective was indeed in contemplation of creating a level playing field with respect to natural individual persons; an array of expanded rights were granted to the corporation.[168] This elevation of corporate entity, a fundamentally artificial entity,[169] over real person was achieved through step-by-step building blocks, where each incremental right such as perpetual life,[170] limited liability,[171] and ability to declare voluntary bankruptcy to avoid financial obligation,[172] carved out an unaccountable sanctuary of

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163. *Id.*

164. *Id.*

165. *See* Schane *supra* note 49, at 564, 567-68.

166. I establish the difficulty of fully embracing the idea of "full personhood" for corporate entities in jurisprudence, yet, I observe expansion of various constitutional rights for corporations in equivalence with those granted to natural persons. Eventually, I seek to conclude that, perhaps, construing corporate rights as some sort of quasi-personhood right might account for some of the inconsistencies found in the jurisprudence.

167. *See* Schane, *supra* note 49, at 563.

168. I generally refer to the post-*Santa Clara* corporate constitutional jurisprudence. Beginning in the 1886 decision in *Santa Clara*, where corporate personhood doctrine became the watershed moment for the corporate rights narrative in American constitutionalism, a series of Supreme Court decisions for the next one hundred-twenty five years paved the way for corporate entities to assert rights under various amendments of the Constitution. *See Santa Clara*, 118 U.S. 394 (1886).

169. *See* Mayer *supra* note 47, at 638-58.

170. *See* Norman Barry, *The Theory of the Corporation: Corporate Capitalism Is a Great Achievement* (Mar. 2003), *available at* http://www.thefreemanonline.org/featured/the-theory-of-the-corporation/.

171. *Id.*; *see also* Henry M. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 106-08 (1989).

172. Carl Mayer noted, "The corporate drive for constitutional parity with 'real' humans comes at a time when legislatures are awarding these artificial persons superhuman privileges. Besides perpetual life, corporations enjoy limited liability for industrial accidents such as nuclear power disasters, and the use of voluntary bankruptcy and other means to dodge financial obligations while remaining in business." Mayer, *supra* note 47, at 658-59; *see also,* ROBERT B. REICH & JOHN D. DONAHUE, NEW DEALS:

freedom for the corporation, in direct deprivation of presumptive rights for individuals. Although this process unfolded through more than a century of jurisprudence and evolved through hundreds of constitutional decisions, corporate personhood continues to be an elusive reality in jurisprudence.

D. Corporate Personhood Conflicts with Nexus of Contracts

To further contribute to its definitional conundrum, a corporation has been addressed as a 'legal person,'[173] 'legal fiction,'[174] and 'artificial person,'[175] all stopping short of calling it a natural person. However, the contractual theory of the corporation is in stark contrast to the legal concept of the corporation as an entity created by the state.[176] This tension between the contractual theory of corporations and the entity theory of the corporation brings in further confusion in the establishment of the doctrine of corporate personhood. Contractual theory of corporations is founded in private contract, where the state's role is to enforce the contract that the corporation has created.[177] Here, each contract in the nexus surrounding the corporation must have the same legal and constitutional protections as other legally enforceable contracts.[178] Thus, the nexus of contract theory of corporations recognizes that the legal and constitutional protection emanates from the force of contract, and not through endowment of entities within the

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THE CHRYSLER REVIVAL AND THE AMERICAN SYSTEM, 58-59 (1985) (describing how the bankruptcy laws allow firms to escape obligations).

173. *See* Schane, *supra* note 49, at 563.

174. *See id.*

175. *See* BLACKSTONE, *supra* note 47, at 475-76.

176. *See* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989).

177. Here I generally refer to the contract theory based description of corporation that subscribes to the modern associational view of corporation. This is where the corporation acquires its meaning by evolving through a series of cascading relationships among various units of production called "nexus of relationships." *Id.* at 1478. This theory has gone through transformation by legal and economic scholars, some of whom view the corporation as "a legal fiction that serves as a nexus for a set of contractual relationships among individual factors of production." *Id.* In this "nexus," the corporate manager is the facilitator who ensures perpetual life for the corporation, by triggering and managing "a continuous process of negotiation of successive contracts." *Id.* (citing Michael C. Jensen & William H. Meckung, *Theory of The Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976)). *See generally* Melvin Aron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 GEO. WASH. L. REV. 582. (1984) (discussing contractual approach).

178. *See* Bratton, *supra* note 176.

contract.[179] Therefore, a corporation in this construct can be seen as an entity that acquires its meaning through its actions in relation to other entities, not in its relative dominance of other entities. Corporations exist in equilibrium and in contemplation of exercising the contractual meaning between themselves and other entities.[180] Therefore, any attempt to suddenly endow the corporation with an expansive illumination of constitutional rights may comparatively deprive other entities to the contract of similar rights.[181] Since a corporation must satisfy its contractual obligation in equilibrium with other entities, it is inherently inconsistent for it to acquire expansive meaning within the contract paradigm. The contractual arrangement of corporations also compels us to see the contractual meaning of such contracts within the full evaluation of the freedom of the contract,[182] where parties to the "nexus"[183] must be allowed to structure their relationships as they desire. Again, in freedom of contract, within the meaning of the nexus of contract framework, a corporation is entitled to a set of carefully constructed constitutionally permitted privileges to operate within society.[184] Nowhere in this contractual paradigm, is primacy given to

179. *See id.*

180. *See id.* (referring to the relationship between corporate units mentioned here).

181. This concept is discussed throughout this article.

182. In constitutional jurisprudence, the freedom of contract derives its force from the contract clause of Article I, Section 10 of the Constitution, explicitly prohibiting the states from impairing the obligations of contracts. *See* U.S. CONST. art. I, §10, cl. 1; *see also* David E. Bernstein, *Freedom of Contract*, GEO. MASON LAW & ECON. 2 (2008), *available at* http://ssrn.com/abstract=1239749. One scholar observed, "This clause had the potential to be the foundation of a general right to freedom of contract, but the Supreme Court held in *Ogden v. Saunders*, 25 U.S. 213 (1827), that the clause applies only to retroactive impairments of existing contracts, not to general police power regulation that affects future contracts." Bernstein, *supra.* Freedom of contract became extremely controversial in the *Lochner* case. *See* Sunstein, *Naked Preferences*, *supra* note 33. According to Bernstein, the post-*Lochner* period of constitutional jurisprudence represented a new found protection paradigm based on freedom of contract, as he noted, "It was only after *Adkins* that *Lochner*'s vigorous protection of freedom of contract was no longer an anomaly. The next decade or so marked the Court's most aggressive consistent enforcement of freedom of contract. The Court, for example, invalidated a law regulating the size of bread loaves (*Jay Burns Baking v. Bryan*, 264 U.S. 504 [1924]), and a law establishing an ice monopoly in Oklahoma (*New State Ice v. Liebmann*, 285 U.S. 262 [1932]). The Court also expanded its protection of liberty of contract to include private school attendance (*Pierce v. Society of Sisters*, 268 U.S. 510 [1925]), and foreign language instruction (*Meyer v. Nebraska*, 262 U.S. 390 [1923]) . . . ." Bernstein, *supra*, at 6-7. Despite its prominence in early jurisprudence, freedom of contract is relatively "unprotected under modern constitutional law." *Id.* at 9.

183. *See supra* note 181.

184. *See* Bratton, *supra* note 176.

transform that privilege into constitutional entitlement as has been proposed in the most recent ruling, *Citizens United*.[185]

The corporate personhood theory in *Citizens United* gained momentum because of the judiciary's explicit recognition of political speech rights of the corporation. But this version of the corporate personhood doctrine gets perhaps the biggest jolt if a set of threshold questions are asked. For example, who makes the decision as to when and how the corporation will have its political speech delivered? Because it is clear that corporation is not a metaphysically complete natural entity,[186] and there is a need for well-structured and substantiated laws to illuminate and reveal its desire to speak. Despite Justice Kennedy's affirmation both in the existence and in the sufficiency of the procedures of corporate democracy to govern corporate decisions to engage in political speech,[187] the threshold question regarding the decision maker, the limits, the manner, and the temporal context of corporate speech remains undefined and outside the periphery of legal rules.

Clearly, the judiciary's venture into expanding the corpus of corporate rights has created an unaccountable Frankenstein, albeit in a faulty attempt to create a variant of corporate personhood. This attempt was neither driven by the exigencies of economic advancement, nor was it based on any altruistic social justice-driven agenda. Rather, this exigency was manufactured through the confusion of the perennial American dilemma in which Americans are conflicted between their yearning for the pre-industrial era of individualism and an existential desire for amenities of the modern era only exacerbated by corporate advertisement and driven by false needs.[188] Therefore, corporate

185. *Citizens United*, 130 S. Ct. at 916.

186. By 'metaphysical' I refer to the ontological construct that can acquire meaning from an existential sense without having a physical form and without association with any other entity. In this construct, it is difficult to conceptualize the existence of a corporation without its association with other entities, which leads us to conclude that a corporation cannot be a natural entity.

187. *See generally Citizens United*, 130 S. Ct. 876.

188. False needs are artificially created realities designed by the controlling system and injected into the subjective core of the individual such that *these* needs become true needs in the consciousness of the individual. When the individual is stripped of inherent internal history and the society is reasonably symmetric, this injection process becomes much more efficient, effective, and relatively everlasting. The efficacy of this process lies in the fact that these false needs overcome the resistance from inherent individual tendencies of self-gratification and self-determination, and thereby are able to bypass the more subjective human essence. The symmetry process resets the individual self-determination into a collective, externally imposed self-determination, and realigns the inherent self-gratification by superimposing the objective desire of the controlling element. In essence, I refer to the monolithic tendency of an individual within a symmetric social order that follows the lead. Robot-like, these collective needs of an individual are thus driven by an

personhood, introduced into constitutional jurisprudence not via judicial construction, but through an inadvertent mistake by the clerk of the Court,[189] is an illusory concept and will continue to be fodder for judicial objection in contemplation of law, far detached and isolated from finding sanctity of the natural person. Indeed, it shall remain a dominant metaphor in the constitutional jurisprudence, not because of its significance, but because of the confusing conundrum with which it is associated.

IV. *CITIZENS UNITED* AND MARKETPLACE OF IDEAS

The *Citizens United* Court relied heavily on the theory of the marketplace of ideas.[190] Founded in Justice Holmes' dissenting opinion in *Abrams*,[191] the theory of the marketplace of ideas has gained momentum through a series of First Amendment opinions.[192] Centered

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artificially created rationality. Under the influence of a dominating power, such as a corporation or the media, individual societal needs get carefully designed and eventually sublimated into a deeper consciousness where the individual suffers from the effects of bounded rationality. In this existence, the individual rationalizes not only her false needs, but also her requirement of symmetry within the environment in such a way that rationality cannot extend the artificial barrier imposed upon her current consciousness. *See* generally, Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165 (2009) (providing an expository analysis of false needs and its shaping effect on society).

189. *See* Schane, *supra* note 49, at 563. Although *Santa Clara* is remembered as the watershed constitutional case based on the modern assertions of corporate personhood and the claimed First and Fourteenth Amendment entitlements for corporations, the actual case was never about constitutional decision-making. *See generally Santa Clara*, 118 U.S. 394. The Chief Justice never considered review of the corporate constitutional rights. *Id.* In a stroke of coincidence, the clerk of the court misrepresented the opinion while writing up the case summary, after the Chief Justice had actually avoided making a decision. *Id.* It was back in 1886 that the Supreme Court decision in *Santa Clara* ostensibly led to corporate personhood and free speech rights, thereby guaranteeing protections under the First and Fourteenth Amendments. *Id.* "However, according to Thomas Hartmann, the relatively mundane court case never actually granted these personhood rights to corporations. In fact, Chief Justice Morrison Waite wrote, 'We avoided meeting the Constitutional question in the decision.' Yet when writing up the case summary—which has no legal status—the Court reporter . . . J.C. Bancroft Davis, declared: 'The defendant corporations are persons within the intent of the clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a state to deny any person within its jurisdiction the equal protection of the laws.'" PETER PHILLIPS & PROJECT CENSORED, CENSORED 2004: THE TOP 25 CENSORED STORIES 74-75 (2003).

190. *See supra* note 5.

191. Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

192. *See supra* note 5.

on an economic view of freedom of speech,[193] this doctrine imparts a sense of maximization of consumer preferences[194] in the constitutional value of freedom of speech.[195] The *Citizens United* Court, in invalidating *Austin*'s holding that banned political speech based on the speaker's corporate identity, embraced Justice Holmes's doctrinal development, as Kennedy observed, "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment. It permits the Government to ban the political speech of millions of associations of citizens."[196] In this context, *Citizens United* is problematic on two fronts. First, the doctrine of marketplace of ideas is premised on maximizing consumer preference in the protection of constitutional speech, an objective shared by the *Citizens United* Court.[197] The Court, however, never leaves its shallow constitutional confines to delve deeper into the procedural level of implementation. Illuminated first by Justice Holmes[198] and subsequently followed in doctrinal development, the marketplace of ideas contains both procedural and threshold safeguards, which remain out of the scope of Justice Kennedy's discussion. Second, while embracing this doctrine in *Citizens United,* the Court does not follow a consistent trajectory of jurisprudence.[199] Rather, its invocation is based on the existential need to justify a desired outcome. This predictable construction of inserting a doctrine to fit the theory is a rather conventional practice. As a result, First Amendment jurisprudence continues to suffer from inconsistencies of periodic embrace and discard of doctrines borne out of exigencies of specific desired outcomes. Lacking a robust locus of consistent doctrinal development, the continued pursuit of implementing principled grounds of justification to advance particularized decisions can cause confusion and contribute to attenuation in precedential values of prior decisions. Unfortunately, *Citizens United* is no different, as I examine below.

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193. In the marketplace of ideas, the free flow of ideas ensues via uninterrupted and unhinged exchange of massive participation of entities with their respective communicative framework. As in economic free trade arrangements where all trades have an equal chance of success, the marketplace of ideas indicates that all views would have an equal chance of getting heard.

194. Maximization of consumer preferences refers to the ability of all consumers to express their viewpoints as long as the consumer is willing to participate. For a detailed exposition see CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 171-76 (1999).

195. Here, I generally refer to the constitutional framework by means of which maximization of participation is ensured.

196. *Citizens United*, 130 S. Ct. at 906-07 (citations omitted).

197. *See id.*

198. *See Abrams*, 250 U.S. at 630 (Homes, J., dissenting).

199. *See generally Citizens United*, 130 S. Ct. 876.

A. Marketplace of Ideas in History

The theory of the marketplace of ideas entered the political conception of the First Amendment at a critical junction in American history. History recounts this as a time when a narrow interpretation of the political crime of seditious libel was threatening the very fabric of American democracy.[200] Justice Holmes sought to protect the "censorial power of the people over the government" by proposing "free trade in ideas" in the "competition of the market" to protect freedom of speech.[201] The development of this doctrine has been discussed by other scholars,[202] and I shall refrain from a rehearsal of that description. Rather, by exploring the procedural constructs of how this doctrine can be exercised to protect the constitutional values of freedom of speech, I observe that the underlying rationale embracing the theory in *Citizens United* might be flawed.

Justice Kennedy observes in *Citizens United* that *Austin*'s ban of political speech is tantamount to the chilling of political speech.[203] Chilled because it would stop the free flow of ideas from entering the marketplace, this would indeed go against the constitutional value of freedom of speech.[204] Here the *free trade of ideas* metaphor gains currency from the understanding that, in deliberative democracy, all ideas must be allowed to come to the meeting point of ideas. This is premised on the recognition that, within socio-political discourse in contemporary society, ideas with the greatest power of conviction should prevail in democratic deliberation. As Justice Holmes understood, and other scholars pointed out,[205] the danger of inconsistent objectives and conflicting theoretical adherence can ruin the purpose of a specific doctrine.

We must explore this aspect of *Citizens United* by addressing a fundamental question: Is the marketplace of ideas analogy the correct framework through which *Austin*'s invalidation can be justified? Justice Kennedy never ventured to go to the next level of abstraction that is required to fully extricate the relevance and intended construct behind Justice Holmes's marketplace of ideas. While Justice Holmes intended the truth function mechanism for process level testing to validate the

200. *See generally* Debs v. United States, 249 U.S. 211 (1919).

201. *Abrams*, 250 U.S. at 629-30 (Holmes, J., dissenting).

202. *See generally* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 789 (1989); *see also*, Post, *supra* note 5.

203. *See Citizens United*, 130 S. Ct. at 891-92.

204. *Id.* at 913.

205. *See* Post, *supra* note 5, at 10-13.

application of his doctrine,[206] Justice Kennedy was reluctant to embrace such detail-oriented application. Therefore, without a corroborative doctrinal test, *Citizens United* can never validate its implementation of the doctrine, nor can the opinion institutionalize the doctrine's constitutional objective. Apprehensive of precisely such an incoherent outcome of his newly minted doctrine, Justice Holmes proposed this truth seeking function-based application of his doctrine in his dissent in *Abrams*.[207] He understood that in order for the marketplace of ideas to acquire a robust meaning it must protect speech to an extent necessary for the pursuit of truth. The Court observed in *Turner Broadcasting System, Inc. v. FCC*,[208] "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[209] This understanding did not find force in Justice Kennedy's opinion in *Citizens United*.[210] Instead, it remained muted in Justice Kennedy's construction of not exerting the full force of the marketplace of ideas, leaving us to ponder why such an important procedural level requirement in the form of a truth-seeking function has been left out of the doctrine.

To efficiently implement the doctrine would require an adequate understanding of the truth-seeking function of the marketplace of ideas in the relevant setting for which it is intended.[211] The mere fact of a huge conglomeration of ideas flowing from the massive participation of entities with their respective communicative properties of speech evidently requires necessary safeguards in the shared social practice and norm. In this shared environment, the capacity of comprehension of political speech must be accompanied with ability for self-evaluation. This ability is borne out of a commitment to reason, and solidified in practice by the association of the reasoning with dispassionate neutrality

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206. *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (arguing "that the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 52, 56 (1988) (describing the truth-seeking function of the marketplace of ideas" where "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas") (quoting FCC v. Pacifica Found, 438 U.S. 726, 745-46 (1978)).

207. A truth-seeking function would allow the doctrine to implement the objectives envisioned in the theory. For a general discussion of other scholars view of "truth-seeking function," *see supra* note 5; *see also* Laura A. Heymann, *The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer*, 43 GA. L. REV. 651, 664 (2009).

208. *See* Turner Broad. Sys. Inc. v. FCC, 507 U.S. 1301 (1993).

209. *Id.* at 1304 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)); *see also Hustler Magazine*, 485 U.S. at 52, 56.

210. *See Citizens United*, 130 S. Ct. at 896-97.

211. *Hustler Magazine*, 485 U.S. at 52.

and objective evaluation. Therefore, the truth-seeking function Justice Holmes envisioned in his marketplace of ideas doctrine is premised on having an objective deliberation process that must be ingrained within the social fabric of the marketplace.

Citizens United has misapplied the marketplace of ideas doctrine by simply scratching the surface without going to the required depth of the truth-seeking function. This truth-seeking function has been solidified in post-Abrams constitutional cases by equating the requirement of constitutional protection of speech with an adequate frame of reference,[212] which looks through the prism of the exigencies of society. This exigency, however, is not borne in ephemeral isolation of facts, nor does it emanate via a decision-driven outcome. Rather, it must emerge in objective deliberations of a multitude of ideas. Therefore, the marketplace of ideas doctrine must go beyond a theoretical determination of regulatory needs of communication according to available constitutional standards of the theory, unlike the product of the narrow interpretation envisioned in *Citizens United.* However, performance of that constitutional determination requires that the intended messages be understood by the recipients of those messages, a broader construction that is not addressed in *Citizens United.*

B. Is the Marketplace of Ideas Doctrine in Jeopardy for its Faulty Application in Citizens United*?*

Clearly, procedural safeguards in the application of the marketplace of ideas have been ignored in *Citizens United,* and special attention was not given to carefully filter "false idea[s]."[213] In the continuous trajectory of the evolution of the marketplace of ideas, it was observed, "[t]he First Amendment recognizes no such thing as a false idea."[214] This is again scratching the surface of a doctrine, as this blanket doctrinal imposition simply channels us to a particularized outcome, but objective constitutional interpretation mandates that false ideas can and must be regulated, even in the context of commercial speech.[215] So, does the

212. I draw attention to the procedural safeguard that must be associated with the theory surrounding the marketplace of ideas. Without a procedural understanding, the theory is most likely to be misapplied, yielding erroneous conclusions. There is a danger to such construction and in the context of the marketplace of ideas, Justice Holmes was aware of such a constructionist fallacy, and therefore, he was able to establish his doctrinal development with solid foundation by introducing procedural finesse with "truth-seeking function." *See* Post, *supra* note 5.

213. *See Hustler Magazine*, 485 U.S. at 51.

214. *Id.*

215. *See generally* Redish, *supra* note 5.

truth-seeking function compel us to find a distinction between "false ideas" and "non-false ideas"? Must one of these two ideas gain primacy in our cognitive construct? Not much has been clarified in that sense. However it is imperative that the general public have the ability to sort out false ideas from the conglomeration of ideas that come before them in the marketplace.

In this context, the robustness of the truth-seeking mechanism depends on the sanctity of the deliberative process. In this context, Professor Robert Post observed that, John Dewey recognized the critical importance of this deliberative process. In explaining how to conduct this deliberative process, Dewey noted that it must be done via cooperation amongst all the speeches that come into the marketplace, such that the cooperation is not coerced by "forceful suppression"[216] by any participant of the deliberative process. This viewpoint also resonates with Charles Pierce, who provided a definition of the truth-seeking function by proposing "the method of science as the truth-seeking mechanism."[217] In such expression, the truth-seeking mechanism is divorced from "the method of authority"[218] that employs the organized force of the state to suppress "liberty of speech."[219] Revisiting its origin and doctrinal development once again provides a stark reminder that the marketplace of ideas doctrine must be handled with prudence. It is applicable only when there is an objective deliberative process in place for the truth to emerge without coercion from the competition of ideas.

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216. John Dewey observed that rational deliberation depends upon "'the possibility of conducting disputes, controversies, and conflicts as cooperative undertakings in which both parties learn by giving the other a chance to express itself,' and that this cooperation is inconsistent with one party conquering another 'by forceful suppression . . . a suppression which is none the less one of violence when it takes place by psychological means of ridicule, abuse, intimidation, instead of by overt imprisonment or in concentration camps.'" Post, *supra* note 5, at 18. *See also* John Dewey, *Creative Democracy The Task Before Us*, *reprinted in* CLASSIC AMERICAN PHILOSOPHERS 389, 393 (Max H. Fisch ed., 1951).

217. According to David Bogen, Justice Holmes may have been influenced by Charles Pierce's definition while he was devising a robust implementation of his marketplace of ideas doctrine. *See* David S. Bogden, *The Free Speech Metamorphisis of Justice Holmes*, 11 HOFSTRA L. REV. 97, 119 (1982). According to Bogen, this may be evidenced by Holmes' articulation of the truth function, because of its ability to separate false ideas from the rest of the ideas using Pierce's "method of science" philosophy." *Id.* at 120 (quoting Charles S. Pierce, *The Fixation of Belief*, *reprinted in* C.S. PEIRCE, SELECTED WRITINGS 92 (Philip P. Wiener ed., 1958)). In his article, Professor David Post invokes Charles Pierce in order to advocate this deliberative dialectics surrounding speech. *See* Post, *supra* note 5, at 13-15.

218. *Id.*

219. *Id.* at 117.

In today's political economy, the method of authority comes more from the domineering impact of a corporation than that of a state. Today's corporations have achieved such status, in part by extending their tentacles to every aspect of consumer society, but mostly by shaping consumer preferences through sheer visibility.[220] According to Professor Post, Charles Pierce forewarned us of the dangers of the organized force of the state more than a half-century back.[221] Today's organized force, however, comes not from the state in the Western democratic world, but from the relentless flexing of domineering power by the corporation. If we realize that corporations are in every walk of our life, shaping and reshaping peoples' needs while slowly influencing individual constructs since birth, perhaps we can grasp the requirement of an objective truth-seeking function. Clearly, mere invocation of the marketplace of ideas to grant political speech would render the doctrine inoperable, as it would severely undermine the original objective of Justice Holmes's vision. If a corporation is given an unfettered ability to spend its treasury funds in support of a candidate in the process of deliberative democracy, what would happen to other political speeches that are not backed by equivalent corporate resources?

We live in a society where the advent of highly technological devices has created a virtual world for everyone to shape, unfold, and illuminate in isolated confines of the internet. Societies are continuously being formed and consolidated both in physical isolation and without proximate physical interaction amongst participating entities. In this non-confrontational societal participation, the vehicle for communication has largely been speech disseminated either via corporate-controlled media, such as network television or radio, or designed via corporate pathways, such as the iPad, iPhone, or the Internet. It is therefore important to understand the marketplace of ideas' contextual relevance, both in the temporal difference of its origination and in its contemporary applicability. When the marketplace of ideas was brought forward initially, society was not shaped and enabled by such influencing forces of the corporation, nor was it constructed in today's proximate isolation and escalating absence of actual human interaction. Society has evolved much to the absence of those cooperating objective fundamentals sought out by Justice Holmes in devising and designing his truth-seeking function.[222] The absence of such procedural safeguards, as seen in

220. Throughout this discourse, I draw attention to the domineering power of corporations in today's marketplace, especially in their ability to influence opinion.

221. *See* Post, *supra* note 5, at 13-14.

222. *See generally* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 1-46 (2004).

Citizens United, raises enough doubts to signal that indeed this case may have been wrongly decided.

C. Embracing the Marketplace of Ideas—Corporation-Individual Conflict

Citizens United's implication should be seen as an existential conflict between two sources of ideas coming into the marketplace, raising important questions of doctrinal validity that may turn on constitutional sanctity.[223] Can we legitimately embrace the neutral objectivity that must be given to this deliberative process? According to the theory, all speech, whether coming from an individual or a corporation, must be given equal opportunity to come into the marketplace of societal discourse. Within this framework, which purports to retain the integrity of the deliberative process, the most convincing of the speeches should prevail. Yet, what is the legitimate chance that a non-corporate individual's political speech will be able to rise through the domineering conglomeration of corporate speech from the media, Internet, and associated technological paraphernalia, in order to retain its visibility? Can a non-corporate speech be truly "uninhibited?"[224] Indeed, the marketplace of ideas is a robust doctrinal development in First Amendment jurisprudence, but today's marketplace of ideas, as constructed in *Citizens United*, is not truly "uninhibited." In this distorted social fabric, the marketplace of ideas doctrine loses its force as the question of congruent application illuminates our evaluation. Therefore, as *Citizens United*'s adoption of this doctrine is constructed under a faulty framework, we must reject its constitutional implications.

V. SPECTER OF DESTRUCTION OF DEMOCRATIC INTEGRITY

Thus far I have developed an interpretation of *Citizens United* by looking through two theoretical developments the Court has relied on in its invalidation of *Austin*'s censorship of corporate political speech. First, the Court used corporate personhood theory as a vehicle to advance its explicit espousal of political speech rights of the corporation.[225] Second, the majority's venture in introducing the marketplace of ideas doctrine to enhance corporate First Amendment rights was poorly constructed for

223. I draw attention to fidelity, a coherent judicial construction framework that does not turn on desired outcome-driven jurisprudence or isolated constitutionalism.

224. The expression "uninhibited" refers to expression of ideas in the marketplace that is neither coerced nor muzzled by domineering forces.

225. *See infra* Part III.D.

various reasons explained above.[226] Most notably, in articulating its rationale, the Court has not taken into account how the difference in views of various competing stakeholders in the marketplace can be addressed. Such divergence of views can arise under various circumstances. For instance, through the corporation's assertion of its political speech rights, the broader shareholder community and the corporate managers may be impacted asymmetrically. Likewise, corporate political speech decisions may impact minority and majority shareholders differently, due to discrepancies in viewpoints that exist between them. *Citizens United*'s framework would essentially ignore these differences by bringing to the surface the most domineering of these speeches by emboldening the preferred corporate speech. This presents a clear and existential danger to all other speeches that falls outside the protection of an expansive conception of corporate speech. As I see it, this disenfranchisement and deprivation of relative rights is akin to a destruction of the democratic integrity, the very prevention of which the Court ironically advanced as its objective in making this decision.[227]

A. Addressing Divergence between Corporate Managers and Shareholders

Although the *Citizens United* majority conferred upon the corporations an expansive version of political speech rights,[228] it did not take into consideration how other shareholders and stakeholders might be impacted by such an expanded scope of constitutionally protected corporate political speech. As a result, the majority failed to articulate the process by which these rights must be protected for all corporate stakeholders.[229] This brings me to the legitimate threshold question, who makes corporate decisions to engage in corporate political speech? Scholars have made two broad assertions to address this threshold question.[230] First, in the absence of any future safeguards, the decision to engage in political speech in the near future is expected to be shaped by the existing plenary authority of the corporate managers—the directors and executives of the corporation.[231] While the safeguards could come from any measure, such as new legislative development, a constitutional

226. *See infra* Part IV.
227. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 917 (2010).
228. *See infra* Part III.D.
229. *See infra* Part III.
230. *See* Bebchuck & Jackson, *supra* note 17, at 83-90.
231. *Id.* at 87-89.

amendment, or a new development in constitutional jurisprudence, they remain unavailable at this time. Second, based on the existing corporate framework, there is no distinction between ordinary business decisions and corporate decisions to embark on political speech.[232] The decisions surrounding the time, nature, and content of political speech will be governed by the existing plenary authority along the same framework that defines how ordinary business decisions are made.[233] Therefore, in the existing framework, these decisions do not require shareholder input, as they do not trigger disclosures for shareholders. In a similar vein, they do not require input from the independent directors of the corporation's Board of Directors.[234]

The existence of significant divergences between the interest of corporate directors and executives and those of the shareholders that has not been adequately addressed would be an important legacy of *Citizens United*. Given their tremendous financial implications, even the most innocuous of political speeches could impact such divergence sufficiently to advance one entity's interest over another.[235] Remedies exist in recognizing that political speech decisions and ordinary business decisions as groups of activities must be governed by different rules of application and engagement.[236] The different rules must be accompanied by two fundamental safeguards. First, minority shareholders' interests must be protected—otherwise minority shareholders would be forced to associate with political speech supported by their majority counterpart. Again, this is not the objective of the marketplace of ideas doctrine. Second, such rules must account for the difference in political aspirations, including First Amendment interests and economic objectives of the minority shareholders, which may not necessarily align with the majority shareholders.[237] This would allow additional safety

232. *Id.* at 89-91.

233. *See Citizens United*, 130 S. Ct. at 894-97 (focusing on corporate political speech and rationalizing elimination of any remote factor that might contribute to a chilling of such speech). The Court did not provide any mechanism or means of which any "chilling" effect to non-corporate political speech might be prevented. *Id.* In its narrow focus, the Court left open the possibility that, in the absence of no delineation between business decision-making and political speech decision-making for a corporate entity, political speech of non-corporate actors might drown in the elevated status of their corporate counterparts. *Id.*

234. *See* Bebchuk & Jackson, *supra* note 17, at 87-89 (creating significant structural difficulties given the current corporate governance framework, where no distinction is made for the decision making process or for the separate functionalities of business decision making and political speech making).

235. *Id.* at 89-90.

236. *Id.* at 88.

237. *Id.* at 87-89.

measures and would ensure that political speeches and their contents are based on legitimate shareholder involvement.

Furthermore, corporate political speech differs significantly from individual political speech in its aspiration and in subject matter analysis, as well as in its mode of available delivery mechanisms. Individual political speech is borne out of a set of fundamental ideas that have shaped an individual's construct via economic and non-economic factors. On the contrary, corporate political speech can be construed as a composite developed with a set of complex aspirations such as business fundamentals of the corporations, a corporation's rejection of the regulatory framework, and political preferences of the corporations' executives and directors, among others. This construct does not necessarily allow shareholders to align with or subscribe to the executives' political beliefs. In fact, shareholders' economic interests may never be convergent to those of the corporate executives.[238]

Despite *Citizens United*'s sustained invocation of equality of rights, in many ways *Citizens United* goes against the equality fundamental to the First Amendment's speech protection. Minority shareholders' First Amendment protections may be interrupted by majority shareholders and corporate managers alike. In this way, minority shareholders are forced to be associated with speech to which they do not conform. This is in direct violation of the Court's earlier holding in *Boy Scouts of America v. Dale*, observing that First Amendment protection of "freedom of association plainly presupposes a freedom not to associate."[239] Such sentiments resonate from a decade earlier in *Abood v. Detroit Board*, where the First Amendment rights of union members to not associate were protected.[240] In the confines of an interconnected system, such as today's corporation, allocation of rights follows patterns of non-congruence that do not necessarily allow all rights to be asserted concomitantly. Therefore, expansive invocation of a corporate right to political speech carries with it the asymmetric outcome that some rights of other entities within this allocated rights framework may be chilled, an outcome the Court never wanted to address in *Citizens United*.

B. Tyranny of Elitism Looking Through Citizens United

Expanding the scope of constitutional protection of corporate political speech brings with it a litany of unintended consequences. First, corporate political spending in support of specific candidates in the

238. *Id.*
239. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).
240. *See* Abood v. Detroit Bd., 431 U.S. 209, 234-36 (1977).

electoral process has a strong ability to affect the future outcome of the government's ability to regulate business practices in reshaping corporate governance rules.[241] The impact on corporate governance rules can have multiple consequences. For example, it could have an adverse effect on corporate economic performances as might be evident through stock return or corporate profits, in so much that shareholders may not have the interests to be associated with the corporate speech that precipitated such an outcome. Currently, wide latitude is given in the existing corporate law framework, such that corporate executives and directors have the plenary power to make business decisions.[242] This is because, under existing corporate law, there is no role for the shareholders in business decision-making.[243] There is no mandatory obligation for individual directors to opine on justifiability of political speech expenditure nor are there any disclosure requirements for investors when it comes to making ordinary business decisions.[244] In addition, given that shareholder advisory proposals are not binding under existing corporate law,[245] shareholders remain an "orphaned"[246] group when it comes to decision-making in ordinary business situations. Similarly, when views of corporate managers and directors take precedent over residual views of shareholders in corporate speech decision-making, a new area of corporate executive dominance is created where views of the shareholders are muted against the views of the corporate managers. Indeed, this can be construed as advancing the elitism vis-à-vis the tyrannical process of dominating corporate speech.[247] Finally, because

241. *See Citizens United*, 130 S. Ct at 940 (Stevens, J., concurring in part and dissenting in part) (stating that, "Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions—and the narrow interests they represent—vis-à-vis the role of political parties—and the broad coalitions they represent—in determining who will hold public office."); *see generally* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103 (2002).

242. *See infra* Part III; *see* Bebchuk & Jackson, *supra* note 17, at 83.

243. *See* Bebchuk & Jackson, *supra* note 17, at 84-86.

244. *Id.* at 88.

245. *Id.* at 87.

246. This is due to their legal and organizational structure. Corporate shareholders do not take part in the everyday decision-making process. However, within *Citizens United*'s expanded conception of corporate political speech rights, political decisions of the corporations might shape their financial outcome, which in turn will impact shareholders. Yet, these shareholders will remain outside the decision-making zone.

247. In the *Citizens United* framework, when a corporate entity engages in political speech, that speech represents the corporate managers, or in some instances, the majority shareholders. Yet, the corporate managers are vested with the authority to make decisions

investor protection has not been expressly mentioned in the decision, barring legislative interference or future judicial invalidation, the framework of elitism will allow corporate insiders to use corporate assets to lobby politicians to achieve their objective to reshape the democratic political process.

Historically, corporations have been constructed as the products of a set of legal rules that govern the relationships amongst shareholders, corporate directors, and corporate executives. Without new corporate legal guidelines, the post-*Citizens United* corporate landscape is quite deficient in its ability to delineate business decision-making from corporate political speech decision-making. Thus, *Citizens United*'s expansion of corporate rights can be seen as a concomitant attenuation of rights for non-corporate entities, including shareholders. In its asymmetric suppression of political speech rights of non-elitist and non-corporate individuals while advancing those of their minority elite counterparts, *Citizens United* could be viewed as the enabler of tyrannical elitism. In this construction, the very principle of equality and participation upon which *Citizens United* was built remains hopelessly detached in the decision's broader interpretation.

VI. CONCLUSION

This article focused its analysis on the two main doctrines the *Citizens United* Court relied on to expand corporate political speech rights—corporate personhood and marketplace of ideas. While my examination suggests that corporate personhood continues to be an illusory concept, at the procedural level, the marketplace of ideas may have been wrongfully constructed. Driven by a desire to identify a newer meaning of "corporation" in light of *Citizens United*, I embarked on a broader narrative of corporate constitutional jurisprudence to illuminate the scope of the interplay between corporate personhood and marketplace of ideas.

My article has two primary objectives. First, I seek to debunk the myth of human personification of the business corporation by illuminating the threshold question of corporate personhood: is there a

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regarding political speech. Therefore, managerial grant is bestowed on the minority who, in their sole capacity, make decisions related to which type of speech gets to the marketplace. As a result, a regular employee may never have the opportunity for his or her idea to get to the marketplace. This decision by the minority on behalf of the majority, without adopting any deliberative framework, can be seen as a tyrannical representation of the corporate speech framework. Carl Mayer has noted this elitism, which he referred to as the tyranny of the majority. *See* Mayer, *supra* note 47, at 605-06.

coherent test in constitutional jurisprudence? Despite its two centuries old constitutional operationalism, the Court has yet to devise a test for corporate personhood. Three separate observations impart robust meaning to this constitutional conundrum. First, corporate personhood never found root within the Constitution, entering in and out of favor with the need for a desired outcome in exigencies of cases. Second, *Citizens United* did not explicitly embrace corporate personhood. Its effort to erase differences between a real person's rights and a corporation's rights can at best develop a construct for quasi-personhood. Interestingly enough, this was neither done by finding flesh and blood within the corporation nor by finding life within its soul. Rather it was done by adopting a quasi-personhood abstraction within the meaning of "corporation" while showing fidelity to its legal entity description. Third, by adopting a framework to understand the meaning of "corporation," I do not see a metaphysical abstract view that must be illuminated via a living-entity-like persona. Rather, I acquire meaning through the interconnected contractual relationships that embody the modern corporation.

My second objective is to place *Citizens United*'s adoption of the marketplace of ideas theory in a proper context from a broader doctrinal perspective. Three interconnected observations illuminate my main conclusion that the doctrine was misapplied here. First, the marketplace of ideas doctrine requires a truth function to be fully illuminated such that the ability to seek truth against corrosion of comprehension can be assured. *Citizens United* neither discussed nor provided an alternative to this mechanism. Second, the mere invocation of the doctrine breeds confusion, particularly in light of an asymmetrical rights interplay between corporate citizenship and its non-corporate counterpart. An expansive political speech right granted to a corporation could potentially mute the political speech rights of the shareholders and the general public. Third, an incomplete use of the doctrine would facilitate an erroneous view of the First Amendment, and it might remove its interpretative gloss from future complex constructions.

From the perspective of advancing jurisprudence, *Citizens United* opened new intellectual strands of inquiry, while leaving some corporate law questions unanswered. The Court's focus on the "free trade of ideas," as well as on political speech jurisprudence, opened up new constructions, especially in areas where intellectual property rights intersect with the First Amendment. Similarly, the Court's attempt to re-invigorate corporate personhood could open up a more principled investigation of corporate identity along different ontological constructs at the intersection of law and society connected by abstract fundamentals.

Several other areas of future inquiry could be constructed from the Court's (*mis*)adventure here. First, the tension between Justice Kennedy's opinion and Justice Stevens' dissent can be interpreted through the fundamental disconnect between the First Amendment's broader objective of equality and the opinion's expansive potential for developing a hierarchically dispersed economic entities-based framework in society.

Second, in their quest for a broader corporate political speech right, the majority in essence has handed down an exclusive right to shape opinion by sheer dominance of corporate monetary power. As the asymmetric power of corporate-sponsored political action committees reveals itself in their shaping effect of election outcomes, the non-corporate majority faces a real danger of their political speech right being relegated to that of the corporation. Thus, the exclusivity of a select few might very well preclude a majority of citizens from exercising their own political speech right—a real possibility the *Citizens United* Court may have never thought through. Lurking in this construct is the real danger that silencing the free speech rights of the majority will give rise to a more domineering corporate entity that can reshape society even further.

Finally, *Citizens United* was decided in response to the well-settled question in campaign finance jurisprudence of whether corporate political speech should be censored due to its adverse potential for undermining democratic integrity. Despite society's general acceptance of the status quo in this area, the judiciary embarked to carve out a future for the corporate entity that might not exist in harmony with its non-corporate counterpart, but might continue in an uncertain trajectory without legislative intervention. In this, corporate law might suffer from the absence of much needed regulatory oversight in an ambience of corporate excess and economic inequality.