

# GUNS, INC.: *CITIZENS UNITED*, *MCDONALD*, AND THE FUTURE OF CORPORATE CONSTITUTIONAL RIGHTS

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*The Supreme Court began its 2009 Term by addressing the constitutional rights of corporations. It ended the Term by addressing the incorporated rights of the Constitution. In Citizens United v. Federal Election Commission, a five-member majority of the Court held that corporations have a First Amendment right to spend their own money on political advocacy. A corporation generally is no different than a natural person when it comes to the First Amendment—at least as it relates to political speech. In McDonald v. City of Chicago, a plurality of the Court held that the Second Amendment to the United States Constitution is incorporated through the Due Process Clause and applies to states and municipalities. Neither the federal government nor states may prevent persons from keeping and bearing arms in their homes for self-defense.*

*Given this new world in both senses of incorporation, the time has come to explore the issue of Second Amendment rights and the corporate form. This Article will offer an analysis of the potential Second Amendment rights of the corporation. And it will, in the process, provide a more systematic critique of corporate constitutional rights in general.*

INTRODUCTION .....	889
I. <i>CITIZENS UNITED</i> , <i>MCDONALD</i> , AND THE QUESTION OF CORPORATE SECOND AMENDMENT RIGHTS .....	893
A. <i>Citizens United and Corporate Political Speech Rights</i> .....	893
B. <i>McDonald v. City of Chicago and the Incorporated Right To Keep and Bear Arms</i> .....	899
C. <i>The Question of Corporate Second Amendment Rights</i> .....	902

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1.	<i>First Amendment Framing of the Second Amendment</i> .....	902
2.	<i>Regulations That Implicate Corporate Second Amendment Rights: Private Security, Ideological Associations, Guns-to-Work Laws, and the Commercial Firearm Industry</i> .....	905
II.	CORPORATE CONSTITUTIONAL RIGHTS: A PRIMER .....	908
A.	<i>The Broken Jurisprudence of Corporate Constitutional Rights</i> .....	909
B.	<i>Theories of Corporate Personhood and Their Influence on Corporate Constitutional Rights</i> .....	914
1.	<i>The Artificial Entity Theory</i> .....	916
a.	History .....	916
b.	Application .....	918
2.	<i>The Real Entity Theory</i> .....	921
a.	History .....	921
b.	Application .....	923
3.	<i>The Aggregation Theory</i> .....	928
a.	History .....	928
b.	Application .....	930
III.	CORPORATE SECOND AMENDMENT RIGHTS .....	931
A.	<i>Is the Second Amendment Right "Purely Personal"?: Nature, History, and Purpose of the Right To Keep and Bear Arms</i> .....	931
1.	<i>Nature of the Second Amendment</i> .....	932
2.	<i>History of the Second Amendment</i> .....	934
3.	<i>Purpose of the Second Amendment</i> .....	937
B.	<i>Corporate Personhood Theory and Its Effect on Corporate Second Amendment Rights</i> .....	940
1.	<i>Artificial Entity Theory and the Second Amendment</i> .....	940
2.	<i>Real Entity Theory and the Second Amendment</i> .....	942
3.	<i>Aggregate Entity Theory and the Second Amendment</i> .....	944
IV.	THE FUTURE OF CORPORATE CONSTITUTIONAL RIGHTS .....	946
A.	<i>The Corporation as Intermediary Organization</i> .....	947
B.	<i>The Limited Vocabulary for Corporate Constitutional Rights</i> .....	951
C.	<i>Re-Framing Corporate Constitutional Rights: A Preliminary Assessment</i> .....	954
	CONCLUSION .....	956

## INTRODUCTION

Themes of incorporation bracketed the Supreme Court's blockbuster 2009 term. The Term began with a case concerning the constitutional rights of the corporation. In *Citizens United v. Federal Election Commission*,<sup>1</sup> the Court ruled five to four that corporations possess the same First Amendment rights to engage in political speech as do natural persons.<sup>2</sup> The Court "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"<sup>3</sup>

The Term ended with a case concerning the incorporated rights of the Constitution. In *McDonald v. City of Chicago*, the Court held that the Second Amendment right to keep and bear arms restricts state and local governments to the exact same degree it restricts the federal government.<sup>4</sup> The right to bear arms for self-defense is a fundamental right, incorporated against the states through the Due Process Clause of the Fourteenth Amendment.<sup>5</sup> That clause prohibits states from depriving "any person of life, liberty, or property, without due process of law."<sup>6</sup>

While many hailed *McDonald's* outcome,<sup>7</sup> a majority of Americans responded to *Citizens United* with scorn.<sup>8</sup> One online satirist posted a mock headline stating "High Court Rules Corporations Have Right To Bear Arms."<sup>9</sup> But the idea of Second Amendment rights for corporations cannot be dismissed as a good punch line. If *Citizens United* is taken seriously, the Second Amendment, like the

<sup>1</sup> 130 S. Ct. 876 (2010).

<sup>2</sup> *Id.* at 886.

<sup>3</sup> *Id.* at 900 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

<sup>4</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036, 3050 (2010).

<sup>5</sup> *See id.* at 3030–31 (declining to use the Privileges or Immunities Clause to incorporate the Second Amendment).

<sup>6</sup> *Id.* at 3028 (quoting U.S. CONST. amend. XIV, § 1) (emphasis added).

<sup>7</sup> *See, e.g.*, Press Release, Nat'l Rifle Ass'n, Inst. for Legislative Action, Statement by Wayne LaPierre, Exec. Vice President, Nat'l Rifle Ass'n (NRA) and Chris W. Cox, Exec. Dir., Nat'l Rifle Ass'n-Inst. for Legislative Action, Regarding U.S. Supreme Court Decision *McDonald v. City of Chicago* (June 28, 2010), <http://www.nraila.org/News/Read/NewsReleases.aspx?ID=13956>.

<sup>8</sup> To the extent it is relevant, early polling placed opposition to the decision as high as eighty percent. Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>.

<sup>9</sup> Steven Clifford, *High Court Rules Corporations Have Right To Bear Arms*, HUFFINGTON POST (Jan. 25, 2010, 1:06 PM), [http://www.huffingtonpost.com/steven-clifford/high-court-rules-corporat\\_b\\_435619.html](http://www.huffingtonpost.com/steven-clifford/high-court-rules-corporat_b_435619.html); *see also* Jim Gallagher, Letter to the Editor, TIME, July 26, 2010, at 9 (commenting on *Citizens United* and asking rhetorically whether a corporate right to bear arms is next).

First Amendment and like many other provisions of the Bill of Rights, guarantees liberties to natural and corporate persons alike.

Corporations, no less than natural persons, need to defend themselves. Yet some states highly regulate a corporation's ability to provide security to protect its employees and customers from violence and its property from theft.<sup>10</sup> A dozen states actually *require* a corporation to allow armed employees and visitors onto its property and grounds.<sup>11</sup> Associations, no less than natural persons, have an interest in banding together for self-protection, but many states have anti-militia laws that restrict the ability of private groups to train together with private arms or to form private self-defense forces.<sup>12</sup> Finally, some corporations manufacture, sell, or distribute arms. Yet these collective bodies are subject to restrictions on their businesses to a far greater degree than individuals.<sup>13</sup>

Plus, doctrinally, the Court's repeated reference to the First Amendment as an interpretive analog for the Second would seem to augur for some level of corporate Second Amendment rights. Following the logic of the Court, corporate claims to Second Amendment

<sup>10</sup> See U.S. DEP'T. OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION: SECURITY GUARDS AND GAMING SURVEILLANCE OFFICERS (2011), available at <http://www.bls.gov/oco/ocos159.htm> [hereinafter OUTLOOK HANDBOOK] (summarizing such regulations); see also Private Investigators and Private Security Agents Act, ARK. CODE ANN. §§ 17-40-101–107 (2001) (setting forth the licensing requirements and qualifications for private security agents); Private Security Guards Act, ME. REV. STAT. ANN. tit. 32, §§ 9401–9418 (1999) (same); OHIO REV. CODE ANN. §§ 4749.01–4749.10 (West 2004) (regulating private investigators and security guards, including their use of firearms). Note that state regulation is neither uniform nor uniformly strict.

<sup>11</sup> Those states are Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Oklahoma, and Utah. ALASKA STAT. § 18.65.800 (2010); ARIZ. REV. STAT. ANN. § 12-781 (Supp. 2010); FLA. STAT. ANN. § 790.251 (West Supp. 2011); GA. CODE ANN. § 16-11-135 (Supp. 2010); IND. CODE ANN. § 35-47-11-2 (West Supp. 2010); KAN. STAT. ANN. § 75-7c11(a)(1) (Supp. 2009); KY. REV. STAT. ANN. § 237.110(17) (LexisNexis Supp. 2010); LA. REV. STAT. ANN. § 32:292.1 (Supp. 2009); MINN. STAT. § 624.714(18) (Supp. 2011); MISS. CODE ANN. § 97-37-1 (West 1999); OKLA. STAT. ANN. tit. 21, § 1289.7 (West 2002); UTAH CODE ANN. § 53-5a-102 (LexisNexis 2010). For a discussion of these laws, see Dayna B. Royal, *Take Your Gun to Work and Leave It in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 FLA. L. REV. 475, 495–503 (2009) and Stefanie L. Steines, Note, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171 (2008).

<sup>12</sup> For a discussion of private militia-related regulations, including at least 38 states that limit or prohibit the formation of private military units, see Thomas B. McAfee, *Constitutional Limits on Regulating Private Militia Groups*, 58 MONT. L. REV. 45, 54–56 (1997). See also *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 208 (S.D. Tex. 1982) (enjoining the paramilitary activities of the Klan's military arm on the grounds that military operations are not entitled to constitutional protection).

<sup>13</sup> See 18 U.S.C. §§ 921(a)(9)–(11), (a)(21) (2006) (defining persons “in the business of” manufacture, importation, or dealing in firearms from others); see also *infra* Part I.C.2 (discussing regulations and restrictions that implicate corporate Second Amendment rights).

rights seem to advance the same kind of liberty and antityranny goals that animate the Court's First Amendment jurisprudence.<sup>14</sup> The Court justifies corporate political speech rights as necessary to prevent monopolization of the political discourse by government. A similar argument could be made with respect to the Second Amendment: a corporate right to keep and bear arms is necessary to prevent monopolization of the tools of violence by the state.<sup>15</sup>

Corporate Second Amendment rights are at the frontier of Second Amendment doctrine. The remarkable 2009 Supreme Court Term provides an opportunity to examine how courts may implement the Second Amendment in a world populated by corporate persons. But this Article's critique is broader. The possibility of corporate Second Amendment rights raises important questions about the place of corporations in our republic. Corporations, like churches, unions, and political parties, are powerful intermediary organizations that are positioned between the individual and the state.<sup>16</sup>

Business corporations in particular possess a degree of coercive power equal to, and occasionally greater than, that of government.<sup>17</sup> Despite their power and prevalence, the constitutional claims of these intermediary organizations have frustrated efforts at consistent adjudication. The prospect of British Petroleum or Wal-Mart or General Electric claiming a right to arm itself in a manner once reserved only for municipal police departments or state militias provides an opportunity to revisit all of our unresolved debates regarding collective action, power, sovereignty, and individual rights.

This Article, therefore, has three goals: first, to explain how the Court may implement the Second Amendment in the corporate context; second, to use that discussion as a springboard for a more thorough critique of corporate constitutional rights jurisprudence; and

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<sup>14</sup> See *infra* Part I.C.1 (discussing the First Amendment framing of the Second Amendment).

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

<sup>16</sup> See *infra* Part IV; see also Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 998–99 (1998) (reviewing arguments that a democratic society needs intermediate institutions as a counterbalance to government).

<sup>17</sup> Indeed, there is a long history of scholarship addressing private corporations exercising power as functional sovereigns. See, e.g., Wolfgang G. Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 165 (1957) (considering the tension between the state and corporation in terms of ongoing “dialectic process”); Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129 (2008); Arthur S. Miller, *Toward Constitutionalizing the Corporation: A Speculative Essay*, 80 W. VA. L. REV. 187, 188–89 (1978) (considering the assertion of constitutional rights against corporate “private governments”); Daniel J.H. Greenwood, *The Semi-sovereign Corporation* (Univ. of Utah S.J. Quinney Coll. of Law Legal Studies Research Paper Series, Paper No. 05-04, 2005), available at <http://ssrn.com/abstracts=757315> (examining the “diminish[ed]” modern state in an age of ascendant corporate power).

third, to offer preliminary thoughts on how to reframe the corporate constitutional rights issue in a way that is functional, yet respectful of institutional approaches to fostering, protecting, and regulating intermediary organizations.

Part I begins with *Citizens United*. In particular, it examines the Court's conclusion that corporations and natural persons are nearly indistinguishable when it comes to core political speech rights. Part I then transitions to *McDonald*. It focuses on the Court's holding that the Second Amendment and the Fourteenth Amendment protect "persons" from both federal and state infringements on the right to keep and bear arms.<sup>18</sup> Part I then ties these cases together. It forecasts how First Amendment analog, including *Citizens United*, may influence the Court's evolving Second Amendment jurisprudence. It then outlines four specific regulations that a corporate Second Amendment right to keep and bear arms could affect.

Part II expands the analysis. It begins with a survey of existing corporate constitutional rights doctrine. It first examines *First National Bank of Boston v. Bellotti*,<sup>19</sup> the only case in which the Court attempts to articulate a uniform test for corporate constitutional rights. Specifically, it explains how *Bellotti* fails to justify its default presumption that corporations are constitutional persons. It also explains how *Bellotti* fails to appreciate the way in which corporate personhood theory influences the Court's decisions on corporate constitutional rights.

Next, Part II details the three dominant theories of corporate personhood—the artificial, real, and aggregate theories. It explains how courts use these theories to justify both the existence of and the limits on corporate constitutional liberties.

Part III applies the existing jurisprudential framework for corporate constitutional rights to the Second Amendment. Using the four specific examples of corporate regulation outlined in Part I, it explains how the *Bellotti* test, combined with the Court's characterization of corporate personhood, may lead the Court to conclude that corporations have no Second Amendment rights, some restricted Second Amendment rights, or Second Amendment rights equivalent to those of natural persons.

Part IV discusses how corporate Second Amendment rights will test the Court's trust in the salutary nature of intermediary organizations in our society, and how it will challenge the Court's avowed preference for originalist and textualist methodologies in constitutional

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<sup>18</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3028 (2010).

<sup>19</sup> 435 U.S. 765 (1978).

adjudication. It demonstrates how the limited constitutional vocabulary for intermediary organizations is a problem, and it sketches the preliminaries of an alternative method of approaching corporate constitutional rights in the future.

## I

### *CITIZENS UNITED, McDONALD, AND THE QUESTION OF CORPORATE SECOND AMENDMENT RIGHTS*

Read together, *Citizens United* and *McDonald* signal that corporations may lay some claim to Second Amendment rights.<sup>20</sup> To understand why, this Part examines *Citizens United* and *McDonald* and then discusses these cases in light of existing corporate constitutional rights jurisprudence.

#### A. *Citizens United and Corporate Political Speech Rights*

*Citizens United* is a revolution in corporate constitutional doctrine. It is a near-complete vindication of the belief that the Constitution protects a corporation's political speech just as much as it protects the political speech of individuals. But the case began narrowly, with a dispute over whether on-demand video streaming of a political hit piece about Hillary Clinton, *Hillary: The Movie*,<sup>21</sup> violated the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>22</sup>

President George W. Bush signed BCRA on March 27, 2002, despite vociferous opposition from pundits and fellow Republicans. BCRA restricted, among other things, independent corporate expenditures for "electioneering communication[s]" that take place within thirty days of a primary election or within sixty days of a general election.<sup>23</sup> BCRA was just one of a suite of federal and state regulations

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<sup>20</sup> Here I refer to Second Amendment rights the corporation can claim *in its own name*, not in the well-established sense that an association, like the NAACP or the NRA, possesses Article III standing to assert the rights of at least one of its members. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (finding that for associational standing "[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit").

<sup>21</sup> To call the documentary a hit piece is merely to restate the Court's description. *Citizens United v. FEC*, 130 S. Ct. 876, 890 (2010) ("The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.").

<sup>22</sup> Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered titles of U.S.C.); see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 591-92 (2011) (discussing the modest beginnings of *Citizens United*).

<sup>23</sup> *Citizens United*, 130 S. Ct. at 887 (citing 2 U.S.C. §§ 434(f)(3)(A), 441b(b)(2) (2006)). An "electioneering communication," according to the Court, is "'any broadcast, cable, or satellite communication' that 'refers to a clearly identified candidate for Federal office'"

designed to prevent corruption in politics. Corruption, or the appearance of corruption, had long justified regulation of direct contributions to candidates.<sup>24</sup> But as campaigns became more complex and media buys became more expensive, regulators began to see the potential for corruption from even independent expenditures of money.

BCRA and its state-law analogs regulated two specific risks posed by large corporate expenditures: first, the risk that corporate money could exaggerate the apparent popularity of an otherwise minority corporate viewpoint (the distortion problem);<sup>25</sup> and second, the risk that corporate managers might spend the money of dissenting investors on speech that the investors found offensive (the dissenting investor problem).<sup>26</sup>

As a regulatory solution, governments restricted independent expenditures by corporations and forced them to form separate Political Action Committees (PACs). The theory was that PACs more accurately represented the popularity of the corporate political speech and better protected dissenting investors, because only those individuals who wanted to contribute to the PAC would do so.<sup>27</sup>

Litigation and legislation crafted two important exceptions to these rules. First, nonprofit political organizations were generally exempt for obvious reasons: Those who contributed to these organizations did so specifically because they are political, and so neither the distortion nor the dissenting investor rationale justified the restriction.<sup>28</sup> Second, media companies were generally exempt because a media company's core business is the dissemination of information. By crafting an exemption, regulators recognized the important, but

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and which is “publicly distributed.” (quoting 2 U.S.C. § 434(f)(3)(A) (2006), 11 C.F.R. § 100.29(a)(2) (2009)).

<sup>24</sup> See *McConnell v. FEC*, 540 U.S. 93, 115–19 (2003) (detailing the history of campaign contribution legislation).

<sup>25</sup> *Citizens United*, 130 S. Ct. at 903 (discussing the distortion rationale).

<sup>26</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 805–06 (1978) (White, J., dissenting) (observing that shareholders may not share the political goals of corporate managers or expect their investment in the company to be used to advance those goals).

<sup>27</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 670 (1990) (Brennan, J., concurring) (“The resources available to [a PAC], as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee.” (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986))).

<sup>28</sup> See *Mass. Citizens for Life*, 479 U.S. at 259–61 (1986) (noting that the restriction on a nonprofit corporation's independent expenditure was not compelling because the corporation was not formed to amass wealth, and because people who contribute “are fully aware of its political purposes, and in fact contribute precisely because they support those purposes”).

not exclusive, role that media companies play in informing the public.<sup>29</sup>

Corporations tested the pre-BCRA restrictions in *Austin v. Michigan Chamber of Commerce*.<sup>30</sup> The *Austin* Court considered the constitutionality of a Michigan law that prohibited corporations from using their general funds for independent political advocacy.<sup>31</sup> *Austin* reaffirmed that legislatures could limit independent corporate expenditures in support of, or in opposition to, a candidate.<sup>32</sup> The Michigan legislature had undoubtedly restricted core political speech. But for the *Austin* majority, the state had articulated a sufficiently compelling government interest: the risk of distortion by powerful corporate speakers.<sup>33</sup> Business corporations enjoy the benefits of state corporate law, including “limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets,”<sup>34</sup> which make them dominant players in the economic marketplace.<sup>35</sup> The government articulated a compelling interest in ensuring that the state-enabled corporate dominance of economic markets did not allow corporations to dominate political markets as well.<sup>36</sup> Neither Michigan’s exception for nonprofit ideological organizations nor its exception for media companies was found to undermine the constitutionality of the law.<sup>37</sup>

Justice Brennan’s concurrence focused on the protection of dissenting investors. He acknowledged the longstanding “importance of state corporate law in ‘protect[ing] the shareholders’ of corporations chartered within the State.”<sup>38</sup> To Brennan, Michigan’s law advanced the compelling interest of preventing corporations from using share-

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<sup>29</sup> See *Austin*, 494 U.S. at 666–68 (finding that the government has a compelling interest in treating media companies differently from other types of companies for purposes of campaign finance regulation); cf. *Bellotti*, 435 U.S. at 781–82 (noting that “[t]he press cases emphasize the special and constitutionally recognized role of [the press] in informing and educating the public,” but also noting that “the press does not have a monopoly on either the First Amendment or the ability to enlighten”).

<sup>30</sup> 494 U.S. 652 (1990).

<sup>31</sup> *Id.* at 654.

<sup>32</sup> *Id.* at 655.

<sup>33</sup> *Id.* at 659–60.

<sup>34</sup> *Id.* at 658–59.

<sup>35</sup> *Id.* at 659.

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

<sup>37</sup> *Id.* at 661–62, 666. The Court took pains to distinguish nonprofit corporations—whose activities enjoyed far more protection than those of the Chamber of Commerce—and the individuals associated with them, from profit-oriented companies. See *id.* at 662–65 (observing that the Chamber of Commerce is more akin to a business corporation than a nonprofit ideological organization like Massachusetts Right to Life).

<sup>38</sup> *Id.* at 675 (Brennan, J., concurring) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 91 (1987) (alteration in original)).

holder money to promote political causes a shareholder might find antithetical to his or her own interests or conscience.<sup>39</sup>

Hours after President Bush signed BCRA, Kentucky Senator Mitch McConnell and the National Rifle Association challenged the legislation in court.<sup>40</sup> Although BCRA provided the *casus belli* for a renewed constitutional attack by First Amendment activists, *Austin* was the real target.

The first shot fizzled. In *McConnell v. Federal Election Commission*<sup>41</sup> the Court wrote a dense, fragmented opinion that essentially upheld BCRA's prohibitions on corporate expenditures.<sup>42</sup> The Court continued to accept *Austin*'s rationale that democracy must be protected from "the corrosive and distorting effects of immense aggregations of wealth . . . accumulated with the help of the corporate form."<sup>43</sup> After *McConnell*, narrow court rulings followed.<sup>44</sup>

*Citizens United* initially appeared to be another misfire—just one more small-bore ruling on the technicalities of BCRA. The Court took full briefing and oral argument on March 24, 2009. Three months passed without a ruling. Then, on June 29, 2009, the Justices surprised court-watchers by directing further briefing. The question: "[S]hould the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) . . . and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) . . . which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act

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<sup>39</sup> *Id.* at 670 (Brennan, J., concurring) ("A stockholder might oppose the use of funds drawn from the general treasury—which represents, after all, *his* money—in support of a particular political candidate."). The fact that a dissenting investor could try to change company policy from the inside, or sell his shares in the corporation to protest the speech did not make the government interest any less compelling. *See id.* at 674 (Brennan, J., concurring) ("[T]hese options [for exit from the corporation] would impose a financial sacrifice on those objecting to political expenditures."). Although Brennan acknowledged that, in the case of the Chamber of Commerce, one company's shareholder's money had been sent to *another* company to advance political speech, the difference was inconsequential to the point of protecting the investment of objecting shareholders. *See id.* at 672–74 (Brennan, J., concurring).

<sup>40</sup> *See McConnell v. FEC*, 251 F. Supp. 2d 176, 206 (D.D.C. 2003) (noting that McConnell filed suit "within hours" of Bush's signature).

<sup>41</sup> 540 U.S. 93 (2003).

<sup>42</sup> For an in-depth discussion of this case, see Hasen, *supra* note 22.

<sup>43</sup> *McConnell*, 540 U.S. at 2005 (quoting *Austin*, 494 U.S. at 660), *overruled by Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

<sup>44</sup> *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (discussing a challenge to the BCRA as applied to an ideological organization advertisement); *see also* Hasen, *supra* note 22, at 590 (discussing *FEC v. Wis. Right to Life*).

of 2002, 2 U.S.C. § 441b?”<sup>45</sup> The Court set the hearing for September 9, 2009, a month before the traditional opening of the Court term.<sup>46</sup>

At oral argument, three Justices peppered counsel with questions on the relevance of corporate personhood to the First Amendment analysis. Justice Stevens asked, “does the First Amendment permit any distinction between corporate speakers and individual speakers?”<sup>47</sup> Justice Ginsburg observed that “[a] corporation . . . is not endowed by its creator with inalienable rights. . . . [I]s there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?”<sup>48</sup> Counsel for Citizens United, Theodore Olson, deflected these questions by asserting the simple fact that the Court’s prior speech cases had always covered corporations.<sup>49</sup> Justice Sotomayor ventured that perhaps the Court had made an “error to start with, not [in] *Austin* or *McConnell*”; but rather, when “the Court imbued a creature of State law,” the corporation, “with human characteristics.”<sup>50</sup>

Whatever the other Court members thought of Justice Sotomayor’s question, it did not prevent a majority from concluding that Congress had violated the free speech rights of Citizens United. In a five to four decision, the Court struck down BCRA’s ban on independent expenditures as facially unconstitutional.<sup>51</sup>

Justice Kennedy wrote for the majority, and the Court’s position was apparent within the first paragraph. *McConnell* depended on *Austin*.<sup>52</sup> *Austin* had held that core political speech could “be banned based on the speaker’s corporate identity.”<sup>53</sup> And “*Austin* was a significant departure from ancient First Amendment principles”; as such, it was undeserving of continued respect under *stare decisis*.<sup>54</sup>

Justice Kennedy equated the constitutional dignity of natural persons with that of corporations. He wrote that “[i]f [BCRA] applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence

<sup>45</sup> *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (mem.); see also Robert Barnes, *Justices To Review Campaign Finance Law Constraints*, WASH. POST, June 30, 2009, at A3 (noting that the September argument was a “surprise” and potential “blockbuster”).

<sup>46</sup> Barnes, *supra* note 45.

<sup>47</sup> Transcript of Oral Argument at 7, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

<sup>48</sup> *Id.* at 4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 33.

<sup>51</sup> *Citizens United*, 130 S. Ct. at 913.

<sup>52</sup> See *id.* at 886 (“In this case we are asked to reconsider *Austin* and, in effect, *McConnell*.”).

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

<sup>54</sup> *Id.* (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (Scalia, J., concurring in part and concurring in the judgment)).

entities whose voices the Government deems to be suspect.”<sup>55</sup> To Kennedy, corporations, no less than individuals, enjoy the same right to speech because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content.”<sup>56</sup> Corporations and other associations, no less than individuals, are participants in the marketplace of ideas.<sup>57</sup>

Neither the distortion rationale nor the dissenting shareholder rationale justified restrictions on core First Amendment protections.<sup>58</sup> The fact that individuals choose to use the corporate form to amplify their message is inconsequential. *Austin, McConnell*, and BCRA had sinned against a cardinal rule of free speech—government had dared to “interfere[ ] with the ‘open marketplace’ of ideas protected by the First Amendment.”<sup>59</sup> As for dissenting shareholder concerns, Justice Kennedy had faith that “procedures of corporate democracy”<sup>60</sup> would prevent any abuse. Finally, it did not matter whether the corporation was formed for ideological or for commercial purposes. A corporation formed for any purpose has the same political speech rights as a natural person.<sup>61</sup>

Justice Scalia concurred. He agreed that corporate identity did not justify restrictions on speech,<sup>62</sup> but he rested his conclusion on textual grounds. The text of the First Amendment says that “Congress shall make no law . . . abridging the freedom of speech,”<sup>63</sup> and the text “makes no distinction between types of speakers.”<sup>64</sup> While it is true that the First Amendment’s text, indeed “[a]ll the provisions of the Bill of Rights,”<sup>65</sup> protect individual men and women, “the individual person’s right to speak includes the right to speak *in association with*

<sup>55</sup> *Id.* at 898.

<sup>56</sup> *Id.* at 899.

<sup>57</sup> *See id.* at 900 (“Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.” (quoting *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion))).

<sup>58</sup> *Id.* at 904, 911.

<sup>59</sup> *Id.* at 906 (quoting *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)). However, the majority did hold that BCRA’s mandatory disclosure of the corporate source of the independent expenditure *was* constitutional. *Id.* at 913–16.

<sup>60</sup> *Id.* at 911 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)).

<sup>61</sup> *See id.* at 913 (“No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”).

<sup>62</sup> The Chief Justice, in his concurrence, also endorsed this point: “The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.” *Id.* at 917 (Roberts, C.J., concurring).

<sup>63</sup> U.S. CONST. amend. I.

<sup>64</sup> *Citizens United*, 130 S. Ct. at 925 (Scalia, J., concurring).

<sup>65</sup> *Id.* at 928.

*other individual persons.*”<sup>66</sup> A business corporation’s claim to free speech is no different than that of an association of individuals, and it cannot be denied on “the simplistic ground that [the corporation] is not ‘an individual American.’”<sup>67</sup> Justice Scalia concluded with this sweeping statement: “The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . . .”<sup>68</sup> According to Justice Scalia, any attempt to craft a special category of corporate persons for core First Amendment purposes would be in clear derogation of the text.

### B. *McDonald v. City of Chicago and the Incorporated Right To Keep and Bear Arms*

In *McDonald v. City of Chicago*, the Court dealt with incorporation in a different sense. The question before the Justices was whether the Fourteenth Amendment incorporates the Second Amendment. If it did, then the right to keep and bear arms would restrict state and municipal governments alongside the federal government.<sup>69</sup> In *District of Columbia v. Heller*,<sup>70</sup> decided in 2008, the Court had held that the Second Amendment right to keep and bear arms is a personal right. According to the Court, laws that prevent a person from keeping and transporting an operable handgun in the home are unconstitutional.<sup>71</sup> Prior to *Heller*, Second Amendment debates raged over whether the right to keep and bear arms was a right possessed by every citizen individually or whether it was a collective right reposed in the institu-

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 929.

<sup>69</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). In *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), Chief Justice Marshall writing for the majority held that the federal Bill of Rights protected individuals only from the national government. *Id.* at 247. But through a series of rulings beginning in the early twentieth century and accelerating in the next thirty years, nearly all of the protections of the Bill of Rights came to be selectively incorporated to apply against states through the Fourteenth Amendment’s Due Process Clause. See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.6(b) (4th ed. 2007). Today, most guarantees of the Bill of Rights are incorporated against the states, except the Third Amendment, the grand jury requirement of the Fifth Amendment, the Seventh Amendment civil jury trial, and the Ninth and Tenth Amendments. *Id.* It is disputed whether the Excessive Fines Clause of the Eighth Amendment has been incorporated. Cf. *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (declining to decide whether the Excessive Fines Clause applies to the states).

<sup>70</sup> 554 U.S. 570 (2008).

<sup>71</sup> *Id.* at 628–29.

tion of an organized state militia, such as the National Guard.<sup>72</sup> *Heller* held that the right was individual; no person needs to belong to an organized militia to claim a right to keep and bear arms for self-defense.<sup>73</sup> Instead, the Court held that the militia clause simply contemplates a “citizens’” or “people’s” militia of individual rights-holders who severally possess the right to keep and bear arms.<sup>74</sup>

*Heller* bound only the federal government.<sup>75</sup> *McDonald* addressed whether *Heller*’s Second Amendment right to keep and bear arms also applied to the states.<sup>76</sup> In deciding this question, the Court had to determine whether the Second Amendment applied through the Due Process Clause of the Fourteenth Amendment,<sup>77</sup> which protects “person[s],”<sup>78</sup> or through the Privileges or Immunities Clause of the Fourteenth Amendment,<sup>79</sup> which protects “citizens.”<sup>80</sup>

A four-Justice plurality of the Court held that it is the Fourteenth Amendment’s Due Process Clause that incorporates the Second Amendment.<sup>81</sup> As Justice Alito wrote, “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day,” and that the individual right to self-defense is “‘the *central component*’ of the Second Amendment right.”<sup>82</sup>

<sup>72</sup> See Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1292–93 (2009) (discussing the history of the individual versus collective right to bear arms debate).

<sup>73</sup> See *Heller*, 554 U.S. at 599 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”).

<sup>74</sup> *Id.* at 598–600.

<sup>75</sup> *Heller* dealt with laws in the District of Columbia, a federal territory, and so its application was limited to the federal government.

<sup>76</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010).

<sup>77</sup> *Id.* at 3028 (“As a secondary argument, petitioners contend that the Fourteenth Amendment’s Due Process Clause ‘incorporates’ the Second Amendment right.”).

<sup>78</sup> U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law . . . .”) (emphasis added).

<sup>79</sup> *McDonald*, 130 S. Ct. at 3028 (“Petitioners’ primary submission is that this right [to keep and bear arms] is among the ‘privileges or immunities of citizens of the United States’ . . . .”).

<sup>80</sup> See U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States . . . .”) (emphasis added).

<sup>81</sup> *McDonald*, 130 S. Ct. at 3050. Justice Thomas wrote a concurrence which would have held that the Second Amendment is incorporated fully through the Privileges or Immunities Clause as a “privilege of American citizenship.” *Id.* at 3059 (Thomas, J., concurring).

<sup>82</sup> *Id.* at 3036 (citing *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

The *McDonald* plurality again refused to designate any level of scrutiny to evaluate the constitutionality of a regulation.<sup>83</sup> In fact, it “specifically rejected” the “balancing” of Second Amendment rights.<sup>84</sup> After *McDonald*, it appears that no restriction on the Second Amendment can be justified on the basis that there is a compelling, serious, or rational government interest that outweighs the constitutional right, because the right itself is a product of balancing by the Founders.<sup>85</sup> However, this does not mean that the right is limitless. Instead, the plurality reiterated that “longstanding regulatory measures,” such as felon disarmament, prohibitions of firearms in “sensitive places,” or qualifications for commercial sale of arms are presumptively constitutional.<sup>86</sup> But it offered no justification for why that is so.<sup>87</sup> Whether other categories of persons, arms, places, or bearing fall outside the scope of Second Amendment protection was left for another day.<sup>88</sup>

The *McDonald* Court, like the *Heller* Court, continued to delegitimize the organized militia as an institution that defines the scope or purpose of the Second Amendment. *Heller* decoupled the right to keep and bear arms from the organized militia; *McDonald* went further and suggested the right was specifically guaranteed as a protection *against* the organized militia.<sup>89</sup> The Court noted that the Second Amendment is incorporated against the states specifically because

<sup>83</sup> See *id.* at 3050 (“The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” (quoting *Heller*, 554 U.S. at 634)).

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

<sup>85</sup> See *Heller*, 554 U.S. at 635 (noting that, like the First Amendment, the Second Amendment resulted from balancing of interests at the Founding). Notwithstanding the Supreme Court’s reluctance, a number of lower courts have embraced some traditional scrutiny analysis in Second Amendment cases. See, e.g., *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (applying intermediate scrutiny); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (same).

<sup>86</sup> *McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626–27). *But see id.* at 3127 (Breyer, J., dissenting) (questioning the source of these limitations and their provenance).

<sup>87</sup> See Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1356–58 (2009) (questioning the methodological source of these exceptions); Miller, *supra* note 72, at 1293–96 (noting internal contradictions of these exceptions); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273 (2009) (observing that *Heller* seems to want to dodge the “unpleasant consequences” of the Second Amendment right to bear arms); Adam Winkler, *Heller’s Catch-22*, 56 UCLA L. REV. 1551, 1561 (2009) (remarking on the lack of originalist support for these exceptions).

<sup>88</sup> For speculation on the future of *McDonald* in the lower courts, see generally Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 294–301 (2011).

<sup>89</sup> For a discussion of the complexities this suggestion produces, if taken seriously, see Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939 (2011).

Freedmen needed to deter both unreconstructed state militias as well as private criminals.<sup>90</sup> Following the Civil War, African-Americans were terrorized by local law enforcement, local militias, and white supremacist organizations,<sup>91</sup> an ordeal that continued well into the twentieth century. *McDonald* held that the Fourteenth Amendment incorporated the Second Amendment to enable the Freedmen to defend themselves against this corrupted state security apparatus.

### C. *The Question of Corporate Second Amendment Rights*

Reading *Citizens United* and *McDonald* together leads to the inevitable question: Do corporations possess Second Amendment rights? If corporate associations enjoy core First Amendment protections that are indistinguishable from those of natural persons, what about Second Amendment protections?

Before answering, I will address two potential objections to this line of inquiry. The first objection is doctrinal. How relevant is *Citizens United*, and indeed the entire First Amendment, to the analysis?<sup>92</sup> The second objection is practical. When, other than in a law school hypothetical, would a corporation claim a constitutional right to keep and bear arms?

This Part addresses these objections. First, it explains how the Court uses First Amendment doctrine as a framing device for the Second Amendment and how the Court seems to view the purposes of the First and Second Amendments in similar terms. It then provides examples of existing regulations that would be implicated by a corporate Second Amendment right.

#### 1. *First Amendment Framing of the Second Amendment*

The Court uses the First Amendment as an interpretive template for the Second.<sup>93</sup> In both *Heller* and *McDonald*, the Court repeatedly

<sup>90</sup> See *McDonald*, 130 S. Ct. at 3043 (stating that, without the right to keep and bear arms, blacks would be vulnerable to harassment by state militia and peace officers).

<sup>91</sup> See *id.* at 3039 & n.20, 3043 (noting the disarmament of, and violence toward, blacks during the decade after the Civil War).

<sup>92</sup> See Lawrence Rosenthal & Joyce Lee Malcolm, *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun-Control Laws*, 105 Nw. U. L. REV. 85, 90 n.32 (2010) (discussing the difficulty of using First Amendment analogs).

<sup>93</sup> A sample of the scholarly literature comparing the two includes Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); David B. Kopel, *The Second Amendment in the Tenth Circuit: Three Decades of (Mostly) Harmless Error*, 86 DENV. U. L. REV. 901, 935 (2009); Miller, *supra* note 72, at 1292–1321; Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1449, 1458–59 (2009); see also *United States v. Marzzarella*, No. 09-3185, slip op. at 6–7 & 7

hinted that lower courts should use the First Amendment as a resource to implement the Second Amendment.<sup>94</sup>

Certainly the First and Second Amendments appear to be textual counterparts. Both are written in strong, prohibitory terms: “Congress shall make *no* law . . . *abridging* the freedom of speech”<sup>95</sup>; “[T]he right of the people to keep and bear arms, *shall not be infringed*.”<sup>96</sup>

But the Court also expects First Amendment analogs to soften an otherwise intolerably rigid Second Amendment text. Just as the Court has said there is no right to yell “fire” in a crowded theater,<sup>97</sup> the Court has also said “the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’”<sup>98</sup> The Court has developed a rich selection of tempering doctrine in First Amendment cases. The Court’s First Amendment allusions in *Heller* and *McDonald* seem to offer lower courts a limited license to use similar doctrine to avoid the “unpleasant consequences”<sup>99</sup> of a too-literal approach to the Second Amendment.

I use the phrase “limited license,” because the Court has made clear that not all First Amendment analogs are equal. Categories are favored; balancing is denounced. Just as there are categorical exceptions for “obscenity, libel, and disclosure of state secrets” in the First Amendment, there are also categorical exceptions to the Second Amendment right to keep and bear arms.<sup>100</sup> Schools are one such cat-

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n.4 (3d Cir. July 29, 2010) (stating that the “First Amendment is the natural choice” for understanding the scope of the Second).

<sup>94</sup> See, e.g., *McDonald*, 130 S. Ct. at 3043–44 (arguing that just as the First Amendment incorporated against states gives substantive guarantees, so too does the Second Amendment); *id.* at 3054 n.5 (Scalia, J., concurring) (arguing that because “[t]he First Amendment freedom of speech is incorporated—not the freedom to speak on Fridays, or to speak about philosophy,” the Second Amendment—whatever its scope—is incorporated against states); *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (“Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms . . . .”) (citation omitted); *id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”).

<sup>95</sup> U.S. CONST. amend. I (emphasis added).

<sup>96</sup> *Id.* amend. II (emphasis added).

<sup>97</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>98</sup> *McDonald*, 130 S. Ct. at 3047 (quoting *Heller*, 554 U.S. at 626).

<sup>99</sup> See *Wilkinson*, *supra* note 87, at 273 (“The *Heller* majority seems to want to have its cake and eat it, too—to recognize a right to bear arms without having to deal with any of the more unpleasant consequences of such a right.”).

<sup>100</sup> *Heller*, 554 U.S. at 635.

egory, as are felons.<sup>101</sup> But it is historically-glossed *categories*, rather than case-by-case balancing or any of the more supple forms of First Amendment doctrine,<sup>102</sup> that the Court has endorsed thus far.<sup>103</sup> As the *Heller* Court insists, the Second Amendment, “[l]ike the First . . . is the very *product* of an interest balancing by the people.”<sup>104</sup>

Finally, the Court appears to regard the function of First and Second Amendment protections as similar. According to the Court, the First and Second Amendments serve dual functions. First, they both advance personal liberty and autonomy. The First Amendment protects speech because of Americans’ deep fear of “giving government the power to control men’s minds.”<sup>105</sup> This point has its mirror in the Second Amendment, where the Court has reiterated that the right to keep and bear arms is, at its core, about the autonomy associated with self-protection.<sup>106</sup>

Second, the Court seems to view the First and Second Amendments as important checks on overweening government.<sup>107</sup> In *Citizens United*, the Court feared that public regulation of corporate political speech would lead to government control of democratic discourse.<sup>108</sup> In *Heller* and *McDonald*, the Court expressed concern that tyranny could reign when government possesses a monopoly on the tools (if not also the legitimacy) of violence.<sup>109</sup>

Under the logic of the Court, these First and Second Amendment purposes—self-actualization and government deterrence—were advanced as much by protection of corporate behavior as by protec-

<sup>101</sup> *McDonald*, 130 S. Ct. at 3047 (citing *Heller*, 554 U.S. at 626–27). *But see id.* at 3127 (Breyer, J., dissenting) (questioning the source of these limitations); *see also supra* note 87 (surveying scholarship that questions the historical provenance of these restrictions).

<sup>102</sup> For example, First Amendment government interest analysis, levels of scrutiny, and time, place, and manner regulations, are far looser than the type of doctrine the Court has applied to the Second Amendment.

<sup>103</sup> For a further discussion of the use of categories in First and Second Amendment jurisprudence, see generally Blocher, *supra* note 93.

<sup>104</sup> *Heller*, 554 U.S. at 635.

<sup>105</sup> *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

<sup>106</sup> *See McDonald*, 130 S. Ct. at 3036–37 (discussing the Second Amendment as a fundamental right to self-defense); *see also* Michael Steven Green, *Why Protect Private Arms Possession? Nine Theories of the Second Amendment*, 84 NOTRE DAME L. REV. 131, 149–50 (2008) (describing autonomy as a justification for the Second Amendment).

<sup>107</sup> For more discussion of these points, see *infra* Part III.

<sup>108</sup> *See Citizens United v. FEC*, 130 S. Ct. 876, 898–99 (2010) (expressing concern if the government imposes restrictions on speech based on identity of the speaker).

<sup>109</sup> *See, e.g., McDonald*, 130 S. Ct. at 3043 (discussing the concern during Reconstruction that the only persons able to possess weapons were police and militia forces); *Heller*, 554 U.S. at 598 (“[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”); *id.* at 600 (finding that right reposed only in organized militia “does not assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny”).

tion of individual behavior.<sup>110</sup> Given the Court's reference to First Amendment doctrine as a guide to the Second Amendment, and given that the Court ascribes similar functions to the two Amendments, it is logical that the First Amendment rights of corporations may influence the Court's approach to the Second Amendment rights of corporations in a future case.

## 2. *Regulations That Implicate Corporate Second Amendment Rights: Private Security, Ideological Associations, Guns-to-Work Laws, and the Commercial Firearm Industry*

But what of the practical relevance of a corporate Second Amendment right? When is such a case likely to arise? I offer four specific examples of areas where government regulation of corporate rights to keep and bear arms for self-defense is pervasive and common: private security, ideological associations, "guns-to-work" laws, and the commercial gun trade. I chose these four examples for their salience, although one could imagine many more.<sup>111</sup> This Section outlines the regulations in these four areas. I will return to them in Part III and explain how the Court's different approaches to corporate personhood could result in different levels of constitutional viability for these regulations.

First, consider private security. The private security industry is large, grossing between thirty and fifty billion dollars a year.<sup>112</sup> The Bureau of Labor Statistics estimates that private security employment will expand by fourteen percent by 2018, faster than the average of all other occupations.<sup>113</sup>

Private security companies and their agents operate under some fairly stringent, if uneven, government regulation. Private guards are subject to random drug screening, background checks, and even special certifications—far more regulation than would be imposed on an

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<sup>110</sup> See *infra* Part IV (discussing the role of intermediary organizations as mechanisms for both self-fulfillment and as a buffer between an individual and the government).

<sup>111</sup> To begin, consider the rules concerning self-help by corporations in retaining their property from shoplifters, or in repossessing property from others; consider the differences in duties imposed when a security agent of a corporation uses violent self-defense, as opposed to a lone individual. See, e.g., *People v. Johnson*, 254 N.W.2d 667, 670 (Mich. 1977) (noting that a private security guard was not obliged to retreat when confronted with deadly force).

<sup>112</sup> See LARRY K. GAINES, MICHAEL KAUNE & ROGER LEROY MILLER, *CRIMINAL JUSTICE IN ACTION: THE CORE*, at 100 (2001) (describing the growth in, and size of, the private security industry); JAMES F. PASTOR, *THE PRIVATIZATION OF POLICE IN AMERICA*, at x (2003) (indicating revenues of the private security industry); PHILIP P. PURPURA, *SECURITY LOSS AND PREVENTION: AN INTRODUCTION* 27 (5th ed. 2008) (describing the growth and size of the private security industry).

<sup>113</sup> *OUTLOOK HANDBOOK*, *supra* note 10.

individual firearm owner or a group of armed citizens.<sup>114</sup> Two jurisdictions, Washington and Arizona, have even gone so far as to specifically exclude corporations from their state right to bear arms, warning that “nothing in this [constitutional] section [on the individual right to bear arms] shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”<sup>115</sup> Does the Constitution permit private security companies to be treated any differently from an unincorporated association, or even from a lone individual?

Second, consider nonprofit self-defense, vigilance, religious, or ideological organizations, many of which are organized as corporations. The Guardian Angels, famous for their red berets, is organized as a nonprofit corporation,<sup>116</sup> as is at least one chapter of the Black Panther Party.<sup>117</sup> The parent organization for the border patrol group, the Minutemen, is a 501(c)(4) organization.<sup>118</sup> Even the Ku Klux Klan is organized as a nonprofit corporation in some states.<sup>119</sup> Could the Guardian Angels, famous for being unarmed, decide to arm themselves and patrol the subway cars as a private protective association? What about the hundreds of voluntary militia organizations nationwide that are currently restricted in their ability to train or assemble as an armed force?<sup>120</sup> What about those states that prohibit firearms in houses of worship, which are often organized as nonprofit corporations?<sup>121</sup>

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<sup>114</sup> See *supra* note 10 (citing various state regulations that govern corporate self protection).

<sup>115</sup> ARIZ. CONST. art. II, § 26 (“The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.”); WASH. CONST. art. I, § 24 (“The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”).

<sup>116</sup> See GUARDIAN ANGELS, <http://www.guardianangels.org/> (last visited Feb. 7, 2011) (describing the organization as a 501(c)(3) nonprofit corporation).

<sup>117</sup> See *Corporation File Detail Report*, CYBERDRIVEILLINOIS, <http://www.ilsos.gov/corporatellc/> (last visited July 5, 2010) (search for “black panther party”; then follow hyperlink “Black Panther Party”) (indicating that the entity is a nonprofit). This organization now seems defunct.

<sup>118</sup> See MINUTEMANHQ.COM, <http://www.minutemanhq.com/hq/> (last visited Aug. 9, 2011) (describing its parent organization as 501(c)(4) nonprofit, tax-exempt organization).

<sup>119</sup> See, e.g., Initial Articles of Incorporation of Brotherhood of Klans Knights of the Ku Klux Klan, Inc., Ohio Secretary of State, No. 200718401754 (2007) (on file with the New York University Law Review).

<sup>120</sup> See *supra* note 12 (compiling sources that discuss private militia organizations and regulations).

<sup>121</sup> Arkansas, Georgia, Mississippi, and North Dakota forbid guns in houses of worship. Georgia is currently litigating this issue. See Rhonda Cook, *Suit Aims To Lift Ban on Guns*

Third, consider guns-to-work laws. Currently, twelve states prohibit a private employer from preventing an employee (and sometimes customers, contractors, and visitors) from storing a firearm in his or her car on the employer's parking lot.<sup>122</sup> Businesses reluctant to allow firearms onto their property have thus far used property rights, takings, and other grounds to challenge these laws.<sup>123</sup> Their arguments could also be supported by the proposition that they, as corporations, have the right to keep and bear arms for self-defense—independent of the rights of their employees. In this line of argument, guns-to-work laws impermissibly elevate the Second Amendment rights of individuals over the Second Amendment rights of the corporation itself.

Fourth, consider the firearms industry. Approximately \$1.4 billion worth of guns are sold every year.<sup>124</sup> This figure does not capture the numerous gun clubs, shooting ranges, trade shows, and other types of commercial activity associated with firearms. At present, the firearms industry is heavily regulated at not only the point of manufacture, but also throughout the distribution chain. *Heller* and *McDonald* insist that their opinions do not question the validity of commercial firearm regulation. But, could a firearms manufacturer, distributor, or other corporate entity claim a right to be free from government restriction in the same way that the press is free under the First Amendment?<sup>125</sup>

Given the potential “tsunami”<sup>126</sup> of Second Amendment litigation after *McDonald*, any one of these laws is ripe for Second Amendment challenge. Indeed, some regulations are embroiled in liti-

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*in Church: Thomaston Minister Wants Weapon ‘For Protection of His Flock.’ Filing Lists State, Upson County as Defendants*, ATLANTA J. CONST., July 10, 2010, at B1 (discussing the status of a suit to overturn Georgia law); Amy Leigh Womack, *Guns-in-Churches Injunction Denied by Federal Judge*, MACON TELEGRAPH, Aug. 24, 2010, available at <http://www.vvmacon.com/2010/08/24/1238483/guns-in-churches-injunction-denied.html> (same).

<sup>122</sup> See *supra* note 11 (citing numerous regulations regarding a corporation's obligation to permit armed individuals onto its property).

<sup>123</sup> For an example of a challenge to guns-to-work laws by a consortium of retailers, see Fla. Retail Fed'n, Inc. v. Att'y Gen., 576 F. Supp. 2d 1281, 1284 (N.D. Fla. 2008). See also Steines, *supra* note 11, at 1185–96 (analyzing whether parking lot laws violate the Takings Clause).

<sup>124</sup> Philip J. Cook & Jens Ludwig, *Litigation as Regulation: Firearms*, in REGULATION THROUGH LITIGATION 101 (W. Kip Viscusi ed., 2002). These numbers are based on estimates from earlier in the decade.

<sup>125</sup> This issue is raised in current litigation involving a corporate plaintiff. See *Ezell v. City of Chicago*, No. 10 C 5135, 2010 WL 3998104, at \*1 (N.D. Ill. Oct. 12, 2010) (identifying “Action Target, Inc.” as a named plaintiff against Chicago shooting range regulations).

<sup>126</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3105 (2010) (Stevens, J., dissenting).

gation now.<sup>127</sup> Part III of this Article will therefore address how theories of corporate personality and corporate constitutional rights may impact each of these specific examples. Part IV will explore how corporate Second Amendment rights raise questions about the structure of corporate constitutional rights in general.

But first, a primer on corporate constitutional rights is necessary to understand how corporate Second Amendment rights may fit within the existing framework.

## II

### CORPORATE CONSTITUTIONAL RIGHTS: A PRIMER

To understand how the Second Amendment might protect corporations, we must first understand why any constitutional provision protects corporations. After all, corporations “are not themselves members of ‘we the people’ by whom and for whom our Constitution was established.”<sup>128</sup> When they are mentioned in the records of the Founders, it is often with suspicion.<sup>129</sup> Yet, corporations currently claim varying degrees of parity with natural persons when it comes to constitutional rights. Only by understanding how and why corporations have benefitted from constitutional protections in the past may we begin to understand how and why corporations may benefit from constitutional protections in the future.

This Part, therefore, offers a primer on corporate constitutional rights. The aim is to explain the Court’s past treatment of corporate constitutional rights in light of corporate personality theory, so we may anticipate in Part III how the modern Court may use this doctrine to implement corporate Second Amendment rights.

Part II.A surveys the current, incoherent Supreme Court doctrine on corporate constitutional rights. It also explains why the only analytical framework that exists, a footnoted aside in *First National Bank of Boston v. Bellotti*,<sup>130</sup> is incomplete. Part II.B then explores how the three prevailing theories of corporate personhood—the artificial entity theory, the real entity theory, or the aggregation theory—influence the Court when it decides a corporate constitutional rights

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<sup>127</sup> See Womack, *supra* note 121 (describing a Georgia suit to enjoin enforcement of the prohibition of guns at church). For a look into the extensive litigation on gun shows in California, see *Nordyke v. King*, 563 F.3d 439, 444 (9th Cir. 2009) (challenging a prohibition on gun shows on county property), *vacated*, 611 F.3d 1015 (9th Cir. 2010) (en banc) (remanding to a 9th Circuit panel for consideration in light of *McDonald*).

<sup>128</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting).

<sup>129</sup> See *id.* at 949–50 (reviewing the Founders’ view of corporations in American society).

<sup>130</sup> 435 U.S. 765 (1978).

case. Part III returns to the Second Amendment and explains how the Court's analysis in *Bellotti* and these three theories of the corporate personality could interact to form the analytical framework for the Court's application of Second Amendment rights to corporations.

### A. *The Broken Jurisprudence of Corporate Constitutional Rights*

"Corporations" do not appear in the text of the Constitution. "Nations,"<sup>131</sup> "states,"<sup>132</sup> "people,"<sup>133</sup> "citizens,"<sup>134</sup> and "tribes"<sup>135</sup> all appear in the text of the Constitution, but not corporations.<sup>136</sup> Nevertheless, corporations fall within a category of entities protected by the Constitution, sometimes. No unified theory governs when or to what extent the Constitution protects a corporation.<sup>137</sup> Instead, the Justices resort to a grab bag of history, metaphysical rumination, *Lochnerian* tailings, and pragmatism to resolve the specific corporate constitutional claim at hand.<sup>138</sup> The Court's approach has left us with a broken and disjointed jurisprudence, a string cite rather than a doctrine.

<sup>131</sup> U.S. CONST. art. I, § 8.

<sup>132</sup> *Id.* art. I, §§ 2, 3, 8, 9, art. II, § 2, art. III, § 2, art. IV, §§ 2, 3, 4, art. V, art. VI, art. VII, amend. X, amend. XII, amend. XIV, § 1, amend. XVI, amend. XVIII, §§ 2, 3, amend. XX, § 6, amend. XXI, § 3.

<sup>133</sup> *Id.* pmb., art. I, § 2, amends. I, II, IV, IX, X, XVII.

<sup>134</sup> *Id.* art. III, § 2, art. IV, § 2, amend. XI, amend. XIV, §§ 1, 2, amend. XV, § 1, amend. XIX, amend. XXIV, § 1, amend. XXVI, § 1.

<sup>135</sup> *Id.* art. I, § 8.

<sup>136</sup> For a discussion of the original understanding of corporate rights, see Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, U.C. DAVIS BUS. L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1620993>.

<sup>137</sup> As Michael Rivard put it, there is no coherent theory of corporate constitutional rights—there are "only legal conclusions." Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1465 (1992).

<sup>138</sup> One commentator has castigated the Court's method as "constitutional operationalism," a "pragmatic, antitheoretical approach to corporate rights." Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 650 (1990); see also Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 399 (2006) (noting a "right-by-right basis" of corporate constitutional decision making); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005) (noting "ad hoc, arbitrary" decision making, and observing that "different corporate metaphors have been used within the same case, even in interpreting different portions of the same Constitutional Amendment"); Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1348 (1979) (noting a lack of consistency in constitutional jurisprudence on the nature of the corporation and its rights); Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1243 (1999) ("[E]lection law has not settled on a single, coherent conception of the corporation—what it is, what values it serves, and what role it should play in politics."). A list of corporate claims to specific constitutional rights and their outcomes is printed in Carl Mayer's work. See Mayer, *supra* at 664–67.

Today, corporations possess some First Amendment free speech and press rights,<sup>139</sup> some rights of expressive association,<sup>140</sup> and (perhaps) some right to free exercise.<sup>141</sup> They enjoy Fourth Amendment rights against unreasonable searches<sup>142</sup> but only a limited right to privacy.<sup>143</sup> Corporations possess Fifth Amendment rights against double jeopardy<sup>144</sup> and takings<sup>145</sup> but no rights against self-incrimination.<sup>146</sup> The Sixth Amendment guarantees corporations a right to trial by jury<sup>147</sup> and to counsel<sup>148</sup> but not a right to appointed counsel.<sup>149</sup> Corporations are “citizens” for purposes of Article III jurisdictional

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<sup>139</sup> See *First Nat'l Bank of Bos. v. Belotti*, 435 U.S. 765, 795 (1978) (discussing the corporate right to political speech); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 249–51 (1936) (holding that a press corporation is a person entitled to the protection of the First and Fourteenth Amendments).

<sup>140</sup> See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8–9, 17 n.14 (1986) (holding that California cannot force a private, but heavily regulated, utility company to use space in its mailing envelopes to transmit potentially offensive messages from its customers).

<sup>141</sup> See *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) (finding a corporate right to the free exercise of religion).

<sup>142</sup> See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978) (finding a corporate right against warrantless inspections by workplace safety regulators).

<sup>143</sup> See *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006) (finding no corporate right of privacy in regard to running a sex-oriented club); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 650–52 (1950) (finding lesser privacy protections for corporations than natural persons). The Court recently held that corporations have no statutory privacy rights under the Freedom of Information Act, but declined to address any constitutional privacy issue. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1179 (2011).

<sup>144</sup> See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565, 575 (1977) (finding corporation had rights against double jeopardy).

<sup>145</sup> See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (holding that a foreign corporation has the right to claim takings violation under Fifth Amendment).

<sup>146</sup> See *Wilson v. United States*, 221 U.S. 361, 383–84 (1911) (finding that a corporation has no power to claim the Fifth Amendment right against self-incrimination); *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906) (same).

<sup>147</sup> See *United States v. R.L. Polk & Co.*, 438 F.2d 377, 378–80 (6th Cir. 1971) (holding that corporations have the same Sixth Amendment right to jury as natural persons); *United States v. Greenpeace, Inc.*, 314 F. Supp. 2d 1252, 1261 (S.D. Fla. 2004) (same). Corporations also have a Seventh Amendment right to a jury in federal court. See *Ross v. Bernhard*, 396 U.S. 531, 536, 542 (1970) (holding that an individual can claim derivative right to civil jury under the Seventh Amendment if a corporation would have had a right to a jury).

<sup>148</sup> *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (“Consequently, we hold that the guarantee of effective assistance of counsel applies to corporate defendants.”).

<sup>149</sup> See *United States v. Unimex, Inc.*, 991 F.2d 546, 550 (9th Cir. 1993) (“Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel.”); see also *United States v. Hartsell*, 127 F.3d 343, 350 (4th Cir. 1997) (citing *Unimex* with approval). *But cf.* *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) (“It appears beyond sensible debate that corporations . . . do indeed enjoy the right to retain counsel.”).

powers<sup>150</sup> but not “citizens” for purposes of the Privileges or Immunities Clause.<sup>151</sup> Corporations are “persons” with Fourteenth Amendment rights to equal protection<sup>152</sup> and procedural due process<sup>153</sup> and some, but not all, of the incorporated Bill of Rights.<sup>154</sup> Corporations are also “persons” who may spend money to influence voters,<sup>155</sup> but they cannot themselves become voters under the Fourteenth, Fifteenth, Nineteenth, or Twenty-Fourth Amendments.<sup>156</sup>

A footnote in *First National Bank of Boston v. Bellotti*<sup>157</sup> is the closest the Court has come to creating a standard test. According to Justice Powell’s *Bellotti* decision, the Constitution protects corporations except for “[c]ertain ‘purely personal’ guarantees.”<sup>158</sup> Whether a constitutional right is “‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”<sup>159</sup>

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<sup>150</sup> *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1188 (2010) (citing *Marshall v. Balt. & Ohio R.R.*, 57 U.S. (16 How.) 314, 327–28 (1854) and *Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497, 558–59 (1844)).

<sup>151</sup> *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (“The term citizens . . . [as used in the Fourteenth Amendment] applies only to natural persons . . . not to artificial persons created by the legislature . . .”).

<sup>152</sup> See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (applying equal protection to a corporation based on “well established” view that corporations are persons under the Fourteenth Amendment); *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886) (stating it is clear that corporations are entitled to equal protection).

<sup>153</sup> See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 413–14 (1984) (finding due process rights against the exercise of personal jurisdiction).

<sup>154</sup> *Compare* *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (finding that liberty is not included as a right of corporations), *with* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978) (finding that corporations have First Amendment rights). The Supreme Court has yet to hold that corporations have Eighth Amendment rights against cruel and unusual punishment and rights against excessive fines (even if the latter were incorporated). See *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (“We shall not decide whether the Eighth Amendment’s prohibition on excessive fines applies to the several States through the Fourteenth Amendment, nor shall we decide whether the Eighth Amendment protects corporations as well as individuals.”). *But see id.* at 285 (O’Connor, J., concurring in part and dissenting in part) (suggesting the application of the Excessive Fines Clause to corporations). They also have, according to one court, a right against bills of attainder. *Consol. Edison Co. v. Pataki*, 292 F.3d 338, 346–47 (2d Cir. 2002) (finding that corporations are protected by the Attainder Clause but noting a split in authority).

<sup>155</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (striking down restrictions on corporate independent expenditures as a First Amendment violation).

<sup>156</sup> See *id.* at 948 (Stevens, J., dissenting) (observing, sarcastically, that the majority’s reasoning would require corporations to have the right to vote); *Texfi Indus., Inc. v. City of Fayetteville*, 269 S.E.2d 142, 150 (N.C. 1980) (rejecting a corporate right to vote).

<sup>157</sup> 435 U.S. 765 (1978).

<sup>158</sup> *Id.* at 778 n.14 (identifying the right against self-incrimination as purely a personal right).

<sup>159</sup> *Id.*

Powell's test is superficially attractive but practically disappointing. First, it is a test in search of a case. With the exception of *Citizens United*, the Court seldom reexamines prior corporate constitutional decisions. Instead, the Court's history has been to simply assert that corporations have a certain constitutional right and then build doctrine upon that naked declaration.<sup>160</sup> Given that the Second Amendment breaks new constitutional ground, Powell's test is ripe for a workout.<sup>161</sup>

Second, many corporate constitutional rights that predate *Bellotti* would probably fail Powell's test if applied today. The Fourth Amendment's prohibitions against unreasonable searches and seizures derive from the Framers' interest in protecting the privacy, dignity, and security of one's person, house, papers, and effects.<sup>162</sup> The purpose of the Fourth Amendment points to a purely personal right. Yet corporations can claim some, although not all, Fourth Amendment protections to the same degree as natural persons.<sup>163</sup> The Fifth Amendment's Double Jeopardy Clause protects a person from twice risking "life or limb,"<sup>164</sup> and shields the individual from the anx-

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<sup>160</sup> In *Santa Clara v. S. Pac. R.R.*, 118 U.S. 394 (1886), the Court held that private corporations have rights to equal protection. Chief Justice Waite declared:

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.

*Id.* at 396. Subsequent decisions have built upon this raw *ipse dixit*, such as *S. Ry. v. Greene*, 216 U.S. 400, 412 (1910) (citing *Santa Clara* to show that corporations are entitled to equal protection under the Fourteenth Amendment) and *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578, 591 (1896) (same), much to the consternation of the late Justice Douglas, among others. See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576–77 (1949) (Douglas, J., dissenting) (noting that "[t]here was no history, logic, or reason given [in *Santa Clara*] to support [the] view" that corporations are persons within the meaning of the Fourteenth Amendment); see also Krannich, *supra* note 138, at 96 (noting this tendency to build upon older cases).

<sup>161</sup> See *infra* part III.A (using *Bellotti* to evaluate the Second Amendment).

<sup>162</sup> U.S. CONST. amend. IV; *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

<sup>163</sup> See LAWRENCE M. FRIEDMAN, *THE HISTORY OF AMERICAN LAW* 178–79 (3d ed. 2005) (noting "personality"-centered nature of corporate criminal liability and defenses); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 798 n.19 (1996) (criticizing incoherence of this approach).

<sup>164</sup> U.S. CONST. amend. V.

ity of future and successive prosecutions.<sup>165</sup> Yet this clause protects corporations that possess neither life nor limb nor anxieties.<sup>166</sup>

Third, Powell's test suggests a binary that the existing doctrine does not support. According to *Bellotti*, a constitutional provision protects a corporation, or it does not. But Powell's formula does not capture those rights that corporations may claim to some *lesser degree* than a natural person, such as the right against unreasonable searches and seizures, the right to privacy, or, until recently, the right to political speech.

Fourth, Powell's test obscures unstated assumptions about corporate personality.<sup>167</sup> Corporations are treated as natural persons for some constitutional purposes, as aggregates of natural persons for others, and as neither aggregates nor natural persons for yet others.<sup>168</sup> But, as Peter Henning has observed, "short of . . . announcing a test for what constitutes an individual non-corporate right,"<sup>169</sup> there is no way of knowing what rights are "'purely' personal" or "somewhat personal."<sup>170</sup>

Finally, in operation, *Bellotti* creates a rebuttable presumption in favor of corporate constitutional rights. Corporations are constitutional persons, equal to human beings, unless for reasons of nature, history, or purpose, they are something less. This itself is a startling baseline from which to begin. Further, it remains unclear what textual, historical, intentional, or prudential concerns count as an adequate rationale to rebut this presumption.<sup>171</sup>

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<sup>165</sup> See *Green v. United States*, 355 U.S. 184, 187–88 (1957) (explaining the purpose of the Fifth Amendment Double Jeopardy Clause).

<sup>166</sup> See Henning, *supra* note 163, at 841–43; Krannich, *supra* note 138, at 105. *But see* *United States v. Hosp. Monteflores, Inc.*, 575 F.2d 332, 335 (1st Cir. 1978) (recognizing that "corporations do not have human emotions" but finding that double jeopardy protects against loss of good will in the marketplace).

<sup>167</sup> See Mayer, *supra* note 138, at 650 (observing that "sub silentio the corporation is legitimated as a constitutional actor" through equating corporations with persons).

<sup>168</sup> See *id.* at 580–81.

<sup>169</sup> Henning, *supra* note 163, at 798 n.19.

<sup>170</sup> *Id.*

<sup>171</sup> Consider that Justice Scalia and Justice Stevens both examined the text and original understanding of the First Amendment in *Citizens United* and came to different conclusions. Stevens assumed that because business corporations were not widespread in 1791, the Ratifiers could not have understood the First Amendment text to protect them, at least to the same extent as natural persons. Justice Scalia looked at the same history and assumed that any collection of individual human beings was protected, whether joined together into a separate corporate person or not. *Compare* *Citizens United v. FEC*, 130 S. Ct. 876, 925–29 (2010) (Scalia, J., concurring) (stating that individuals working through corporate form have First Amendment protection), *with id.* at 949–50 (Stevens, J., dissenting) (stating that corporations would not have been understood as within scope of First Amendment protections); *see also* Rivard, *supra* note 137, at 1463 n.153 (calling this pre-

Even if one rebuts the presumption of equal constitutional rights for corporations and human beings, what are the consequences? Is a corporate person bereft of rights, as in the case of the right against self-incrimination? Is a corporate person given some lesser degree of rights, as in the case of searches and seizures? And what constitutional methodology empowers the Court to grant “corporate persons” rights in some lesser measure than natural persons?<sup>172</sup>

Powell’s test disguises the question that Justice Ginsburg raises but does not answer in *Citizens United*: namely, when does the Constitution protect associations of natural persons acting through the corporate form? Powell’s formulation, while an important starting point, eventually must be refined to address the fundamental questions raised by large intermediary organizations in our constitutional rights structure. I will revisit this issue in Part IV.

### B. *Theories of Corporate Personhood and Their Influence on Corporate Constitutional Rights*

The Court has no systematic jurisprudence for corporate constitutional rights because it has no systematic jurisprudence for corporate personhood. Broadly stated, corporate personhood falls into three models: the artificial entity theory,<sup>173</sup> the real entity theory,<sup>174</sup> and the aggregate entity theory.<sup>175</sup> These three models are the product of a dialectic between judges, who patched together corporate law from the corpus of eighteenth century common law,<sup>176</sup> and scholars, who wanted to invigorate that doctrine with a simulacrum of internal coherence.<sup>177</sup>

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sumption of constitutional personhood “conclusory”). See generally Marcantel, *supra* note 136 (discussing the original understanding of corporations).

<sup>172</sup> See *Citizens United*, 130 S. Ct. at 905 (holding that the First Amendment forbids granting corporations some lesser rights to political speech than natural persons). But see *United States v. Morton Salt Co.*, 338 U.S. 632, 651–54 (1950) (holding that corporations have lesser Fourth Amendment protections because of their corporate nature).

<sup>173</sup> This theory is also known as the fictional, concessionary, or grant theory of the corporation.

<sup>174</sup> The real entity theory is also known as the natural entity theory. This Article will use real entity, rather than natural entity, to distinguish a corporation from a natural person (a human being).

<sup>175</sup> This is sometimes referred to as the aggregation or contractarian theory of the corporation. Professor Avi-Yonah has remarked on the stability of these categories of corporate personality theory throughout the generations. See Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 WISC. L. REV. 999, 1001.

<sup>176</sup> FRIEDMAN, *supra* note 163, at 137.

<sup>177</sup> See Charles D. Watts, Jr., *Corporate Legal Theory Under the First Amendment: Bellotti and Austin*, 46 U. MIAMI L. REV. 317, 323 (1991) (noting the evolution of corporate theory “[a]s social, political, economic, and doctrinal circumstances change”). See *gen-*

Recently, the Court has tried to run away from corporate personality theory in constitutional cases.<sup>178</sup> This effort has met with little success. Part of the Court's challenge is the mechanism of constitutional reasoning itself. Whether a corporation enjoys some, none, or all of the benefits of a constitutional right depends in large part on the theoretical assumptions the Court makes about corporate personality. But those assumptions are themselves informed by earlier Court decisions. In this way, precedent based on corporate personality theory tends to shape the constitutional analysis at the outset. Once a corporation is deemed a person for one right, reason demands an explanation why it is not a person for another. Moreover, corporate personality theory tends to legitimate the Court's ultimate decision about a corporate constitutional right by situating the decision within an existing corpus of jurisprudence respecting persons.

So although the Court is pragmatically averse to theories of corporate personhood, artificial, natural, or aggregate entity theories of the corporation become constitutional doctrine by necessary inference, if not by express adoption.<sup>179</sup> The Court's avoidance of corporate personality does not make the issue disappear; it simply becomes a judicial silence, pregnant with implication.<sup>180</sup>

The balance of this section will explain the history of these three theories; how courts have justified decisions using their reasoning; the problems the theories of corporate personhood try to solve; and the problems they create. Part III then demonstrates how these three types of corporate personality theory may influence the Court's

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erally Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985).

<sup>178</sup> See Mayer, *supra* note 138, at 643–44 (noting that the Court has abandoned corporate personhood theory in favor of an amendment's purpose). This is precisely what the Court attempted to do in *Citizens United*.

<sup>179</sup> Normative claims of how a corporation should be treated rely on descriptive assumptions of the nature of the corporation. This is the corollary to David Millon's observation that descriptive assertions of what a corporation is anchor normative claims of how it should be treated. David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STANFORD AGORA: AN ONLINE JOURNAL OF LEGAL PERSPECTIVES 39, 40–41 (2001) [hereinafter Millon, *Ambiguous Significance*] (discussing the legitimate role of the corporate personality theory); see also Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 96 (1995) (noting that although issues related to constitutional limits on government power over corporations "generally have been examined through the broad lens of constitutional law, their resolution has in fact often depended on how the corporation is characterized").

<sup>180</sup> The benefit of this approach is flexibility and partial insulation from the vagaries of state incorporation law and corporate theory. Its defect is that it splinters the inquiry into a case-by-case, clause-by-clause analysis that offers little in the way of predictive value or coherence. Cf. Krannich, *supra* note 138, at 62–63 (arguing that the Court's corporate constitutional jurisprudence based on past decisions is unstable, "for corporate theory itself is unstable").

approach to corporate Second Amendment challenges to the specific regulations outlined in Part I.

## 1. *The Artificial Entity Theory*

### a. History

The artificial entity theory of the corporation governed American jurisprudence from the Founding to the mid-nineteenth century.<sup>181</sup> The theory posits that corporations could not exist but for state grant or concession. They are creatures of sovereign dispensation.<sup>182</sup> Originally, the sovereign dispensed this grant in exchange for a commitment to operate the corporation for some public good or benefit.<sup>183</sup> Such exchanges were commonplace and accepted. Since grant of a corporate charter and its benefits, including, eventually, limited liability and immortality,<sup>184</sup> were acts of government beneficence, “the state had the right to extract a price.”<sup>185</sup>

Private corporations could claim constitutional rights only to those things that inhered in the corporate form itself, particularly property. In a famous passage from *Trustees of Dartmouth College v. Woodward*,<sup>186</sup> Chief Justice Marshall described a corporation as “an *artificial being*, invisible, intangible, and existing only in contemplation of law.”<sup>187</sup> The corporation “possesses only those properties which the charter of its creation confers upon it, either expressly, or as

<sup>181</sup> See, e.g., FRIEDMAN, *supra* note 163, at 129–31 (discussing the history of corporations as special charters from the state).

<sup>182</sup> See, e.g., *id.* at 129 (noting that early corporate charters were rare “grants of authority from the sovereign”); WILLIAM A. KLEIN, JOHN C. COFFEE, JR. & FRANK PARTNOY, *BUSINESS ORGANIZATIONS AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 112 (11th ed. 2010) (noting that under English law only the sovereign could charter corporations); Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 *YALE L.J.* 235, 235 (1981) (noting the evolution of the business corporation from its origins as “an entity that the state allowed to be created only as a special privilege”).

<sup>183</sup> See FRIEDMAN, *supra* note 163, at 131 (noting that early corporations “were chartered to do work that was traditionally public” and “tended to vest exclusive control over a public asset, a natural resource, or a business opportunity in one group of favorites or investors”); KLEIN, COFFEE & PARTNOY, *supra* note 182, at 1113 (“Occasionally, the corporation would be required to aid specific charities or other public purposes as a condition of its existence.”); Horwitz, *supra* note 177, at 181 (noting public purpose of early corporations).

<sup>184</sup> These benefits did not always obtain. Early corporate law rejected limited liability and eternal life. See FRIEDMAN, *supra* note 163, at 131.

<sup>185</sup> *Id.* at 132.

<sup>186</sup> 17 U.S. (1 Wheat.) 518 (1819).

<sup>187</sup> *Id.* at 636 (emphasis added). For a discussion of Marshall’s difficulties in squaring corporate theory with the demands of constitutional diversity jurisdiction, see Avi-Yonah, *supra* note 175, at 1005–08.

incidental to its very existence.”<sup>188</sup> Moreover, the state could “reserve” power, and forbid the corporation from operating outside its charter.<sup>189</sup>

The corporation did not completely lack constitutional protection.<sup>190</sup> *Dartmouth College*, after all, concluded that the corporation was protected by the Contracts Clause. It would be illogical for the sovereign to permit a private corporation to form without also allowing it to possess and protect the property that motivated its formation.<sup>191</sup> But no corporation could lay claim to *intangible* or *liberty* interests like free speech, privacy, personal security, and those “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”<sup>192</sup> Those rights were reserved for human beings. As Justice Harlan summarized in 1906, liberty means “the liberty of natural, not artificial, persons.”<sup>193</sup>

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<sup>188</sup> *Dartmouth College*, 17 U.S. (1Wheat.) at 636.

<sup>189</sup> *Id.* at 712 (Story, J., concurring) (discussing the authority of the state to reserve contractual powers from corporations through chartering); see also Larry E. Ribstein, *Why Corporations?*, 1 BERKELEY BUS. L.J. 183, 209 (2004) (noting that even retroactive reservations were permitted); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 8 n.27 (2006) (discussing the power of state to reserve rights).

<sup>190</sup> The *Dartmouth* case is cited both by those who support the artificial entity theory and by those who see it as a vindication of the aggregate theory right to contract. See Liam Séamus O’Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 207 & n.27 (2006) (noting these differing interpretations).

<sup>191</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that regulation of a coal company’s coal mining activity under Pennsylvania act could be so pervasive as to constitute a taking under the Fifth Amendment); *Coleman & Williams, Ltd. v. Wis. Dep’t of Workforce Dev.*, 401 F. Supp. 2d 938, 943 (E.D. Wis. 2005) (“With respect to the Due Process Clause, the Court has long considered the property interests of corporations to be entitled to constitutional protection.”); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) (“[W]hen a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law.”).

<sup>192</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Court has not settled on a definitive list of liberty interests, although the *Meyer* Court identifies the “right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . .” *Id.* One might also add “specific freedoms protected by the Bill of Rights [including the First and Second Amendments]” and “the liberty specially protected by the Due Process Clause includ[ing] the rights . . . to marital privacy, to use contraception, to bodily integrity, and to abortion.” 16A AM. JUR. 2D *Constitutional Law* § 609 (2009).

<sup>193</sup> *Nw. Nat’l Life Ins. v. Riggs*, 203 U.S. 243, 255 (1906) (holding that the liberty referred to in the Fourteenth Amendment does not apply to an insurance company).

## b. Application

Stray references to artificial entity theory still litter the doctrine.<sup>194</sup> But outside of a few select areas—the Fifth Amendment right against self-incrimination being the most pertinent<sup>195</sup>—the Court seldom denies constitutional protection on the basis of corporate artificiality.<sup>196</sup> Instead, remnants of artificial entity theory manifest as balancing tests. Today, the corporate form legitimates the level, rather than the existence, of many corporate constitutional protections.

An example of this “artificial-entity-lite” is *Austin v. Michigan State Chamber of Commerce*.<sup>197</sup> Prior to its abrogation by *Citizens United*, *Austin* held that corporations enjoy less core First Amendment protection than natural persons.<sup>198</sup> As the Court observed, state law “grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the

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<sup>194</sup> This is especially true in the privileges or immunities analysis, which has implications for the incorporation of the Bill of Rights against state governments. *See, e.g., Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514 (1939) (Roberts, J.) (plurality opinion) (“Natural persons, and they alone, are entitled to the privileges and immunities which Section 1 of the Fourteenth Amendment secures for ‘citizens of the United States.’”); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (stating that privileges or immunities belong “only to natural persons” and not to corporations); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 493 (7th Cir. 1984) (“An unincorporated association is not a natural person, and for most purposes not a citizen. Any legal protection it enjoys is, as with corporations, a matter of the state’s grace.”).

<sup>195</sup> In *Hale v. Henkel*, the Court initially dodged the question of personhood, then forged ahead:

[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

*Hale v. Henkel*, 201 U.S. 43, 74–75 (1906); *see also Braswell v. United States*, 487 U.S. 99, 105 (1988) (noting *Hale*’s reliance on the artificiality of the corporation); Susanna K. Ripken, *Corporations Are People Too*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 118 n.75 (2009) (discussing *Hale*).

<sup>196</sup> Not even Justice Stevens in his *Citizens United* dissent depended on the artificiality of the corporation, recognizing that “many legal scholars have long since rejected the concession theory of the corporation.” *Citizens United v. FEC*, 130 S. Ct. 876, 952 (2010) (Stevens, J., dissenting).

<sup>197</sup> 494 U.S. 652, 658–59 (1990), *overruled by Citizens United*, 130 S. Ct. at 876.

<sup>198</sup> *See Citizens United*, 130 S. Ct. at 903 (acknowledging a line of cases that permitted restrictions on political speech “based on a speaker’s corporate identity”).

accumulation and distribution of assets.”<sup>199</sup> The state has a compelling interest in ensuring that a corporation, with its state-created ability to concentrate power in the economic marketplace, does not use that same ability to “distort[ ]” the political marketplace.<sup>200</sup> In the corporate speech context, the recurrent image is that of a corporation, created by positive law, and protected in its acquisition of financial and political influence, becoming a Frankenstein’s monster capable of devouring good government. The Court rejected these “Frankenstein” rationales in *Citizens United*.<sup>201</sup>

Outside the First Amendment context, corporations enjoy less constitutional protection than natural persons. As discussed below, in Fourth Amendment jurisprudence, corporations have *some* protection from unreasonable searches and seizures.<sup>202</sup> But Fourth Amendment notions like “expectations of privacy” or “dignity” strain the fictional language used to describe corporations. So, rather than say that a corporation has *no* expectation of privacy, the Court has held that corporations, as artificial entities, expect *less* privacy than a natural person. In *United States v. Morton Salt Co.*,<sup>203</sup> for example, the Court stated that “corporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>204</sup>

A variant of the artificial entity theory categorizes some businesses as “pervasively regulated”<sup>205</sup> and accords them less Fourth Amendment protection than natural persons. In *United States v. Biswell*,<sup>206</sup> the Court held that firearms dealers have less Fourth Amendment protection than other market participants. Justice White, writing for the Court, held that the “pervasive[ ] regulat[ion]” of firearms dealers meant that the government could conduct a warrantless

<sup>199</sup> *Austin*, 494 U.S. at 658–59.

<sup>200</sup> *Id.* at 659–60 (citing the risk that “resources amassed in the economic marketplace” will give corporations “an unfair advantage in the political marketplace” (citation omitted)).

<sup>201</sup> Compare *Citizens United*, 130 S. Ct. at 899, 900 (finding that corporations are no different than humans with respect to political speech), with *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 809 (1978) (White, J., dissenting) (“The State need not permit its own creation to consume it.”), and *Liggett Co. v. Lee*, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting) (“Such is the Frankenstein monster which States have created by their corporation laws.”). Cf. Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 122 n.79 (1992) (discussing the use of this monstrous image).

<sup>202</sup> See *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (stating that a chemical company has a “reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe,” but holding that the search was reasonable).

<sup>203</sup> 338 U.S. 632 (1950).

<sup>204</sup> *Id.* at 652.

<sup>205</sup> *United States v. Biswell*, 406 U.S. 311, 316 (1972).

<sup>206</sup> *Id.* at 311.

search of a pawn shop under the federal Gun Control Act of 1968.<sup>207</sup> The majority acknowledged that the historical roots of federal regulation of firearms were thin,<sup>208</sup> but concluded that the government had “large interests” in ensuring firearms were distributed through “regular channels” in a “traceable manner” to prevent their sale to “undesirable customers.”<sup>209</sup> According to the Court, the entire regulatory regime of firearms licensing and inspection would be imperiled by the burden of a warrant.<sup>210</sup>

In *California Bankers Ass'n v. Shultz*,<sup>211</sup> the Court upheld financial institution reporting requirements against a Fourth Amendment challenge by reference to corporate artificiality. Then-Justice Rehnquist, writing for the Court, reminded the objecting banks that they operated as “artificial entities.”<sup>212</sup> As such, they could have no equality of rights of privacy with natural persons.<sup>213</sup> The Court concluded that “[w]e have no difficulty . . . in determining that the . . . [reporting] requirements . . . abridge no Fourth Amendment right of the banks themselves.”<sup>214</sup> “[N]either [corporations] nor unincorporated associations can plead an unqualified right to conduct their affairs in secret.”<sup>215</sup>

In sum, the artificial entity theory is enervated, but it is not extinct. It is a doctrinal device that the Court uses to justify regulation of corporations to a degree different than individuals. Because a corporation could not exist but for state law, the state may burden its activity to a greater degree than it could an individual human being.<sup>216</sup> This “greater includes the lesser” rationale is neither ironclad nor

<sup>207</sup> *Id.* at 316.

<sup>208</sup> *Id.* at 315 (“Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry.”). Whether this characterization is historically accurate is a separate point.

<sup>209</sup> *Id.* at 315–16. There is a serious tension between this opinion and the Court’s insistence that the balancing of government interests play no part in Second Amendment adjudication. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (rejecting the use of balancing tests for Second Amendment rights).

<sup>210</sup> *Id.* at 316. The pawn shop owner had only limited expectations of privacy, knowing that dealing in firearms is “pervasively regulated.” *Id.*; see also *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970) (holding that alcohol is a pervasively regulated industry which allows for a lesser amount of Fourth Amendment protection than in other areas).

<sup>211</sup> 416 U.S. 21 (1974).

<sup>212</sup> *Id.* at 66.

<sup>213</sup> *Id.* at 65.

<sup>214</sup> *Id.* at 66.

<sup>215</sup> *Id.* at 66–67 (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

<sup>216</sup> For a discussion of unconstitutional conditions and corporate law, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 113–15 (1993).

uncontroversial,<sup>217</sup> but it exists. Operationally, the Court seems to focus on the artificiality of the corporation to justify an interest-balancing approach that the current Court's emphasis on historically-defined categories and clear rules would otherwise reject.<sup>218</sup>

## 2. *The Real Entity Theory*

### a. History

Artificial entity theory fared poorly from the mid-nineteenth century on. Legions of Andrew Jackson-era reformers viewed state chartering as a fen of influence-peddling, graft, and monopoly.<sup>219</sup> State after state reformed their corporate laws in favor of "free incorporation" to avoid the corruption created by state chartering.<sup>220</sup> Simultaneously, jurists and political theorists began to see incorporation less as a special benefit conferred by the state, and more as a natural way that individuals organize their personal and economic lives.<sup>221</sup>

Jacksonian free incorporation and Gilded Age economics placed enormous pressure on the existing common law doctrines of the business association.<sup>222</sup> The common law, with its focus on the individual shopkeeper or family partnership, did not fit neatly with the reality of the new and rapidly growing business model.<sup>223</sup> This is because the law had to address three interrelated developments: first, corporations had become ubiquitous and economically powerful;<sup>224</sup> second, share-

<sup>217</sup> *Id.* (arguing against the "greater includes lesser" argument as applied to First Amendment speech).

<sup>218</sup> See *infra* Part IV (discussing the challenge posed by corporations to originalist and textualist constitutional methodologies).

<sup>219</sup> Horwitz, *supra* note 177, at 181; see also KLEIN, COFFEE & PARTNOY, *supra* note 182, at 114 (noting that the special chartering of corporations by the legislature tended to invite corruption).

<sup>220</sup> Horwitz, *supra* note 177, at 181; see also KLEIN, COFFEE & PARTNOY, *supra* note 182, at 114 ("[E]qual access to corporate chartering swept through many states, at roughly the same time that the Jacksonian reform era was seeking to eliminate other special privileges.").

<sup>221</sup> See Horwitz, *supra* note 177, at 181 (discussing this change in attitude); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1454 (1987) ("Free incorporation . . . suggested that the corporate form was an individual's natural tool, as useful a device for independence and growth as a farmer's plow."). The unintended consequence of Jacksonian reform was that by severing the corporation from sovereign grant, it simultaneously loosed corporations from their civic obligations. Freeing the corporation from public corruption also freed it from public conscience. *Id.* at 1454.

<sup>222</sup> Horwitz, *supra* note 177, at 181–82, 184–85.

<sup>223</sup> Mark, *supra* note 221, at 1445, 1464–65. See also FRIEDMAN, *supra* note 163, at 137 ("For all practical purposes, the courts created a body of corporation law out of next to nothing.").

<sup>224</sup> See FRIEDMAN, *supra* note 163, at 137, 390–91 (discussing the increasing availability of the corporate form and the wealth of corporate owners during the nineteenth century).

holders owned the corporation but were not individually liable for its debts or torts;<sup>225</sup> third, as corporations grew in size, shareholders owned, but did not actually control, the corporation.<sup>226</sup>

Real entity theory helped resolve this trio of interpretive challenges. First, to solve the problem of corporate ubiquity and power, real entity theorists came to perceive corporations as merely the natural consequence of group dynamics.<sup>227</sup> People associate for various reasons—ethnic, religious, economic, familial.<sup>228</sup> However, these groups are not explicable as the total of the individual preferences, privileges, or rights of each group’s members.<sup>229</sup> Real entity scholars applied this insight to corporate law. To them, a corporation was something other than its shareholders. It was real, like a family or a congregation. And it was real in a way that was not explainable as the sum of its parts. The only question was whether the law would recognize it as such.<sup>230</sup>

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<sup>225</sup> See Horwitz, *supra* note 177, at 183–85, 205 (explaining the problems that arise from this form of limited liability).

<sup>226</sup> See Horwitz, *supra* note 177, at 206 (noting that even in late 1800s it was becoming apparent that management controlled the corporation). As David Millon put it, “[i]f a mere majority could bind a dissenting minority, ‘the corporate will’ had to mean something other than the actual consent of the [shareholders].” David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 215. See generally Mark, *supra* note 221 (discussing these conceptual problems).

<sup>227</sup> See, e.g., Horwitz, *supra* note 177, at 197 (noting that some turn-of-the-twentieth-century scholars saw “the large industrial corporation [as], in short, a natural reflection of the rational economic tendency toward combination”).

<sup>228</sup> As Victor Morawetz explained:

The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes. . . . So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; for example, political parties, societies, committees, courts.

1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 1 (2d ed. 1886); see also Mark, *supra* note 221, at 1469 (“[T]he organicists saw society as a collection of collectivities, each a legitimate outgrowth of individuals united for purposes of their own.”).

<sup>229</sup> See Horwitz, *supra* note 177, at 185–86, 205–07 (discussing the rise and fall of the legal movement to treat corporations as merely unincorporated partnerships of shareholders).

<sup>230</sup> See Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 257–62 (1911) (arguing that corporations—like houses, churches, and schools—are distinct entities which are greater than the sum of their aggregate parts and that “[a]ll that the law can do is to recognize, or refuse to recognize, the existence of this entity”); Horwitz, *supra* note 177, at 220 (noting the turn-of-century legal movement to treat corporations as organic beings greater than sum of parts (citing W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L.Q.R. 365, 379 (1905))).

Conceptualizing the corporation as a real entity, separate from its owners, helped resolve the second interpretive problem: the fact that a corporation assumed the liability of its owners for debts and torts. Because courts came to treat the corporation as a separate entity, it meant that the corporation, not the individual owners, was liable for breach of its duties.<sup>231</sup> But the flipside of duty is right.<sup>232</sup> Therefore, in the same way the corporation came to have duties independent of its owners, it also came to have rights independent of them.<sup>233</sup>

Finally, real entity theory resolved the problem of the separation of ownership and control. It did so by the simple expedient of ascribing the “will” of the corporation to the “will” of the controlling forces within the corporation—typically, its managers.<sup>234</sup>

In this way, real entity theory responded to the practical and doctrinal challenges of the corporate form, but not without cost. Infusing the corporation with life depended upon a precarious stack of legal fictions: that the corporation was an independent person, that it had dignity, and that it had a mind and feelings and motives and rights.

#### b. Application

Real entity theory offers corporations the fullest protection under the Constitution. When the Constitution says persons, it means persons. Corporations are persons for purposes of due process and equal protection analysis under the Fourteenth Amendment, even though

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<sup>231</sup> See Horwitz, *supra* note 177, at 185, 205 (highlighting Chief Justice Roger Taney and corporate theorist Henry O. Taylor’s concern that limited liability would vanish if corporations were not entities). Cf. Mark, *supra* note 221, at 1473 (noting that the right of limited liability inheres in a corporation and not in its constituents).

<sup>232</sup> I intentionally use this common image in a less rigorous analytical sense than Hohfeld. Cf. John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Legal Thought*, 32 HARV. J.L. & PUB. POL’Y 513, 537 (2009) (arguing that in a liberal society, one’s rights are other’s duties); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31 (1913) (referring to rights and duties as “correlative[s]”); cf. also Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 372 (2007) (“Persons have rights, duties, and obligations; things do not.”).

<sup>233</sup> Cf. Millon, *Ambiguous Significance*, *supra* note 179, at 44, 46 (noting that as corporations began being seen as natural entities, they developed special rights and states abandoned special corporate regulations).

<sup>234</sup> *Beveridge v. N.Y. Elevated R.R.*, 19 N.E. 489, 494 (N.Y. 1889) (“The expression of the corporate will . . . may originate with its directors, where the law or the by-laws have not expressly restricted their authority . . . .”); see Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 799–800 (2005) (discussing the rise of the business judgment test as showing the development of the real entity theory and the deference to corporate boards); O’Kelley, *supra* note 138, at 1363 (“If . . . Mobil Oil Corporation pays for an advertisement that expresses certain social views, the expression involved is not that of the myriad shareholders, but of the top management of Mobil.”).

each shareholder within the corporation may not suffer an individual due process or equal protection violation.<sup>235</sup>

In First Amendment jurisprudence, the real entity theory underpins corporate rights against compelled speech: a corporation cannot be forced to associate with speech it finds offensive.<sup>236</sup> In *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, a plurality of the Court held that a state could not compel Pacific Gas, a highly regulated utility company, to include the messages of third party consumer groups in Pacific Gas billing envelopes.<sup>237</sup> The Court analogized the corporation to a religious objector who found the mandatory display of “Live Free Or Die” on his license plate an affront to his conscience.<sup>238</sup> Among the Court’s reasons for striking down the rule was the belief that “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say.”<sup>239</sup>

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<sup>235</sup> Similarly, a corporation is viewed as a separate entity for purposes of the Article III citizenship clause, without regard to the fact that it may contain shareholders of any number of states or countries. See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187–88 (2010) (showing the development of the doctrine that a corporation is a citizen of the state where it is incorporated and has its principal place of business for jurisdiction purposes). Some commentators dispute the view that granting Fourteenth Amendment rights to corporations depends on corporate personhood. See O’Kelley, *supra* note 138, at 1356 (identifying the view that corporate rights are coextensive with the aggregate of shareholders’ rights). See *supra* notes 152–53 and accompanying text for a discussion of the establishment of corporate Fourteenth Amendment rights.

<sup>236</sup> Compare *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1 (1986) (plurality opinion) (holding that California cannot force a private utility company to use space in its billing envelopes to transmit messages from groups with which it disagrees), and John C. Coats IV, Note, *State Takeover Statutes and Corporate Theory: Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 827 (1989) (“At work here is the conception of the corporation as a natural entity having rights, including free speech, which demand the courts’ protection.” (discussing *Pacific Gas*)), with *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (finding that the government cannot criminally sanction a New Hampshire driver for obscuring “Live Free Or Die” motto on his license plate, which he found offensive).

<sup>237</sup> *Pacific Gas*, 475 U.S. at 5, 12–13 (plurality opinion). The Court’s reasoning did not turn on a First Amendment forum analysis of the envelope. See *id.* at 17.

<sup>238</sup> See *id.* (comparing the then-present situation to that described in *Wooley*, 430 U.S. at 705).

<sup>239</sup> *Id.* at 16 (citing *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

Despite sharp criticism,<sup>240</sup> this argument still animates corporate First Amendment jurisprudence.<sup>241</sup>

Corporations also possess some moral right to privacy under the Fourth Amendment, even if it is to some lesser measure than natural persons.<sup>242</sup> In *Hale v. Henkel*,<sup>243</sup> the Court held that a corporation possesses some protection from unreasonable searches and seizures.<sup>244</sup> *Hale* involved a subpoena directed to a corporate agent which required him to disclose certain business materials as part of an antitrust investigation.<sup>245</sup> The agent asserted both a Fourth Amendment claim that the subpoena was an unreasonable search and a Fifth Amendment claim that the corporation did not have to incriminate itself.<sup>246</sup> The Court held that the Fourth Amendment protected corporations against unreasonably broad subpoenas,<sup>247</sup> as a “corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity.”<sup>248</sup> The Court bolstered its conclusion by observing that corporations also enjoy rights to just compensation for takings, due process, and equal protection.<sup>249</sup> The Court pronounced this tautology for its conclusion: “[I]n organizing itself as

<sup>240</sup> Then-Justice Rehnquist dissented in *Pacific Gas*. According to Rehnquist, business corporations cannot claim a negative free speech right, any more than they can claim a right to remain silent or a right to privacy, the “two constitutional liberties most closely analogous to the right to refrain from speaking.” *Id.* at 32 (Rehnquist, J., dissenting). Justice Rehnquist pounced on the Court’s invocation of a real entity theory of the corporation. In his view, it was ridiculous to talk of a corporation as having a “mind,” a “conscience,” and a need for “self-expression,” because such discussion simply “confuse[s] metaphor with reality.” *Id.* at 33.

<sup>241</sup> See *Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 651–52 (7th Cir. 2006) (holding that forcing retailers and manufacturers to place warning labels on violent or sexually explicit video games was compelled speech which was not narrowly tailored); *cf.* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–56 (2000) (holding that the federally chartered nonprofit corporation, Boy Scouts, has a First Amendment right of expressive association despite dissenters within its corporate structure).

<sup>242</sup> See *supra* notes 202–18 and accompanying text for a discussion of privacy. See *supra* notes 164–66 and accompanying text and *infra* notes 259–63 and accompanying text for a discussion of double jeopardy.

<sup>243</sup> 201 U.S. 43 (1906).

<sup>244</sup> See Horwitz, *supra* note 177, at 182 (arguing that *Hale* used natural entity theory to extend Fourth Amendment protections to corporations). *But see* Henning, *supra* note 163, at 819 n.116 (arguing that *Hale* did not in fact adopt any theory of corporate form to decide the case); Julie R. O’Sullivan, *The Last Straw: The Department of Justice’s Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 351 (2008) (arguing that the *Hale* ruling is based on practical concerns rather than on the concept of a corporation).

<sup>245</sup> *Hale*, 201 U.S. at 44–46.

<sup>246</sup> *Id.* at 70–71.

<sup>247</sup> *Id.* at 75–76.

<sup>248</sup> *Id.* at 76. An aggregate approach to the corporate form is apparent in this line as well.

<sup>249</sup> *Id.*

a collective body [a corporation] waives no constitutional immunities appropriate to such body.”<sup>250</sup>

Post-*Hale*, the Court has extended Fourth Amendment protections for corporations in terms more appropriate for human beings. In *Marshall v. Barlow's, Inc.*,<sup>251</sup> an Idaho corporation<sup>252</sup> sued to enjoin the Occupational Safety and Health Administration (OSHA) from conducting a warrantless search of its premises.<sup>253</sup> The Court concluded that warrantless administrative searches were not permitted outside the heavily regulated industries of liquor and firearms.<sup>254</sup> “The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes.”<sup>255</sup> Privacy is violated regardless of whether the search is in a home or in a business, or whether the government’s motivation is criminal or civil.<sup>256</sup> The fact that the corporation had no expectation of privacy from the eyes of its employees did not “throw[ ] open th[ose] areas . . . to the warrantless scrutiny of Government agents.”<sup>257</sup> Presumably, the corporation’s reasonable expectation of privacy mirrored that of a family, in that opening the doors to corporate agents, like opening the doors to family members, did not diminish the reasonable expectation of privacy of the corporation.<sup>258</sup>

In *United States v. Martin Linen Supply Co.*, the Court justified protection for corporations under the Fifth Amendment Double Jeopardy Clause in part because of the “embarrassment,”<sup>259</sup> “anxiety,”<sup>260</sup> and “personal strain”<sup>261</sup> that the threat of successive prosecu-

<sup>250</sup> *Id.*

<sup>251</sup> 436 U.S. 307 (1978).

<sup>252</sup> *Barlow's, Inc. v. Usery*, 424 F. Supp. 437, 438 (D. Idaho 1976) (describing the plaintiff as an “Idaho corporation in good standing”).

<sup>253</sup> Although the Supreme Court says that the corporation’s president, Mr. Barlow, refused admission of the OSHA officer and subsequently asserted his own personal Fourth Amendment rights, *Marshall*, 436 U.S. at 310, it is apparent from the lower court ruling on the plaintiff corporation’s Fourth Amendment challenge that the corporation was also attempting to claim Barlow’s personal rights, *Barlow's*, 424 F. Supp. at 439.

<sup>254</sup> *See Marshall*, 436 U.S. at 313 (exempting pervasively regulated businesses from the search warrant requirement).

<sup>255</sup> *Marshall*, 436 U.S. at 311.

<sup>256</sup> *Id.* at 312.

<sup>257</sup> *Id.* at 315.

<sup>258</sup> *Cf. Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (finding that the corporation had a reasonable expectation of privacy within its covered buildings); *United States v. Jamieson-McKames Pharm., Inc.*, 651 F.2d 532, 542–43 (8th Cir. 1981) (finding that the copartner in a corporation had the apparent authority to consent to search).

<sup>259</sup> *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187–88 (1957)).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971)).

tion places on a defendant.<sup>262</sup> The fact that such emotive terms seem misplaced when applied to a legal construct did not prevent their use in the Court's decision.<sup>263</sup>

Real entity theory solved the problem of fitting the corporation into the common law system, but it did so at a price. The price was the heavy strain that constitutional adjudication placed on the personhood metaphor once corporate rights transitioned from property to liberty. Real entity theory compels the Court to speak of a corporation as if it had a "soul to . . . damn[ ]" and a "body to . . . kick[ ]."<sup>264</sup> But the more the Court treats a corporation as real, the less real it seems to be.<sup>265</sup>

Recognizing this strain, the Court's modern tendency is to concentrate on the scope of the constitutional right, rather than on corporate personality.<sup>266</sup> However, focusing on the right rather than the litigant trends toward a "real entity by default" theory of the corporation.<sup>267</sup> Under this modern twist, a corporation possesses all of the constitutional rights of a natural person, except when it doesn't. But what counts as a showing that a corporation is a special category of "person" without equal claim to a constitutional right is not clear. According to *Citizens United*, the lack of textual or historical references to the rights of corporations is insufficient.<sup>268</sup>

Whatever the required quantum of historical or jurisprudential proof, once the Court suggests that a constitutional right protects a corporation to some different degree than that of a natural person, the analysis reverts to some measure of artificial entity theory of corporate constitutional rights. Alternatively, once the Court views a corpo-

<sup>262</sup> See *United States v. Hosp. Monteflores, Inc.*, 575 F.2d 332, 335 (1st Cir. 1978) (finding that corporations "suffer" and are "made very insecure" due to the "stigma" of conviction).

<sup>263</sup> See Henning, *supra* note 163, at 854 ("Anthromorphizing an entity in order to stretch the Double Jeopardy Clause rings hollow . . .").

<sup>264</sup> John C. Coffee, Jr., "No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (1981) (quoting a remark by Edward, First Baron Thurlow).

<sup>265</sup> Felix Cohen's famous essay exposed the circularity of corporate personhood metaphors. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 813-14 (1935).

<sup>266</sup> See, e.g., Greenwood, *supra* note 16, at 1020 (noting this avoidance).

<sup>267</sup> See *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) ("The Supreme Court generally has considered issues of the application of constitutional rights to corporations in negative terms: asking whether corporate status should defeat an otherwise valid claim of right." (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978))); see also Rivard, *supra* note 137, at 1463 n.153 (suggesting that *Rad-O-Lite* adopted a modified real entity approach).

<sup>268</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 928 (2010) (Scalia, J., concurring) (rejecting a different First Amendment analysis for corporations).

ration as a real entity standing in equal position to human beings, the corporation's composite and fictional character becomes constitutionally invisible.

### 3. *The Aggregation Theory*

#### a. History

The Gilded Age produced the aggregation theory as an alternative to the artificial entity theory of the corporation.<sup>269</sup> In an 1882 opinion called *Railroad Tax Cases*, Justice Field, riding circuit, held that corporations can claim equal protection and due process under the Fourteenth Amendment—not because corporations have rights in themselves, but because corporations represent the aggregation of natural persons that have Fourteenth Amendment rights.<sup>270</sup> Acknowledging *Dartmouth College*, Justice Field recognized that “[p]rivate corporations are . . . artificial persons,”<sup>271</sup> but then quickly penetrated this legal veneer. Except for sole corporations, a corporation “consist[s] of aggregations of individuals united for some legitimate business.”<sup>272</sup>

Justice Field thought it would be intolerable that “a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states” should end “the moment the person becomes a member of a corporation.”<sup>273</sup> Instead, a court should hold that whenever a constitutional provision guarantees persons “the enjoyment of property, or . . . [a] means for its protection, or prohibits legislation injuriously affecting it, [then] the benefits of the provision extend to corporations.”<sup>274</sup> Justice Field promised “that the courts will always look beyond the name of the artificial being to the individuals whom it represents.”<sup>275</sup>

Modern aggregate theory views corporations as individual rights holders “acting through fiduciaries.”<sup>276</sup> Corporations are neither fictions nor real entities, but a “nexus” or “web” of contracts between

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<sup>269</sup> For an overview of the nineteenth century history of aggregation theory, see Horwitz, *supra* note 177, at 177–78 and Millon, *Ambiguous Significance*, *supra* note 179, at 41.

<sup>270</sup> 13 F. 722, 743 (C.C.D. Cal. 1882).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* Justice Field also offered an encomium to the corporate form, listing all the ways in which corporations advance our material and moral welfare. *Id.* at 744 (“Indeed, there is nothing which is lawful to be done . . . to enrich and ennoble humanity, which is not to a great extent done through the instrumentalities of corporations.”).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> Millon, *supra* note 226, at 224.

free and independent individuals who make choices dictated by his or her own utility calculus.<sup>277</sup> To work, aggregation theories replace real entity notions like “will” or “anxiety” with normative judgments about unconstitutional conditions and freedom of contract. A corporation does not have to exist, but if it does, the government cannot condition its existence on the surrender of certain constitutional rights within its web of contracts.<sup>278</sup>

The moral assumptions of aggregation theory can be either strongly libertarian—that interference with corporate constitutional rights is tantamount to interfering with liberty of contract or with substantive due process<sup>279</sup>—or looser—that corporations, like other institutions, maximize self-realization and fend off totalizing government and therefore need to be scrupulously protected from government interference.<sup>280</sup>

Under either theory, whether the person’s motive to associate is to promote monetary gain or to act as a “catalyst for self-realization” (or both), the corporation is usually a “salutary association,” formed by the free will and for the benefit of its contractors and others.<sup>281</sup> Regulation that interferes with those choices—however broadly defined and for whatever reason—“lack[s] legitimacy” because it “intrude[s] upon individual autonomy.”<sup>282</sup>

<sup>277</sup> *Id.* at 229–30.

<sup>278</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (“It is rudimentary that the State cannot exact as the price of those special advantages[*e.g.*, limited liability] the forfeiture of First Amendment rights.”); *Railroad Tax Cases*, 13 F. at 743–44 (“It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.”); RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 113–15 (1993) (discussing the protection of corporate First Amendment speech as requiring an “unconstitutional conditions” analysis); Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have but Do Not Want*, 34 HARV. J.L. & PUB. POL’Y 639, 650 (2011) (discussing the free speech benefits of the *Lochner* era); Ribstein, *supra* note 179, at 105–08 (discussing and criticizing Epstein’s unconstitutional conditions model).

<sup>279</sup> Millon, *Ambiguous Significance*, *supra* note 179, at 53 (“[F]reedom of contract, [is the] anti-redistributive ideology that lies at the heart of the nexus-of-contracts agenda.”).

<sup>280</sup> See Martin H. Redish & Howard M. Wasserman, *What’s Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 237 (1998) (arguing that corporate speech is “a form of indirect or catalytic self-realization . . . and thus fully consistent with the purposes served by the constitutional protection of speech”); see also Winkler, *supra* note 138, at 1268–69 (describing Redish and Wasserman’s view).

<sup>281</sup> Adam Winkler uses the terms “contract-based salutary association” and “constitutive salutary association” to distinguish between these wealth- and autonomy-maximizing conceptions of the corporation. Winkler, *supra* note 138, at 1266–69. For more on the salutary versus perilous association, see *infra* Part IV.

<sup>282</sup> Millon, *supra* note 226, at 231 (criticizing this position).

## b. Application

Modern First Amendment jurisprudence embraces some measure of aggregation theory.<sup>283</sup> *Citizens United* contains understated allusions to the aggregate nature of the corporation: “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”<sup>284</sup> Scalia’s concurrence, drawing upon prior decisions,<sup>285</sup> is more forthright. The First Amendment protects “the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf.”<sup>286</sup> In this view, associating together as a business corporation “is no different” from associating as any other group of rights-holders.<sup>287</sup> Those who do not like the speech are not compelled to join, understand that managers might speak in ways that the members disapprove of, and can voluntarily withdraw from the association.<sup>288</sup> As for externalities—such as distortion of the marketplace of ideas by a financially powerful speaker—the Court says that those are not externalities at all. According to the Court, the First Amendment codifies a solution to the risk of concentration of speech: more speech.<sup>289</sup>

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<sup>283</sup> Cf. Coats, *supra* note 236, at 815 n.50 (“Under the aggregate theory, the extent to which a corporation may be said to have ‘rights,’ especially constitutional rights, corresponds to the rights of the individuals which make it up.”).

<sup>284</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 904 (2010).

<sup>285</sup> See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (referring to the rights of “[t]hose individuals who form that type of voluntary association known as a corporation”), *abrogated by Citizens United*, 130 S. Ct. 876; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (“Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 n.34 (1978) (observing that the most analogous position of those shareholders in a corporation is that of members of a voluntary association); see also Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 31 (2001) (noting that *Bellotti* “invoked the logic of the aggregation theory” when it “treat[ed] corporate activity as the product of the individual agreement of its shareholders”).

<sup>286</sup> *Citizens United*, 130 S. Ct. at 928 (Scalia, J., concurring).

<sup>287</sup> *Id.*

<sup>288</sup> See *Austin*, 494 U.S. at 686–87 (Scalia, J., dissenting) (noting that corporate shareholders freely contract with the knowledge that a corporation may speak in ways they deplore and that they have right to withdraw their support from the corporation). For an argument that *Citizens United* applies a real entity view, see Avi-Yonah, *supra* note 175, at 1040–45.

<sup>289</sup> *Citizens United*, 130 S. Ct. at 911 (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“[T]he remedy to be applied [to bad speech] is more speech, not enforced silence.”). In this manner, the Court has adopted a kind of neo-liberal approach to the issue of political speech by corporations. See also Joseph Blocher, *Institutions in the*

Aggregation theory tries to reap all the benefits of the real entity theory without all of the metaphorical hocus-pocus. Corporations are not artificial; they are not real; they are a set of relationships with which government should not, or constitutionally must not, interfere.

### III

#### CORPORATE SECOND AMENDMENT RIGHTS

How will the Second Amendment fit into this bric-a-brac of corporate constitutional methodology? The answer depends on two variables: first, whether the Court concludes that the Second Amendment right to keep and bear arms is a purely personal right, and second, if not, whether the Court understands the corporate form to justify any restrictions on the right. If the Second Amendment is purely personal, it will not extend to corporations.<sup>290</sup> If, however, the Second Amendment is *not* purely personal, the Court will have to decide what effect, if any, the corporate form should have on its scope.

Whether the corporate form affects the scope of the Second Amendment will require the Court to engage expressly or implicitly with one of the three theories of corporate personality—artificial, natural, and aggregate—and the choice may result in different and surprising conclusions.

Part III.A discusses whether the Second Amendment right to keep and bear arms is a purely personal right, and concludes that the better argument is that it is not. Part III.B discusses the effect of corporate theory on the right as applied to the four types of regulation discussed in Part II.

#### A. *Is the Second Amendment Right “Purely Personal”? : Nature, History, and Purpose of the Right To Keep and Bear Arms*

Despite its flaws, the Court will likely use some form of Justice Powell’s *Bellotti* test as the threshold inquiry for corporate Second Amendment rights.<sup>291</sup> As Justice Powell instructed, whether or not the

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*Marketplace of Ideas*, 57 DUKE L.J. 821, 829–38 (2008) (discussing the origins of, and flaws with, the “marketplace of ideas” approach to the First Amendment).

<sup>290</sup> In this way, corporations would not have Second Amendment rights just as they do not have Fifth Amendment rights against self-incrimination.

<sup>291</sup> Courts have used *Bellotti* in the past for analyzing other rights. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284–85 (1989) (O’Connor, J., concurring in part and dissenting in part) (using *Bellotti* to analyze Eighth Amendment claims made by a corporation); *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir. 2006) (using *Bellotti* test to analyze whether a company that allowed live sex acts could claim a right to privacy); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) (citing *Bellotti* regarding the right of a corporation to free exercise of religion); *Consol. Edison Co. v.*

right to keep and bear arms for self-defense “is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the [Second Amendment].”<sup>292</sup> Unfortunately, neither the nature, nor the history, nor the purpose of the Second Amendment leads to definitive answers. The best that can be said is that evidence points to some level of a collective Second Amendment right to keep and bear arms *in addition to* an individual right.

### 1. *Nature of the Second Amendment*

The Second Amendment right to keep and bear arms for self-defense is, in its nature, personal. Both *Heller* and *McDonald* emphasize that the “central component” of the Second Amendment right is individual self-defense, not self-defense through an organized state militia.<sup>293</sup> However, simply because the right is personal does not mean it is *purely* personal.

The Second Amendment is grounded in moral values of self-reliance. Guns are symbols of freedom and protected out of “respect for Lockean values of autonomy and individualism.”<sup>294</sup> Second Amendment activists regard the provision as a “pledge” that individuals do not have to surrender their “physical autonomy.”<sup>295</sup> And, of course, allied with this notion of autonomy is self-defense, the “central component” of the Second Amendment right.<sup>296</sup>

The nature of the Second Amendment appears to be personal.<sup>297</sup> But is it *purely* personal? A textual examination suggests perhaps not.

Pataki, 292 F.3d 338, 346–49 (2d Cir. 2002) (using *Bellotti* test to analyze an attainder clause challenge); *United States ex rel. Tyson v. Amerigroup III, Inc.*, 488 F. Supp. 2d 719, 742–43 (N.D. Ill. 2007) (using *Bellotti* to find that a corporation could claim Eighth Amendment protections).

<sup>292</sup> *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778–79 n.14 (1978).

<sup>293</sup> *See supra* Part I.B.

<sup>294</sup> Green, *supra* note 106, at 188; *see also* Robert Weisberg, *The Utilitarian and Deontological Entanglement of Debating Guns, Crime, and Punishment in America*, 71 U. CHI. L. REV. 333, 337 (2004) (noting the “association of the gun with a form of individual autonomy” (reviewing GUNS, CRIME, AND PUNISHMENT IN AMERICA (Bernard E. Harcourt ed., 2003))).

<sup>295</sup> Clark M. Neily III, *The Right To Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARV. J.L. & PUB. POL’Y 185, 193 (2010).

<sup>296</sup> *District of Columbia v. Heller*, 554 U.S. 570, 591 (2008).

<sup>297</sup> Michael Green has suggested that one can describe both the right to bear arms and the right to remain silent in Lockean terms; he argues that both silence and firearms are auxiliary rights designed to protect inalienable natural rights. Michael Steven Green, *Paradox of Auxiliary Rights*, 52 DUKE L.J. 113, 116 (2002) (“The privilege [against self-incrimination] and the Second Amendment . . . give individuals the power to defend their reserved [natural] rights when other forms of legal protection fail.”). Green has explored a

The Second Amendment refers to the right of the “people” to keep and bear arms. As Akhil Amar has suggested, the Constitution uses “persons” to refer to individuals and to individual rights, and “the people” to emphasize collectives.<sup>298</sup> The Second Amendment speaks of “the people” and of a “militia”; both connote collective or associative behavior.<sup>299</sup> Indeed, some state constitutions contain Second Amendment analogs that speak of the right to keep and bear arms to protect oneself *and* to protect *others*.<sup>300</sup>

The right to keep and bear arms appears designed to apply to “the body of the people, *or* any single man” when the threat to liberty is extreme.<sup>301</sup> Blackstone referred to the right to bear arms as a “political” right.<sup>302</sup> It is Reconstruction that transformed the Second Amendment from a right concerned with the polity to a right primarily, but not exclusively, concerned with the person.<sup>303</sup>

In sum, it seems as if the nature of the Second Amendment right is not “purely personal,” at least as the Court has designated that term in other provisions. This conclusion is reinforced, but also complicated, by the history of the right to keep and bear arms for self-defense.

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revised position on this point. See Green, *supra* note 106, at 188 (articulating the right to keep and bear arms as natural rather than auxiliary).

<sup>298</sup> Akhil Reed Amar, *The Supreme Court 1999 Term – Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 127 (1999). Note, however, that the doctrine of corporate constitutional rights has not been consistent in this regard. See *supra* Part II.A (detailing inconsistencies in doctrine).

<sup>299</sup> See, e.g., *Heller*, 554 U.S. at 590 (discussing the protection of Second Amendment rights for “people’s” or “citizens’” militia, as opposed to organized militia). Compare this to the Fifth Amendment right against self-incrimination, which refers to a “person” and is self-reflexive, referring to “himself.” U.S. CONST. amend. V. For an illuminating discussion of the autonomy and self-defense values behind both the Second Amendment and Fifth Amendment right against self-incrimination, see Green, *supra* note 297.

<sup>300</sup> See Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 198, 199, 205–07, 216 (2006) (compiling and characterizing state provisions regarding the right to bear arms, including for the protection of other people).

<sup>301</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 168, at 87 (C.B. MacPhearson ed., Hackett 1980) (1690) (emphasis added). Compare this to the more intimate right to remain silent. The right to remain silent is guaranteed because of the specter of government “invas[ing] the [defendant’s] mind and tak[ing] dominion of his will.” Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B. ASS’N J. 91, 98 (1954). For this reason, it extends to testimonial evidence—evidence procured from the defendant’s own mouth. See Green, *supra* note 297 at 134–41 (discussing the philosophical grounds for the right against self-incrimination).

<sup>302</sup> Green, *supra* note 297, at 166.

<sup>303</sup> See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1198, 1261–62 (1992) (discussing this transformation); Miller, *supra* note 72, at 1330–31 (same).

## 2. *History of the Second Amendment*<sup>304</sup>

Historically, private collectives and early corporations possessed some ability to keep and bear arms. The English monarchy granted charters to venture corporations to settle Virginia and Massachusetts. In those charters, the corporations possessed authority to keep, transport, and employ arms “for their several defense and safety.”<sup>305</sup> English common law protected persons who assembled armed to defend an owner’s house, although they could be charged with riot or unlawful assembly if they carried their guns outside of the property.<sup>306</sup>

Further, there is historical support that the right to keep arms extended to one’s business. Under some, but not all, common law decisions, a person was not obliged to retreat to safety when confronted in his business by a stranger but could stand his ground, just as if he were in his own home.<sup>307</sup> Texas, even in the midst of the blood-

<sup>304</sup> A full recounting of the history of the Second Amendment has filled many volumes of law reviews and dominated the debate until very recently. This section cannot survey the entire literature; instead, it will focus narrowly on the historical evidence for and against collective arms bearing.

<sup>305</sup> The Charter of New England (1620), in 3 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1835* (1909) [hereinafter *COLONIAL CHARTERS*] (spelling modernized); see also The First Charter of Virginia (1606), in 7 *COLONIAL CHARTERS at 3787* (allowing the company to “transport the goods, chattels, armor, munition[s] and furniture, needful to be used by them, for . . . defense or otherwise in respect of the said plantations” (spelling modernized)).

<sup>306</sup> Compare 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 516 (John Curwood ed., 8th ed. 1824) (1721) (“[A]n assembly of a man’s friends in his own house, for the defence of the possession thereof . . . is indulged by law . . .”), with *Queen v. Soley*, (1707) 88 Eng. Rep. 935, 937 (“Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.”). As a writer in an eighteenth-century magazine stated:

If a man be *in* his house and hears that others are coming there to beat him, it is lawful for him to assemble his friends, in his house, for the safety of his person; but if a man be threatened to be beaten *out* of his house, it is not lawful for him to make such assembly; for he hath another remedy by surety of the peace.

See *Cyder-Act Subversive of Civil Liberty*, in 33 *GENTLEMEN’S MAG. & HIST. CHRON.* 447 (Sylvanus Urban ed., 1763) (spelling modernized).

<sup>307</sup> See *Bryant v. State*, 39 So. 2d 657, 658 (Ala. 1949) (finding no duty to retreat from business); *Bean v. State*, 8 S.W. 278, 280 (Tex. Ct. App. 1888) (discussing the application of the right to self-defense in the workplace). *But see Perry v. State*, 10 So. 650, 652 (Ala. 1892) (suggesting a duty to escape if confronted in cartilage of business); *Commonwealth v. Gagne*, 326 N.E.2d 907, 910–11 (Mass. 1975) (declining to craft a business exception to the duty to retreat). For a compilation of these laws, see Jeffrey F. Ghent, *Homicide: Duty To Retreat as Condition of Self-Defense When One Is Attacked at His Office, or Place of Business or Employment*, 41 A.L.R. 3d 584 (1972).

shed of Reconstruction, for instance, allowed the carrying of arms on “one’s own premises or place of business.”<sup>308</sup>

The history of law enforcement also suggests something other than a purely personal right to keep and bear arms. The professional police force is a nineteenth century innovation; prior to that, law enforcement was the responsibility of private<sup>309</sup> assemblages of armed citizens.<sup>310</sup> Medieval systems such as the hue and cry and the *posse comitatus* were civic obligations, performed by private collectives.<sup>311</sup> In the eighteenth century, private interests sometimes pooled resources to hire patrols, catch thieves, and protect land and game.<sup>312</sup> These traditions, with their blurred lines between public and private collective arms-bearing, were transplanted to the States.<sup>313</sup> Later, private corporations such as the Pinkerton National Detective Agency (the Pinkertons) supplied many of the investigatory and protective services that eventually became the responsibility of the public police force. These private agencies “maintained private arsenals.”<sup>314</sup> For example, in their Chicago office alone, the Pinkertons “kept about 250 rifles and 500 revolvers.”<sup>315</sup>

Although history is full of examples of private organizations keeping and bearing arms, historical attitudes toward the prevalence and presence of such groups, especially in public, have been mixed. In America, along with the hue and cry and the *posse comitatus*, there is a tradition of other, less savory forms of collective arms-bearing that are hard to distinguish from private police. The slave patrol is one example. This phenomenon was the product of “informal collaboration of slave owners”<sup>316</sup> exercising what they understood as rights to

<sup>308</sup> Act of Apr. 12, 1871, 1911 Tex. Crim. Stat. art. 476.

<sup>309</sup> I use the term “private” guardedly, as the history of policing has been a tension between purely private self-protective or self-interested behavior and private persons performing public functions. See, e.g., David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1195–1201 (1999) (discussing private origins of public policing).

<sup>310</sup> JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* 2–3 (1994) (discussing the history of collective self-defense).

<sup>311</sup> See FRANK MORN, *THE EYE THAT NEVER SLEEPS: A HISTORY OF THE PINKERTON DETECTIVE AGENCY* 2 (1982); Sklansky, *supra* note 309, at 1195–1200 (discussing early collective security arrangements).

<sup>312</sup> Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 582, 584 (discussing private prosecution and patrol societies); Sklansky, *supra* note 309, at 1201–02 (discussing the hiring of game keepers and early London patrols).

<sup>313</sup> Sklansky, *supra* note 309, at 1205.

<sup>314</sup> MORN, *supra* note 311, at 104.

<sup>315</sup> *Id.*

<sup>316</sup> See Harry V. Jaffa, *Dred Scott Revisited*, 31 HARV. J.L. & PUB. POL’Y 197, 214–15 (2008) (calling such patrols “commonplace” in antebellum America); see also KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 189 (1989) (discussing the activity of slave patrols). Stampp notes that “[g]roups of slaveholders some-

defend themselves and their property.<sup>317</sup> After the abolition of slavery, private groups of Klansmen rode armed in what they openly asserted to be protective law enforcement organizations.<sup>318</sup> When prosecuted under anti-Klan legislation, Klan members claimed that they rode in expression of their natural right to self-defense.<sup>319</sup> And, of course, collective arms-bearing for self-defense has sometimes been difficult to distinguish from vigilantism.<sup>320</sup>

In the late nineteenth and early twentieth centuries, private corporate arms-bearing did not escape the notice of government or the ire of the American public. The public was not sympathetic to the fact that Pinkertons possessed so many weapons and deployed force on behalf of private—usually corporate—interests, as opposed to public ones.<sup>321</sup> Popular distrust of private forces during the late nineteenth and early twentieth centuries led to regulations and investigations of these private collectives.<sup>322</sup>

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times rode through the swamps with their dogs and made the search for fugitives a sport comparable to fox hunting.” *Id.*

<sup>317</sup> Sklansky, *supra* note 309, at 1209 & n.245 (describing slave patrols modeled on medieval practices). Sometimes the patrol merged with the activities of the militia. See STAMPP, *supra* note 316, at 214 (discussing slave patrol as a type of militia activity); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 335–36 (1998) (observing that slave patrols and militia were largely synonymous in the South).

<sup>318</sup> The professed object of the Klan, according to its founding document was “[t]o protect the weak, the innocent, and the defenseless, from the indignities, wrongs and outrages of the lawless, the violent, and the brutal.” *The Ku Klux Klan Organization and Principles 1868*, reprinted in 1 DOCUMENTS OF AMERICAN HISTORY 500 (Henry Steele Commager ed., 10th ed. 1988). Or, as former Confederate General John B. Gordon testified before Congress, the Klan “was simply this—nothing more and nothing less . . . an organization, a brotherhood of the property-holders, the peaceable, law-abiding citizens of the State, for self-protection. The instinct of self-protection prompted that organization . . .” *Affairs in Insurrectionary States: Hearing Before the J. Comm. To Inquire into the Condition of Affairs in the Late Insurrectionary States*, 42d Cong. 308 (1871) (statement of John B. Gordon). It was, in his words, “purely a police organization to keep the peace.” *Id.* at 309.

<sup>319</sup> Counsel for the Klan defendants hoped that the jury would understand that the Klan was simply part of a natural right to “[b]and . . . together as a defense against any such threats as were apprehended.” PROCEEDINGS IN THE KU KLUX TRIALS AT COLUMBIA, S.C. IN THE UNITED STATES CIRCUIT COURT, NOVEMBER TERM, 1871, at 425–26 (Ben Pitman & Louis Freeland Post eds., 1872); see also Saul Cornell & Justin Florence, *The Right To Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?*, 50 SANTA CLARA L. REV. 1043, 1063 (2010) (commenting on self-defense arguments of the Klan during these trials); Miller, *supra* note 72, at 1332–34, 1347–48 (same).

<sup>320</sup> See Joh, *supra* note 312, at 582–83 (discussing early policing and vigilantism); Sklansky, *supra* note 309, at 1209 (same); see also *The Army and the Militia*, N.Y. TIMES, June 11, 1878, at 4 (despairing of “rifle clubs or white leagues, over which the state has no authority, and which are little better than lawless vigilance committees”).

<sup>321</sup> See MORN, *supra* note 311, at 107–08 (discussing anti-Pinkerton laws passed in the wake of congressional investigation).

<sup>322</sup> See MORN, *supra* note 311, at 107–08, 185–86 (discussing the investigation of private security and private police); Sklansky, *supra* note 309, at 1214–19 (discussing federal investigation and popular sentiment). As a historical matter, the effectiveness of this regulation

This history suggests that collective arms-bearing for self-defense is protected, albeit to an unspecified degree. Granted, *Heller* contains some imprecise language indicating that private groups associating in military organizations may be prohibited, at least perhaps when they assemble in public.<sup>323</sup> And certainly, a paramilitary organization and a compound of persons engaged in collective security could be hard to distinguish from each other. But a blanket prohibition on all private collective self-defense would run counter to at least one line of Anglo-American history. So, while the *Heller* Court rejected numerous examples of the right to keep and bear arms as a solely collective right, it did not foreclose some level of collective right *in addition to* a personal right.

### 3. Purpose of the Second Amendment

The nature of the Second Amendment thus appears to be something more than purely personal, and history, albeit conflicted, suggests the same. *Bellotti* also demands that we consider the purpose of the Second Amendment.<sup>324</sup> Its “central component” is self-defense.<sup>325</sup> This central component includes both an individualistic and communitarian aspect. It is individualistic in that the Second Amendment’s purpose is to facilitate individual self-defense in cases of individual confrontation.<sup>326</sup> It is also communitarian in that the “people” have the right to keep and bear arms as a bulwark against tyrannical government.<sup>327</sup> At some point, these justifications can collapse.<sup>328</sup> The

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seems limited. *See id.* at 1216 & nn.296–97 (discussing the effectiveness of regulation for curbing Pinkerton activity). An interesting breakdown of the respective constitutional powers of Congress and the states to regulate such private defense organizations is recorded in one such investigation. *See* H. REP. NO. 2447, at XV–XVI, XXVI–XXIX, LXVII–III (1893).

<sup>323</sup> *District of Columbia v. Heller*, 554 U.S. 570, 620–21 (2008) (noting that the plaintiff did not “contend[ ] that States may not . . . prohibit[ ]. . . private paramilitary organizations”); *see also* *Presser v. Illinois*, 116 U.S. 252 (1886) (holding that there is no fundamental right to assemble in public as a military force).

<sup>324</sup> *See supra* notes 157–59 and accompanying text (setting forth the *Bellotti* test).

<sup>325</sup> *Heller*, 554 U.S. at 599; *see also* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (referring to self-defense as the “central component” of the Second Amendment).

<sup>326</sup> *Heller*, 554 U.S. at 592, 595. The Court emphasizes, however, that not all confrontations are the same. Confrontations among school friends or nations are apparently different from anticipated confrontations with robbers. *Id.* at 595.

<sup>327</sup> *Id.* at 600 (stating that the individual right is necessary to “assure the existence of a ‘citizens’ militia’ as a safeguard against tyranny”). As I have written, however, this is an inchoate citizens’ militia. If mobilized, the members become subject to government oversight or the political sympathy of others. *See* Miller, *supra* note 72, at 1320.

<sup>328</sup> For a discussion of the doctrinal problem posed when these justifications collapse into a single person, the lawless law enforcement officer, *see* Miller, *supra* note 89, at 939–58. For more about these two strains in the context of private policing, *see* Sklansky, *supra* note 309, at 1190–91.

Court has yet to make any meaningful distinction between a threat posed by one, ten, or a hundred thousand persons.<sup>329</sup> In fact, *McDonald's* conclusion that the Framers and Ratifiers of the Fourteenth Amendment believed the right to bear arms essential for Freedmen to protect themselves makes this distinction harder to maintain, as a lone individual would stand little chance resisting a lawless militia.<sup>330</sup>

If the Second Amendment's central purpose is to facilitate a natural right to self-defense, then some type of collective right to bear arms for self-defense would also seem to fall within its scope. Associations magnify the ability of persons to exercise their core right. Just as individuals can better exercise their First Amendment rights by associating together, individuals can better exercise their Second Amendment rights by association. After all, a person shouting from a soapbox is far less effective at communicating than are ten thousand persons in a parade.<sup>331</sup> Similarly, a lone gunman is far less able to defend himself than is an armed gang.<sup>332</sup> Just as the right "peaceably to assemble" is an individual right that is exercised collectively, one can imagine the Second Amendment right to keep and bear arms as

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<sup>329</sup> Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87, 93 (1992) ("Whether murder, rape, and theft be committed by gangs of assassins, tyrannous officials and judges or pillaging soldiery was a mere detail . . . . The right to resist and to possess arms therefore remained the same . . . ."); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. REV. 1359, 1454 n.358 ("[T]he theme [of the Second Amendment's Framers] was self-defense, and the question of how many criminals were involved (one, or a standing army) was merely a detail."). *But see* District of Columbia v. Heller, 554 U.S. 570, 586 (2008) (stating that there is no Second Amendment right to "wage war"). Elsewhere I have suggested some doctrinal tools that can help distinguish between individual self-defense and individual opposition to government. *See* Miller, *supra* note 72, at 1303–56 (suggesting demarcation at home to preserve difference); Miller, *supra* note 89, at 966–67 (suggesting alternative approaches for evaluating the Second Amendment in the context of resisting arrest).

<sup>330</sup> *McDonald*, 130 S. Ct. at 3038–42 (suggesting that the purpose of incorporating the Second Amendment was to allow Freedmen to defend themselves from unreconstructed state militias).

<sup>331</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010) (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.").

<sup>332</sup> Some have suggested that the Second Amendment might protect associations such as private gun clubs or private firing ranges. *See, e.g.*, Thomas B. McAfee, *Constitutional Limits on Regulating Private Militia Groups*, 58 MONT. L. REV. 45, 54 (1997) ("Firing ranges and gun clubs should receive constitutional protection precisely because they have standing to assert the Second Amendment rights of their members."). Others have suggested that the right is broad enough to protect private self-defense organizations. *See, e.g.*, Stephen P. Halbrook, *The Right of Workers To Assemble and To Bear Arms: Presser v. Illinois, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 949–50 (1999) (discussing the history of a labor organization's assembling with arms).

an individual right that can be exercised collectively, albeit perhaps, in a more tightly circumscribed manner.<sup>333</sup>

Further, the Second Amendment, as interpreted by the Court, shares certain “positive” and “negative” purposes associated with the First. As Martin Redish and Howard Wasserman have observed, First Amendment free speech protection is justified by theories that can be broadly organized as “positive” and “negative.”<sup>334</sup> Positive values of free speech protection focus on speech’s ability to further individual self-realization, personal expression, and autonomy.<sup>335</sup> Negative theories of free speech focus on the “skeptical, mistrustful strain” of American politics.<sup>336</sup> These theories view freedom of speech, especially *organized* speech, as essential to counter malignant forces such as totalizing or abusive government.<sup>337</sup>

The Second Amendment seems to track these positive and negative purposes of free speech protection. Protection of the right to fire-arms advances positive values such as individual autonomy because it empowers persons to defend themselves against private and public threats. It also advances the negative values, such as checks on government, if one accepts the proposition that the Second Amendment contains an antityranny principle.<sup>338</sup>

The corporate form acts as a force multiplier for the positive and negative values of these Amendments. Corporations and other associations promote the positive values of those Amendments because they form a matrix to nurture an individual’s feelings of self-actualization, self-worth, and self-identification. They also advance the negative values of the First and Second Amendments because both group political speech and armed individuals form a buffer between government and the individual. The question, which I raise in Part IV

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<sup>333</sup> Cf. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 738–39 (2009) (“Much like federalism and the separation of powers, constitutional features such as the right to assemble and the right to bear arms were intended both to prevent the concentration of absolute power and to protect popular sovereignty.”). One does not have to accept as a corollary to the right to assemble with arms, a right to form private armed patrols of public areas. Such a group right would run counter to one thread of the history of public arms-bearing. Instead, one may find a constitutionally protected right to form a gun club on private property, but no constitutional right to form a gun club parade, or to form a self-defense patrol of the neighborhood streets.

<sup>334</sup> Redish & Wasserman, *supra* note 280, at 243.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 243–44, 260–61; see also Green, *supra* note 106, at 173 n.136 (discussing the First Amendment as necessary for democratic protections).

<sup>338</sup> Green, *supra* note 106, at 172–73. Green notes one way to view the right is that, although it grants each person a right to arms, “the right is collective in the sense that it exists to protect the majority’s power [against tyrannical minorities], rather than protect the interests that individuals have against the majority.” *Id.*

below, is how can society ensure that these rights-bearing private groups do not themselves become destructive, insular, or despotic, as they did during Reconstruction, Jim Crow, and the Gilded Age, and as they have in many other nations around the world?

In any event, this analysis casts doubt on the idea that the nature, history, and purpose of the Second Amendment unquestionably justify its classification as a purely personal right.

### *B. Corporate Personhood Theory and Its Effect on Corporate Second Amendment Rights*

Assuming the Second Amendment right is *not* purely personal, the second inquiry is whether the corporate form has any bearing on its scope.<sup>339</sup> In *Citizens United*, the Court held that the corporate form had no impact on the scope of political speech. Either the corporation has rights equivalent to natural persons because it is a real entity, or a corporation has rights equivalent to natural persons because it is an aggregation of rights-holders who use corporate law to amplify the members' political voices. In either case, nothing about the corporate form warrants any reduction in First Amendment protection.

How the Court approaches corporate Second Amendment rights will require some conclusion about the corporate form. As noted above, corporate theory informs the manner in which courts approach corporate constitutional rights claims at the same time that corporate theory legitimates those very decisions. Moreover, corporate personhood theory provides some of the tempering doctrine that the Court has all but invited lower courts to use in deciding Second Amendment cases.

Whether the Court views a corporate right to keep and bear arms through the analytical tools of artificial entity, real entity, or aggregate entity theory will produce profound and potentially surprising consequences for corporate Second Amendment rights.

#### *1. Artificial Entity Theory and the Second Amendment*

The Court could conclude that the right to keep and bear arms is purely personal and that an artificial entity such as a corporation has no Second Amendment rights. However, as discussed above, that result seems unlikely given the text, purpose, and history of the Second Amendment. Even if it were likely, the Court need not go so far as to hold that the Second Amendment is purely personal in order

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<sup>339</sup> See, e.g., *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979) (noting that *Bellotti* creates a rebuttable presumption that corporations have constitutional rights).

for it to confer some lesser degree of Second Amendment protection on a corporation. As discussed in Part II, the Court relies on the artificiality of the corporation as a categorical tool to justify corporate regulation to an extent intolerable if applied to a natural person.

In this scenario, the Court could justify almost any regulation of corporate Second Amendment rights short of absolute prohibition. Essentially, the effect would be to resurrect the reasoning of *Austin v. Michigan Chamber of Commerce* and the dissent in *Citizens United*, but as applied to the Second Amendment rather than to the First. An absolute prohibition on corporate arsenals and employment of private security would be unconstitutional; but heavy regulation of this right would be permitted, under the reasoning that the state has an interest in preventing “Frankenstein”-like private police forces from operating under the aegis of state incorporation law.

Ideological organizations may, but need not, produce a slightly different analysis. To the extent they attempt to perform their associative functions with the help of the corporate form, such organizations would be subject to the restrictions imposed on corporations. If they attempt to perform their associative activities outside the corporate form, they could potentially do so without additional restrictions; alternatively, they could be protected by some higher level of scrutiny or subject to some narrow exception, in a similar manner to how ideological or political associations are treated in the First Amendment context.

Perhaps counterintuitively, the artificial entity approach to corporate Second Amendment rights strengthens the constitutional basis of guns-to-work laws. Just as the artificiality of the corporation justifies protecting minority shareholders and other stakeholders in a corporation, the artificiality of the corporation would justify regulation of its right to keep and bear arms. If the state believes that the optimal way to protect gun-bearing minorities in the corporation is to allow them to carry their firearms onto the employer’s property, then such regulation would be constitutional.

Corporations involved in the firearm trade could also be subject to fairly regular and heavy regulation, but again, they could not be eliminated. Following *Biswell*,<sup>340</sup> the government would be able to demonstrate a compelling interest in ensuring firearms were properly manufactured and did not end up in the wrong hands. Nevertheless, a corporation could still raise a Second Amendment defense if the regulation eliminated it from the marketplace, broadly defined.

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<sup>340</sup> See *supra* text accompanying notes 205–10 (discussing *Biswell*).

Artificial entity theory in these cases would give the Court room to fashion tests that it has otherwise forbidden in Second Amendment cases.<sup>341</sup> Corporations, like felons, children, or the mentally ill, would then become another category of persons for whom a different level of protection would apply. Such an approach would fit Second Amendment corporate jurisprudence with Fourth Amendment corporate jurisprudence, and would rationalize the Court's dicta regarding firearm regulation. However, it would also place corporations in a category for purposes of the Second Amendment that the *Citizens United* Court rejected for purposes of the First.

## 2. *Real Entity Theory and the Second Amendment*

Alternatively, the Court could conclude that the corporation has Second Amendment rights equal to those of a natural person, which are also independent of the Second Amendment rights of either its principals or its agents. Neither the internal dynamics of corporate governance nor its status as for-profit or nonprofit would have any consequence.

A corporation's right to employ, equip, and train its own security guards would then be subject only to the same regulations that are placed upon natural persons. Additional hurdles for private security, such as requiring background checks, drug screening, or special licensing, would be economically prudent (it is unlikely that insurers would allow a large corporation to operate a security detail without such supplementary measures). But these requirements—over and above those placed on a natural person—could not be imposed by government regulation. Restrictions such as state constitutional prohibitions on a corporation's ability to “organize, maintain, or employ an armed body of men” likely would be facially unconstitutional,<sup>342</sup> irrespective of the organization's for-profit or nonprofit status. If the core purpose of the right to keep and bear arms is for self-defense, the commercial status of the entity exercising the right would not matter. Neither incorporated for-profit, nor nonprofit, nor vigilance organizations could be prevented from amassing or training with arms on their own property any more than could a natural person.

By contrast, corporations viewed as a real entity would have strong constitutional grounds to challenge government imposition of guns-to-work laws. Suits against guns-to-work laws have thus far

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<sup>341</sup> See *supra* text accompanying notes 8080–87 (discussing the Court's refusal to apply balancing tests to Second Amendment restrictions).

<sup>342</sup> See ARIZ. CONST. art. II, § 26; WASH. CONST. art. I, § 24.

involved challenges on the basis of regulatory taking under the Fifth and Fourteenth Amendments, federal workplace safety preemption,<sup>343</sup> or First Amendment free exercise claims (in the case of churches).<sup>344</sup> These suits have had mixed success.<sup>345</sup> However, a corporation with self-defense rights equal to those of a natural person would have a much stronger position. The right to self-defense includes a right to disarm another.<sup>346</sup> And there may even be a right *not* to keep and bear arms.<sup>347</sup> Few would think, for example, that a state could pass a law requiring you to accept an armed visitor into your backyard. A corporation could claim that it is a comparable infringement of the corporation's Second Amendment rights to force it to suffer the threat of armed employees, contractors, and customers in areas subject to its control.

Firearms manufacturers and dealers could also argue that any restrictions on their businesses could not be any more stringent than those imposed on an individual gunsmith or someone holding a yard sale. If those individuals were required to be licensed and subject to inspection, then so would a corporation in the firearms trade. However, if no such licensing were required for natural persons, neither could it be imposed on corporations.

Finally, one must consider the consequences of the Court's attempt to dodge corporate personhood, by focusing, *Citizens United*-style, on the scope of the right, rather than on the party asserting it. As discussed above, attempting to sidestep the corporate form by focusing on the right simply assumes the equivalence of the corporate person and the natural person. Therefore, any restriction on the right for natural persons has to be identical to those of corporations. If the Court fashions a doctrine based on the "scope" of the

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<sup>343</sup> See, e.g., *Fla. Retail Fed'n, Inc. v. Att'y Gen.*, 576 F. Supp. 2d 1281, 1284, 1288–89, 1297–99 (N.D. Fla. 2008) (discussing these challenges brought by a consortium of retailers).

<sup>344</sup> See *Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 198, 210 (Minn. Ct. App. 2008) (discussing a challenge based on various grounds, including First Amendment free exercise).

<sup>345</sup> Compare *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009) (upholding a guns-to-work law on rational basis grounds), with *Edina Cmty. Lutheran Church v. State*, 2006 WL 6111893, at \*5, \*16–19 (Minn. Dist. Ct. 2006). The Minnesota Court of Appeals affirmed the District Court's striking down of portions of the guns-to-work law, but did so on alternate state constitution grounds, not ruling on the lower court's free exercise holding. See *Edina Cmty.*, 745 N.W.2d at 210.

<sup>346</sup> See, e.g., *State v. Smith*, 150 S.E.2d 194, 198 (N.C. 1966) (holding that taking another's firearm in self-defense is not larceny); see also Green, *supra* note 106, at 157–58 (stating that under a Lockean analysis, a party does not need to wait to be attacked to disarm another, but also arguing that mere possession does not justify disarming another).

<sup>347</sup> See generally Joseph Blocher, *The Right Not To Keep and Bear Arms*, forthcoming STAN. L. REV. (on file with author).

Second Amendment by reference to the “scope” of the right for corporations, it is simply employing a type of artificial entity determination in disguise.

### 3. *Aggregate Entity Theory and the Second Amendment*

A court could conclude that the corporation has Second Amendment rights that are not independent of the corporation’s principals and agents, but that must be respected because the corporation is simply an association of persons using the corporate form to best protect their individual constitutional rights. In this model, the government could neither condition its sanction of the corporation on the surrender of those rights, nor meddle with the individual utility calculus of a shareholder, director, or agent who has entered into this nexus of contract.

In most respects, the Court’s use of aggregate theory would lead to Second Amendment protections indistinguishable from the corporation as a real entity. The focus here is not that the corporation has a right to keep and bear arms as much as that the right to keep and bear arms is a default position around which the various parties—such as management, shareholders, and employees—may contract. Therefore, as a default, private security guards and vigilance organizations are placed roughly in the same position as they are with the real entity theory. However, with aggregation theory, the regulatory function of the government seems to be on surer footing when the corporate structure attempts to externalize costs onto noncontracting parties, such as the public.<sup>348</sup>

The difference between corporate rights under the real entity theory, and those under the aggregate entity theory, is that of rationale versus outcome. In the real entity theory, the minority viewpoint is invisible. In the aggregate theory, the law assumes the normative proposition that the market best mediates these competing intra-organizational values. Those individuals who do not want to be protected by the corporation in the fashion the corporation provides will sell their shares or find another job.

Guns-to-work laws present a more difficult point. On one level, the normative backdrop of the nexus of contract theory resists regulations on contractual relationships with and among the corporation and

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<sup>348</sup> See David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 260 (2009) (“Nexus of contract theorists . . . prescribe[s] collateral regulatory regimes to contain the . . . corporation’s tendency to externalize its costs to the general public with whom it has no contractual relationship at all . . .”); see also Sklansky, *supra* note 309, at 1192–93 (discussing the economic aspects of private policing, including externalization of costs).

others. The conclusion is that workers, shareholders, and directors will best decide for themselves whether guns should be allowed onto company property. Those who want to work or own shares in such a company will do so, and those who don't won't. Everyone will be satisfied based on his or her own utility calculus.<sup>349</sup> On a different level, a regulation requiring a company to accept firearms into its parking lot could be viewed as a measure that forces the company to internalize the costs of crime control. These are costs that the corporation might otherwise spread out amongst the police and taxpayers because it would be their duty to ensure that the corporate agents and the corporation are safe.

Aggregate theories of the corporation could also provide stronger protection for firearm industry participants than the Court's previous comments on the subject allow. Manufacturers of firearms have a good argument based on *Citizens United* that they should enjoy special protection under the Second Amendment. One of the Court's primary concerns with BCRA was the statute's effect on media companies, which are not specifically identified in the Constitution but have rights akin to the press. Under this aggregate theory, firearms manufacturers may enjoy special protections under the Second Amendment that are not given to other types of manufacturers. This is because in the First Amendment context, the normative assumption is that a corporation is an aggregate of persons with a right to political speech. No one is forced to contract with such an aggregate and thus the ability to withdraw voluntarily is sufficient to protect the interests of dissenters. As for externalities, the First Amendment assumes that there is no such thing as an externality, at least with regard to core political speech. There is bad speech, but the First Amendment commits the republic to the proposition that more speech is always better, and the way to avoid externalities is by curing bad speech with good.<sup>350</sup> Speech providers—especially those who do so in the aggregate—must be protected so that they can contribute to this marketplace.

If the Court were to adopt an aggregation approach to corporate Second Amendment rights, it would require tacit agreement with the aforementioned economic assumptions. Like speech, the aggregate theory of corporate Second Amendment rights assumes that markets take care of objectors. Like speech, the aggregate theory assumes that the answer to whether more guns in the marketplace is a good or bad

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<sup>349</sup> See *supra* Part II.B.3.a.

<sup>350</sup> See Hasen, *supra* note 22, at 607 (discussing bad speech in the context of foreign versus domestic money in elections); see also *supra* note 289 (citing the "good speech curing the bad" proposition in the contexts of *Citizens United* and *Whitney v. California*).

idea is not a disputed empirical proposition<sup>351</sup> but a constitutional imperative.<sup>352</sup> In this scenario, the Second Amendment answer to the bad use of guns is more guns.

#### IV

##### THE FUTURE OF CORPORATE CONSTITUTIONAL RIGHTS

Corporate Second Amendment rights will test the limits of the Court's ability to integrate the corporation into our constitutional structure. The potential for corporations to concentrate some level of military power, along with political and economic power, will form a crucible. In that crucible, both the Court's implicit trust in corporations as healthy mediating institutions in our republic and its trust in text-based originalism as a methodology for determining how corporations are to be treated will be put to the fire.

Corporate Second Amendment rights will test the Court's trust in corporations as intermediaries. In *Bellotti*, the Court laid down a rebuttable presumption that business corporations possess all the constitutional rights of human beings.<sup>353</sup> This is a remarkable baseline from which to begin. It is a powerful vote of confidence that business corporations are salutary participants in our republic. And it places a heavy thumb on the scale of pluralist and libertarian notions of democratic governance, rather than on more republican notions.<sup>354</sup> How far will the Court affirm the presumption that private corporations serve

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<sup>351</sup> See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3125–29 (2010) (Breyer, J., dissenting) (arguing that a firearms policy requires difficult empirical judgments that courts are ill-equipped to make). Compare JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 19–20 (2d ed. 2000) (arguing that more guns in private hands has the effect of reducing incidence of crime), with Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1197–1202 (2003) (disputing Lott's empirical results, noting that once different regression models are used, "the core finding of more guns, less crime is reversed," and that while Lott's study indicates that concealed-carry gun laws "can lower rates of murder and rape, better models undermine this conclusion"), and Ian Ayres & John J. Donohue III, *The Latest Misfires in Support of the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1371, 1372–74 (2003) (dispensing with criticism of prior article, concluding that they "have not been moved to change any of the opinions we previously advanced"). For the record, I remain utterly agnostic about the hypothesis. See Miller, *supra* note 72, at 1278 n.\*.

<sup>352</sup> See Green, *supra* note 106, at 146 (observing that one theory of the Second Amendment right is that it "constitutionalizes the empirical judgment that private arms possession promotes public safety").

<sup>353</sup> See *supra* text accompanying notes 179–180.

<sup>354</sup> Cass Sunstein has identified four "liberal republican[ ]" principles: political deliberation, equality of political actors, belief in the common good, and citizenship, as the method to inculcate political virtue. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541–42 (1988). This is contrasted with pluralism, which sees "politics . . . [as] a struggle among interest groups for scarce social resources," in which "[l]aws are a kind of

a vital and beneficial intermediary role in our republic? Will corporate Second Amendment rights simply be a bridge too far, the point at which the corporation turns from a valuable check on government overreach to an intolerable threat to democratic governance?

Corporate Second Amendment rights also will test the Court's resolve to decide Second Amendment cases with originalist methodology. How far will the Court depart from its stated textual and originalist commitments when confronted by powerful and potentially threatening mediating institutions that do not fall neatly within constitutional text or history? Will the Court's fidelity to historically defined categories and its repudiation of interest-balancing lead it to conclude that the Constitution requires such powerful intermediaries to possess weapons on the same level as natural persons no matter the cost?

Part IV.A discusses the ambivalent role intermediary organizations, including corporations, play in our democracy. Part IV.B explains how existing categories in constitutional law do not adequately consider the reality of especially large, powerful intermediaries like corporations. Part IV.C briefly outlines some basic principles that the Court can use in judging whether an intermediary organization, including a corporation, may claim a constitutional liberty. Above all, it urges the Court to be more circumspect about abandoning the existing constitutional structures that implicate mediating institutions.

### A. *The Corporation as Intermediary Organization*

The modern business corporation forms an important intermediary organization in our society. Intermediary organizations are collectives of people interposed between the individual and the state and that mediate the individual's relationship both with the state and with other individuals.<sup>355</sup> Political parties, Girl Scout troops, parent-teacher associations, athletic leagues, and business corporations are just some of the legion of intermediary organizations that exist within a polity. The role of these intermediary organizations, to borrow Adam Winkler's terminology, can be both "salutary" and "perilous."<sup>356</sup>

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commodity, subject to the forces of supply and demand" and in which "[v]arious groups . . . compete for loyalty and support from citizens." *Id.* at 1542.

<sup>355</sup> See Meir Dan-Cohen, *Between Selves and Collectives: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213, 1213–14 (1994) (identifying intermediary institutions as possessing a positional and functional relationship with individuals and the state).

<sup>356</sup> See Winkler, *supra* note 138, at 1244, 1260–72.

Intermediary organizations, including corporations, are a salutary part of a functional and healthy republic.<sup>357</sup> De Tocqueville celebrated them as among the best aspects of the American experiment.<sup>358</sup> Their role is two-fold. First, intermediary organizations form a matrix for personal autonomy and fulfillment.<sup>359</sup> As Amy Gutmann has written, “[b]y associating with one another, we engage in camaraderie, cooperation, dialogue, deliberation, negotiation, competition, creativity, and the kinds of self-expression and self-sacrifice that are possible only in association with others.”<sup>360</sup> Second, they form an important buffer between the state and the individual.<sup>361</sup> Without this “stratum of intermediate associations,” the citizen is left standing “naked before the state, unable to protect [himself] against its tendency to rule.”<sup>362</sup> As discussed previously, these roles of intermediary organizations are mirrored in the justification for constitutional protection of both speech and the right to keep and bear arms. These liberties advance personal autonomy and fulfillment and act as a barrier to totalizing government.

But intermediary organizations can also be perilous. They can be oppressive to their own members, abusive to outsiders, and a menace

<sup>357</sup> See Sunstein, *supra* note 354 at 1573 (noting the benefits that intermediary institutions provide as part of a thriving republic, including community and the opportunity for deliberation).

<sup>358</sup> 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 115–200 (Henry Reeve trans., Phillips Bradley ed., Alfred A. Knopf 1945) (1840).

<sup>359</sup> See Sunstein, *supra* note 354, at 1573, 1575; Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 967 (2004); see also Redish & Wasserman, *supra* note 280, at 237, 260–64 (making this point in light of First Amendment corporate speech).

<sup>360</sup> David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 231 (quoting Amy Gutmann, *Freedom of Association: An Introductory Essay*, in *FREEDOM OF ASSOCIATION* 3, 3–4 (Amy Gutmann ed., 1998)).

<sup>361</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984) (describing these relationships as “buffers”); Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 897 (1997) (reviewing *PROGRESSIVE CORPORATE LAW* (Lawrence E. Mitchell ed., 1995)) (“[I]t is perfectly plausible to think of the corporation as an intermediary institution standing between the individual and Leviathan.”); Sunstein, *supra* note 354, at 1573 (noting that private organizations “serve both as checks on government and as arenas for the cultivation and expression of republican virtues”); see also Vischer, *supra* note 359, at 967 (identifying one value of intermediary organizations as resisting any “hegemonizing ambitions” of government (quoting Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1853 (2001))).

<sup>362</sup> See Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 885 (2006) (quoting Alan Wolfe, *Democracy, Social Science, and Rationality: Reflections on Burke’s Reflections on the Revolution in France*, in EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 268, 274 (Frank M. Turner ed., Yale Univ. Press 2003) (1790)).

to civic virtues.<sup>363</sup> Intermediary organizations, no matter how initially democratic and egalitarian, tend to become bureaucratic and repressive. This is the famous “iron law of oligarchy.”<sup>364</sup> An elite class in almost any organization eventually comes to dominate it. The oppression is not just internally directed; intermediary organizations can abuse non-members by becoming exclusive, reclusive, and monopolistic.<sup>365</sup> Prior to the civil rights revolution of the 1960s, for example, corporations and other associations freely discriminated against women, as well as racial, religious, and ethnic minorities. Simultaneously, they concentrated political, economic, and social power into the hands of predominately white males. Intermediary organizations also have the potential to siphon away commitments to the social contract and public good and to channel them to more narrow forms of parochialism and tribalism.<sup>366</sup>

Business corporations magnify some of these problems of oligarchy and oppression because of their size, power, ubiquity, and amorality. The modern business corporation is an intermediary organization so different in magnitude as to be different in kind. Large corporations possess powers that, taken together, can functionally replicate sovereignty.<sup>367</sup> They concentrate economic resources that rival some nation-states.<sup>368</sup> They have foreign alliances and foreign policy.<sup>369</sup> Sometimes they exercise security functions, especially in

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<sup>363</sup> See Sunstein, *supra* note 354, at 1574 (“A system that allowed intermediate organizations to proceed without regulation would lead to intolerable results.”); Winkler, *supra* note 138, at 1260–66 (explaining the “perilous association view” of corporations).

<sup>364</sup> Don Herzog, *Dragonslaying*, 72 U. CHI. L. REV. 757, 763 (2005) (reviewing GERRY MACKIE, *DEMOCRACY DEFENDED* (2005)) (making similar points in discussing the iron law of oligarchy).

<sup>365</sup> As one court said, “without supervision . . . or if permitted unrestrainedly to control and monopolize . . . [corporations] become a public menace, against which public policy and statutes design protection.” *Leslie v. Lorillard*, 18 N.E. 363, 365–66 (N.Y. 1888).

<sup>366</sup> See Vischer, *supra* note 359, at 963 (noting that exceedingly “thick” associations tend to become distrustful and insular).

<sup>367</sup> See, e.g., Howard M. Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 NOTRE DAME L. REV. 173, 174 (1979) (observing that the corporation “has become a basic social institution and a center of power resembling governmental structures” (quoting PHILLIP I. BLUMBERG, *THE MEGACORPORATION IN AMERICAN SOCIETY: THE SCOPE OF CORPORATE POWER* 1 (1975))); Garrett, *supra* note 17, at 130–32 (discussing how corporations have aspects of sovereigns); O’Melinn, *supra* note 190, at 206 (“The corporation has not only acquired a power of sovereignty over its membership through a steady delegation of sovereign power from the state, it has also managed to attain real powers of government over the broader public.”).

<sup>368</sup> See Garrett, *supra* note 17, at 146–48 (noting that the “largest corporations” have revenues several times greater than the gross domestic product of some developing countries).

<sup>369</sup> See *id.* at 148–51 (“[C]orporations engage in diplomacy, establish outposts in other nations, engage in trade negotiations, and often serve as proxies for their home country’s government.”).

those societies where the professional police and military are corrupt or unreliable.<sup>370</sup> Thomas Hobbes listed corporations as among those things that “[w]eaken, or tend to the Dissolution of a Common-Wealth.”<sup>371</sup> As he graphically put it, corporations are like worms within the body politic, for “the great number of Corporations” act as “many lesser Common-wealths in the bowels of a greater.”<sup>372</sup> Many leaders—including Jefferson, Lincoln, and Theodore Roosevelt—viewed corporations as potentially grave threats to the survival of the American republic.<sup>373</sup>

At the same time, large corporations are not constrained by duties of national allegiance or constitutional limitations that control other types of institutions.<sup>374</sup> They may be owned in part or in whole by citizens of other nations.<sup>375</sup> They are not especially democratic in their operation.<sup>376</sup> As Christopher Tiedeman warned over a century ago, private corporations can become “a menace to the liberty of the individual, and to the stability of the American States as popular governments.”<sup>377</sup> The possibility of armed corporations places *Bellotti*’s default presumptions about the salutary nature of these organizations to the test.

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<sup>370</sup> See *id.* at 152–53 (noting that corporations may undertake police functions, such as “guarding corporate facilities, investigating crimes, or protecting employees,” particularly where the state fails to provide such services); see also André M. Peñalver, Note, *Corporate Disconnect: The Blackwater Problem and the FCPA Solution*, 19 CORNELL J.L. & PUB. POL’Y 459, 485 (2010) (noting that the British South Africa Company created a police force, “which was, in actuality, the company’s standing army”).

<sup>371</sup> See THOMAS HOBBS, *LEVIATHAN* 232 (A.R. Walker ed., Cambridge Univ. Press 1904) (1651).

<sup>372</sup> *Id.* at 241. In fact, Hobbes conceived of the sovereign itself as an “artificial person.” See Alice Ristroph, *Covenants for the Sword* 8 & n.11 (Sept. 13, 2009) (unpublished manuscript) (on file with author).

<sup>373</sup> See Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2366–67 (2007) (quoting these presidents as associating powerful corporations with corruption).

<sup>374</sup> Millon, *Ambiguous Significance*, *supra* note 179, at 40 (“[C]orporate status has long implied economic and political power without accountability.”); Sklansky, *supra* note 309, at 1183 (“[T]he vast set of interrelated Constitutional doctrines that regulate the day-to-day operations of police officers . . . has almost nothing to say about the activities of private security guards.”).

<sup>375</sup> See *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (holding that property rights of a corporation duly organized under the laws of Russia were entitled to constitutional protection under the Fifth Amendment); see also Sklansky, *supra* note 309 at 1182 (commenting on multinational ownership and control of private security).

<sup>376</sup> See Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, 41–60 (2005) (arguing that corporate law is not democratic because it is removed from political processes and is largely a product of markets).

<sup>377</sup> Horwitz, *supra* note 177, at 206 (quoting CHRISTOPHER G. TIEDEMAN, *A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES* 383 (1900)).

### B. *The Limited Vocabulary for Corporate Constitutional Rights*

A related problem is the paucity of our constitutional vocabulary to address these intermediary organizations. As important as the modern business corporation is as a mediating institution, it is almost completely absent from the text or the history of our written constitution. The Constitution's drafting history indicates that the business corporation as it exists today was not within the imagination of the Framers. Corporate Second Amendment rights therefore challenge the Court's current preference for originalist methodologies.

The Bill of Rights is commonly understood as a document dominated by classical liberal philosophy.<sup>378</sup> In this world-view there are two antagonistic forces: the individual and the state.<sup>379</sup> Initially, the Constitution largely confined this antagonism to the struggle between individuals and the federal government.<sup>380</sup> But Reconstruction, the Fourteenth Amendment, and the process of selective incorporation of the Bill of Rights including, now, the right to keep and bear arms, broadened and deepened this individualism.<sup>381</sup> Today, this individual rights structure operates not only against the federal government, but against all levels of government and against most agents of government.

The problem of corporations as intermediary organizations is really a problem of calibration.<sup>382</sup> What is the appropriate level of protection for intermediary organizational power? At what point does

<sup>378</sup> See A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 20 (2009) (labeling U.S. Constitution and Bill of Rights as examples of classical liberal constitutions). *But see* Sunstein, *supra* note 354, at 1566–67 (arguing that the Constitution contains elements of both liberalism and republicanism).

<sup>379</sup> See Miller, *supra* note 17, at 193 (“When the fundamental law was written in 1787 the Framers of the Constitution envisaged but two legal entities: the individual person and the government. Nothing intermediate was contemplated.”); *see also* Vischer, *supra* note 359, at 950 (“We tend to formulate legal interests, rights, and obligations in terms that are easily classified between the individual on one side and the state on the other.”).

<sup>380</sup> See *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that the Bill of Rights restricts only the federal, not state, government). An exception would be the prohibition on bills of attainder, which the Constitution forbids to both states and the federal government. *See* U.S. CONST. Art. I, § 9 (prohibiting congressional bills of attainder); *id.* Art. I, § 10 (prohibiting state bills of attainder).

<sup>381</sup> See Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 178 (2008) (noting how incorporation made the Constitution more individualistic); *cf.* Miller, *supra* note 89, at 968–74 (2011) (discussing the effect of Second Amendment antityranny rationales as applied against individual police officers).

<sup>382</sup> See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 295 (2001) (noting that the object of intermediary organizations is to “counterbalance the state . . . while not preventing the state from fulfilling its role of keeper of the peace.” (quoting ERNEST GELLNER, *CONDITIONS OF LIBERTY* 5 (1994))); *see also* Kuhner, *supra* note 373, at

the salutary intermediary organization become a perilous one? And what forces are best able to gauge and supply the calibration?

One perspective is to protect the corporation through constitutional law, and then allow the market to do the adjustment. But markets fail, and sometimes fail spectacularly.<sup>383</sup> For example, when individuals formed private self-defense leagues during Reconstruction, the Klan developed.<sup>384</sup> State regulatory intervention could therefore be another source of calibration.<sup>385</sup> This has been the primary justification for campaign finance restrictions on corporations. But such regulation creates its own problems: Once you summon Leviathan to pacify Behemoth, whom do you summon to pacify Leviathan?<sup>386</sup>

The Court has only a limited vocabulary to deal with large and influential intermediary organizations.<sup>387</sup> Instead, the history of public law is one of desperate attempts to shoehorn the business corporation into an older set of legal models, often with incongruous results.<sup>388</sup> As detailed in Part II, the Court uses clumsy historical tools like the artifi-

23, 54–55 (claiming that the question of interaction of market and democracy “boils down to one of degree”).

<sup>383</sup> Witness the 2008 recession, which was precipitated by a housing and credit crisis that many economists ascribe to a catastrophic failure of the self-regulating power of the market. *See, e.g.*, JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010).

<sup>384</sup> *See* Miller, *supra* note 72, at 1329–36, 1347–50 (discussing the self-defense claims of the Klan); Miller, *supra* note 89, at 968–70 (discussing the predatory actions of self-described self-defense organizations in the Reconstruction South). *Cf.* Green, *supra* note 106, at 178 (“[A]rming the population [can] create a new oppressor—an armed majority of private citizens.”).

<sup>385</sup> *Cf.* Dan-Cohen, *supra* note 355, at 1214 (discussing the need for the state to protect persons from intermediary organizations if intermediaries develop oppressive tendencies).

<sup>386</sup> *See* Sunstein, *supra* note 354, at 1574 (“Government must . . . play a role in limiting the powers of [intermediary] organizations without denying the importance of [those organizations’] continued existence.”). Professor Dan-Cohen uses another metaphor from the ancients: “Don’t the individuals who call upon the state’s assistance knowingly bring in a Trojan Horse of gigantic proportions?” Dan-Cohen, *supra* note 355, at 1214.

<sup>387</sup> Issacharoff, *supra* note 382, at 293–94 (discussing the problem of categorizing intermediary institutions as either entities that enjoy autonomy or entities that can be subject to state regulation); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1870 (2003) (“Corporations have historically represented an anomaly to liberal legal thinkers who envisioned the world as sharply divided between state power and individual right holders . . . . A corporation was both—an association of individual right holders, on the one hand, but an entity with state-like powers, on the other.”).

<sup>388</sup> *See* Tsuk, *supra* note 387, at 1870 (describing one strategy: “[D]ivid[e] corporations into two different entities—public corporations that assimilate[ ] the role of the state, such as municipal associations, and private corporations that assimilate[ ] the role of the individual in society, such as business organizations.”); Vischer, *supra* note 359, at 950 (observing that the law tries “to force disputes involving associations into a close approximation of this bipolar framework [between the state and the individual]”).

cial person to try to calibrate the correct level of protection versus regulation of large intermediary organizations.

Alternatively, the Court uses the private/public distinction to the same effect. The case of *Marsh v. Alabama*<sup>389</sup> is a perfect example of this. In *Marsh*, a woman was arrested by the state for proselytizing on the property of a private company that operated and controlled an entire town. The Court held that a private corporation that had essentially taken over the operation of a municipality could not rely on its private character to defend itself against the First Amendment rights of an individual.<sup>390</sup>

Large intermediary organizations like corporations seem to bewilder constitutional methodologies that demand slavish devotion to historically-defined categories that predate the rise of the modern corporation, or that depend upon appeals to pre-political natural rights, or that do both—as was the case with the Court’s Second Amendment analyses in *Heller* and *McDonald*.<sup>391</sup> These deeply rooted constitutional categories, at least as the current Court conceives of them, seem inadequate to deal with the phenomenon of the large multinational organization.<sup>392</sup> The potential of corporate Second Amendment rights may well force the Court to craft a more flexible approach to constitutional adjudication than its recent pronouncements on the First and Second Amendments would countenance.

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<sup>389</sup> 326 U.S. 501, 507 (1946) (holding that “[w]hether a corporation or a municipality owns or possesses the town[,] the public in either case” has a protected First Amendment interest). Cf. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (“[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature they become . . . subject to . . . constitutional limitations.”); *Terry v. Adams*, 345 U.S. 461, 463, 468–70 (1953) (holding that party elections held under the banner of a “self-governing voluntary club” can still violate the Fifteenth Amendment). *But see* *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (noting that company property does not lose its private character when the company takes on something less than “all of the attributes of a state-created municipality”).

<sup>390</sup> See *Marsh*, 326 U.S. at 505–06.

<sup>391</sup> See Sunstein, *supra* note 354, at 1580 (noting the republican skepticism of the theories of government that rely on rights discourse that “antedate[s] political deliberation”).

<sup>392</sup> See *id.* at 1539. Sunstein writes:

History does not supply conceptions of political life that can be applied mechanically to current problems. Circumstances change; theoretical commitments cannot be wrenched out of context without great risk of distortion; contemporary social and legal issues can never be resolved merely through recovery of features, however important and attractive, of the distant past.

*Id.*; see also Greenwood, *supra* note 16, at 1007 (noting this problem).

C. *Reframing Corporate Constitutional Rights:  
A Preliminary Assessment*

It is clear that we need a new framework for corporate constitutional rights. We must also recognize the obvious: Not all constitutionally protected behavior works the same in the aggregate as it does individually.<sup>393</sup> An individual riding armed to defend himself or others is a cautious traveler; a hundred persons riding armed for the defense of themselves or others is a militia, or a mob.<sup>394</sup> A home buyer who covenants not to possess firearms is a respectful neighbor; a village of private covenants not to possess firearms is a zoning regulation.<sup>395</sup> The potential for collectives to concentrate *the* core function of the social compact—the monopoly on legitimate violence—into private hands provides an opportunity to re-examine the entire analytical structure of corporate constitutional rights.

If, indeed, arguments about corporate constitutional rights are “really normative arguments masquerading as positive assertions,”<sup>396</sup> then the problem with constitutional rights and corporations is not a problem of corporate personhood per se. It may not even be a problem of the public/private distinction. Instead, the problem is with the “scalability” of a constitutional rights structure that has typically focused on the individual in a nation where people often behave in groups.<sup>397</sup> What the doctrine needs is a methodology to resolve these four questions: (1) What constitutionally protected individual behavior is protected to the same degree in the aggregate as it is individually?; (2) What constitutionally protected individual behavior is

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<sup>393</sup> As one court, dealing with the fallout of an “open carry” rally at a local restaurant observed, “There are any number of activities, legal in themselves, but taken collectively may pose risks and dangers (to the public and to officers on the scene) and, thereby generate a reasonable suspicion to justify what would otherwise be a Fourth Amendment invasion.” *Banks v. Gallagher*, 686 F. Supp. 2d 499, 524 (M.D. Pa. 2009).

<sup>394</sup> See, e.g., Miller, *supra* note 72, at 1347–48 (discussing how the Klan used self-defense to justify terror of Freedmen).

<sup>395</sup> For a discussion of restrictive covenants concerning guns, see John-Patrick Fritz, Comment, *Check Your Rights and Your Guns at the Door: Questioning the Validity of Restrictive Covenants Against the Right To Bear Arms*, 35 SW. U. L. REV. 551 (2007). For more of this issue in the context of racially restrictive covenants, see Darrell A.H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999, 1007 (2008) and Darrell A.H. Miller, *State DOMAs, Neutral Principles, and the Möbius of State Action*, 81 TEMPLE L. REV. 967, 972 (2008).

<sup>396</sup> Millon, *Ambiguous Significance*, *supra* note 179, at 25.

<sup>397</sup> Cf. Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 293 (2010) (remarking in the context of executive power that “the Constitution does not create a set of institutional arrangements . . . that are easily scalable”). Professor Epstein goes on to observe that “an efficient distribution of power for a small government turns out to be an overrigid distribution of power for an expanded state,” an observation that can be expanded to constitutional liberties themselves. *Id.*

not protected when exercised in the aggregate?; (3) What constitutionally protected individual behavior is protected in the aggregate, but to a different degree than individual behavior?; and (4) What is the theoretical basis for distinguishing between these options?<sup>398</sup>

A full exploration of this framing device is the work of future scholarship. However, some initial principles are apparent. First, some constitutional rights have no sensible application to intermediary organizations at all. The right to habeas corpus, for example, is nonsensical if applied to corporations or associations. They have no body to be shown, and to extend the metaphor to a corporation would shift constitutional reasoning from the analogical to the chimerical. Second, not all intermediary organizations in our constitutional structure are completely undetermined. Despite the Constitution's silence on most intermediary institutions, the Constitution does contemplate some collective behavior. The First Amendment Free Exercise and Establishment clauses, for example, contemplate the existence of, and perhaps a role for, churches or organized religious worship.<sup>399</sup> So do the militia clauses. Despite their de-institutionalization in *Heller* and *McDonald*, the militia clauses have not been swept completely out of the Constitution.<sup>400</sup> In a similar way, the text of the Constitution elevates the institution of the press over other speakers.<sup>401</sup> Frederick Schauer has proposed that the First Amendment be understood within an institutional framework, contextualized by the institutions in which speech operates—an Institutional First Amendment.<sup>402</sup> Perhaps a similar model should be considered for the Second.<sup>403</sup>

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<sup>398</sup> Cf. Henning, *supra* note 163, at 798 n.19 (discussing the need for distinguishing between personal and “somewhat personal” constitutional rights).

<sup>399</sup> See Sunstein, *supra* note 354, at 1573 (noting that religious intermediary organizations can help promote civic republicanism). For more on the constitutional meaning of associations, see Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978 (2011).

<sup>400</sup> See Miller, *supra* note 72, at 1319–20 (arguing that the “people’s militia,” when mobilized, becomes an institution that is subject to state control).

<sup>401</sup> See Blocher, *supra* note 93, at 850 (observing the Institutional First Amendment theory that the state should express solicitude for reporters as opposed to other types of speakers, due to the institutional value of the press).

<sup>402</sup> Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *HARV. L. REV.* 84, 84–86 (1998) [hereinafter Schauer, *Principles, Institutions, and the First Amendment*] (suggesting that the expansion of free speech rights claims, especially in the context of government land, funds, or agents, demands an attention to institutional settings of speech); Frederick Schauer, *Towards an Institutional First Amendment*, 89 *MINN. L. REV.* 1256 (2005); see also Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821, 847–52 (2008) (explaining Professor Schauer’s approach).

<sup>403</sup> I have suggested in other places at least one manner in which this institutional Second Amendment approach could work. Public display of weapons places bearers of those weapons in the category of militia members, whose rights are constrained by the plenary authority of the state or federal government to regulate; private weapons represent an inchoate or quiescent militia, which represents the private Second Amendment right at

At the very least, this model suggests that courts should be wary of dispensing too readily with those collective institutions that the Constitution *does* contemplate, such as the organized militia, the press, organized religion, or the states.<sup>404</sup> The important point for future constitutional adjudication is to recognize that some kinds of collectives and some kinds of intermediary institutions are textually and historically indicated, but that the process of fitting them within our constitutional structure requires a form of legal reasoning that cannot be over-rigid, one-sided, or value-free.

### CONCLUSION

The future of corporate constitutional rights is opaque and full of risk. After *Citizens United*, courts are already struggling to make distinctions between corporations and natural persons in other First Amendment areas;<sup>405</sup> other constitutional provisions cannot be far behind. As one judge put it, corporate constitutional rights is “an idea that continues to evolve in complex and unexpected ways.”<sup>406</sup> This Article has attempted to explore the ways in which the Court may approach the issue of corporate Second Amendment rights, whenever that day comes. This Article has also attempted to offer some resources to jurists and scholars who want to develop an alternative way of conceiving of the problem of corporate constitutional rights in general, one that is respectful of institutional history but also of institutional competence. As corporations and other intermediary organizations come to have greater influence over our lives, it will ultimately be up to the Court to decide how they best fit within our constitutional republic and who is best positioned to do the tailoring.

Professor Bainbridge has sagely observed that “[e]ffective legal rules and reliable predictions about human behavior must be based upon the fallen state of human beings.”<sup>407</sup> In different ways, *Citizens United* and *McDonald* augur a resurrection of laissez-faire constitu-

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its apogee. See Miller, *supra* note 72, at 1308, 1320. Professor Volokh has also considered institutional settings for firearms and self-defense, albeit with far more categorical flexibility than the Court has countenanced. See generally Volokh, *supra* note 93, at 1516–28.

<sup>404</sup> See, e.g., Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 402, at 84 (noting the Court’s refusal to accord the press special institutional treatment “[d]espite the textual mandate of the Press Clause”).

<sup>405</sup> See, e.g., *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 741 F. Supp. 2d 1115, 1126–28, 1132–34 (D. Minn. 2010) (challenging state regulations mandating disclosure and prohibiting corporate contributions to candidates); *Thalheimer v. City of San Diego*, 706 F. Supp. 2d 1065, 1083–85 (S.D. Cal. 2010) (challenging corporate contribution restrictions).

<sup>406</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 n.11 (2d Cir. 2010) (citing *Citizens United v. FEC*, 130 S. Ct. 876 (2010)).

<sup>407</sup> Bainbridge, *supra* note 361, at 886.

tionalism. They both appear to operate on a faith that individuals, acting collectively and in their own interest, will make everyone better off in the long run. Moreover, they both suggest that certain portions of the Constitution require this faith. Perhaps they are right.

But the history of private collectives empowered by notions of inalienable rights has sometimes been as ugly as the history of public collectives who deny those same rights. The depravity of private and public collectives during Reconstruction and Jim Crow is a prime example.

The decision where to place one's trust in fallen man—in his public institutions or in his private ones—is fraught with danger. We can only hope that when a corporate Second Amendment case comes before the Court, the Court's trust will not be misplaced.