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Business as Usual: Hobby Lobby and the Purpose of Corporate Rights

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ARTICLE

BUSINESS AS USUAL: *HOBBY LOBBY* AND THE PURPOSE OF CORPORATE RIGHTS

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This article explores the interdependence of the discourse of corporate rights and the law of corporate purpose. I argue that the history of corporate rights reflects changing reactions of the U.S. Supreme Court to social, political, and cultural concerns, each reaction offering a different purpose for corporations in our modern society. At the turn of the twentieth century, in response to fears about the advance of socialism, the Court used liberal assumptions to justify protecting the publicly held corporation's property rights as derived from the rights of individual shareholders. In so doing, the Court helped turn the corporation, with its collective ownership, into the epitome of capitalism. In the 1940s, as fears about the potential impact of European totalitarianism on American democracy mounted, the Court drew on theories of pluralism, which focused on corporate power, to impose constitutional limitations on private entities and organizations. The corporation became the guardian of American democracy. Beginning in the 1970s, amidst concerns about the potential threat that large corporations posed to economic and political markets, the Court relied on the managerialist view that corporate managers were best suited to attend to the affairs of their corporations to rationalize the extension of First Amendment rights to corporations. Even when the Court acknowledged corporate management's responsibility to the shareholders, it

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dismissed concerns about management's usage of shareholder funds to promote corporate goals with which the shareholders might not agree. Questions about corporate rights and corporate purpose became questions of business judgment, and corporate managers became the mediators of American society's social and cultural goals.

I. INTRODUCTION

On September 12, 2012, the Green family, as owners and managers of Hobby Lobby Stores, Inc.,[1] a for-profit corporation with over 13,000 employees, brought suit against the Secretary of the U.S. Department of Health and Human Services, challenging the Patient Protection and Affordable Care Act's requirement that employment-based group health care plans provide, among other preventive care means, contraceptive methods approved by the Food and Drug Administration.[2] The Greens argued that this requirement

[1] For a detailed analysis of the ownership structure of Hobby Lobby, see Elizabeth Pollman, *Corporate Law and Theory in* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 149, 152 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

[2] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697–98 (2014).

violated the Free Exercise Clause of the First Amendment to the U.S. Constitution, as well as the Religious Freedom Restoration Act of 1993 (RFRA).[3] Writing for the Court, Justice Samuel Alito held:

> [T]he owners of . . . the companies [did not] forfeit[] all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.[4]

Hobby Lobby met with strong reactions from corporate law scholars. Leo Strine, then Chief Justice of the Supreme Court of Delaware, wrote that "if . . . *Hobby Lobby* elevates the power of corporate managers over that of secular society, then the argument that corporate law should focus only on stockholder welfare, rather than the best interests of all those affected by corporate behavior, is weakened."[5] In turn, David Millon and Lyman Johnson, strong proponents of the idea that corporations have social responsibilities beyond the maximization of value for their shareholders, were quick to announce that *Hobby Lobby* "will reshape fundamentally how business people, lawyers, legal and business scholars (particularly, corporate law professors), as well as ordinary citizens, think about the permitted objectives of business corporations in a free society, objectives that extend . . . into the larger realm of corporate social responsibility of all kinds."[6]

[3] *Id.* at 701.

[4] *Id.* at 691.

[5] Leo E. Strine, Jr., *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and its Problematic Implications*, 41 J. CORP. L. 71, 76 (2015).

[6] Lyman Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 2–3 (2015) (footnote omitted); *see also Hobby Lobby*, 573 U.S. at 756–57 (Ginsburg, J., dissenting) ("The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held

Notably, while Justice Alito focused on the rights of Hobby Lobby's owners, corporate jurists emphasized that the decision affected the discretion of corporate managers, suggesting that the discourse of corporate rights, as developed by the U.S. Supreme Court, impacts the law of corporate purpose, as developed in state courts. Seeking further to evaluate the relationship between these two discourses, this Article examines the history of corporate rights through the lenses of corporate law and theory, specifically the law and theory of corporate purpose. I argue that throughout the twentieth century, the discourse of corporate rights reflected changing reactions of the U.S. Supreme Court to social, political, and cultural concerns, each reaction offering a different purpose for corporations in our modern society.

I have previously explored how state courts used the rhetoric of corporate purpose to empower corporate managers to address apprehension about socialism at the turn of the twentieth century, about totalitarianism and the survival of democracy in the midcentury, and about the success of economic and political markets at the end of the twentieth century.[7] In this Article, I argue that similar concerns helped shape jurists' conceptualizations of the nature of corporate entities and corporate rights. By the turn of the twenty-first century, despite rhetoric that at times suggested otherwise, the discourse of corporate rights and the law of corporate purpose converged on empowering corporate managers to run corporations without intervention by shareholders, other stakeholders, or the courts. Questions about corporate rights and corporate purpose thus became questions of business judgment.

corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith." (footnote omitted)).

[7] *See generally* Dalia T. Mitchell, *From* Dodge *to* eBay*: The Elusive Corporate Purpose*, 13 VA. L. & BUS. REV. 155 (2019).

As this Article demonstrates, in responding to political, social, and cultural concerns, jurists drew upon three paradigms—a liberal paradigm, a pluralist paradigm, and a managerialist paradigm. Proponents of the liberal paradigm attempted to fit corporations—an anomaly to classical liberal thought that conceptualized the world as sharply divided between state power and individual right holders—within the U.S. constitutional tradition; to do so, they described corporations either as individuals (or persons) or as aggregations of individuals.[8] In turn, proponents of a pluralist vision of the corporation—a vision grounded in a critique of classical liberalism—recognized the realities of corporate power and attempted to constrain it as one would tame government power.[9] If the liberal paradigm lent itself to supporting corporate rights, advocates of the pluralist vision promoted imposing public limits and constitutional restrictions on corporate powers.[10] Finally, managerialists turned attention away from power and toward corporate hierarchies and advocated allowing managers freely to attend to the affairs of their corporations, including corporate purpose and rights.[11]

[8] *See infra* Part II.A.

[9] In contemporary political science and legal scholarship, the term pluralism is often associated with interest group theories of democracy, which scholars like Robert Dahl articulated during the 1950s and 1960s. *See, e.g., generally* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967). In anthropological and sociological studies, the term legal pluralism is often used to describe the multiplicity of normative centers or institutions in society. *See, e.g.*, Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 869–72 (1988). I use the term pluralism to refer to early-twentieth century pluralists, who envisioned corporations not as associations of individuals (or interest groups) but as real entities with power similar to the power of the sovereign state. For these pluralists, groups and organizations formed the foundation of the modern state. *See* Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 189–94 (2005) (reviewing ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Macmillan 1932)).

[10] *See infra* Part III.A.

[11] *See infra* Part IV.A.

To a large extent, these three paradigms developed in parallel lines, each being prominent at a different period as a response to particular social, economic, and political concerns; the three core parts of the Article correspond to these periods.

Part II, *Liberal Grounds*, explores the dominance of the liberal paradigm at the turn of the twentieth century and how, in its decisions in that era, the U.S. Supreme Court consistently envisioned corporations as aggregations of individuals (and sometimes as individuals).[12] Reacting to fears about the advance of socialism, the Court used liberal assumptions to justify protecting the publicly held corporation's property rights, as derived from the rights of individual shareholders-members, from encroachment by the states.[13] The corporation, with its collective ownership, became the epitome of capitalism.

Part III, *Pluralist Challenges*, demonstrates how, in the 1940s, as fears about the potential impact of European totalitarianism on American democracy mounted, the Court drew on pluralist ideas not to endow corporations with rights but rather to prevent certain private entities and organizations from limiting individual liberties (especially freedom of speech), on the one hand, and, on the other, to ensure that individual members of vulnerable groups and organizations enjoy their liberty rights (especially freedom of association).[14] The corporation, the bastion of capitalism, became the guardian of American democracy.

Yet, as Part IV, *Managerialist Solutions*, explores, by the last decades of the twentieth century, the democratic-pluralist

[12] *See, e.g.*, Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 409 (1886).

[13] On extending rights to corporations to protect the rights of their individual members, see, e.g., Margaret M. Blair and Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1680–1696 (2015).

[14] For example, in *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court protected an individual's First Amendment rights from encroachment by a company town. Later, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court focused on protecting the NAACP from potential scrutiny by the state so as to protect the First Amendment rights of the association's individual members.

ideal was replaced by a managerialist one,[15] and corporations gained liberty rights. When the Court, expressing a strong commitment to the free market of ideas and consumerism, extended First Amendment rights to corporations so as to ensure that individuals had access to information,[16] it endorsed the idea that corporate managers could spend corporate (and shareholders') funds to pursue goals they deemed appropriate, including those affecting the property and liberty rights of others, whether shareholders or other stakeholders. Corporations and their managers became the mediators of American society's social and cultural goals.

As the Article concludes, by the turn of the twenty-first century, amid concerns about the threat that large corporations could pose to the market economy, the rhetoric of shareholder wealth maximization came to dominate corporate law.[17] Yet, just as state courts continued to empower managers to define the shareholders' interest, the U.S. Supreme Court, while acknowledging the need to protect shareholders, dismissed concerns about management's usage of shareholder funds to promote corporate speech with which the shareholders might not agree. The Court simply endorsed the corporate law adage according to which shareholders who were not happy with their managers could either vote them out or sell their shares. "That is the deal," Justice Antonin Scalia announced in his dissent in *Austin v. Michigan Chamber of Commerce*.[18] In *Citizens United v. Federal*

[15] *See* Harwell Wells, *"Corporation Law is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305, 331–35 (2013).

[16] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[17] *See, e.g.*, Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015) ("Despite attempts to muddy the doctrinal waters, a clear-eyed look at the law of corporations in Delaware reveals that, within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."); Mitchell, *supra* note 7, at 202–07.

[18] 494 U.S. 652, 686 (1990) (Scalia, J., dissenting).

Election Commission, the Court's majority affirmed that deal,[19] and, as this Article argues, so did the Court in *Hobby Lobby*. It so happened that the Green family both owned and managed the corporation.[20]

In his thorough exploration of the history of corporate rights, Adam Winkler argues that corporations gained, first, economic, then, liberty rights by relying upon the idea that corporations are associations of individuals whose constitutional rights merit protection.[21] *Hobby Lobby* was accordingly the culmination of a century-long crusade by corporations to gain civil rights—from protection of their property in the early decades of the twentieth century, to speech rights in the midcentury years, to religious rights in the first decades of the twenty-first century.[22] By exploring the history of corporate rights as intertwining with the history of corporate purpose and corporate law and theory more broadly, this Article adds another dimension to the narrative: it illustrates how extending rights to corporations, throughout the past century, was the U.S. Supreme Court's means of finding a purpose for corporations. Viewed through the prism of corporate law, *Hobby Lobby* simply legitimatized the power of corporate managers to define their corporation's purpose.

II. LIBERAL GROUNDS

This Part explores how, at the turn of the twentieth century, as legal scholars struggled to (re)define the nature of corporate entities to fit the realities of the changing public

[19] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 361–62 (2010).

[20] David Green describes Hobby Lobby as a family-owned rather than shareholder-owned company. DAVID GREEN WITH DEAN MERRILL, MORE THAN A HOBBY: HOW A $600 START-UP BECAME AMERICA'S HOME & CRAFT SUPERSTORE 11 (2005).

[21] *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

[22] *See* Adam Winkler, *Corporations are People, and They Have More Rights than You*, THE HUFFINGTON POST, https://www.huffpost.com/entry/corporations-are-people-a_b_5543833 [https://perma.cc/KK4A-XXJM] (last updated Aug. 30, 2014).

corporation, they developed two liberal visions of the corporation: a contractual vision that likened corporations to associations of individuals, and a natural entity theory that portrayed corporations as natural entities akin to natural persons. It further demonstrates how the *Lochner*-era Supreme Court drew upon the contractual paradigm to protect the economic rights of corporations so as to defend the modern American state against the perceived threat of socialism.

A. Conceptualizing the Corporation at a Century's End

Corporations have historically represented an anomaly to liberal legal thinkers who envisioned the world as sharply divided between state power and individual right holders.[23] A corporation was both—an association of individual right holders, on the one hand, and an entity with sovereign-like powers, on the other.[24] For eighteenth-century thinkers, the continued existence of corporations demonstrated the failure of liberal efforts to destroy the intermediate forms (i.e., guilds) associated with medieval life.[25] Early nineteenth century legal doctrine eased the tension by dividing corporations into two different classes—public corporations, such as municipal associations, that "assimilated to the role of the state," and private corporations, such as business organizations, that "assimilated to the role of an individual in society."[26]

The categorization of corporations as private or public organizations shaped the boundaries of their autonomy.[27] Courts compared municipal associations to governments in order to support the imposition of checks on their powers—checks that were similar to the limits imposed on sovereign powers.[28] By analogizing commercial (as well as charitable) corporations to private individuals, the courts ensured that

[23] *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1099 (1980).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See id.* at 1100.

[28] *See id.* at 1100–01.

business corporations would be subject to more limited checks on their powers.[29] Private corporations were viewed as artificial entities (unlike real persons) created by a charter or a grant of the state—the charter being a contract between the sovereign and those seeking incorporation.[30] Corporate charters included restrictions on the activities in which a corporation could engage, the corporation's rights in property, the length of the corporation's existence, the amount of capital it could raise, and how profit would be applied, as well as provisions addressing shareholders' powers and liabilities.[31]

By the late nineteenth century, however, the depiction of corporations as artificial entities, also known as the concession paradigm,[32] lost much of its credibility as the requirement for a state charter was reduced from a means of controlling corporations to a mere formality.[33] Growing consumer demand, increasing numbers of workers, an expanding pool of capital, and the quickly developing national railroads and telegraph networks enabled the creation of large enterprises, while corporate lawyers devised different legal tools to allow their clients to increase the scope of their operations so as to avoid destructive competition among large businesses.[34] Trusts, holding companies, and mergers became common, even if often contested in state courts.[35] Beginning

[29] *See id*.

[30] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

[31] P.M. Vasudev, *Corporate Law and Its Efficiency: A Review of History*, 50 AM. J. LEGAL HIST. 237, 246 tbl.2 (2010).

[32] *See, e.g.*, Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 208 (2006).

[33] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 77–78 (1992); Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1455–56 (1987).

[34] Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1514–15 (2006).

[35] On the development of the large publicly held corporation and the legal changes that accommodated it, see HORWITZ, *supra* note 33, at 65–107; DOUGLAS M. EICHAR, THE RISE AND FALL OF CORPORATE SOCIAL RESPONSIBILITY 20 (2017) (discussing the effects of competition on the

in the 1880s, states changed their corporate laws to remove "restrictions on . . . capitalization and assets, mergers and consolidations, the issuance of voting stock, the purpose(s) of incorporation, and the duration and locale of business."[36] By the late 1890s, gone were the nineteenth-century legislative constraints on corporations' powers, as well as limitations on their capital structure.[37]

To accommodate the demise of the concession paradigm of the corporation and the quickly-developing large, publicly held corporation, legal thinkers adopted either a contractual or a natural entity vision of the corporation.[38] The contractual paradigm described corporations as aggregations of individuals, similar to partnerships.[39] In contrast, the natural entity paradigm portrayed corporations as distinct from their individual members, though, like individuals, they had real existence.[40]

Both the contractual and natural entity theories were grounded in what legal historian Morton Horwitz has labeled "'methodological individualism,' that is, the view that the only real starting point for political and legal theory is the individual."[41] Yet only the entity theory was adaptable to the realities of the modern corporation.[42] While antebellum businesses were single-unit enterprises owned by small groups of investors, in the early-twentieth century big

development of the modern corporation); JULIA C. OTT, WHEN WALL STREET MET MAIN STREET: THE QUEST FOR AN INVESTORS' DEMOCRACY 19–20 (2011) (discussing the growth of trusts).

[36] SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY 60 (1996).

[37] *See id.* ("When Delaware joined the bandwagon in 1899 . . . the new course was firmly set.").

[38] David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 211 (1990); Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 579–80 (1989); Mark, *supra* note 33, at 1444–49.

[39] Hager, *supra* note 38, at 580.

[40] *Id.*

[41] HORWITZ, *supra* note 33, at 72.

[42] Millon, *supra* note 38, at 214.

businesses were multiunit enterprises.[43] Getting outputs from the new economies of scale required large capital investments, which most individuals lacked, so firms began to draw capital from many dispersed individuals.[44] Paid skilled executives took control over the day-to-day operations of the business, and the large corporation was rapidly characterized by dispersed shareholders and centralized management.[45] The contractual paradigm could not accommodate these dramatic changes in business structure.[46] Representing the corporation as the aggregate property of its shareholders simply ignored the reality that, as ownership in large public corporations was increasingly separated from control, the owners' liability became limited.[47]

Nonetheless, the U.S. Supreme Court chose to ignore novel business realities, treating corporations as associations of shareholders and corporate rights as derived from the rights of the shareholders.[48] Beginning with its well-known 1886 decision in *Santa Clara County v. Southern Pacific Railroad Co.*—a case addressing California's tax laws affecting corporate property[49]—the Court consistently declared that the safeguards of the Fourteenth Amendment's Equal Protection and Due Process clauses protected corporations because their members, the shareholders, were so protected.[50]

[43] *See* MICHAEL J. PIORE & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE 49–72 (1984) (discussing how the early-twentieth century development of mass production as the dominant form of industrial organization resulted in the construction of giant corporations capable of balancing supply and demand in their respective industries).

[44] *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 4 (1994).

[45] *Id.*; *see also* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 490–500 (1977) (examining the modern shift toward managers running large corporations and its effect on the concentration in American industries).

[46] Mark, *supra* note 33, at 1464–65.

[47] *See id.* at 1472–73.

[48] *See generally* Blair and Pollman, *supra* note 13.

[49] 118 U.S. 394, 397 (1886); WINKLER, *supra* note 21, at 144.

[50] *Santa Clara*, 118 U.S. at 396; *see also* HORWITZ, *supra* note 33, at 69–70 (describing arguments made prior to and in connection with *Santa Clara*).

It is important to stress that the Court's decision in *Santa Clara* did not endorse the natural entity theory (or the idea that corporations were persons). As Margaret Blair and Elizabeth Pollman have demonstrated, throughout the early decades of the twentieth century (and even later), the Court had only tentatively accepted the natural entity paradigm.[51] Still, the Court's embrace of the vision of corporations as associations of shareholders helped support the underlying liberal assumptions of the natural entity theory and thus the cultural idea that corporations were persons rather than mere artificial entities. As Morton Horwitz explains, by "[r]easoning from individualist premises," contractualists were able to call attention to

> the anomalous character of the artificial entity theory of the corporation, not only because it clashed with the underlying spirit of general incorporation laws but also because of its hostility to any theory of natural rights. . . . [T]he artificial entity theory represented a standing reminder of the social creation of property rights.[52]

In contrast, "contractualists worked from a conception of property as existing prior to the state."[53] So conceived, property had to be protected from the coercive power of the state. By extending the protections of the Fourteenth Amendment to corporations, even if derivatively, the Court was able to legitimate big business and mask both its creation by the state and its power.[54]

Ironically, the Court was not necessarily keen on promoting big business. As Section II.B explicates, coming amidst growing fears about socialism (and other forms of collectivism), the Court's decisions reflected the Court's ambivalence toward the concept of corporate rights and

[51] *See* Blair & Pollman, *supra* note 13, at 1731–32.

[52] HORWITZ, *supra* note 33, at 103–04.

[53] *Id*. at 104.

[54] *See id.* at 68, 79; *see also* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 589 (1990) ("Once armed with the fourteenth amendment, corporations wielded it with considerable force.").

corporations more broadly. Rather than evaluating the nature of corporate entities, the Court focused on protecting the property rights of the corporation's members—the shareholder-owners. As I argue, given the Court's concerns about the social and political ramifications of treating property rights as anything but natural, protecting shareholders' property rights was not intended to empower corporations or shareholders; it was, rather, a means of fighting what the Court deemed a prominent threat to the survival of American society at the time: socialism.

B. Corporate Property Rights and the Fear of Socialism

The rapidly growing public corporations generated serious concerns about their economic, social, and political powers. In 1874, Thomas Cooley cautioned that state enabling laws allowed "the most enormous and threatening powers in our country" to flourish.[55] Corporations, Cooley warned, were quickly obtaining "greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence."[56] Similarly, a 1913 *Yale Law Journal* article began by noting that "[t]he dominion of corporate power is greater than the general public comprehend, also the evils which infest these creatures of the law are skilfully [sic] and secretly destroying the inalienable rights of personal liberty while the people are lingering."[57] "By the Second decade of the [twentieth] century," Alfred Chandler has explained, "[m]odern business enterprises dominated major American industries, and most of these

[55] *See* Theodore H. Davis, Jr., *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603, 619 (1991) (internal quotation marks omitted) (quoting THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 279 n.2 (3d ed. 1874)).

[56] COOLEY, *supra* note 55, at 280 n.2.

[57] J. Newton Baker, *The Evil of Special Privilege*, 22 YALE L.J. 220, 220 (1913).

same firms continued to dominate their industries for decades."[58]

The separation between ownership and control in the large publicly held corporation exacerbated the early-twentieth century agitation over the concentration of corporate power. For one thing, the 1913 report of the Pujo Committee announced the existence of a money trust, consisting of a small number of financiers sitting on multiple corporate boards. According to the report, these financiers controlled the economy with the assistance of the New York Stock Exchange, which allowed stock price manipulation techniques to the detriment of working- and middle-class individual investors.[59] A year later, Louis Brandeis explained that "[t]he goose that lays golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by somebody else's goose."[60] By controlling other people's money, investment bankers and their associates could "control the people through the people's own money."[61]

Progressives worried about the concentration of power in large business corporations. Especially given the separation of ownership from control, they feared that corporations were wearing away the function of the individual producer and, with it, nineteenth-century democratic and economic ideals—that is, the power of markets to distribute equally the rewards of individual industry and to help conform individual liberty

[58] CHANDLER, *supra* note 45, at 345.

[59] *See* OTT, *supra* note 35, at 32–33.

[60] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 17–18 (1914).

[61] *Id*. A couple of decades later, Adolf A. Berle, Jr. and Gardiner C. Means noted that the multiplicity of owners of corporations created "tremendous aggregations of property," facilitating possible accumulations of power (in the hands of the control group). ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 5 (1932). The prospect of mass concentration of power augmented the risk of inefficient uses of power and the potential adverse effect of corporations on the economy at large. *See id.* at 6–7. Because Berle and Means's argument focused on publicly held corporations (which they labeled "quasi-public"), they viewed the consolidation of power and the separation of ownership from control as interrelated phenomena. *Id*. at 5.

to socially beneficial goals.[62] For some, individual ownership of property and participation in the market economy were a means of cultivating social and political citizenship. They saw in the corporation's collective ownership a threat to the idea of "ordinary 'producers'" who "shape their world on equal footing."[63] For others, private property was a means of constraining the exercise of public power. The concentration of power in a few corporations thus posed a threat to individual autonomy.[64] As Allen Kaufman and Lawrence Zacharias write, "modern corporate society reduced the individual, America's basic element of constitutional logic, to apparent sociological irrelevance."[65]

Many also worried that the concentration of wealth in a few large corporations (and individuals) indicated that the economy was moving toward socialism. In 1897, John P. Davis wrote:

> It is sometimes prophesied with a considerable degree of assurance . . . that society is to attain in the near future a stage of development in which the social unit will be aggregate or composite instead of individual . . . and that the corporation is the institution through which socialism . . . is to be made effective.[66]

Three decades later, Brandeis, by then an Associate Justice of the U.S. Supreme Court, warned that, unless the "great captains of industry and finance" curb the curse of bigness, they would be "the chief makers of socialism."[67]

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[62] L.S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 NW. U. L. REV. 596, 618–19 (1988).

[63] *Id.* at 618.

[64] *Id.* at 619.

[65] Allen Kaufman & Lawrence Zacharias, *From Trust to Contract: The Legal Language of Managerial Ideology, 1920-1980*, 66 BUS. HIST. REV. 523, 524 (1992).

[66] John P. Davis, *The Nature of Corporations*, 12 POL. SCI. Q. 273, 279 n.1 (1897).

[67] WINKLER, *supra* note 21, at 214 (internal quotation marks omitted); *see also* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) ("Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution—an institution which has brought such concentration of

The separation of ownership from control in large corporations further intensified the distress over socialism and even communism. As Adolf Berle and Gardiner Means would observe in 1932:

> The only example of a similar subjection of the economic interests of the individual to those of a group which appears to the writers as being at all comparable, is that contained in the communist system. Though the communist ideology differs and the communist application is more drastic, the principle seems similar. As a qualification on what has been known as private property in Anglo-American law, corporate development represents a far greater approach toward communist modalities than appears anywhere else in our system . . . [T]he corporation director who would subordinate the interests of the individual stockholder to those of the group more nearly resembles the communist in mode of thought than he does the protagonist of private property.[68]

State courts sought to alleviate the growing anxiety about socialism by focusing on workers' welfare. For one thing, when corporate leaders, in an attempt to avoid ruinous strikes and dissuade workers from unionizing, began demonstrating concern for workers and committing themselves to improving workers' conditions, state courts held their actions to be valid exercises of corporate power.[69] "Expenditures resulting in stimulating the employees to better work, and promoting faithfulness and loyalty to the employer," were rendered "tributary to the promotion of corporate objects."[70] Corporations could maintain "relief funds" to support employees injured at work before workmen's compensation legislation was enacted, as well as pay bonuses to keep up employee "morale" and encourage more "energetic efforts."[71]

economic power that so-called private corporations are sometimes able to dominate the state.").

[68] BERLE & MEANS, *supra* note 61, at 278.

[69] Mitchell, *supra* note 7, at 166.

[70] Note, *Donations by a Business Corporation as Intra Vires*, 31 COLUM. L. REV. 136, 136 (1931).

[71] *Id.* at 137–38.

In 1909, the Supreme Court of New York, Appellate Division, announced that "[t]he enlightened spirit of the age, based upon the experience of the past, has thrown upon the employer other duties which involve a proper regard for the comfort, health, safety and well-being of the employee."[72] And in 1922, in *Armstrong Cork Co. v. H. A. Meldrum Co.*, a court deemed intra vires contributions by a corporation doing business in Buffalo, New York to the endowment funds of a college and a university in Buffalo because they would allow for the creation of opportunities for business training.[73] By 1931, a Note in the *Columbia Law Review* concluded that courts were "more ready to adjudge gratuitous corporate contributions *intra vires* where the immediate benefit is received by employees than in any other situation."[74]

The U.S. Supreme Court was not oblivious to the concentration of wealth in corporations and to the challenge that the separation of ownership from control in large publicly held corporations posed to the liberal understanding of property. But the Court's solution was reactionary rather than progressive. State courts, without much discussion, accepted that corporations were sovereign-like entities with centralized management, and focused their attention on channeling management's power so as to alleviate social concerns. A bastion of classical legal thought at least through the 1930s, the U.S. Supreme Court instead drew upon traditional rules to portray corporations as the embodiment of liberalism. In its decisions (including *Santa Clara*), protecting property rights became a tool in the fight against socialism. For example, Justice Stephen Field, who wrote the circuit court opinion in *Santa Clara*, stressed that a failure to extend constitutional protections to corporations was "the very essence of tyranny"—a tool in the hands of "the enemies of capitalism."[75] As Field noted, "[i]t is a matter of history that

[72] People *ex rel.* Metro. Life Ins. Co. v. Hotchkiss, 120 N.Y.S. 649, 651 (N.Y. App. Div. 1909).

[73] 285 F. 58, 58–59 (W.D.N.Y. 1922).

[74] Note, *supra* note 70, at 136.

[75] WINKLER, *supra* note 21, at 144–45 (internal quotation marks omitted).

unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world."[76]

Justice Field acknowledged the realities of corporate power. As Margaret Blair and Elizabeth Pollman observed, "[h]e made particular note of the miles of railway, the value of the roads, and the 1.6 million people employed in the operation and construction of railroads."[77] Still, Field, viewing the corporation as an association of individuals, stressed the importance of protecting its property rights:

> [W]henever a provision of the constitution or of a law guaranties to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations; not to the name under which different persons are united, but to the individuals composing the union. The courts will always look through the name to see and protect those whom the name represents.[78]

Field did not hold that "corporations were constitutionally protected persons."[79] Rather, as Ruth Bloch and Naomi Lamoreaux explain, his opinion focused on the rights of natural persons "who owned stock in these corporations and who were the ones who actually bore the burden of the unequal tax."[80]

Other cases tracked Field's analysis. As Blair and Pollman have demonstrated, "[n]ineteenth-century cases decided after *Santa Clara* do little to further flesh out the Court's view of the corporation, but what little they do in this regard is

[76] Cnty. of Santa Clara v. S. Pac. R.R. Co., 18 F. 385, 399 (C.C.D. Cal. 1883).

[77] Blair & Pollman, *supra* note 13, at 1691.

[78] *Cnty. of Santa Clara*, 18 F. at 403.

[79] Ruth H. Bloch & Naomi R. Lamoreaux, *Corporations and the Fourteenth Amendment*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 286, 291 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

[80] *Id.*

consistent with an associational view."[81] Moreover, reflecting the common concerns of the era, the rights protected in these cases were typically the contractual and property rights of corporations, not their First Amendment rights.[82] Indeed, in 1907 Congress passed "[t]he Tillman Act, which banned corporations from spending money 'in connection with' any federal election."[83]

Property rights, Victoria Nourse explains, were viewed as "the last line of defense against socialism."[84] By vigorously protecting property rights, including those of corporate members as in *Santa Clara*, the justices "believed that they were standing for a far more important, much grander principle: fighting the good fight against state socialism."[85] If "corporations hold all their property, and the right to its use and enjoyment, at the will of the state; [and if] it may be invaded, seized and the companies despoiled at the state's pleasure," Justice Field wrote for the circuit court in *Santa Clara*, "there would be little security in the possession of property held by such a tenure, and of course little incentive to its acquisition or improvement."[86] The fear of socialism, Oliver Wendell Holmes echoed a decade later in *The Path of the Law*, both infected "the comfortable classes of the community" and "influenced judicial action both here and in England."[87] And in 1949, Justice William O. Douglas, in his account of the history of the U.S. Supreme Court, emphasized that

> [w]e can never know how much the spectre of socialism and the fear of assaults on capitalism

[81] Blair & Pollman, *supra* note 13, at 1694.

[82] *Id.* at 1695.

[83] *Id.* at 1713 (quoting Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907)).

[84] Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 777 (2009).

[85] *Id.* at 792–93.

[86] Cnty. of Santa Clara v. S. Pac. R.R. Co., 18 F. 385, 405 (C.C.D. Cal. 1883).

[87] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

> contributed to the decision [in *Santa Clara*]. But the end result is plain: the Court itself became part of the dynamic component of history. It did not live aloof from the turbulence of the times. It was part of the life of the community, absorbed from it the dominant attitudes and feelings of the day, and moved with the impetus of the era.[88]

By holding that the corporation was an aggregation of individuals and its rights derived from its members' rights, the Court, in short, was fighting against potential social and political implications of the rapidly growing publicly held corporation and, with it, an economic system premised on collective ownership. As Nourse explains, "[t]he rights invoked in the early part of the twentieth century condensed widely held, majoritarian fears of socialism and communism."[89] By recognizing that "[t]his governmental fear, based on the taking of private property, lent no urgency to rights outside the economic sphere, whether they were rights of religion or speech or privacy,"[90] we can begin to understand why, even in cases that seemed to abandon the original *Santa Clara* rationale and began extending constitutional protections to corporations as natural entities (separate from their members), the Court limited the scope of corporate rights to economic ones and did not aim to protect the "life and liberty of corporations."[91]

In the end, indeed, not the Court but rather Progressive scholars' attempts, in part in reaction to socialism, to develop

[88] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 738–39 (1949).

[89] Nourse, *supra* note 84, at 797.

[90] *Id*.

[91] *See* Bloch & Lamoreaux, *supra* note 79, at 292–93. One would also be mistaken, of course, to characterize *all* the decisions of the *Lochner* Court as manifestations of fears about the advance of socialism. Nor were all the decisions consistently pro-business. As Robert McCloskey explained, "the Court established a kind of dialectic" protecting free enterprise from regulation (and American society from perceived socialism), on the one hand, and recognizing the need to protect those vulnerable to business, on the other. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 91 (Sanford Levinson ed., 6th ed. 1994).

a political and legal theory that would acknowledge the realities of corporations, organizations, and other groups in the modern administrative state, helped provide legitimacy to the entity theory of the corporation and to corporate rights beyond the protection of corporate property. As Part III explores, Progressives' writings about the corporation's role in the modern state helped plant the seeds for a pluralist vision of incorporated entities that would, albeit briefly, inform the decisions of the U.S. Supreme Court in the midcentury years.

III. PLURALIST CHALLENGES

The pluralist vision is traceable to an early-twentieth century critique of traditional liberalism. Scholars who embraced this pluralist vision described corporations as real, powerful, semi-sovereign entities. In the 1940s, as fears about the resilience of American democratic institutions in the face of European totalitarianism replaced earlier concerns about the power of the large publicly held corporation and socialism, the cases before the U.S. Supreme Court involved entities quite different from the large publicly held corporations that occupied the justices' attention in the early twentieth century. These developments made the Court more willing to protect vulnerable individuals from corporate action and vulnerable members of organizations from state power. Influenced by pluralist ideas, the Court imposed constitutional obligations on different entities so as to protect the liberty rights of individuals both within and outside organizations.[92]

A. The Pluralist Alternative to Socialism

While the U.S. Supreme Court focused on protecting property rights, Progressive social scientists offered different solutions to the problem of growing corporations. Some viewed

[92] As I have previously demonstrated, these decisions paved the path that led the Court to impose similar obligations on the states. *See* Dalia Tsuk Mitchell, *Transformations: Pluralism, Individualism and Democracy*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 185, 193–94 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

large business units (and economies of scale) as inevitable and sought to subject them to national control; they envisioned federal licensing or chartering of corporations engaged in interstate commerce.[93] Other scholars called for local control of business units so as to constrain corporate power and encourage civic participation.[94]

To supplement national regulation, or to act as a form of local control, Progressives also proposed an important role for the individual investor, the consumer. Walter Weyl's *New Democracy*, for example, urged Americans to confront big business and centralized markets not with the tools of local or national regulation, but rather as enlightened consumers.[95] During World War I and in its aftermath, government officials hoped that large-scale investment in federal debt "would secure the 'loyalty and solid patriotism' of every inhabitant. . . . [F]or he who acquired a 'personal stake in the government' proved 'less susceptible to insidious suggestion' and became 'a more interested, more constructive, more active citizen.'"[96] As New York's director of publicity declared, "the spread of 'capital' in 'small units throughout the majority of our country'" provided "'the best practical guarantee' against 'social unrest . . . Radicalism and Bolshevism.'"[97] It wasn't long before widespread investment in corporate securities became seen as "an antidote" to the large corporation's impact on "individual initiative, independence and enterprise."[98]

The focus on individual investors grounded nationalism, decentralization, and consumerism in the classical liberal tradition. Another group of Progressive scholars, however, used the corporation as a foundation for a critique of individualism. To them, the corporation was the quintessential example of the significance of non-

[93] Mitchell, *supra* note 34, at 1516

[94] *Id.*

[95] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 223–27 (1996).

[96] OTT, *supra* note 35, at 105.

[97] *Id*.

[98] LAWRENCE E. MITCHELL, THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY 103 (2007).

individualistic legal institutions in the developing modern American state.[99] The corporation accordingly was not an association of individuals, nor was it a natural entity that, like individuals, was entitled to constitutional rights. Rather, the corporation was a real entity—a separate entity with real, sovereign-like power over individuals and other groups.[100] While adherents to the natural entity theory used the discourse of liberal legal thought with its emphasis on natural rights to portray the corporation as rights-bearing, Progressive legal scholars (and legal realists) endorsed a real entity vision of the corporation to give a normative recognition to an already existing economic structure.[101] They used the real entity paradigm pragmatically—it was becoming an accurate description of corporate reality, with its multiplicity of ownership, complex financial structure, managerial control, and immortality.[102]

The real entity vision of the corporation fit within a particular ideology, namely the ideology of political pluralism that developed in Britain and the United States amidst the organizational revolution of the early twentieth century.[103] As farmers, workers, professionals, consumers, women, and ethnocultural groups formed a variety of associations to protect and advance their interests, political pluralists described the state as too broad and abstract a body to command loyalty and allegiance from individuals, who associated more easily with diverse groups and organizations than with a unified state entity.[104] They argued in favor of adding groups, organizations, and associations to the existing array of local and state governments so as to offer a more realistic description of democratic politics and of the (limited) role of the liberal state.[105] In their writings, debates over the

[99] HORWITZ, *supra* note 33, at 72.

[100] Tsuk, *supra* note 9, at 192.

[101] *See* Mark, *supra* note 33, at 1465.

[102] Hager, *supra* note 38, at 580–81; Mark, *supra* note 33, at 1475–76.

[103] *See* EARL LATHAM, THE GROUP BASIS OF POLITICS: A STUDY IN BASING-POINT LEGISLATION 12–13 (1952).

[104] *See* Mitchell, *supra* note 92, at 188.

[105] *See, e.g.*, *id.*; JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 175 (1927) ("[D]emocracy is not an alternative to other principles of associated life. It

personality of associations reflected a legitimacy crisis in classical liberal thought.[106]

Political pluralism offered a progressive alternative to European socialism. Resisting traditional liberal thought and concerned about the radical visions of Marxists and socialists, pluralists offered a middle ground between conservative individualism and radical collectivism by describing groups—specifically functional groups such as labor unions, churches, as well as corporations—as centers of representation.[107] While traditional class analysis viewed class conflict as an inevitable characteristic of social and political life, pluralists described groups as "forums [where] individuals received . . . meanings [for] their ideas and actions."[108] They celebrated the diversity of interests in society but resisted analyses that prioritized one social structure over others. Rather than dividing society into classes, they described a multiplicity of groups as the

is the idea of community life itself."); MARY P. FOLLETT, THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT 3 (1918) ("Group organization is to be the new method in politics, the basis of our future industrial system, the foundation of international order[,] . . . for creative force comes from the group, creative power is evolved through the activity of the group life."); Harold J. Laski, *The Sovereignty of the State*, 13 JOURNAL OF PHILOSOPHY, PSYCHOLOGY AND SCIENTIFIC METHODS 85, 96 (1916) ("[The pluralistic theory of the State] insists that the State, like every other association, shall prove itself by what it achieves[, and it] . . . sets group competing against group in a ceaseless striving of progressive expansion."). For an analysis of theories of political pluralism, see generally AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM (1995).

[106] HORWITZ, *supra* note 33, at 72; *see also* Hager, *supra* note 38, at 583–85 (describing the appeal to early-twentieth century legal thinkers of Otto Gierke's charge that political individualism eliminated communal political units and thus empowered the state and capital at the expense of individual citizens).

[107] *See, e.g.*, Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943*, 11 LAW & HIST. REV. 59, 65 (1993) (noting that John Commons, for example, "unfavorably contrasted Marx's view of 'labor as a mass' with the craft unionism of Samul Gompers; the latter, Commons felt, provided 'surer economic foundations' for the individual liberty of wage earners" (quoting John R. Commons, *Karl Marx and Samuel Gompers*, 41 POL. SCI. Q. 281, 285 (1926)).

[108] *Id.* at 60.

foundation of the modern state.[109] "[B]y the 1920s," Avigail Eisenberg writes, political pluralism "was displacing the conventional conception of the state."[110]

Legal scholars expanded upon theories of political pluralism to formulate new legal doctrines.[111] Advocates of the workers' right to organize and corporate law scholars drew upon theories of pluralism to portray labor unions and corporations, respectively, as real entities whose existence was both real and distinct from their individual members'.[112] Moreover, while, for the most part, political pluralists were not concerned about the power that organizations might exercise (trusting labor unions and corporations to self-regulate), many legal scholars closely examined the boundaries of group autonomy.[113] They exposed organizations, associations, and corporations as loci not only of individual self-government but also of coercive power (over their

[109] *See, e.g.*, GREGOR MCLENNAN, MARXISM, PLURALISM AND BEYOND: CLASSIC DEBATES AND NEW DEPARTURES 20 (1989) ("US pluralists . . . tended to posit a multiplicity of groups rather than a concentration of society into *classes*."); A. A. Berle, Jr., *The Liberal Tradition in America*, 3 J. ECON. & SOCIO. 46 (1943) ("American liberal thinking has nothing in common with the doctrine of the class war. . . . America has never been interested in the dictatorship of the proletariat. It wants and proposes to abolish the proletariat; to foster an American commonwealth composed of people acting according to their abilities, without undue social disparity, and in which everyone participates according to the use he is able to make of intellectual, spiritual and economic freedom.").

[110] EISENBERG, *supra* note 105, at 63.

[111] As John Dewey noted at the time, legal scholars' fascination with the entity paradigm was primarily due to their endorsement of different goals. Some scholars viewed corporations as real because they desired "to preserve the autonomy of ecclesiastic organizations." John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 671 (1926). Others sought to defend corporate personality in order "to afford a basis for popular government." *Id.* Still others wanted "to moralize the idea of the state, to attack the idea of irresponsible sovereignty, and, under the influence of the pluralistic philosophy . . . to utilize the importance of the group" to promote "group interests" like those of labor and trade unions. *See id.*

[112] *See* Hager, *supra* note 38, at 579–80.

[113] *See generally* Ernst, *supra* note 107 (exploring the similarities and differences among strands of pluralism).

members, nonmembers, and other associations)—power that liberal legal thought cloaked as free contractual arrangements between individuals.[114] Worried about the power that labor unions or corporations could amass, legal scholars such as Adolf Berle argued that courts should tame potential abuses of that power by imposing on organizations limitations resembling the constraints on sovereign power. For one thing, they wanted courts to ensure that incorporated and unincorporated entities exercised their power to benefit the community at large.[115]

As Section III.B explores, by the 1940s the U.S. Supreme Court, determined to protect American democracy from the potential threat of European totalitarianism, seemed to embrace the idea that groups and organizations were constitutive elements of the American state. In a series of decisions during that decade, the Court rendered the discriminatory practices of private entities, including certain corporations, unconstitutional.

B. Corporations, Pluralism, and the Constitution

Beginning in the 1930s, economic, political, and cultural developments turned scholarly attention toward the centrality of corporations to American society and paved the path for pluralist ideas to begin influencing the judiciary. Concerns about corporate power and socialism dissipated as the New Deal regulatory state took shape.[116] By the 1940s,

[114] *Id.* at 62.

[115] *See* BERLE & MEANS, *supra* note 61, at 355–56; Hager, *supra* note 38, at 625 ("[E]arly twentieth-century analysts and advocates thought the real entity paradigm would help restrain corporate capital while promoting the growth of more responsible and democratic institutions and arrangements."). Interestingly, Berle also believed in consumerism, wishing to be remembered as "Marx of the [s]hareholder [c]lass." JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 62 (1987).

[116] *See, e.g.*, Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1688 (1988) (noting that after the New Deal "little was left of the classical corporation" as the federal securities acts regulated its relationship with investors, federal labor laws

war production and the development of new industries helped eliminate corporate debt, allowed corporations to cut prices, and made corporations more likely to assume public responsibilities.[117] Rather than a threat to the American dream, big business became a vehicle for achieving the American democratic ideal.[118] The corporation, Peter Drucker wrote in 1946, was not merely an economic organization but "America's representative social institution."[119] As such, it strove to fulfill "the aspirations and beliefs of the American people."[120] The corporation was "the institution which sets the standard for the way of life and the mode of living of our citizens; which leads, molds and directs; which determines our perspective on our own society; around which crystallize our social problems and to which we look for their solution."[121] The publicly held corporation, in short, became the quintessential American institution.

At the same time, as American social scientists wondered why and "how America had managed to avoid succumbing to European totalitarianism,"[122] scholarly attention turned to the protection of ethnic and cultural minorities.[123] Progressive legal scholars focused on the economic and social needs of different groups in society, and the early New Deal policies emphasized the individual's rights to work, livelihood, social insurance, and economic independence.[124] This concept of

regulated its dealing with workers, and antitrust laws regulated its relationship with consumers and suppliers).

[117] *See* George David Smith and Davis Dryer, *Oligopoly's Golden Age*, *in* COLOSSUS: HOW THE CORPORATION CHANGED AMERICA 263, 266 (Jack Beatty ed., 2001).

[118] *See* BOWMAN, *supra* note 36, at 190–91.

[119] PETER F. DRUCKER, CONCEPT OF THE CORPORATION 4 (1946).

[120] *Id.* at 14.

[121] *Id.* at 6.

[122] Morton Horwitz & Orlando do Campo, *When and How the Supreme Court Found Democracy—A Computer Study*, 14 QUINNIPIAC L. REV. 1, 28 (1994).

[123] *Id.* at 28–29.

[124] *See* William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 698–99 (1999); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1632–

social and economic citizenship gradually lost its primacy in the late 1930s as the intellectual milieu converged on the ideal of civil rights and liberties.[125] Protecting civil rights became the cornerstone of American democracy.[126] As Morroe Berger explained, "[d]uring the later Nineteen Thirties the Court followed a different policy from that which guided its predecessors; it now gave to civil rights the same preferred position which earlier Courts had given to property rights."[127]

The few cases involving corporate rights heard by the U.S. Supreme Court reflected these midcentury changes. As addressed in Part II, early-twentieth century cases focused on the constitutional protection afforded to the property rights of large, publicly held corporations.[128] In the midcentury years, the Court's attention turned to a variety of non-business entities within the developing American state. Particularly, cases addressed such entities' obligations toward members of cultural, ethnic, or religious minorities. The Court's assessment of these obligations reflected a deep commitment to democratic values and a willingness to extend or restrict the rights of incorporated entities and similar organizations so as to promote these values. Informed by the Progressive discourse of pluralism, the Court used the First and Fourteenth Amendments to limit the power of organizations and their managements.

Most notably, in *Marsh v. Alabama*,[129] the Court held unconstitutional restrictions on freedom of speech imposed by Chickasaw, a company-owned town. The question before the Court was whether Alabama, "consistently with the First and Fourteenth Amendments, can impose criminal punishment on

34 (2001); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 380 (1988).

[125] *See generally supra* note 124.

[126] *See* Morton J. Horwitz, Foreword, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 61–65 (1993) (discussing the emergence of democracy as a fundamental constitutional principle during the war years).

[127] Morroe Berger, *The Supreme Court and Group Discrimination since 1937*, 49 COLUM. L. REV. 201, 201 (1949).

[128] *See supra* notes 81–91 and accompanying text.

[129] 326 U.S. 501 (1946).

a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management."[130] The appellant, Grace Marsh, a Jehovah's Witness, was arrested after "distributing religious writings" in violation of the corporation's rule.[131]

Cases that preceded *Marsh v. Alabama* subjected private organizations to constitutional limitations because government action was implicated.[132] In *Smith v. Allwright*, the Court prevented the Texas Democratic party from excluding Black Americans from membership because the discrimination was "state action within the meaning of the Fifteenth Amendment."[133] And in *Steele v. Louisville & Nashville Railway Co.* the Court intimated that unions authorized under federal statute to be bargaining representatives could not discriminate against Black employees without violating the Equal Protection clause.[134]

In *Marsh v. Alabama*, the Court went further, concluding that the Fourteenth Amendment could directly limit the powers of a private corporation, the Gulf Shipbuilding Corporation, that owned and operated Chickasaw.[135] Writing for the majority, Justice Hugo Black asserted that "the corporation's right to control the inhabitants" of the company-owned town was not "coextensive with the right of a homeowner to regulate the conduct of his guests."[136] "Ownership does not always mean absolute dominion," Black stressed.[137] For one thing, when "an owner, for his advantage, opens up his property for use by the public in general . . . his

[130] *Id.* at 502.

[131] *Id.* at 503–04. The State charged Marsh under a statute that "mad[e] it a crime to enter or remain on the premises of another after having been warned not to do so." *Id.* at 504.

[132] *See* Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344, 346 (1948).

[133] Smith v. Allwright, 321 U.S. 649, 664 (1944).

[134] 323 U.S. 192, 198–99 (1944).

[135] *Marsh*, 326 U.S. 501, 502, 508.

[136] *Id.* at 506.

[137] *Id.*

rights become circumscribed by the statutory and constitutional rights of those who use it."[138]

Turning judicial focus from property rights to the interest of the public, Justice Black explained that "[w]hether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[139] Consequently, the corporate managers of a company town "cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute . . . which enforces such action . . . clearly violates the First and Fourteenth Amendments to the Constitution."[140]

Progressive corporate law scholars applauded the Court's willingness to recognize that private organizations were semi-sovereign entities and thus should be subject to constitutional constraints. "This is a new rule of law, but it is typically American in tradition," Adolf Berle stressed in 1952:

> Under this theory certain human values are protected by the American Constitution; any fraction of the governmental system, economic as well as legal, is prohibited from invading or violating them. The principle is logical because, as has been seen, the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists. It resolves the conflict between the property notion that an owner can do what he likes with his own and the governmental concept that a public agency is obliged to serve all alike within strict constitutional limitations, evenhandedly, up to the limit of its capacity. Instead of nationalizing the

[138] *Id.*
[139] *Id.* at 507.
[140] *Id.* at 508.

> enterprise, this doctrine "constitutionalizes" the operation.[141]

Berle believed constitutional constraints should be imposed on all corporations. As he explained, "if there is power, accompanied by invasion of an individual right guaranteed by the Constitution, then it would seem that the mere enjoyment of a state corporate charter is sufficient justification for invoking operation of the Fourteenth and Fifteenth Amendments."[142] Just as corporations could not adopt rules, such as preferential railroad rates, that interfered with Congress's regulation of interstate commerce, they also could not adopt rules burdening or denying "civil rights whose preservation is constitutionally guaranteed."[143] An individual's constitutional rights trumped the exercise of private power. As Berle put it, "a corporation, having achieved economic power making discrimination possible," should be "subject[ed] to constitutional tests as to its practices and regulations" if the latter "really invade[d] personality contrary to some constitutional privilege."[144]

By placing constitutional limitations on a private corporation—a private actor—*Marsh v. Alabama* "nearly brought about a constitutional revolution."[145] In the 1950s and 1960s, the liberal wing of the Court extended the analysis of *Steele v. Louisville & Nashville Railway Co.* and *Marsh v. Alabama* beyond the realm of labor unions and company towns.[146] In the end, however, the Court did not go so far as to

[141] Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 943 (1952).

[142] *Id.* at 951–52.

[143] *See id.* at 948.

[144] *See id.* at 951; *see also* A. A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 661 (1952) (noting the need to protect "the basic rights of individuals" against corporations "as they were against the erstwhile political state").

[145] WINKLER, *supra* note 21, at 267.

[146] For example, in *Terry v. Adams*, 345 U.S. 461 (1953), a case addressing the exclusion of Black Americans from voting in the primaries of the Jaybird Democratic Association, a Texas county political organization, the Court refused to deem the association a private

impose constitutional constraints on organizations merely because of their power; more broadly, it did not endorse pluralism as an alternative to liberalism.

Indeed, less revolutionary were cases where the Court's commitment to protecting the American ideal of democracy led it to extend the rights associated with the First and Fourteenth Amendments to incorporated entities. In 1958, responding to attempts by Southern officials to force the NAACP to reveal its membership lists, the Court announced "that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[147] In this case, freedom of association required granting immunity to the NAACP from state scrutiny of its membership lists.[148] As Justice John Marshall Harlan carefully put it:

> The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. *We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it acts as their representative before this Court*.[149]

Like the cases imposing constitutional limitations on private corporations, cases embracing organizations' rights reflected the Warren Court's recognition, as pluralists argued, of the diverse centers of representation and power in the

organization to which constitutional constraints did not apply. Writing for the Court, Justice Black noted that "[t]he only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded . . . . The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids[.]" *Id.* at 469–70.

[147] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[148] *Id.* at 466.

[149] *Id.* at 458–59 (emphasis added).

modern state. The role of the law was thus to correct imbalances of group power that permeated social, cultural, and legal relationships. Yet, by embracing the rights of organizations such as the NAACP to assert the liberty rights of their individual members, the Court inadvertently opened the door for other entities, especially large corporations, to claim the same rights. Focusing on Justice William O. Douglas's concurrence in *Bell v. Maryland*, Section III.C demonstrates that endowing corporations with liberty rights did not follow from the idea that corporations were real entities, or from the pluralist paradigm more broadly. Indeed, as Part IV will elaborate, by the time the Court granted corporations First Amendment rights, a different vision—managerialism—influenced its opinions.

C. Pluralism, not Liberalism

At issue in *Bell v. Maryland* were the criminal trespass convictions of twelve Black students who participated in a "sit-in" demonstration at a restaurant in Baltimore.[150] By the time the case came before the U.S. Supreme Court, "Maryland ha[d] enacted laws that abolish[ed] the crime of which petitioners were convicted."[151] The Court accordingly vacated and reversed the judgments, remanding the case "so that the state court may consider the effect of the supervening change in state law."[152]

Critical of the Court's refusal to address a "question . . . at the root of demonstrations, unrest, riots, and violence in various areas," a question that "consumes the public attention," Justice Douglas authored a concurring opinion, elaborating why corporations, such as the Baltimore restaurant, should not be granted liberty rights.[153] Contrary to the dissenting justices, who would have affirmed the convictions and viewed the question as focused on "a person's

[150] Bell v. Maryland, 378 U.S. 226, 227–28 (1964).

[151] *Id.* at 228.

[152] *Id.*

[153] *Id.* at 243 (Douglas, J., concurring in the judgment in part and dissenting in part).

'personal prejudices'" and whether a person "may dictate the way in which he uses his property and whether he can enlist the aid of the State to enforce those 'personal prejudices,'" Douglas stressed that corporations were not persons.[154]

Like Justice Black in *Marsh v. Alabama*, Douglas recognized that corporations were real, sovereign-like entities, but, as he argued, real was different from natural. Corporations were real entities due to their governance and financial structures, but they were not natural entities akin to natural persons. "The corporation that owns this restaurant," Douglas wrote "did not refuse service . . . because 'it' did not like" these students.[155] Rather,

> [t]he reason "it" refused service was because "it" thought "it" could make more money by running a segregated restaurant[.]
>
> . . . .
>
> . . . . Moreover, when corporate restaurateurs are involved, whose "personal prejudices" are being protected? The stockholders'? The directors'? The officers'? The managers'? The truth is, I think, that the corporate interest is in making money, not in protecting "personal prejudices."[156]

As real entities, corporations could claim rights relevant to their operations, but not the liberty rights of natural persons. As Douglas put it, the issue in *Bell v. Maryland* was different from previous situations where corporations were "entitled to the attorney-client privilege. . . .[,] protected as a publisher by the *Freedom of the Press Clause of the First Amendment*. . . .[, or] entitled to protection against unreasonable searches and seizures by reason of the *Fourth Amendment*."[157] The right of association, which the restaurants invoked, was a personal right (similar to "the privilege of self-incrimination guaranteed by the *Fifth Amendment* [that] cannot be utilized

[154] *Id.* at 245.
[155] *Id.*
[156] *Id.* at 245–46.
[157] *Id.* at 263 (emphasis added) (citations omitted).

by a corporation"), and corporations, Douglas stressed, did not have personal rights, just as they had no choice or will.[158]

Even if the Court were to derive the rights of the corporation from the rights of its shareholders, Douglas insisted that a sharp distinction existed between the economic and liberty rights not only of the corporation but also of the corporation's shareholders. As he explained,

> [i]t is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? Why should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights personal to him are involved? Why should his interests—his associational rights—make it possible to send these Negroes to jail? [159]

Douglas acknowledged that in certain scenarios the Court could pierce the corporate veil and allow corporations to assert the liberty rights of their members. As he wrote a year earlier, "[a] free society is made up of almost innumerable institutions through which views and opinions are expressed, opinion is mobilized, and social, economic, religious, educational, and political programs are formulated."[160] Accordingly, "government can neither legislate with respect to nor probe the intimacies of political, spiritual, or intellectual relationships in the myriad of lawful societies and groups, whether popular or unpopular, that exist in this country."[161] And the NAACP, for example, "could assert on behalf of its members a right personal to them to be protected from

[158] *Id.* (emphasis added).

[159] *Id.* at 261–62.

[160] William O. Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1373 (1963).

[161] *Id.* at 1375.

compelled disclosure by the State of their affiliation with it."[162] But this was not the case in *Bell v. Maryland*. "There are occasions when the corporation is little more than a veil for man and wife or brother and brother; and disregarding the corporate entity often is the instrument for achieving a just result. But the relegation of a Negro customer to second-class citizenship is not just," Douglas wrote.[163] "Nor is fastening *apartheid* on America a worthy occasion for tearing aside the corporate veil."[164]

Drawing distinctions between economic and liberty rights, and between organizations such as the NAACP and business corporations, was critical for another reason. Douglas stressed that, given the governance structure of corporations, recognizing corporations' constitutional rights simply empowered their managements. As he pointedly put it, granting liberty rights to corporations would merely hand "corporate management vast dimensions for social planning."[165]

> *Affirmance would make corporate management the arbiter of one of the deepest conflicts in our society:* corporate management could then enlist the aid of state police, state prosecutors, and state courts to force *apartheid* on the community they served, if *apartheid* best suited the corporate need; or, if its profits would be better served by lowering the barriers of segregation, it could do so.[166]

In short, it was one thing to impose obligations on corporate managers (as *Marsh v. Alabama* implicitly did), or to protect the rights of members of the NAACP, so as to promote social and cultural goals. It was quite another thing to grant managers the power to determine these goals.

Bell v. Maryland raised significant questions about the role and nature of corporations. Douglas's decision offered a path

[162] *Bell*, 378 U.S. at 267 (Douglas, J., concurring in the judgment in part and dissenting in part).

[163] *Id.* at 271.

[164] *Id.*

[165] *See id.* at 264.

[166] *Id.*

for embracing the idea that corporations were real entities subject to constitutional obligations without also accepting that they were endowed with constitutional rights. But, as Part IV explores, when *Bell* was decided, pluralism was competing with a different vision—namely managerialism—that rapidly took hold in state courts during the midcentury years; managerialism offered the Court a unique justification for upholding corporate liberty rights and, indeed, empowering corporate managers to arbitrate political, social, and cultural conflicts.

IV. MANAGERIALIST SOLUTIONS

Managerialism dominated state corporate law in the midcentury years. Like pluralists, managerialists recognized that corporations were real, powerful institutions. Yet, rather than expecting the federal government or the courts to limit corporate action, managerialists trusted corporate managers to do so. When, in the 1970s, the U.S. Supreme Court began granting corporations liberty rights, its decisions were informed by the managerialist paradigm; managers were empowered to determine corporate actions, including those affecting the liberty rights of others.

A. Managerialism: Pluralism Reimagined

Like the U.S. Supreme Court, midcentury state courts, responsible for resolving questions of corporate governance under state corporate law, were keen on ensuring that corporations contribute to the success of the modern American state.[167] Yet, while embracing the idea that corporations were real entities, state courts did not seek to tame their powers as pluralists did; rather, they focused on the role of corporations

[167] *See* Carroll R. Wetzel & James L. Winokur, *Corporations and the Public Interest—a Review of the Corporate Purpose and Business Judgment Rules*, 27 BUS. LAW. 235, 237 (1971) ("As money and power have become concentrated in corporate enterprises, those enterprises have become an increasingly critical source of funds for public works, and corporate decisions have come increasingly to determine the quality of American life. This has not been overlooked by the managers or by the courts.").

and corporate managers in guarding American democracy. Take, for example, *A. P. Smith Manufacturing Co. v. Barlow*,[168] a test case brought by the National Association of Manufacturers seeking a court declaration that corporate contributions to private institutions of higher education were intra vires.[169] Choosing to make a broad statement about the nature and purpose of the corporation, Justice Nathan L. Jacobs of the Supreme Court of New Jersey stressed the critical role corporations played in defending American ideals:

> During the first world war corporations loaned their personnel and contributed substantial corporate funds in order to insure survival; during the depression of the '30s they made contributions to alleviate the desperate hardships of the millions of unemployed; and during the second world war they again contributed to insure survival. They now recognize that we are faced with other, though nonetheless vicious, threats from abroad which must be withstood without impairing the vigor of our democratic institutions at home and that otherwise victory will be pyrrhic indeed. More and more they have come to recognize that their salvation rests upon [a] sound economic and social environment which in turn rests in no insignificant part upon free and vigorous nongovernmental institutions of learning.[170]

Justice Jacobs's reference to "our democratic institutions at home" and his insistence that corporations were the foundation upon which American democracy could thrive reflected the midcentury obsession with democratic theory.[171] But Jacobs's decision reached further. Viewing charitable contributions as critical for ensuring the survival of American democracy, he declared them intra vires and left them to managerial discretion.[172] Management could choose to make certain contributions despite shareholders' or other

[168] 98 A.2d 581 (N.J. 1953).
[169] Mitchell, *supra* note 7, at 183.
[170] *A. P. Smith Mfg. Co.*, 98 A.2d at 586.
[171] *See* Horwitz & do Campo, *supra* note 122, at 28.
[172] *See A. P. Smith Mfg. Co.*, 98 A.2d at 589–90.

stakeholders' disapproval, but it was not required to do so even if these stakeholders so wished. Corporations and their managements were free to exercise their power without constraints.[173] As Adolf Berle wrote a few years later, "modern directors [were] not limited to running business enterprise for maximum profit, but [were] in fact and recognized in law as administrators of a community system."[174]

Corporate managers were viewed as necessary for the success of American democracy, and their authority to run their corporations could not be challenged.[175] Government regulation of corporate power was characterized as regimented, if not directly similar to the policies of dictatorial regimes.[176] The term "free enterprise," in use since the 1930s, became associated with the free reign of managers who, in the cultural imagination, replaced the small producers and entrepreneurs of the nineteenth century.[177] Freedom of enterprise, that is, the freedom of the enterprise's managers, was singled out as ensuring America's strength and future.[178]

[173] *See* Mitchell, *supra* note 7, at 192–94.

[174] Adolf A. Berle, Jr., *Foreword* to THE CORPORATION IN MODERN SOCIETY ix, xii (Edward S. Mason ed., 1960); *see also* Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 171 (1957).

[175] *See* Wells, *supra* note 15, at 326.

[176] *See* ROLAND MARCHAND, CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS 323–24 (1998).

[177] *See, e.g.*, Daniel Bell, *The Power Elite—Reconsidered*, 64 AM. J. SOCIO. 238, 247 (1958) (reviewing C. WRIGHT MILLS, THE POWER ELITE (Oxford Univ. Press 1956)) (discussing the shift from "'private property' to 'enterprise,' as the justification of power"); Peter F. Drucker, *The Employee Society*, 58 AM. J. SOCIO. 358, 359 (1953) (discussing the emergence of a "new ruling group in our society" called "management" whose "power . . . rest[s] solely on [its] indispensable function"); Davita Silfen Glasberg & Michael Schwartz, *Ownership and Control of Corporations*, 9 ANN. REV. SOCIO. 311, 313 (1983) (discussing "managerial theory['s]" description of a "class of corporate leaders . . . freed from outside pressures" with "unconstrained power" and without "the . . . incentive . . . to misuse" it (citation omitted)).

[178] *See* MARCHAND, *supra* note 176, at 322.

A new cadre of managers supported this transformation.[179] For one thing, General Motors, the subject of Peter Drucker's famous *Concept of the Corporation*, was divided into separate units, each one "responsible for all its commercial operations. Each had its own engineering, production, and sales departments, but was supervised by a central staff responsible for overall policy and finance."[180] "[E]xecutives had more time to" focus "on strategic issues" while "operational decisions were made by people in the front line."[181] The large public corporation and its organizational and leadership structures came to represent the success of the American economic and political system.[182] Corporate executives seemed to possess the expertise required to lead corporations and the country.[183]

Focusing on management's function or "status relationship" to the corporation and on its expertise, social scientists argued that corporate managers were best situated to control business affairs, and to exercise authority over others in the corporate structure and corporate power over those outside the firm.[184] Expert management became the "strategic center" of the large publicly held corporation.[185] Management dominated the corporate bureaucracy, organized production, and exercised power over individual lives within the corporation and market transactions outside it.[186] In 1957, reflecting this transformation, Carl Kaysen celebrated professional managers, noting that management

[179] *See* STUART CRAINER, THE MANAGEMENT CENTURY: A CRITICAL REVIEW OF 20TH CENTURY THOUGHT AND PRACTICE 55 (2000) (noting that business leaders pushed for more decentralized (and more managerially complex) corporations; such corporations constituted around twenty percent of *Fortune* 500 companies in 1950 and eighty percent in 1970).

[180] *Id.* at 54.

[181] *Id.* at 55.

[182] DRUCKER, *supra* note 119, at 5.

[183] *See* BOWMAN, *supra* note 36, at 190–91.

[184] *See* Drucker, *supra* note 177, at 359; William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 413–14 (1989).

[185] William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1476 (1989).

[186] *See* BOWMAN, *supra* note 36, at 197–98.

no longer viewed itself as "the agent of proprietorship seeking to maximize return on investment."[187] Rather, "management s[aw] itself as responsible to stockholders, employees, customers, the general public, and, perhaps most important, the firm itself as an institution."[188]

Corporations were not equipped to determine social priorities and lacked any democratic authority to do so,[189] but corporate leaders were quick to argue that responsible corporate management could reconcile the corporation's interest with the public good and help the nation.[190] And state courts acquiesced, assuming that by empowering managers to pursue social goals, they allowed corporations to continue to serve their role in protecting American democracy.[191] As Section IV.B explores, by the 1970s, as the U.S. Supreme Court began granting corporations constitutional rights, it endorsed management's exercise of corporate power even when it affected the liberty rights of individuals outside and within the corporation.

B. Managerialism and the Emergence of Corporate Rights

Different developments converged to shift the Court's attention away from corporate obligations and toward corporate rights. The Warren Court's decisions were grounded in what Morton Horwitz labeled "a rich conception of democracy"—that is, in the understanding that "greater social inclusiveness and empowerment of minorities" was not in tension with democracy but rather "an extension of democratic values."[192] By the 1970s, however, American jurists turned their attention from the protection of vulnerable groups and toward democratic processes as a

[187] Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 313 (1957).

[188] *Id*; *see also* Gerald F. Davis, *Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1125–26 (2011).

[189] MARCHAND, *supra* note 176, at 363.

[190] *See* Kaufman & Zacharias, *supra* note 65, at 528.

[191] *See* Mitchell, *supra* note 7, at 190.

[192] Horwitz, *supra* note 126, at 63.

means of ensuring the continued success of American democracy. Embracing a vision of the polity as composed of multiple interest groups interacting and trading ends in political markets, legal scholars were more inclined to endorse the pluralists' celebration of group autonomy than their imposition of constraints on group power.[193] The American state was reimagined as a political compromise among various pressure groups, including corporations, while political markets were trusted to produce shared public goods. So long as individuals were allowed freely to associate to promote their shared interests, and so long as everyone had access to political markets, inequalities of power and vulnerabilities were deemed irrelevant.[194]

In this atmosphere, concerns about the property rights of private entities overshadowed reservations about group power, and the conservative wing of the Court was able to override the legal pluralists' influence. For one thing, in *Hudgens v. NLRB* the Court held that union members did not have a First Amendment right to enter a private shopping mall to picket one of its stores.[195] Writing for the Court, Justice Potter Stewart stressed "that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[196] It offers no remedy "against a private corporation or a person who seeks to abridge the free expression of others."[197]

According to Justice Stewart, *Marsh v. Alabama* was a unique case where "a private enterprise [assumed] all of the attributes of a state-created municipality," and "the owner of the company town . . . perform[ed] the full spectrum of municipal powers and stood in the shoes of the State."[198] In all other cases involving privately owned property, the public, even when invited as customers, did not have First Amendment rights as it "would have on the similar public

[193] *See* Mitchell, *supra* note 92, at 201–02.
[194] On these developments, see *id.* at 201–04.
[195] 424 U.S. 507, 520–21 (1976).
[196] *Id.* at 513.
[197] *Id.*
[198] *Id.* at 519.

facilities in the streets of a city or town."[199] Seemingly untroubled by the power that groups and associations, including corporations, could exercise over individuals, the Court chose to protect the property rights of private entities as if they were individuals.

The late-twentieth century evolution of corporations' First Amendment rights similarly reflected the broader jurisprudential shift from substantive evaluations of power and vulnerability to trust in democratic processes and free markets.[200] In the mid-1970s, Ralph Nader's Public Citizen Litigation Group challenged a Virginia statute that declared the advertising of prices of prescription drugs by pharmacists "unprofessional conduct."[201] While at the time "[i]t was taken for granted that the government could regulate commercial speech as part of its power to regulate commerce,"[202] the Group argued that "the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs."[203] And Justice Harry Blackmun, for the Court, embraced their consumer-focused argument.[204] Beginning his decision with a strong affirmation of the importance of a free flow of information in a democracy, Blackmun wrote: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."[205]

[199] *Id*.

[200] *See* Mitchell, *supra* note 92, at 201–4.

[201] *See* Alan B. Morrison, *No Regrets (Almost): After* Virginia Board of Pharmacy, 25 WM. & MARY BILL RTS. J. 949, 949 (2017); Va. State Pharmacy Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 749–50 (1976).

[202] Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy*, *in* CORPORATIONS AND DEMOCRACY 245, 276 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

[203] *Va. Bd. of Pharmacy*, 425 U.S. at 753–54.

[204] *Id.* at 766–70; WINKLER, *supra* note 21, at 297.

[205] *Va. Bd. of Pharmacy*, 425 U.S. at 756 (footnote omitted).

Reflecting still the midcentury focus on the protection of those vulnerable in our society, Justice Blackmun stressed that

> [a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.[206]

Yet, the decision was not limited to the protection of vulnerable consumers. Reaching beyond, perhaps, what Nader's Group intended,[207] Justice Blackmun, while keen on distinguishing commercial from political speech,[208] further held that "speech does not lose its First Amendment protection because money is spent to project it"[209]—even if "the advertiser's interest is purely economic one[,] [t]hat hardly disqualifies him from protection under the First Amendment."[210]

Two years later, in *First National Bank of Boston v. Bellotti*,[211] Justice Lewis Powell extended First Amendment protection to corporate political speech by looking, again, at the nature of the speech and its audience rather than the speaker. The case involved a challenge to a Massachusetts law that barred "certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals."[212] While the lower court "framed the

[206] *Id.* at 763.
[207] *See* Morrison, *supra* note 201, at 950.
[208] WINKLER, *supra* note 21, at 297–8.
[209] *Va. Bd. of Pharmacy*, 425 U.S. at 761.
[210] *Id.* at 762.
[211] 435 U.S. 765 (1978).
[212] *Id.* at 767.

principal question . . . as whether and to what extent corporations have First Amendment rights,"[213] Powell's analysis focused on "interests broader than those of the party seeking their vindication."[214] The question, accordingly, was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," but rather whether the statute in question "abridges expression that the First Amendment was meant to protect."[215] As Margaret Blair and Elizabeth Pollman write, the Court's articulated reason for striking down the restrictions on corporate speech was a "new, instrumental rationale for extending a right to a corporation—the need to protect the interests of people outside the corporation, in this case the listeners, rather than deriving a right from people involved in the corporation."[216]

Bellotti, like *Virginia Board of Pharmacy*, was transformative in another way. Both cases turned to the marketplace of ideas theory to justify the extension of speech rights to commercial and corporate entities.[217] In a statement affirming the importance of corporations to the free market of ideas, yet downplaying their unparalleled power to influence this market,[218] Justice Powell's decision in *Bellotti* stressed:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public

[213] *Id.* at 775–76.

[214] *Id.* at 776.

[215] *Id.*; *see also* WINKLER, *supra* note 21, at 318–19.

[216] Blair & Pollman, *supra* note 202, at 279.

[217] On the marketplace of ideas, see, e.g., generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

[218] In fact, Powell rejected the appellee's argument that corporate "participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government" as lacking sufficient evidence. *Bellotti*, 435 U.S. at 789–90.

> does not depend upon the identity of its source, whether corporation, association, union, or individual.[219]

Gone were the pluralists' concerns about corporate power that characterized the midcentury years. Gone also was the Supreme Court's use of the Constitution to tame corporate power. In a world committed to free markets, the corporation finally won its First Amendment rights; corporate speech, like any other speech, was protected. Moreover, if corporate speech was protected, as Justice Douglas pointed out in *Bell v. Maryland*, managers were free to contribute to public debates as they deemed fit, without restrictions from corporate shareholders, other stakeholders, or the courts. Reacting to demands by business and consumer groups, the Court responded with managerialism.

The association between corporate rights and managerialism was not lost on Justice Powell, who, as a corporate lawyer, urged business executives to use corporate resources to defend the "free enterprise system."[220] Recognizing that by protecting corporate speech the Court was legitimizing the power of corporate managers to determine how corporations should exercise their First Amendment rights, Powell was quick to point out that corporate law offered recourse to shareholders—whose investment presumably funded corporate speech—should they disapprove of their managers' actions. As he noted,

> [u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the

[219] *Id.* at 777 (footnotes omitted); *see also* David Graver, Comment, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 236 (1999) (discussing *Bellotti*'s rationale).

[220] WINKLER, *supra* note 21, at 286–87; s*ee also* Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 L. & HIST. REV. 943 (2018) (discussing Powell's ideas and demonstrating how the executives of the First National Bank of Boston used these ideas to defend the Bank's political speech).

> corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.[221]

No longer bothered by corporate power, Powell turned to the corporation's internal structure. His rhetoric of corporate democracy echoed decisions of state courts. Focused on the fiduciary duties of directors to shareholders (to the exclusion of other stakeholders), state courts have consistently turned to the ideal of representative democracy to rationalize managerialism.[222] Shareholders were "expected to elect directors" who would choose managers to "execute the general policies laid down by the directors."[223] However, shareholders could not order or command their directors or managers. Management's discretion, including its prerogative to determine the corporation's speech and social responsibilities, could not be limited by reference to the shareholders' wishes (or objections).[224]

Indeed, as this Article concludes, even when the Delaware courts in the 1980s seemed to endorse shareholder wealth maximization as the corporation's single purpose, they continued to empower corporate managers to run corporations without interference from their shareholders (or the courts).[225] The U.S. Supreme Court's decisions addressing corporate

[221] *Bellotti*, 435 U.S. at 794–95 (footnote omitted).

[222] *See* Dalia Tsuk Mitchell, *Status Bound: The Twentieth Century Evolution of Directors' Liability*, 5 N.Y.U. J.L. & BUS. 63, 113–14 (2009).

[223] Thomas F. Woodlock, *Careless Owners: How Shall the Supreme Inertia of the American Stockholder Be Overcome?*, WALL ST. J., Apr. 22, 1931, at 1.

[224] *See* Mitchell, *supra* note 222, at 113–14.

[225] *See, e.g.*, Mark S. Mizruchi, *Berle and Means Revisited: The Governance and Power of Large U.S. Corporations*, 33 THEORY & SOC'Y 579, 605–06, 609 (2004) (noting that managers may be less autonomous than in the past but also that they remain meaningfully independent from investors).

rights in the last decades of the twentieth century followed closely. *Hobby Lobby* was the natural outcome.

V. EPILOGUE

The election of Ronald Reagan cemented free economic and political markets as the cornerstones of American democracy. As Kent Greenfield writes, "Reagan embodied a new Zeitgeist. He railed against government regulation, took pride in breaking up the power of public-sector unions, and ushered in an era in which people were encouraged to feel good about making money."[226] Reagan "fostered a belief in . . . the market."[227] While Franklin Roosevelt's New Deal focused on providing for the vulnerable in our society, a focus that carried through to the Warren Court, "Reagan ushered in the 1980s proclaiming, 'What I want to see above all is that this country remains a country where someone can always get rich.'"[228]

With no real threats to American democracy to which corporations were to respond, investment bankers and their lawyers introduced shareholder wealth maximization as the only purpose of corporate law, bringing investors to the frontlines of corporate governance.[229] Retelling the story of managerialism as a narrative about a "self-serving managerial class [that] squandered corporate resources extravagantly on themselves . . . and allowed foreign competitors to overtake the United States in productivity, innovation, and strategy,"[230] investment bankers called for taking over and breaking down the conglomerates of the postwar years, thus "'unlocking' the value of 'underperforming' stock prices" to benefit the shareholders.[231] And the Delaware courts seemingly followed suit. "[W]hile

[226] KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 44 (2018).

[227] *Id.* at 44–45.

[228] *Id.* at 45.

[229] KAREN HO, LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 129–33 (2009).

[230] *Id.* at 130.

[231] *See id.*

concern for various corporate constituencies is proper when addressing a takeover threat," the Delaware Supreme Court held in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* "that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders."[232] Managers were responsible for maximizing value for their shareholders, and shareholders learned not only to expect but also to demand appreciation on their stock price.[233]

The U.S. Supreme Court also appeared more focused on the needs of shareholders in its decisions regarding corporate speech. Take, for one, *Austin v. Michigan Chamber of Commerce*, in which the Michigan Chamber of Commerce challenged the Michigan Campaign Finance Act's prohibition on the usage of "corporate treasury funds for independent expenditures in support of, or in opposition to, any candidates in election for state office."[234] Upholding the restrictions, the Court stressed that the "special advantages" granted to corporations (e.g., "limited liability [and] perpetual life"), "enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments."[235] But these same advantages also allow corporations "to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace,'" a distortion that the government had a compelling interest in preventing.[236] Notably, Justice William Brennan in concurrence emphasized that the law "protect[ed] dissenting shareholders of business corporations . . . to the extent that such shareholders oppose the use of their

[232] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986).

[233] *See* Lawrence E. Mitchell, Who Needs the Stock Market? Part I: The Empirical Evidence 24–25 (Nov. 1, 2008) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1292403 (on file with the Columbia Business Law Review).

[234] Austin v. Michigan Chamber of Com., 494 U.S. 652, 654 (1990).

[235] *Id.* at 658–59.

[236] *Id.* at 659 (quoting Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986)).

money . . . for political campaigns."[237] Writing perhaps to rebut *Bellotti*'s rhetoric of shareholder democracy, Brennan stressed that "shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object."[238]

But the focus on shareholders was proven to be largely rhetorical. While emphasizing their commitment to shareholder wealth maximization, the Delaware courts did not seek to ensure that shareholders profit; for the most part, they used shareholder wealth maximization to empower managers, for example, by offering them a ready justification for thwarting hostile takeovers.[239] If Wall Street investment bankers promoted shareholder wealth maximization as a means of limiting managerial power, the Delaware courts embraced it to ensure that managers remained in control.[240] "Delaware law confers the management of the corporate enterprise to the stockholders' duly elected board representatives," Justice Henry Horsey stressed in *Paramount Communications v. Time Inc.*,[241] a case involving directors blocking a tender offer at almost twice the stock's market price.[242] Dissatisfied shareholders were advised to exercise their voting power,[243] even as the Delaware courts acknowledged that the shareholders' vote was "a vestige or a ritual of little practical importance."[244]

The U.S. Supreme Court followed a similar course. In *Citizens United v. Federal Election Commission*, the Court overruled *Austin*, removing restrictions on corporate

[237] *Id.* at 673 (Brennan, J., concurring).

[238] *Id.* at 674 n.5.

[239] *See* Mitchell, *supra* note 34, at 1573–74.

[240] Mitchell, *supra* note 7, at 209–11.

[241] 571 A.2d 1140, 1154 (Del. 1989).

[242] *See id.* at 1149.

[243] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985) ("If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.").

[244] Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) (acknowledging this as the "conventional" view).

independent expenditures for political speech.[245] In so doing, even though Citizens United was a nonprofit organization, the Court also endorsed Justice Scalia's statements in *Austin* with respect to dissenting shareholders. As Scalia had pointedly put it, shareholders in for-profit corporations understand "*the deal*"; they "know[] that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit."[246] A dissenting shareholder who is unable "to persuade a majority (or a requisite minority) of his fellow shareholders that the action should not be taken," can simply "sell his stock."[247]

Presumably embracing the idea that corporations were associations of individuals, and that corporations' liberty rights were derived from the rights of their individual members,[248] *Citizens United* offered little protection to shareholders who opposed their corporations' speech. Just as the Delaware courts have used the rhetoric of shareholder democracy to justify managerial power, so did the U.S. Supreme Court. Quoting *Bellotti*, Justice Anthony Kennedy simply concluded: "There is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[249]

"The shareholder franchise," Chancellor Allen succinctly put it, "is the ideological underpinning upon which the legitimacy of directorial power rests."[250] Indeed, by the early twenty-first century, not corporations but their managers gained significant rights. Viewed through a managerialist perspective, *Hobby Lobby* did not undermine Delaware's corporate law. Rather, like contemporaneous Delaware cases,

[245] 558 U.S. 310, 365 (2010), *overruling* Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990).

[246] *Austin*, 494 U.S. at 686 (Scalia, J., dissenting) (emphasis added).

[247] *Id.* at 687.

[248] WINKLER, *supra* note 21, at 364.

[249] *Citizens United*, 558 U.S. at 361–62 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978))). On the treatment of shareholders' rights in *Citizens United*, see Sarah C. Haan, *Voter Primacy*, 83 FORDHAM L. REV. 2655, 2670–79 (2015).

[250] Blasius Indus. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

it empowered managers, who in this case were also shareholders, to determine the corporation's goals. As Justice Alito, who wrote the majority opinion, stressed, the corporation is "simply a form of organization used by human beings to achieve desired ends," and the law determines "the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. . . . Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[251]

As to shareholder wealth maximization, Justice Alito pointedly noted that "[w]hile it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[252] Notably, Alito stressed that "ownership approval" is required before for-profit corporations could support "charitable causes."[253] Yet, he added, "it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives."[254] Moreover, lest he were misunderstood as to who, between shareholders and managers, will determine the appropriate corporate goal, Alito was careful to note that, in cases of disagreement between owners, the Court will turn to corporate structure "and the underlying state law in resolving disputes."[255] Accordingly, *Hobby Lobby*, the culmination of century-long debates about the nature and purpose of corporate entities, simply affirmed what state courts have long endorsed: corporations are entities created by a charter from the state; as such they cannot exercise their rights or define their purpose, but their managers certainly can.

[251] Burwell v. Hobby Lobby Stores, 573 U.S. 682, 706–07 (2014) (emphasis omitted).

[252] *Id.* at 711–12.

[253] *Id.* at 712.

[254] *Id.*

[255] *Id.* at 719.