

THE SUPREME COURT AS PROMETHEUS: BREATHING LIFE INTO THE CORPORATE SUPERCITIZEN

by

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*The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American scene.*¹

Abstract

To colonial America corporations represented not just another “person” entitled to constitutional rights, but rather extensions of tyranny of faraway England. Corporations have served a vital role in the commercialization of American society during the past century, but have always raised the specter of unhealthy concentrations of wealth and power of a few individuals. Before 2010, that concentration was limited directly to commercial power and only indirectly to political power. After the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, however, corporations may now directly dominate the political as well as the commercial direction of this country.

Introduction

Imagine working for an employer that requires your attendance at regular ideological seminars in which senior managers proselytize the corporation’s owners’ political views. You are handed a list of political candidates with notations indicating which ones should be supported and which should not. You are warned that if the “wrong” candidates are elected, your job will be in jeopardy. As result of the Supreme Court’s decision in *Citizens United v. Federal Election Commission*,² that “imagined” scenario is a reality.³

In 1612, Justice Coke declared that corporations have no souls.⁴ Nearly four hundred years later, in *Citizens United*, Justice Kennedy concluded that corporations were disadvantaged persons because the government had intruded upon their freedom of speech.⁵ The majority in *Citizens United* portrays a misleading image of corporations; true, most corporations are owned by a small group of individuals, managed by their owners, and limited in size and revenues.⁶ But what the *Citizens United* majority conveniently ignores is one particular attribute which has existed for at least one hundred years—that exceptionally large corporations, controlled by a handful of individuals, have amassed great quantities of wealth and power.⁷ The majority and concurring Justices in *Citizens United* present an intellectually disingenuous argument—corporations existed at the founding of the republic; corporations have always been considered persons in the eyes of the law; *ipso facto*, no difference was intended between natural and artificial corporate persons in the Constitution and the Bill of Rights. The argument is disingenuous for at least four reasons: (1) contrary to Justice Kennedy’s assertion that “[t]he identity of the speaker is not decisive in determining whether speech is protected[,]”⁸ the Supreme Court, as recently as 2006, held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline[.]”⁹ (2) just as the Supreme Court in 1950 recognized a significant enough difference between artificial and natural persons that statutes could properly impose different duties upon them,¹⁰ as recently as March 2011, the Court concluded that the term “personal privacy” within the Freedom of Information Act “suggests a type of privacy evocative of human concerns” and not that of a corporation;¹¹ (3) Justice Kennedy’s assertion that any abuses can be corrected by shareholders “through the procedures of corporate democracy[.]”¹² reflects a naïve fantasy of corporate governance[.]¹³ and (4) as will be demonstrated in this paper, the Court’s portrayal of the role of corporations at the time the Constitution and the Bill of Rights were ratified is inapposite to the historical record.¹⁴

While much has been said about *Citizens United*,¹⁵ particularly relating to its impact on campaign finance,¹⁶ its full consequences are yet to be experienced.¹⁷ This paper focuses on the role of the corporation in American society in light of *Citizens United*’s determination that a corporation is a “person” with unfettered political speech rights. From its inception, the corporation—a legal fiction—has been recognized as a legal entity separate from its owners.¹⁸ And it has always been granted some of the same legal rights as those held by natural persons—it can own and sell property; it can sue or be sued.¹⁹ Indeed, for over one hundred years it has been recognized as a “person” insofar as Fourteenth Amendment property rights are concerned.²⁰ But corporations have often retained supernatural powers, particularly perpetual existence.²¹ The majority opinion in *Citizens United* exhibits an extremely simplified and naïve view of the corporation as a member of U.S. society.

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In particular, corporations were not all that common at the time of the nation's founding, and the ones that did exist were remnants of monopolistic English trading companies.²²

To understand the role of the corporation in the modern U.S. society, it is important to understand the development of the corporation throughout history, and particularly in the U.S. during the past two centuries—a history which is glossed over in *Citizens United* by the majority of Justices. There is one recurring theme in the evolution of the corporation. For nearly two millennia the corporation was treated with suspicion, with its right to exist always weighed against its ability to restrict commerce and amass wealth and power within the hands of a few individuals. From the sixteenth to the mid-nineteenth centuries, commercial corporations were permitted to exist only in situations in which the reigning sovereign was either unable or unwilling to make substantial infrastructure improvements or support highly risky, but socially beneficial, investments. It is only since the end of the nineteenth century that corporations were perfunctorily formed for any legal purpose. Granted, commercial growth demanded easier incorporation, but, as discussed below, the resulting general incorporation laws had less to do with the needs of society and more to do with states loosening the controls over corporations in order to compete for domestic corporate charters and their consequent revenues. As also discussed below, the legal and constitutional rights that were initially granted to corporations arose organically to support their commercial functions and property rights.²³

Part I of this paper explores the history and development of the corporation over nearly two millennia, beginning in ancient Rome and concluding in America at the end of the eighteenth century. Part II traces the evolution of the corporation in nineteenth-century America from a special- to general-purpose entity, along with the constitutional developments associated with that evolution. When Justice Frankfurter wrote that the history of American constitutional law was a reflection of the impact of the corporation upon America,²⁴ he was writing about the Supreme Court's response to the rising economic power of corporations.²⁵ Part III of this paper discusses the growing concentration of wealth and power of the corporation in the late nineteenth and the twentieth centuries, and provides reflections on commentators' growing concern over that concentration of wealth and power. Part IV provides an analysis of the consequences of corporate supercitizens in modern America. At the heart of *Citizens United* is the issue of corporate personhood, at least in terms of constitutional rights. As with Prometheus,²⁶ and possibly Dr. Frankenstein,²⁷ the Supreme Court has breathed new life into an inanimate object. This paper concludes that with its newly acquired constitutional rights, the corporation is perhaps now ready to dominate not just commerce, but the political system as well.

I. The Historical Development of the Corporation

Ancient Rome is generally credited with originating the formal corporate association.²⁸ Modern American corporations can trace their lineage from the English joint-stock companies, the first of which was chartered in 1553.²⁹ And it is those early English companies which themselves trace their origins to the Roman corporations.³⁰ The original English joint-stock companies, which evolved from social and merchant guilds, were the major organizational structure and authority used to colonize North America. The citizens of the newly formed United States were therefore familiar with the corporate form—and of both its advantages and disadvantages.

Ancient Roman Corporations

Under Roman law, a *universitas*, or corporate body, existed when a number of persons “are so united that the law takes no notice of their separate existence, but recognises them only under a common name, which is not the name of any one of them.”³¹ The first Roman associations, *societas*, were family-based economic units.³² These *societas* evolved into *collegia licita*, “societies of men united for some useful business or purpose, with power to act like a single individual...[.]” similar to today's corporations.³³ The *collegia* were also guilds of different trades,³⁴ and came to control many industries, including shipping and mining.³⁵

The Roman corporations possessed many of the characteristics of modern corporations—all members were considered in law to be a single being; the entity could sue or be sued; it could receive and part with property; and it did not necessarily die.³⁶ In addition, the *collegia* could not be created by private agreement; they required the authority of a statute or constitution of an Emperor.³⁷ Roman corporations could cease to exist by one of four means: (1) expiration of a set term if the corporation was originally incorporated for a certain length of time; (2) voluntary surrender of its privileges by its members; (3) death or withdrawal of all members of a private corporation; or (4) an act of the state declaring the corporation dissolved.³⁸

The Roman emperors were often distrustful of corporations. Augustus dissolved “all but the ancient and legal corporations...[.]”³⁹ and Trajan, for example, refused to incorporate a fire brigade, observing that corporations “had greatly disturbed the peace of the cities... [and] that whatever name he gave them, and for whatever purpose they might be instituted, they would not fail to be mischievous.”⁴⁰ It is suggested that for a long period, corporations were endured by the state as harmless creatures.⁴¹ However, by the early part of the first century B.C., corporations were seen as overstepping their

powers and becoming a threat to the state.⁴² As a result of scandals involving public contracts with corporations of which public officials were shareholders, most Roman corporations were dissolved by statute in 64 B.C.⁴³

Early English Guilds, Chartered and Joint-Stock Companies, and the Bubble Act

With the decline of the Roman Empire, commercial corporations were nearly forgotten for a number of centuries.⁴⁴ In the meantime, borrowing from its Roman heritage,⁴⁵ the corporate form was used in England to legitimize and regulate cities, churches and universities.⁴⁶ Similar to their Roman predecessors, these early English corporations exhibited many of the same attributes as the modern corporation—perpetual succession, the right to sue and be sued in its own name, to own and sell property, to self-regulate, and act as a single entity.⁴⁷ These attributes were reflected in social, and later, merchant guilds formed in England in the fourteenth through sixteenth centuries.⁴⁸ The early English guilds adopted regulations to manage their businesses and control their members, with each guild governed by a chief officer, known as an alderman, along with one or more wardens or stewards, who controlled the guild's property.⁴⁹ Some of the guilds also reflected an early form of what we would recognize today as a board of directors. For example, the Gild of the Holy Trinity and St. Leonard, created in 1377, was governed by twelve “good and discrete men[.]” chosen annually.⁵⁰

Merchant guilds existed primarily to protect their members from competing factions, facilitating the emergence of trading monopolies.⁵¹ As England began to develop its foreign trade in the late fourteenth and early fifteenth centuries, a new form of organization developed—regulated companies engaged in foreign trade.⁵² Regulated companies were chartered by the Crown, with rights of association, and, because of the large sums of capital required, were governed by a governor or governors, with provisions for certain duties to be discharged by deputies.⁵³ With “merchant adventurers” taking to sea, exploring new sailing routes and trading opportunities, there was a growing need for greater amounts of capital for long term projects, which led to the creation of the joint-stock company.

The first English joint-stock company, originally chartered in 1553, was *the Mysterie and Companie of the Merchants Adventurers for the discoverie of regions, dominions, islands and places unknown*.⁵⁴ The company's expedition resulted in the discovery of a maritime route to Russia; as such, this first joint-stock company is commonly referred to as the Russia Company.⁵⁵ The Russia Company raised £6,000 by issuing common stock priced at £25 per share.⁵⁶ The funds were used to outfit three ships to explore trade routes along the north-east passage to China and the East.⁵⁷ Although two of the ships were lost to ice, the third ship reached Russia, resulting in a trade treaty.⁵⁸ Shortly thereafter, the Russia Company was granted exclusive rights to all trade with Russia, establishing a basis for the grant of monopolies to joint-stock companies for trade in newly discovered territories.⁵⁹ Besides being the first recognized English joint-stock company, the Russia company also included, for the first time, three levels of management—a governor, twenty-four assistants, and four consuls.⁶⁰ The role and powers of the stockholders, however, were not expressly provided for in the company's charter.⁶¹

Despite the early relative success of the Russia Company, very few joint-stock companies were chartered between 1553 and the following 140 years.⁶² Major exceptions include the East India Company, chartered in 1600,⁶³ and the first two Virginia companies that established the American colonies, chartered in 1606.⁶⁴ But throughout most of the seventeenth century, joint-stock incorporations remained rare; the privilege of organizing a joint-stock company had to be justified on the ground that some particular line of business was best exploited by incorporation.⁶⁵ Plague, war, a default by the government, and a revolution did not, however, stop commerce.⁶⁶ By the end of the seventeenth century, continuous organization with transferable shares and limited liability was becoming a commercial necessity.⁶⁷ Issuing stock to multiple individuals who jointly owned the enterprise proved the ideal solution—continuity of management could be assured although owners would come and go through the length of the enterprise, and the enterprise would not be subject to its individual investors' creditors.⁶⁸ By 1695 there were over 100 joint-stock companies in England.⁶⁹

As the number of joint-stock companies grew in the late 1600s and early 1700s, they introduced a new element into the English economy—freely tradable shares in companies.⁷⁰ Stock speculation was born, and exploited. By 1697, Parliament was investigating the “stock-jobbers” who prowled Exchange Alley, ready to “fleece the unwary with bogus promotions, false rumours, and . . . technical patter.”⁷¹ From 1703 to 1717, the share-capitalization of English joint-stock companies rose 150%, to over £20 million.⁷² During this period, in 1711, Parliament chartered *the Governor and Company of the merchants of Great Britain, trading to the South Seas and other parts of America and for encouragement of the fishing*.⁷³ Known as the South Sea Company, this joint-stock company was chartered to not only open trade routes into the Americas, but to also absorb £9 million of unfunded government debt in exchange for shares in the company.⁷⁴ The South Sea Company later entered into a complex financial arrangement with the Exchequer to absorb even more English debt, with the ability to pay dividends based solely on the appreciation in the value of its shares—and not through its commerce, but through demand for its stock by speculators.⁷⁵ Fueled by a combination of demand for South Sea Company shares and a rapid expansion in joint-stock companies, England experienced a stock speculation bubble during the latter part of 1719 and the first half of 1720.⁷⁶ Speculators were trading in the shares of “innumerable” newly-formed companies, some lasting only a few weeks or a few days.⁷⁷ The South Sea Company's stock price rose from £130 per share in January 1720 to as high as £1,050 in June 1720.⁷⁸

Concern was growing that the speculative bubble could not be sustained.⁷⁹ On June 11, 1720, King George I approved the “Bubble Act,” declaring all unchartered joint-stock companies public nuisances, and making it illegal, as of June 24, 1720, to act as a corporate body and trade shares without a charter granted by Parliament or the Crown.⁸⁰ The speculative bubble burst by the end of 1720.⁸¹ The South Sea Company’s share price dropped from its June 1720 high of £1,050 per share to £124 per share in December 1720.⁸²

The Bubble Act did have an immediate impact, particularly by severely limiting the ability to form a corporation through a charter approved by Parliament or the Crown.⁸³ “The real impact of the Bubble Act was to cut off any possibility of further development of a common law of joint-stock companies.”⁸⁴ As noted below, however, the Bubble Act, which was extended to the American colonies by an Act of Parliament in 1741,⁸⁵ may have had more impact in the United States than in England.⁸⁶

Corporations in Colonial and Post-Revolution America

The American colonists were familiar with the corporate charter,⁸⁷ but not in the way Justice Scalia suggests in *Citizens United*.⁸⁸ Because of the extension of the Bubble Act to the American colonies, there were almost no charters that originated in America prior to the Revolution.⁸⁹ At its birth, the United States adopted a very restrictive approach to allowing corporate charters, due, in part, to the Bubble Act. Similar to the restrictions in England, corporations in the new United States could only be chartered by a special act of legislation.⁹⁰ More importantly, Americans were wary of corporations because they had represented monopolistic approaches to commerce, stifling local enterprises. Adam Smith viewed corporations as the means to restrain competition.⁹¹ Prior to 1800, incorporations were primarily limited to quasi-public purposes,⁹² such as building canals, roads, bridges, and delivering water.⁹³ Though nearly one-quarter of these early charters were for banks and insurance companies,⁹⁴ very few were for manufacturing or other strictly commercial purposes.⁹⁵

While corporations could only be chartered through an act of legislation, there was some dispute regarding the states’ right to repeal or amend charters. Some of the acts granting charters contained provisions allowing the legislature to “alter, limit, annul or restrain” any powers vested by the acts.⁹⁶ While the Massachusetts Supreme Court held in 1806 that “the rights legally vested in . . . any corporation[] cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation[,]”⁹⁷ the Supreme Court of Virginia in 1809 held, “[i]t is the character of a legislative act to be repealable by a succeeding legislature; nor can a preceding legislature limit the power of its successor. . . .”⁹⁸ When, in 1816, the New Hampshire legislature amended the charter of Dartmouth College to increase the number of trustees, nine of the original trustees challenged the right of the legislature to amend the original charter.⁹⁹ The New Hampshire Supreme Court’s holding that the legislature had the power to amend the College’s charter was appealed to the United States Supreme Court,¹⁰⁰ which held that a charter is a contract between the corporation and the sovereign which created it,¹⁰¹ establishing that the U.S. Constitution prevents a legislature from impairing an original contract/charter.¹⁰² In *Trustees of Dartmouth College*, Chief Justice Marshall also formally enunciated the legal status that corporations had already long held: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”¹⁰³

II. The Evolution of Corporations from Special to General Purpose Entities

In *Trustees of Dartmouth College*, Chief Justice Marshall stated that “[b]eing the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”¹⁰⁴ Historically, corporations were created for the “advantage of the public” through the advancement of religion, learning, and commerce.¹⁰⁵ While early Americans were quite leery of corporations because of their grants of monopoly,¹⁰⁶ state legislatures also recognized their advantages in building the infrastructure of the fledgling nation. Special-privilege franchises—establishing rights of ways, charging tolls, issuing bank notes, or exercising the power of eminent domain—were granted to private enterprises through corporate charters in order to provide necessary public services.¹⁰⁷

The extent of a corporation’s power, express or implied, was a major concern in the development of corporations in American commerce during the nineteenth century. Just as the English charters in colonial America represented monopolistic interests, so too did the early charters granted by state legislatures. The extent to which those monopolies would be allowed to continue became a central battle in determining the powers of corporations. The monopoly enjoyed by Robert Livingston and Robert Fulton became the centerpiece of the tension between the right of states to grant exclusive privileges and federal control over interstate commerce.

Robert Livingston, the first Chancellor of New York,¹⁰⁸ submitted a proposal to the New York Legislature in 1798 for a “mode of applying the steam-engine to propel a boat on new and advantageous principles. . . .”¹⁰⁹ Because of the risk and expense of such an enterprise, Livingston requested, and received, “the exclusive right and privilege of navigating all kinds of boats, which might be propelled by the force of fire or steam, on all the waters within the territory or jurisdiction of the State of New York, for the term of twenty years . . . [.]” provided Livingston could build a boat within one year that could travel at least four miles per hour.¹¹⁰ Livingston was unable to build a boat that met the legislative requirements and

abandoned the project when he left for France in 1801.¹¹¹ While in France, Livingston met Robert Fulton, and Livingston financed Fulton's designs that would eventually meet the legislative requirements; Livingston also successfully lobbied the New York Legislature to revive the exclusive navigation rights, this time to Livingston and Fulton jointly.¹¹²

Under their monopoly, Livingston and Fulton granted a license to Aaron Ogden to operate ferry boats between New York and New Jersey.¹¹³ Thomas Gibbons later began to operate steamboats, without New York's permission, in competition with Ogden and Ogden sued to stop Gibbons,¹¹⁴ with the dispute ultimately being heard by the U.S. Supreme Court.¹¹⁵ While Livingston and Fulton had not been granted a charter by the New York Legislature, *per se*, they were granted an exclusive franchise. The extent to which that special-privilege franchise could be exercised under the U.S. Constitution was the central issue in *Gibbons v. Ogden*.¹¹⁶ Chief Justice Marshall nullified Livingston's and Fulton's monopoly, declaring that under the Constitution Congress has the exclusive right to regulate interstate commerce.¹¹⁷

Although corporations were initially used extensively for internal improvement projects, e.g., canals, roads, bridges, and railroads, there began a contraction of state and local government involvement in such projects during the first half of the nineteenth century.¹¹⁸ This contraction reflected, in part, a *laissez-faire* attitude that was also championed by President Andrew Jackson. In expressing his disfavor of the Bank of the United States in his 1833 Fifth Annual Address to Congress, Jackson stated, "the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."¹¹⁹ Another rising argument against special-privilege franchises was that they stifled free enterprise. As cities grew in population¹²⁰ and new transportation technologies evolved, the older public accommodation franchises started becoming obsolete—e.g., railroads were more efficient than canals; bridges more efficient than ferries.¹²¹

The Erie Canal was used as an example of monopolistic abuse because its charter granted it an exclusive right, to protect New York state's investment in the canal,¹²² to all freight transported between the Hudson River and Lake Erie; yet railroads could transport people and freight more economically and all-year round (the canal froze in the winter).¹²³ Early monopolistic special-privilege franchises were becoming seen as a barrier to economic growth.¹²⁴ This attitude received formal legal recognition in the *Charles River Bridge* case,¹²⁵ in which the owners of the Charles River Bridge, a toll bridge connecting Boston and Charleston, objected to the erection of the nearby Warren bridge, which would become toll-free in a few years, resulting, the plaintiffs claimed, in the complete destruction of the value of their franchise.¹²⁶ Fundamentally, the proprietors of the Charles River Bridge argued their franchise granted them exclusive rights to transportation across the Charles River.¹²⁷ In deciding against the plaintiffs, the U.S. Supreme Court ruled that powers conveyed in a charter must be found in the language of the charter itself.¹²⁸ Chief Justice Taney echoed a growing sentiment regarding the role of corporations in American society, "[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations."¹²⁹ As stated by one commentator, "the *Charles River Bridge* case represents another chapter in the process of discarding the old habit of conceiving of corporations as the recipients of special state-conferred favors and of adjusting the law to treat the act of incorporation as nothing more than a mere license to exist."¹³⁰ *Laissez-faire* attitudes and the *Charles River Bridge* case represent a shift in perspective in which the utility of the corporation for overall economic growth outweighed the limited special-privilege franchises, to the extent, as will be shown, that the law ultimately adapted to make the corporation "available on terms most responsive to businessmen's needs or wishes."¹³¹

While the various states were beginning a move toward general incorporations, there remained one additional unresolved issue related to the corporation's role in interstate commerce—comity. Can a corporation, which must be formed in, and exists under the laws of, one state, enter into valid contracts in foreign states? The U.S. Supreme Court answered in the affirmative in *Bank of Augusta v. Earle*.¹³² Chief Justice Taney, who delivered the majority opinion in *Bank of Augusta*, like President Jackson, distrusted corporations as aggregations of wealth and power which posed a direct threat to the democratic system.¹³³ But while Taney may have feared its abuses, he also recognized that the corporation served as an indispensable adjunct of the nation's growth.¹³⁴ In *Bank of Augusta*, two banks and a railroad company, all incorporated in states other than Alabama, sued defendants in Alabama for breach of contracts and the Circuit Court ruled that since the corporations were incorporated in states outside Alabama, they could not bring suit on their contracts in Alabama.¹³⁵ The practical effect of the Circuit Court's decision "was to limit corporate business to the states in which the corporations were chartered, which would have rendered all but impossible the growth of interstate enterprise of any consequence."¹³⁶ Taney ruled that the law of comity permits a corporation chartered in one state to enter into and enforce contracts in other states.¹³⁷ At the same time, however, Taney also recognized the right of states to regulate the conduct of foreign corporations acting within their jurisdiction.¹³⁸

While Taney refused to recognize corporations as persons subject to the privileges and immunities clause of the Constitution,¹³⁹ holding that rights granted to a corporation through its charter are "not the rights which belong to its members as citizens of a state[,]"¹⁴⁰ it has been argued that comity requires and defines the nature of the corporation as a "person":

A group of people go through certain legal forms which, by virtue of the *lex loci*, confer upon them a valuable legal right, personality. Without this legal right, the property which they own, the contracts which

they, as a group, have made, cannot be legally protected. If they were to step into a neighboring state; and that state were to deny their corporate existence, the property and contract rights would be impaired.¹⁴¹

Although Chief Justice Taney was unwilling to grant corporations the same constitutional rights available to its individual members, less than fifty years later the Supreme Court, in what can only be described as an off-hand manner, implied that the Fourteenth Amendment's equal protection clause applies to corporations:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.¹⁴²

Despite how questionable the *Santa Clara County Court*'s ruling that the Fourteenth Amendment applied to corporations may have been, it eventually became settled law that, indeed, it did.¹⁴³

A combination of factors, therefore, changed the role of the corporation in American society in the nineteenth century: states restricting their involvement in internal improvements, looking more to private enterprise; growing laissez-faire attitudes; restricting corporate privileges to those expressly stated in their charters; rights of comity; and protection of corporate property. Incorporation through special legislative act was becoming outmoded. "Beginning about 1848, most of the states junked the special act system and enacted general incorporation statutes under which anyone could organize business corporations by preparing and filing articles subscribed by a prescribed number of incorporators."¹⁴⁴ Article VIII of the Third Constitution of New York of 1846 is generally regarded as the first state constitutional provision eliminating special legislative acts for incorporation.¹⁴⁵ Although no special legislative act was required for the incorporation of certain types of businesses in the early general incorporation statutes, they still imposed strict limitations, particularly relating to the type of business that could be conducted through general incorporation, as well as capitalization.¹⁴⁶ While it is claimed New Jersey adopted the first modern general incorporation law in 1896,¹⁴⁷ it still restricted the types of commercial activities that could be carried out under the statute.¹⁴⁸ Delaware's 1899 general incorporation statute was the first to expressly authorize the formation of corporations for the transaction of any lawful business.¹⁴⁹

III. The Monopolistic Tendencies of the Modern Corporation

While no one has collected incorporation data for every state throughout the history of the United States, limited data has been collected which reflect overall trends in the growth of corporations. For example, a compilation of incorporations under special legislative acts in six states from 1800 through 1891 reveals a total of 10,415 corporate charters.¹⁵⁰ Total incorporations for the same six states under general incorporation laws from 1901 through 1929 total over one-half million.¹⁵¹ No one has tracked state-by-state annual incorporations since 1943, though the United States Census Bureau began tracking aggregate U.S. corporations beginning in 1916.¹⁵² The total number of corporations in the United States reached one million in 1958,¹⁵³ and the most recent figures available record just under six million corporations.¹⁵⁴

Justice Brandeis, in a comprehensive review of the history of the corporation in the United States, recounts that through most of that history, the corporate privilege was granted sparingly, primarily due to "[f]ear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain."¹⁵⁵ Brandeis concluded that "[t]here was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations."¹⁵⁶

As noted above, the privilege of incorporation was still quite limited under the initial general incorporation laws, especially in terms of maximum capital, the type of enterprise permitted, and the length of the enterprise.¹⁵⁷ All that changed, however, at the turn of the century (from nineteenth to twentieth). Almost all restrictions on capital, types of enterprises, length of existence, as well as management control of the corporation, vanished. Not because the concerns over the powers corporations could yield from their vast accumulations of wealth and capital had disappeared. The restrictions were removed by the individual states to compete for corporate charters, and their resulting state revenues.¹⁵⁸ In other words, "[t]he race was one not of diligence but of laxity."¹⁵⁹ Brandeis concludes: "Such is the Frankenstein monster which States have created by their corporation laws."¹⁶⁰

It is the concentration of power that general incorporation laws have fostered that has been the greatest concern during the past century.¹⁶¹ One response to the growing concentration of economic power wielded by corporations was passage of the Sherman Act 1890,¹⁶² which was designed to prevent large corporations from inhibiting competition in the marketplace through monopolistic tendencies.¹⁶³ The legislative history of the Sherman Act suggests that the goal of the Act was maximization of consumer welfare.¹⁶⁴ Still, corporations continued to grow in size and power throughout the twentieth century. By 1950, corporations held almost sixty percent of national income-producing wealth and "became inextricably linked with the idea of postwar prosperity."¹⁶⁵ Today, the 200 largest corporations earn nearly one-quarter of total U.S. business revenues.¹⁶⁶

Regardless of anti-monopoly laws such as the Sherman Act, concentration of wealth and power has long been a natural by-product of the corporation:

Under the power to create corporations with unlimited capital stock, either directly or by consolidation, great aggregations of capital have been formed which have seized upon specific industries and driven everybody else out of them. They stand like armed colossuses astride the gateways of commerce and destroy every entrant who presumes to compete with them. They have no legal grant of monopoly, but monopoly comes to them by virtue of their size, organization and strength, just as surely as monopoly went to the East India Company by royal grant.¹⁶⁷

IV. The Consequences of Corporate Supercitizens

Our review of the historical development of the corporation demonstrates that the modern corporation is not the same entity the Framers of the Constitution understood; it has the capacity to speak with a much greater voice than the Framers could have conceived. Justice Scalia is incorrect when he states that at the founding of this nation, “religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.”¹⁶⁸ Yes, the founders were familiar with the corporate form—as representative of the oppressive monarchy they were overthrowing.¹⁶⁹ As one commentator has noted, the American colonists were quite familiar with the English trading companies, and “[t]he distinguishing feature of these companies was *not legal personality, but monopoly*.”¹⁷⁰ In addition to denying the federal government an exclusive right to grant charters, four states (Massachusetts, New Hampshire, New York, and Rhode Island) accompanied their ratification of the Constitution with the recommendation “[t]hat Congress erect no company of merchants with exclusive advantages of commerce,” or other words of similar import.¹⁷¹ For 100 years after the founding of this nation, the corporation remained a special privilege, granted sparingly and under significant regulation.

The ability of the modern corporation’s voice to drown out the voice of individuals cannot be presumed to have been contemplated by the Framers of the Constitution, nor should it be generally accepted wisdom that corporations necessarily would have been viewed favorably by them.¹⁷² Additionally, the fact that corporations’ vast wealth can fund a voice louder than that of natural persons calls into question individual suffrage, the fundamental democratic principle that the people possess the right to choose their governmental representatives.¹⁷³ Arguably, the “people” are not choosing their governmental representatives if the “people,” in the form of behemoth corporations, are influencing votes of less powerful individuals.

Citizens United held that corporations possess the same political speech rights as natural persons.¹⁷⁴ As a result, corporations have been freed to spend significant, if not unlimited, sums of money on political speech directly influencing elections and have begun to do so.¹⁷⁵ According to an analysis of corporate political expenditures since *Citizens United*, “67% of total independent expenditures in 2010 came from groups ‘freed’ by *Citizens United*”¹⁷⁶ and “37% of outside spending by unions in 2010 came from groups ‘freed’ by *Citizens United*.”¹⁷⁷ As persons having unrestricted First Amendment political speech rights, corporations may apply their political expenditures in a variety of ways. For example, a corporation is now free to send letters to its employees, such as Koch Industries did just before the November 2010 elections, advocating votes for specific candidates and warning those employees of the negative effect on everything from their family to their country if they didn’t vote in accordance with the views of the owners of Koch Industries.¹⁷⁸ Such a letter was impermissible under the pre-*Citizens United* political landscape.

One of the concerns raised by the *Citizens United* decision is that corporations are actually persons like no natural person in existence. Unlike natural persons, corporations do not have a conscience,¹⁷⁹ they do not go to jail,¹⁸⁰ they do not vote, they cannot hold office and they do not possess all of the rights afforded individuals under the Bill of Rights, namely the protection from self-incrimination.¹⁸¹ By holding corporations’ political speech rights to be on par with the political speech rights of natural persons, the Supreme Court has created a supercitizen of immense proportion capable of drowning out the voice of natural persons in a manner similar to the tendency of monopolies to exert undue influence on the commercial market. Just as the protection of individual consumer’s welfare was considered necessary by the Sherman Act’s disallowance of monopolies, it is necessary to protect natural individuals’ political welfare in order to maintain and foster the fundamental individual rights provided under the Constitution and the Bill of Rights.

Corporate political speech is not necessarily the speech of the shareholders of the corporation, since dissenting shareholders’ views are not required to be taken into consideration, but rather the speech of the managers of the corporation.¹⁸² In fact, one criticism of *First National Bank of Boston v. Bellotti*,¹⁸³ in which the Supreme Court originally acknowledged political speech rights for corporations, is that corporate speech is an illusion: “Only individuals can speak, and corporate speech obscures the fact that managers use corporate assets to convey their own views; the nature of corporate governance is such that communication becomes managerial speech, unratiﬁed by shareholders.”¹⁸⁴ While it may not be permissible to censor the speech of wealthy individuals, “it is permissible to limit the power of individuals to use their ownership or management of corporations to influence politics.”¹⁸⁵ To do otherwise enables the possibility of managers of corporations stifling the political debate of citizens by enabling roadblocks to their access of each other’s views.¹⁸⁶ It is not a tremendous leap to conclude that “the living People, if engaged in constitutional politics, would authorize their Article I representatives to legislate for purposes of preventing concentrations of private economic power from distorting political discourse.”¹⁸⁷

The *Citizens United* ruling did not limit the power of corporations to influence politics; in fact, it gives them a greater opportunity to influence politics. It has been acknowledged that the political speech allowed in *Bellotti* was most likely the reason for the referendum on issue in that case being struck down.¹⁸⁸ In other words, once corporate political expenditures were left unfettered, the corporations' political speech was able to directly influence the outcome of the election. The outcome of the referendum underlying *Bellotti*, arguably as a direct result of corporate expenditures for political speech that raise the volume of the political debate and result in a vote favorable to the corporations funding such speech, provides evidence to support the assertion that the increase in speech via corporate funding is not necessarily fostering the free exchange of ideas between the citizenry, rather than drowning out opposing ideas of natural citizens through monopolistic control of the market.

More recently, the Eastern District Court of Virginia not only dismissed an indictment count against a defendant in a campaign financing case because the underlying statute was determined to be unconstitutional after *Citizens United*, but also appears to have extended the *Citizens United* ruling through its interpretation of the Supreme Court's rationale.¹⁸⁹ The District Court decided that *Citizens United* eliminated any distinction between corporations and natural persons with respect to political speech and then afforded corporations another step into the realm corporate superpowers by holding that such elimination means that corporations should be able to make direct campaign contributions within the limits of the Federal Election Campaign Act of 1971 just as individuals can and found the statute's §441b (a) ban against such direct corporate contributions unconstitutional.¹⁹⁰

There is a mechanism in place to provide funding for a corporation's political speech using funds contributed by willing individuals, the Political Action Committee (PAC). PACs are useful because when political speech is funded through PACs, the speech of the corporation truly remains the speech of natural persons since it is funded by natural persons that presumably are in agreement with the use of the funds. The use of general funds by corporations results in the contribution of the money of individuals, the shareholders of the business, being used by the corporation to fund political speech versus applied to business operations; and it may be speech with which shareholders are not necessarily in agreement. The fact that the corporation can contribute vast amounts of money from general corporate funds in contravention to the ideals and votes of the individuals who own the company effectively competes with the voice of those natural individuals.

As noted above,¹⁹¹ the Supreme Court's holding in *Citizens United* is inconsistent with its earlier holding in *Garcetti v. Ceballos*.¹⁹² In *Garcetti*, the Court held that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."¹⁹³ In *Citizens United*, however, the Court expressed no willingness to restrict the speech of an artificial person when that speech owes its existence to the professional operation of a corporation. This suggests that the speech of a corporation in furtherance of its corporate purpose or managerial position is more important than the speech of a natural person in furtherance of his or her professional responsibilities. Such a proposition is antithetical to the overall importance of the freedom of speech as provided in the First Amendment. As the Court expressed in *New York Times Co. v. Sullivan*,¹⁹⁴ the protection of speech provided by the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁹⁵ Further, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people ... is a fundamental principle of our constitutional system."¹⁹⁶ The protection of free speech was understood to be for the benefit of the people rather than for the benefit of an artificially created entity speaking for those people, regardless of whether they agree with the entity or not. If the Court holds that speech in the course of carrying out an individual's duties in employment does not warrant the application of free speech protection, it is unclear as to how it can then extend such protection to the employer itself to fund political speech in furtherance of such corporations' commercial ends.

Conclusion

Corporations in some form existed long before the founding of the United States of America. Over the course of United States history, as corporations proliferated and grew larger, they were also granted constitutional rights as persons additional to those originally held by such corporations. While corporations always held property rights and had the capacity to sue and be sued, other rights and powers, such as Fourteenth Amendment rights, were determined through interpretation in case law over time. The *Citizens United* court further extended these corporate powers to include the same unrestricted freedom of political speech as possessed by natural persons under the Constitution.

Although America has obviously progressed tremendously since 1896, some things remain the same. In 2010, President Obama could easily have channeled the words of President Jackson from his fifth annual address in 1896 and questioned whether the ultimate effect of the decision in *Citizens United* will mean that the citizenry of the United States will still be able to elect representatives of their informed choosing or whether the unfettered political expenditures of American corporations will eliminate the ability for our citizens to make decisions based on an unbiased free flow of information that is able to be heard above the newly freed corporate funded messages in the crowded media stream.¹⁹⁷ Suspicion regarding corporations remains in America despite the apparent unwillingness of this Supreme Court to acknowledge it or to guard against the further expansion of corporate supercitizenship that could now threaten not only the economic balance of the

country through corporate monopolistic tendencies in the commercial arena, but also through similar monopolistic behaviors in the political arena given the newly recognized status of corporations as persons enjoying unrestricted rights of political free speech.

Footnotes

¹ FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 63 (1937).

² 558 U. S. 50, 130 S. Ct. 876 (2010).

³ Mark Ames & Mike Elk, *Big Brothers: Thought Control at Koch*, *THE NATION* (Apr. 21, 2011), <http://www.thenation.com/article/160062/big-brothers-thought-control-koch> (quoting legal experts who called the corporation's "blatant politicking highly unusual although no longer skirting the edge of legality..." after *Citizens United*).

⁴ *The Case of Sutton's Hospital*, 10 Co. Rep. 23a, 32b (1612), reprinted at 77 Eng. Rep. 960, 973 m (1907).

⁵ *Citizens United*, 130 S. Ct. at 899 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."). *Citizens United* reversed *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a state restriction on independent political expenditures by corporations; noting "that the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form[]" (citing *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985)) (*id.* at 659-60) (internal quotation marks omitted)), and reversed that part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203-09 (2003), which had upheld restrictions on corporate independent expenditures under the Bipartisan Campaign Reform Act of 2002 (Act March 27, 2002, Pub. L. 107-155, § 1(a), 116 Stat. 81). See *Citizens United*, 130 S. Ct. at 913.

⁶ See *Citizens United*, 130 S. Ct. at 907 (referencing statistics from the Chamber of Commerce of the United States (96% of its 3 million business members have fewer than 100 employees) and a Congressional Research Service Report (more than 75% of corporations whose income is taxed under federal law have less than \$1 million in receipts per year)).

⁷ The largest 100 U.S. corporations, representing less than 0.2% of all corporations and 0.03% of all businesses in the U.S., earned 22% of total corporate revenues and 18% of total business revenues in 2007. Stated another way, a mere 100 corporations earn nearly one-fifth of all business revenues in the U.S. And the largest 200 corporations earn nearly one-quarter of all business revenues. These calculations are derived from, U.S. Census Bureau, *The 2011 Statistical Abstract, Business Enterprise: Sole Proprietorships, Partnerships, Corporations, Number of Tax Returns, Receipts, and Net Income by Type of Business*, tbl.743, available at <http://www.census.gov/compendia/statab/2011/tables/11s0743.xls> (last visited May 26, 2011) (reflecting 2007 tax returns; latest available); *Fortune 500*, *FORTUNE*, 2007, available at http://money.cnn.com/magazines/fortune/fortune500/2007/full_list/index.html (last visited May 26, 2011). See also *infra* notes 161-167 and accompanying text; *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 565 (1933) (Brandeis, J., dissenting) (noting that by the 1930s, "perhaps two-thirds of our industrial wealth has passed from individual possession to the ownership of large corporations...").

⁸ *Citizens United*, 130 S. Ct. at 900 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986)).

⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹⁰ See *U.S. v. Morton Salt Co.*, 338 U.S. 632, 651 (1950).

¹¹ *Fed. Commc'ns Conn'n v. AT&T, Inc.*, 131 S. Ct. 1177, 1183 (2011) (interpreting 5 U.S.C. § 552(b)(7)(C) (2007)).

¹² *Citizens United*, 130 S. Ct. at 911.

¹³ Students of corporate governance long ago recognized that due to the wide dispersion of stock ownership, particularly in large corporations, control of the corporation has effectively passed from the shareholders to the directors. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 277 (1933) ("[W]e have reached a condition in which the individual interest of the shareholder is definitely made subservient to the will of a controlling group of managers even though the capital of the enterprise is made up out of the aggregated contributions of perhaps many thousands of individuals."). First, the substance of a decision by a board of directors will never be questioned by the courts, only the procedures that were followed. See, e.g., *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del Ch. 1996):

[C]ompliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a *good faith* effort to advance corporate interests.

To employ a different rule—one that permitted an “objective” evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests.

Second, shareholders do not even have the right to nominate their own directors. Securities and Exchange Commission (SEC) Rule 14a-8(i)(8) allows a corporation to exclude from its proxy a shareholder proposal if it relates to a nomination or an election for membership on the company’s board of directors. 17 C.F.R. § 240.14a-8(i)(8) (2011). Although the SEC has proposed a new Rule 14a-11 which requires corporations to include in their proxy statements the names of directors nominated by shareholders under limited circumstances (Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782 (Sept. 16, 2010)), the SEC has stayed implementation of the new rule in light of court challenges (*In re Business Roundtable and Chamber of Commerce*, No. S7-10-09, Order Granting Stay (Sec. & Exch. Comm’n Oct. 4, 2010)). As former SEC chairman Arthur Levitt, Jr. stated, “A director has a better chance of being struck by lightning than losing an election.” Arthur Levitt, Jr., *Stocks Populi*, WALL ST. J., Oct. 27, 2006, at A14. Shareholders are left with only one alternative if they do not agree with the politicking of their corporate board—sell their shares. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 653 (1990) (“At the least, the shareholder is forced to choose between contributing to political expression with which they disagree or foregoing a profitable investment opportunity.”). The political speech of the managers of the corporation will trump the speech of the individual shareholders. Justice Kennedy never explains why it must be the shareholders who are forced to suffer by selling their shares in an otherwise profitable venture.

¹⁴ In the end, the Court’s rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court.

Citizens United, 130 S. Ct. at 941-42 (Stevens, J., dissenting).

¹⁵ Lexis/Nexis lists over 330 law review articles that cite *Citizens United* (though, admittedly, some of the articles do not address the case in substance).

¹⁶ See, e.g., Breanne Gilpatrick, *Removing Corporate Campaign Finance Restrictions in Citizens United v. Federal Election Commission*, 130 S. CT. 876 (2010), 34 HARV. J.L. & PUB. POL’Y 405 (2011); Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77 (2011); David Axelman, *Citizens United: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, 65 U. MIAMI L. REV. 293 (2010).

¹⁷ See, e.g., Alexandra Pichette, *ColbertPAC: Standing up for America’s Real Oppressed Minority, the Corporation*, JETLAW (May 25, 2011), <http://www.jetlaw.org/?p=6626> (discussing comedian Stephen Colbert’s petition to the Federal Election Commission (FEC) for an advisory opinion specifically asking if the money spent in keeping Colbert on the air talking about his Political Action Committee (PAC) would count as an in kind contribution from his broadcaster Viacom; noting that the FEC’s decision, post *Citizens United*, could open the door for on-air political commentators to openly solicit support for their personal PACs).

¹⁸ See, e.g., *infra* note 31 and accompanying text.

¹⁹ See *infra* note 36 and accompanying text; *Trs. Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) (Story, J., concurring) (“Among other things it [a corporation] possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties.”).

²⁰ *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

²¹ See, e.g., *Trs. Dartmouth Coll.*, 17 U.S. at 667 (“Among other things it [a corporation] possesses the capacity of perpetual succession....”) (Story, J., concurring).

²² See *infra* notes 87-89 and accompanying text.

²³ See, e.g., Mayer, *supra* note 13, at 590 (“Although business defended against government regulation by using fourteenth amendment property-oriented safeguards, Bill of Rights protections rarely were sought. When invoked, they were used to defend tangible property against economic regulation and operated much like due process property protections.”). See also *id.* at 664-65 (listing cases applying the Bill of Rights to corporations).

²⁴ *Supra*, note 1 and accompanying text.

²⁵ *Id.* (“We know that [Chief Justice] Taney was keenly alive to the concentration of economic power which the corporate form promoted, and greatly concerned over its threat to those more or less egalitarian hopes for American society which he shared with Jefferson and Jackson.”).

²⁶ Our reference to Prometheus derives from the Roman myths, which portray Prometheus as the creator of humans. See Olga Raggio, *The Myth of Prometheus: Its Survival and Metamorphoses up to the Eighteenth Century*, 21 J. WARBURG & COURTAULD INSTS. 44, 46 (1958).

²⁷ MARY SHELLEY, *FRANKENSTEIN; OR THE MODERN PROMETHEUS* 85 (1818) (“I became myself capable of bestowing animation upon lifeless matter.”). See also *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 567 (1933) (Brandeis, J.,

dissenting) (referring to corporations as Frankensteins). We will leave it the reader to decide whether the Frankenstein references should be limited to creating life from inanimate materials or whether to extend the metaphor to also include monstrous ruin. *See, e.g.*, Charles Francis Adams, Jr., *A Chapter of Erie, in HIGH FINANCE IN THE SIXTIES: CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY* 20, 115 (Frederick C. Hicks ed., 1929) (“Modern society has created a class of artificial beings who bid fair soon to be the masters of their creator.”).

²⁸ Some historians note that the first corporations originated in ancient Greece, which “permitted private companies to institute themselves at pleasure, provided they did nothing contrary to the public law.” JAMES KENT, II COMMENTARIES ON AMERICAN LAW 216 (1827). There is also evidence of associations established for mercantile purposes in Assyria more than two thousand years ago. R.H. INGLIS PALGRAVE, III DICTIONARY OF POLITICAL ECONOMY 65 (1908). Legal commentators, however, credit Roman law as the primary origin of the corporation. *See, e.g.*, SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 468 (1807) (“The honor of originally inventing these political institutions entirely belongs to the Romans.”) (referring to corporations).

²⁹ *See infra* notes 54-59 and accompanying text.

³⁰ KENT, *supra* note 28, at 217 (noting that the principles of law applicable to corporations under English law were borrowed chiefly from Roman law). Some commentators note that early English corporations borrowed some of their structure from early Italian financial associations. *See, e.g.*, WILLIAM ROBERT SCOTT, I THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720 1 (1912) (noting that organizations similar to early English corporations had existed in the Italian states as early as 1407; suggesting the English associations copied the Italian structures). In particular, as larger sums of capital were raised through joint-stock companies (*see, e.g., infra* note 67), the role of “consul,” a deputy-governor charged with administering the finances, was borrowed from Italian organizations. SCOTT, *supra* at 20.

³¹ W.A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 314 (4th ed. 1803).

³² *See* PALGRAVE, *supra* note 28, at 65.

³³ KENT, *supra* note 28, at 216. Contrast with *collegia illicita*, those associations which were illicit or unauthorized because they exceeded their powers or assembled for a purpose other than in their charter. *Id.*

³⁴ THE INSTITUTES OF JUSTINIAN 160 (Thomas Collette Sandars trans., Callaghan & Co. 1876).

³⁵ R.N. Denham, Jr., *An Historical Development of the Contract Theory in the Dartmouth College Case*, 7 MICH. L. REV. 201, 202 (1909). *See also* I THE DIGEST OF JUSTINIAN 172 (Charles Henry Monro trans., Cambridge University Press 1904).

³⁶ HUNTER, *supra* note 31, at 314. It is not entirely clear, however, when enterprises became formally vested with these attributes. *See* WALTER C. CLEPHANE, THE ORGANIZATION AND MANAGEMENT OF BUSINESS CORPORATIONS 2 (2nd ed. 1913).

³⁷ HUNTER, *supra* note 31, at 314. *See also* I THE DIGEST OF JUSTINIAN, *supra* note 35, at 172; Denham, Jr., *supra* note 35, at 202:

[U]nder Julius Cesar, each charter that was applied for had to be submitted to him, with the object of the corporation clearly defined therein, in order to receive the approval necessary to make it a recognized and legal corporation (*collegium licitum*), and unless such authority was received, any society meeting without it was deemed illegal (*collegium illicitum*), to have been organized contrary to the decree of the senate and the imperial commands, and to be subject to dissolution at any time.

(citation omitted).

³⁸ Denham, Jr., *supra* note 35, at 203.

³⁹ KENT, *supra* note 28, at 216-17

⁴⁰ *Id.* at 217.

⁴¹ Denham, Jr., *supra* note 35, at 204.

⁴² *Id.*

⁴³ CLEPHANE, *supra* note 36, at 3. However, Denham, Jr. asserts that only unincorporated associations, acting for no certain legal purpose, and not *collegia licita*, were dissolved. Denham, Jr., *supra* note 35, at 204. This is very similar to actions taken by the King of England some 700 years later. *See infra* note 80 and accompanying text. By 58 B.C. most of the Roman charters which had been repealed were revived and new charters were once again granted. *See* CLEPHANE, *supra* note 36, at 3.

⁴⁴ *See, e.g.*, Denham, Jr., *supra* note 35, at 205 (“After Rome had ceased to flourish and exercise her world power, and up until the Middle Ages, practically all the lay corporations disappeared, and with them, also, went the very conception of a corporation.”); CLEPHANE, *supra* note 36, at 3-4 (noting that brotherhoods of merchants and artisans associated for mutual aid and protection during the Middle Ages, but these guilds lacked any legal form of personhood).

⁴⁵ KENT, *supra* note 28, at 217. *But see* I MAURICE WORMSER, FRANKENSTEIN, INCORPORATED 8 (1931) (noting that Roman law was practically unknown in England prior to 1066; suggesting that the English corporation was a product of local evolution and development).

⁴⁶ See, e.g., KENT, *supra* note 28, at 218 (noting that in the early periods of the history of modern Europe, cities, towns, and fraternities were invested with corporate powers and privileges to protect their trade, as well as a check against overreaching feudal barons); BLACKSTONE, *supra* note 28, at 470-71 (distinguishing ecclesiastical corporations, composed entirely of “spiritual persons[,]” with lay corporations, which include towns, universities, as well as some commercial endeavors; also noting the King was a corporation to ensure immediate succession and preservation of the crown’s property).

⁴⁷ See BLACKSTONE, *supra* note 28, at 474-75 (listing the principal attributes of corporations); WILLIAM SHEPHEARD, OF CORPORATIONS, FRATERNITIES, AND GUILDS 1-5 (1659) (listing similar attributes).

⁴⁸ See SCOTT, I, *supra* note 30, at 3. There is evidence of a guild being granted perpetual succession prior to the Norman Conquest in 1066. *Id.* Scott notes that within the merchant guilds arising after the Norman Conquest, “the conception of the corporate character becomes somewhat more explicit[.]” *Id.* at 5.

⁴⁹ *Id.* at 4.

⁵⁰ TOULMIN SMITH, ENGLISH GILDS 164 (1870). This governing body is recognized as an early form of committee or council (SCOTT, I, *supra* note 30, at 4), which was later used to govern corporations (*see, e.g., infra* note 60 and accompanying text).

⁵¹ SCOTT, I, *supra* note 30, at 3.

⁵² *Id.* at 8.

⁵³ *Id.* at 9. For example, the Fellowship of Merchants Adventurers of England, chartered in 1505, elected twenty-four of “the most sadd, discreet and honest persons . . . to be called and named assistants to the governor.” *Id.* The word “sadd” presumably refers to the modern word “sad,” but with reference to a person of trustworthy character and judgment. *Sad Definition*, OED ONLINE (Mar. 2011),

<http://www.oed.com/view/Entry/169609?rskey=22ql4H&result=1&isAdvanced=false>.

⁵⁴ SCOTT, I, *supra* note 30, at 18. Scott notes that as early as 1485, “a number of noblemen and gentlemen of England were granted rights of mining the precious metals in certain districts and were constituted ‘governors of the Mines Royal[;]’” though it cannot be ascertained whether their association was a partnership or a corporation. *Id.* at 18.

⁵⁵ *See id.* at 18.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 18-19.

⁶⁰ Sebastian Cabot was the Russia Company’s initial governor, appointed for life and to be replaced upon his death by up to two elected governors. *Id.* at 20. In the original merchant guilds, chief power was held by the governor, but over time that power was shared with assistants (the number of which was almost always a factor of 12, probably due to religious influences). *Id.* The four consuls, borrowed from Italian financial organizational structures, were charged with administering the finances. *Id.*

⁶¹ *Id.* (“No provision was made in the charter for any of the functions that would arise out of this company being formed on a joint-stock basis. Thus there were no regulations, relating to the votes of members or to their other rights or obligations.”).

⁶² Foreign mercantile trade was somewhat stymied during this period due to a variety of financial and political factors within England, as well as due to war, pirates, and plague. *See generally id.* at 23-128. *See also* Harold Damerow, *Glorious Revolution*, http://faculty.ucc.edu/egh-damerow/glorious_revolution.htm (last visited May 26, 2011) (summarizing England’s tumultuous seventeenth century, which included a shift from pure Monarchy to a Parliamentary government brought about by the Glorious Revolution).

⁶³ SCOTT, I, *supra* note 30, at 130. The East India company became quite profitable and was granted perpetual succession in 1609, subject to three-years’ notice of revocation in the event it is “not profitable” to the realm. *See* JOHN SHAW, CHARTERS RELATING TO THE EAST INDIA COMPANY FROM 1600 TO 1761 26, 31 (1887).

⁶⁴ One of these companies, however, was never a financial success:

For the 700-odd Elizabethan “adventurers,” including Sir Francis Bacon, who bought stock in the Virginia Company of London, with the capital to cover the transportation and other costs of colonization, America was a bad investment. Over the dozen years of its existence, the Company expended over £100,000 not only without profit but with no return of the principal.

Jack Beatty, *Introduction: “Of a Huge and Unknown Greatness,”* in COLOSSUS: HOW THE CORPORATION CHANGED AMERICA 3, 3 (Jack Beatty ed., 2001).

⁶⁵ *See* JOHN CARSWELL, THE SOUTH SEA BUBBLE 10 (1960).

⁶⁶ *Id.* at 9.

⁶⁷ CECIL T. CARR, SELECT CHARTERS OF TRADING COMPANIES, 1550-1707 xix (1913).

⁶⁸ *Id.* at xvii-xviii.

⁶⁹ CARSWELL, *supra* note 65, at 10.

⁷⁰ Stock was becoming a substitute for land as an investment; it was readily saleable, it required no husbandry, and it was not taxed. *See id.* at 10-11.

⁷¹ *Id.* at 16.

⁷² SCOTT, I, *supra* note 30, at 394.

⁷³ *Id.* at 388.

⁷⁴ CARSWELL, *supra* note 65, at 54. “Politically speaking the South Sea scheme was a marvelous synthesis of finance, commerce, and foreign policy.” *Id.* at 53.

⁷⁵ *See id.* at 100-108 (referring to the scheme, in the language of the time, as “selling the bear’s skin before they had killed the bear”).

⁷⁶ “The rising whirlwind of speculation was catching up innumerable projects, old and new, possible and visionary, sound and unsound. . . . Whatever promise of material progress there was in human ingenuity, was blighted by the determination not to invest, but to make capital gains.” *Id.* at 141-43. Seventeen-twenty has been described as a year of “fantasy, panic, folly, and grotesqueness.” Ron Harris, *The Bubble Act: Its Passage and Its Effects on Business Organization*, 54 J. ECON. HIST. 610, 610 (1994). “It seemed at that time as if the whole nation had turned stockjobbers. Exchange Alley was every day blocked up by crowds. . . . Everybody came to purchase stock.” CHARLES MACKAY, I MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS 83 (1841).

⁷⁷ *See* MACKAY, *supra* note 76, at 86. “It was computed that near one million and a half sterling was won and lost by these unwarrantable practices, to the impoverishment of many a fool, and the enriching of many a rogue.” *Id.* at 87.

⁷⁸ WILLIAM ROBERT SCOTT, III THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720 (pocket insert) (1912). Carswell reports that Sir Isaac Newton, a South Sea Company stockholder, when asked what he thought of the stock’s prospects, replied that “he could calculate the motions of the heavenly bodies, but not the madness of people.” CARSWELL, *supra* note 65, at 131. Newton later sold his £7,000 of South Sea Company stock at a 100% profit. *Id.*

⁷⁹ ARMAND BUDINGTON DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720-1800 2 (1938) (“By May of 1720, this financial frenzy had reached such heights that the government felt constrained to resort to stringent measures.”).

⁸⁰ 6 Geo. I, c. 18 (Eng.). The Act did not become known as the “Bubble Act” until the nineteenth century. *See* Harris, *supra* note 76, at 614. The first 17 sections of the Act incorporated two marine insurance companies. *See* THOMAS COLPITTS GRANGER, II COLLECTION OF STATUTES 227-32 (3rd ed., rev. vol. 1836). Section XVIII of the Act made illegal and void:

the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferrable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks without legal authority either by Act of Parliament or by any charter from the Crown. . . .

Id. at 234. Announcement of the Act was followed by an order of the Lords Justices dismissing all pending applications for charters and dissolving all uncharted companies. MACKAY, *supra* note 76, at 90-91.

⁸¹ Some commentators have argued the bubble would have burst even without passage of the Bubble Act. *See, e.g.*, Julian Hoppit, *Financial Crises in Eighteenth-Century England*, 39 ECON. HIST. REV. 39, 48 (1986) (“The South Sea Bubble burst because the speculative momentum which inflated it in the first place had. . . to pause.”); SCOTT, I, *supra* note 30, at 437 (arguing the South Sea Bubble and the subsequent crash was caused primarily by political financial corruption and attempting to reduce the national debt “by juggling obligations of the State from one fund to another[]”).

⁸² SCOTT, III, *supra* note 78 (pocket insert).

⁸³ *See, e.g.*, SCOTT, I, *supra* note 30, at 437:

In short the result of opinion in 1720 and 1721 was that the rise of the joint-stock system had been the cause of the panic, and therefore it was decided that the Bubble Act should be strictly enforced. As a consequence, no company was safe in beginning business without first obtaining a charter, and such instruments were now only granted after a more searching enquiry than had been usual in the past.

See also DUBOIS, *supra* note 79, at 436 (“[A]s a result of the influence of the Bubble Act upon Crown officials and Parliament, incorporation was difficult to obtain, and in consequence the corporation. . . was not used in the eighteenth century to the full extent of the possibilities inherent in the economic situation.”).

⁸⁴ Paul G. Mahoney, *Contract or Concession? An Essay on the History of Corporate Law*, 34 GA. L. REV. 873, 888 (2000) (“The notion of separate legal personality without incorporation had ceased to reside in the judicial mind.”).

By the end of the century business conducted in partnership had reached the point where the financial interest was almost if not entirely as liquid as it was with the incorporated companies. Partnerships and joint stock associations, as the larger partnerships were generally called, of hundreds of members and with shares freely transferable were making their appearance.

DUBOIS, *supra* note 79, at 38-39. This, in part, set the stage for the Act’s repeal in 1825. *Id.* at 39; 6 George IV, c. 91 (Eng.); GRANGER, *supra* note 80, at 121-23. Prohibition was replaced by regulation. DUBOIS, *supra* note 79, at 39. In particular, the act repealing the Bubble Act provided that members of a chartered corporation would be individually liable, in

their persons and property, for the “debts, contracts, and engagements of such corporation, to such extent and subject to such regulations and restrictions as His Majesty ... may deem fit and proper....” 6 George IV, c. 91, § II (Eng.); GRANGER, *supra* note 80, at 123.

⁸⁵ 14 Geo. II, c. 37 (Eng.).

⁸⁶ *See, e.g.*, Harris, *supra* note 76, at 625-26 (concluding the Bubble Act was intended to have an immediate short-term impact rather than to introduce a long-term change of course, and that its impact was minimal).

⁸⁷ *See, e.g.*, Edward P. Cheyney, *Some English Conditions Surrounding the Settlement of Virginia*, 12 AM. HIST. REV. 507, 511-12 (1907) (“At the close of the sixteenth century the English government was not in a position financially or politically to furnish the funds for colonization, so the only remaining practical method was the formation of a trading company, with its much more extended resources and its corporate life.”); Simeon E. Baldwin, *Private Corporations 1701-1901, in TWO CENTURIES’ GROWTH OF AMERICAN LAW 1701-1901* 261, 261 (1901) (“The law of corporations was the law of their being for the four original New England colonies.”).

⁸⁸ “At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.” *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 926 (2010) (Scalia, J., concurring).

⁸⁹ *See* Baldwin, *supra* note 87, at 267-68; *supra*, note 85 and accompanying text. Baldwin documents 5 charters prior to 1776 and no more 225 total charters prior to 1800. Baldwin, *supra* note 87, at 268, 312. *But see* Samuel Williston, *History of the Law of Business Corporations before 1800, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 195, 234 (1909) (stating that only one business corporation was chartered in America prior to the Declaration of Independence); JOSEPH STANCLIFFE DAVIS, *IV ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 8 (1917) (“Prior to 1801 over 300 charters were granted for business corporations, ninety percent of them after 1789.”). “Prior to 1789 corporations were few. The list has been disputed, though the disputes over individual cases are a matter rather for historians than for lawyers.” ADOLF A. BERLE, JR., *STUDIES IN THE LAW OF CORPORATION FINANCE* 15 (1928). Prior to the Revolution, most large colonial-based enterprises were carried out as partnership-type associations under a company name. *See* Baldwin, *supra* note 87, at 268.

⁹⁰ Kenneth K. Luce, *Trends in Modern Corporation Legislation*, 50 MICH. L. REV. 1291, 1294 (1952) (“Incorporation by special act was the rule until the middle of the nineteenth century.”). “The stifling effect of the Bubble Act may help to explain the organizational inflexibility, and the inadequate, confused provisions with respect to managerial and financial matters which characterized the first general incorporation statutes in America.” *Id.* at 1293. The states defeated proposals for the federal government to have exclusive charter rights, fearing it would dominate commercial life in the United States. *See* BERLE, JR., *supra* note 89, at 16. *See also* DAVIS, *supra* note 89, at 8 (“The power of granting corporate privileges... was assumed by the state governments as the British control was thrown off...”); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 415 (2003) (“[A]fter the Revolution, no one questioned the authority of the states to grant charters.”); WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 113 (1970) (noting that it was assumed both state legislatures and Congress had the authority to grant charters).

⁹¹ ADAM SMITH, *I AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 163 (1789). “The exclusive privileges of corporations are the principal means ...” used to restrain competition in some employments. *Id.* at 157. *See also* BERLE, JR., *supra* note 89, at 15 (“Wherever there was a corporation there was also taint of royal power; ... in America it was feared as a tyranny of faraway England[;] ... in the early phases people were thinking not of the power of massed wealth, but of the power of an avaricious central government.”).

⁹² *See, e.g.*, *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. 315, 347 (1809) (“With respect to acts of incorporation, they ought never to be passed, but in consideration of services to be rendered to the public.”).

⁹³ Of the 225 charters documented by Baldwin that were granted prior to 1800, 36 were for bridges, 21 for canals, 26 for improving navigation, 38 for road building, and 21 for water works—in all, 63% of charters. Baldwin, *supra* note 87, at 312. *See also* HURST, *supra* note 90, at 15 (“[A]lmost all of the business enterprises incorporated ... in the formative generation starting in the 1780’s were chartered for activities of some community interest.... That such public-interest undertakings practically monopolized the corporate form implied that incorporation was inherently of such public concern that the public authority must confer it.”); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting) (“[A]t first, the corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.”).

⁹⁴ Twenty-eight charters for banks and 25 charters for insurance, representing 24% of the 225 charters granted prior to 1800. Baldwin, *supra* note 87, at 312.

⁹⁵ There were only 12 charters granted for manufacturing concerns, a mere 5% of the 225 charters granted prior to 1800; there were also 6 charters granted for general commerce; 1 charter for mining, 2 for logging, 1 for a land company, 1 for a fishery, 1 in aid of engineering, 1 for a burial ground, and 5 in aid of agriculture. *Id.* Between the Revolutionary War and the end of the eighteenth century, enterprises, such as banks and insurance companies and those established for internal improvements, such as toll bridges, turnpikes and canals, sought a form of organization which would enable them to combine

the resources of a considerable number of persons in a single economic unit. E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law 1886-1936*, 50 HARV. L. REV. 27, 28 (1936). Dodd notes the “[d]esire for limited liability was also a factor in bringing about the trend towards incorporation, although many of the early charters did not confer that privilege.” *Id.* at n.1.

⁹⁶ See Denham, Jr., *supra* note 35, at 221 (providing examples of Pennsylvania and New York charters containing such reservations of power).

⁹⁷ *Wales v. Stetson*, 2 Mass. 143, 146 (Mass. 1806).

⁹⁸ *Currie’s Adm’rs v. Mut. Assurance Soc’y*, 14 Va. 315, 348 (Va. 1809).

⁹⁹ *Trs. Dartmouth Coll. v. Woodward*, 65 N.H. 473 (N.H. 1817).

¹⁰⁰ *Trs. Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

¹⁰¹ *Id.* at 627.

¹⁰² *Id.* at 651-52 (presumably, though never expressly stated, through art. I, § 10). See also Denham, Jr., *supra* note 35, at 222, asserting that *Trustees of Dartmouth College*:

[S]ettled for once and always, that a charter of incorporation is a contract, and as such, any act passed by any state legislature impairing the rights existing under it, is such an act is [*sic*] will come under Section 10 of Article I, of the Constitution of the United States, and hence cannot stand as valid.

¹⁰³ *Trs. Dartmouth Coll.*, 17 U.S. at 636.

¹⁰⁴ *Id.*

¹⁰⁵ JOHN P. DAVIS, 2 CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND THEIR RELATION TO THE AUTHORITY OF THE STATE 211 (1905).

¹⁰⁶ See, e.g., *supra* note 91 and accompanying text.

¹⁰⁷ See HURST, *supra* note 90, at 60 (noting also that “out of initial attention to legitimating the use of the public power, we moved to require legitimacy for private power fostered by law[.]”).

¹⁰⁸ Livingston was quite active in the founding of the United States—he was a member of the committee that drafted the Declaration of Independence (though not a signatory); a member of Congress in 1780; Minister of Foreign Affairs from 1781-1783; a member of the convention that framed the first constitution of New York; administered the oath of office to George Washington on his first assumption of duties as President; and, as Minister of the United States to France, negotiated the Louisiana Purchase. See THOMAS W. KNOX, *THE LIFE OF ROBERT FULTON AND A HISTORY OF STEAM NAVIGATION* 90-91 (1887).

¹⁰⁹ *Id.* at 92.

¹¹⁰ *Id.* The bill faced stiff opposition; many legislators believed the project to be “idle and whimsical and quite unworthy the attention of the Legislature...” *Id.* Although the bill passed, it was considered a joke, with some legislators “willing to give Mr. Livingston a monopoly for a hundred or a thousand years, as they did not believe the scheme would ever amount to any thing.” *Id.* at 93.

¹¹¹ See *id.*

¹¹² See *id.* at 97-98. Fulton’s steamship was eventually so successful that in its 1807-08 session, the New York Legislature passed an Act extending the Livingston-Fulton right of exclusivity for up to an additional thirty years. See *id.* at 121.

¹¹³ See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 48 (1993).

¹¹⁴ See *id.*

¹¹⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹¹⁶ *Id.* at 186 (noting Gibbons’ assertion that the exclusive privilege was “repugnant” to the commerce clause).

¹¹⁷ *Id.* at 196 (The power to regulate commerce, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”). “The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with ‘commerce ... among the several States....’” *Id.* at 197.

¹¹⁸ See, e.g., Carter Goodrich, *The Revulsion Against Internal Improvements*, 10 J. ECON. HIST. 145, 161-62 (1950):

After the failures and difficulties of the state programs in the depression of the late thirties, batteries of laissez-faire doctrine were more often and more vigorously applied to the case of internal improvements. Condemnations of government action on grounds of economic principle as well as of financial failure make a constant refrain in legislative proceedings and in the debates of constitutional conventions during the forties.

(referring to the nineteenth century). Railroads, in particular, championed the withdrawal of government from internal improvements. *Id.* at 162 (quoting an editorial in the 1839 *American Railroad Journal* stating that it had no confidence “in any system of internal improvements under the control of the government[.]”).

¹¹⁹ ANDREW JACKSON, FIFTH ANNUAL MESSAGE, DEC. 3, 1833, H.R. Misc. Doc. No. 53-210, pt. 3, at 30 (2d Sess. 1896). Jackson continued with his warnings against the growing powers of corporations over the citizen:

The mischief springs from ... the multitude of corporations with exclusive privileges which they have succeeded in obtaining in the different States, and which are employed altogether for their benefit; and unless you become more watchful in your States and check this spirit of monopoly and thirst for exclusive privileges you will in the end find that the most important powers of Government have been given or bartered away, and the control over your dearest interests has passed into the hands of these corporations.

ANDREW JACKSON, FAREWELL ADDRESS, Mar. 4, 1837, *id.* at 305-6.

¹²⁰ For example, in 1785, when the state of Massachusetts granted a charter to build a toll bridge connecting Boston and Charleston, Boston's population was 17,000 and Charleston's 1,200; less than forty years later, when a second bridge was approved, Boston's population had grown to 60,000 and Charleston's to 8,000. *See infra*, notes 125-126; *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. 344, at *9 (1829).

¹²¹ *See, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 130 (noting that in the early nineteenth century, canals and bridges were beginning to displace turnpikes and ferries on a large scale); *infra* note 123.

¹²² Goodrich, *supra* note 118, at 162.

¹²³ *See* SARAH H. GORDON, *PASSAGE TO UNION: HOW THE RAILROADS TRANSFORMED AMERICAN LIFE, 1829-1929* 17-18 (1998) (noting that while such monopolies were originally "intended to limit wasteful duplication of services and ensure that canals, railroads, and toll bridges operated in a manner consistent with the public interest[,]... the monopoly provisions became difficult to maintain as the railroad proved to be a faster and more efficient carrier than a canal boat[>").

¹²⁴ *See* HORWITZ, *supra* note 121, at 111 ("Previous state concessions to private interests ... had come to represent obstacles to continued growth...").

¹²⁵ *Proprietors Charles River Bridge v. Proprietors Warren Bridge*, 36 U.S. 420 (1837).

¹²⁶ *Id.* at 538.

¹²⁷ *Id.* at 539.

¹²⁸ *See id.* at 549.

The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state; unless it shall appear by plain words, that it was intended to be done.

Id. at 549-50.

¹²⁹ *Id.* at 548.

¹³⁰ HORWITZ, *supra* note 121, at 137.

¹³¹ HURST, *supra* note 90, at 62.

¹³² 38 U.S. 519, 588 (1839) (stating that although a corporation "must live and have its being in ... [its domicile] state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another[>").

¹³³ *See* SCHWARTZ, *supra* note 113, at 88.

¹³⁴ *See id.* at 89.

¹³⁵ *Bank of Augusta*, 38 U.S. at *1-5.

¹³⁶ SCHWARTZ, *supra* note 113, at 89-90.

¹³⁷ *Bank of Augusta*, 38 U.S. at 592 ("We think it is well settled, that by the law of comity among nations, a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its Courts; and that the same law of comity prevails among the several sovereignties of this Union.").

¹³⁸ "Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests; the presumption in favour of its adoption can no longer be made." *Id.*

¹³⁹ *Id.* at 586; U.S. CONST. art IV, § 2.

¹⁴⁰ *Bank of Augusta*, 38 U.S. at 587.

¹⁴¹ GERARD CARL HENDERSON, *THE POSITION OF FOREIGN IN AMERICAN CONSTITUTIONAL LAW* 5-6 (Lawbook Exchange, Ltd. 1999) (1918).

¹⁴² *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (Waite, C.J., prior history) (referencing CONST. amend. XIV, §1). In fact, the Supreme Court based its decision on whether assessed property was outside the jurisdiction of the tax authority, stating:

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot property [*sic*] be the basis of a judgment against the defendant.

Id. at 411. The court concluded that since the judgment below could be based on the state assessing property outside its jurisdiction, "it is not necessary to consider any other questions raised by the pleadings and the facts found by the court." *Id.* at 416.

¹⁴³ See, e.g., *Louis K. Liggett, Co. v. Lee*, 288 U.S. 517, 536 (1933) (“Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons.”) (once again addressing inconsistent application of tax laws).

¹⁴⁴ Luce, *supra* note 90, at 1294. Luce notes that “[i]ncreasing economic activity pointed up the cumbersome aspects of the special charter system and led to widespread corruption in the obtaining of special charters.” *Id.* “The great depression of 1837-1844 was the watershed in the development of the modern American business corporation because the state constitutional conventions held after 1840 almost always contained provisions that effectively separated corporate business opportunities from state politics...” RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855* 180 (1982). While New York enacted the first general incorporation statute in 1811, it was quite restrictive: it was limited to manufacturing concerns only, the articles of incorporation had to be sworn to before a judge, the charter lasted only 20 years, and the capital stock of the company could not exceed \$100,000. 1811 N.Y. Laws 151.

¹⁴⁵ N.Y. CONST. of 1846, art. VIII. See *Louis K. Liggett Co.*, 288 U.S. at 549 n.4 (Brandeis, J., dissenting) (listing constitutional amendments among the states eliminating special legislation for most business incorporations).

¹⁴⁶ See, e.g., Luce, *supra* note 90, at 1294 (“The first statutes conceived of an incorporated business as a static economic unit, in which growth or change was not to be expected.”); 1851 Mass. Acts. 633 (permitting general incorporation for any business “for the purpose of carrying on any kind of manufacturing, mechanical mining or quarrying business” with a maximum capitalization of \$200,000); DEL. CONST. amend ch. 1 (1875) (empowering the state legislature “to enact a general incorporation act to provide incorporation for religious, charitable, literary and manufacturing purposes, for the preservation of animal and vegetable food, building and loan associations, and for draining low lands...”); 15 Del. Laws 181 (1875) (authorizing Superior Court judges to review and approve certificates of incorporation “for religious, charitable, literary or manufacturing purposes, or for the preservation of animal and vegetable food, or as building and loan associations, or for draining low lands...”); The Pennsylvania Corporation Act of 1874, Act 29 Apr. 1874, § 2; P.L. 73 (enumerating 25 types of for-profit enterprises that could be incorporated under the general incorporation statute). See also *Louis K. Liggett Co.*, 288 U.S. at 550-56 (Brandeis, J., dissenting) (describing historical limitations on the amount of capital and types of enterprises permitted under early general incorporation statutes).

¹⁴⁷ See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 664 (1974).

¹⁴⁸ 1896 N.J. Laws 277, § 6.

¹⁴⁹ 21 Del. Laws 445, § 1 (1899).

¹⁵⁰ GEORGE HEBERTON EVANS, JR., *BUSINESS INCORPORATIONS IN THE UNITED STATES 1800-1943* 95-151 app. 3 (recording special-act incorporations in Maine (2,379 charters, 1820-1891), Maryland (578 charters, 1801-1852), New Jersey (2,361 charters, 1800-1875), New York (1,509 charters, 1800-1845), Ohio (1,268 charters, 1803-1851), and Pennsylvania (2,320 charters, 1801-1860)).

¹⁵¹ *Id.* (Maine (18,318 incorporations), Maryland (18,820 incorporations), New Jersey (32,037 incorporations, 1901-1918), New York (365,499 incorporations), Ohio (85,851 incorporations), and Pennsylvania (32,666 incorporations, 1901-1920)). Total incorporations for the same time period rise to nearly three-quarters of a million when charters under general incorporation laws of Connecticut (16,208 incorporations), Delaware (82,551 incorporations), Illinois (67,957 incorporations, 1901-1917, 1925-1929), and Massachusetts (28,361 incorporations, 1901-1920) are included. *Id.*

¹⁵² U.S. CENSUS BUREAU, *THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 914 ser. V, at 41-53 (1976).

¹⁵³ *Id.*

¹⁵⁴ U.S. Census Bureau, tbl. 743, *supra* note 7 (reflecting 5.869 million corporate tax returns for the year 2007).

¹⁵⁵ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933) (Brandeis, J., dissenting). In England, corporations, particularly ecclesiastical, were restricted in their ability to hold and transfer real property through statutes of mortmain. See *Corporations*, 4 AM. JURIST & L. MAG. 298, 303 (1830). Mortmain restrictions were applied to early corporations in Pennsylvania (*see id.*) and New York (*see SEAVOY, supra* note 144, at 10-11). The original purpose of mortmain statutes was to prevent the permanent accumulation of lands in the hands of churches and charitable corporations. SEAVOY, *supra* note 144, at 10-11. Mortmain restrictions were initially applied to private corporations in New York to promote equal opportunities for individuals to own land. *Id.* at 11.

¹⁵⁶ *Louis K. Liggett Co.*, 288 U.S. at 549 (Brandeis, J., dissenting).

¹⁵⁷ See *id.* at 549-56 (discussing in detail the “severe restrictions upon size and upon the scope of corporate activity” embodied in the early general incorporation laws); *supra* note 146 and accompanying text.

¹⁵⁸ See *Louis K. Liggett Co.*, 288 U.S. at 557-60 (Brandeis, J., dissenting).

¹⁵⁹ *Id.* at 559.

Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by stockholders—results not designed by the States and long unsuspected. They

show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise.

Id. at 564-65. See also Abram F. Myers, *Federal Regulation of Corporations under the Commerce Clause*, 129 ANNALS AM. ACAD. POLITICAL & SOC. SCI. 143, 145 (1917):

The creation of corporations has lost its dignity as an exercise of the sovereign prerogative for the furtherance of commerce and in the interest of the people of the state. What was once regarded as the conferring of a great privilege, to be limited and circumscribed by all necessary provisions for the protection of the public, has become a bargain sale, and states are advertising and competing for the business.

¹⁶⁰ *Louis K. Liggett Co.*, 288 U.S. at 567 (Brandeis, J., dissenting). See also Edgar H. Farrar, Address of the President before the American Bar Association (Aug. 29, 1911), in REPORT OF THE THIRTY-FOURTH ANNUAL MEETING OF THE AM. BAR ASS'N, Aug. 29-31, 1911, at 229, 236 (“[I]f there are Frankensteins in corporate form stalking over the land, spreading terror and threatening destruction, the people themselves have created them by their duly accredited representatives in the legislatures of the states.”).

¹⁶¹ See, e.g., SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* 76 (1996):

[The] tendency toward centralized control within the business corporation and other forms of enterprise, which coincided with an ever greater concentration of wealth in the hands of progressively fewer industrialists and financiers, initially had developed as a strategy of survival within the competitive marketplace and had in turn facilitated the accumulation of capital that served as a basis for the emergence of corporate capitalism in the first decade of the twentieth century.

¹⁶² 15 U.S.C. §§ 1-38 (2004).

¹⁶³ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-493 (1940) (stating that the Sherman Act “was enacted in the era of ... capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern[.]”).

¹⁶⁴ See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7, 10 (1966) (“The legislative history, in fact, contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare.”).

¹⁶⁵ OLIVER ZUNZ, *MAKING AMERICA CORPORATE 1870-1920* 1, 1 (1990).

¹⁶⁶ See *supra* note 7.

¹⁶⁷ Farrar, *supra* note 160, at 239.

¹⁶⁸ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 926 (2010) (Scalia, J., concurring).

¹⁶⁹ See, e.g., BERLE, JR., *supra* note 89, at 15 (“Wherever there was a corporation there was also taint of royal power; ... in America it was feared as a tyranny of faraway England[;] ... in the early phases people were thinking not of the power of massed wealth, but of the power of an avaricious central government.”); HENDERSON, *supra* note 141, at 19 (“The identification of incorporation with the grant of special and exclusive privileges or monopolies, and the fear that the corporation would infringe on the ‘natural rights’ of citizens, was the chief source of the early opposition to corporations.”) (referring to debate during the constitutional convention).

¹⁷⁰ HENDERSON, *supra* note 141, at 12 (emphasis added).

¹⁷¹ *Id.* at 20.

¹⁷² Carol R. Goforth, “*A Corporation Has No Soul*”—*Modern Corporations, Corporate Governance and Involvement in the Political Process*, 47 HOUS. L. REV. 617, 659 (2010) (“Given the accepted notion that the Framers were indeed concerned with individual rights, they never would have contemplated giving such entities free speech rights.”) (referring to corporations).

¹⁷³ *Powell v. McCormack*, 395 U.S. 486, 540-541 (1969) (quoting Alexander Hamilton before the New York state convention, “[t]he true principle of a republic is, that the people should choose whom they please to govern them[.]”).

¹⁷⁴ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 899-900 (2010) (stating that “First Amendment protection extends to corporations[.]” and that “political speech does not lose First Amendment protection “simply because its source is a corporation[.]” (citations omitted) (internal quotation marks omitted).

¹⁷⁵ See Zachary Newkirk, “*IRS Targets Donors to Politically Engaged Nonprofits*” (May 22, 2011), <http://www.opensecrets.org/news/2011/05/irs-targets-donors-politically-engaged-nonprofits.html> (noting a spike in spending by non-profit groups in the wake of *Citizens United* using contributions from corporations to fund political messages at any time of the election cycle).

¹⁷⁶ Center for Responsive Politics, *A Center for Responsive Politics Analysis of the Effects of: Citizens United v. Federal Election Commission*, OPENSECRETS.ORG, available at http://www.slideshare.net/s_maccoll/effects-of-the-citizens-united-v-federal-election-commission-7847726, slide 4 (last visited May 26, 2011).

¹⁷⁷ *Id.* at slide 7.

¹⁷⁸ Ames & Elk, *supra* note 3.

¹⁷⁹ See, e.g., JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 1-2 (2004) (arguing that the corporation is a pathological institution because its “legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others[.]”).

¹⁸⁰ Though corporations can be held criminally liable for the acts of its agents. See, e.g., *Wis. v. Richard Knutson, Inc.*, 537 N.W.2d 420 (Wis. Ct. App. 1995). See also generally Laurel J. Harbour & Natalya Y. Johnson, *Can a Corporation Commit Manslaughter? Recent Developments in the United Kingdom and the United States*, 73 DEF. COUNS. J. 226 (2006).

¹⁸¹ See, e.g., *U.S. v. Morton Salt Co.*, 338 U.S. 632, 651 (1950) (“Corporations ... have no constitutional immunity from self-incrimination[.]”).

¹⁸² See *supra* note 13.

¹⁸³ 435 U.S. 765 (1978).

¹⁸⁴ Mayer, *supra* note 13, at 653 (citation omitted).

¹⁸⁵ *Id.*

¹⁸⁶ See, David Chang, *Beyond Formalist Sovereignty: Who can Represent “We The People Of The United States” Today?*, 45 U. RICH. L. REV. 549, 635 (2011). (discussing the power of communications inherent in corporations of all forms which can result in “corporate managers ... [using] that concentrated power in pursuit of corporate interests in ways that could undermine public debate by preventing citizens from effectively identifying and accounting for each other’s views[.]”).

¹⁸⁷ *Id.* at 637.

¹⁸⁸ Mayer, *supra* note 13, at 615 n.193 (citing a telephone interview with Dan Sullivan, Massachusetts Department of Campaign Financing, discussing corporations’ role in overturning the statute which resulted in defeat of the referendum).

¹⁸⁹ See *U.S. v. Danielczyk, Jr.*, No. 1:11-cr-00085 (E.D. Va. May 26, 2011).

¹⁹⁰ *Id.* at *46 (applying 2 U.S.C. § 441b (2002)).

¹⁹¹ See *supra* note 9 and accompanying text.

¹⁹² 547 U.S. 410 (2006).

¹⁹³ *Id.* at 421-22.

¹⁹⁴ 376 U.S. 254 (1964).

¹⁹⁵ *Id.* at 269 (quoting *Roth v. United States*, 354 U. S. 476, 484 (1957)) (internal quotation marks omitted).

¹⁹⁶ *Id.* (quoting *Stromberg v. California*, 283 U. S. 359, 369 (1931)) (internal quotation marks omitted).

¹⁹⁷ *Supra* note 119 and accompanying text. Specifically, Jackson stated “the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of ... great corporation[s] are to be secretly exerted to influence their judgment and control their decisions.”